A

Court of Appeal

*Regina *v* Roberts (Mark)

Regina *v* Precado

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B

Regina *v* Woodward

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Regina *v* Dowe

[2016] EWCA Crim 71

2015 Dec 10;
2016 March 18

Lord Thomas of Cwmgiedd CJ,
Openshaw, William Davis JJ

F

Crime — Sentence — Imprisonment or detention for public protection — Sentences of imprisonment or detention for public protection imposed on applicants under former statutory regime — Applicants remaining in prison long after expiry of minimum term — Applications for extension of time for appealing against sentence — Whether court having jurisdiction to review sentences owing to changes having subsequently taken place in penal system — Whether sentences passed in accordance with statutory criteria and applicable case law — Whether sentences inhuman treatment or arbitrary in breach of Convention rights — Criminal Appeal Act 1968 (c 19), s 11(3) — Human Rights Act 1998 (c 42), Sch 1, Pt I, arts 3, 5 — Criminal Justice Act 2003 (c 44), s 225

G

Prior to their amendment in 2008, sections 225(3) and 229(3) of the Criminal Justice Act 2003[1] required the court to make the assumption that an offender was

H

[1] Criminal Justice Act 2003, s 224, as originally enacted: "(1) An offence is a 'specified offence' for the purposes of this Chapter if it is a specified violent offence or a specified sexual offence. (2) An offence is a 'serious offence' for the purposes of this Chapter if and only if— (a) it is a specified offence, and (b) it is, apart from section 225, punishable in the case of a person aged 18 or over by— (i) imprisonment for life, or (ii) imprisonment for a determinate period of ten years or more."

S 225, as originally enacted: "(1) This section applies where— (a) a person aged 18 or over is convicted of a serious offence committed after the commencement of this section, and (b) the

dangerous if he had been convicted on an earlier occasion of a specified offence, unless it was unreasonable to do so, and, where an offender had been found to be dangerous and over 18 years of age, to pass a sentence of imprisonment for public protection or life imprisonment, the court having no discretion to do otherwise. Each applicant was serving a sentence of imprisonment or detention for public protection ("IPP"), which had been imposed between 2005 and 2008 under section 225, and had either been detained in custody long after the expiry of the minimum term or been recalled for breach of licence. Each applied for an extension of time in which to apply for permission to appeal against sentence, on the grounds (i) that whatever might have been the position at the time the sentences of IPP had been passed, the Court of Appeal had power under section 11(3) of the Criminal Appeal Act 1968[2] to pass sentences which, in the light of what had happened over the intervening years, now would be the proper sentence; (ii) that the Court of Appeal should reconsider the assessments made by sentencing judges in the light of decisions of the Court of Appeal (Criminal Division); and (iii) that a time had been reached when the length of the imprisonment was so excessive and disproportionate compared with the index criminal offence that it amounted to inhuman treatment under article 3 of the Convention for the Protection of Human Rights and Fundamental Freedom[3] or arbitrary detention under article 5, because the detention no longer had any meaningful link to the index offence.

On the applications—

Held, refusing the applications, (1) that since the Court of Appeal (Criminal Division) was a court of review its function was to review sentences imposed by courts at first instance and to determine whether they were wrong in principle or manifestly excessive, not to conduct a sentencing exercise of its own from the beginning; that it had not been established and was not constituted to consider, years after the sentence and in the light of what has happened over that period, whether an offender should be sentenced in an entirely new way because of what had happened in the penal system or because the offender had supplied information long after conviction; and that the rectification of any injustice in the way in which the operation of the applicants' sentences had in fact eventuated was a matter for the Parole Board, or, if a change were required for the regime for release, for the

court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences. (2) If— (a) the offence is one in respect of which the offender would apart from this section be liable to imprisonment for life, and (b) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life, the court must impose a sentence of imprisonment for life. (3) In a case not falling within subsection (2), the court must impose a sentence of imprisonment for public protection."

S 229, as originally enacted: "(1) This section applies where— (a) a person has been convicted of a specified offence, and (b) it falls to a court to assess under [section 225] whether there is a significant risk to members of the public of serious harm occasioned by the commission by him of further such offences . . . (3) If at the time when that offence was committed the offender was aged 18 or over and had been convicted . . . of one or more [specified] offences, the court must assume that there is such a risk as is mentioned in subsection (1)(b) unless, after taking into account— (a) all such information as is available to it about the nature and circumstances of each of the offences, (b) where appropriate, any information which is before it about any pattern of behaviour of which any of the offences forms part, and (c) any information about the offender which is before it, the court considers that it would be unreasonable to conclude that there is such a risk."

[2] Criminal Appeal Act 1968, s 11(3): see post, para 18.

[3] Human Rights Act 1998, Sch 1, Pt I, art 3: "No one shall be subjected . . . to inhuman or degrading treatment or punishment."

Art 5: "1. 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; . . . 4. Everyone who is deprived of his liberty . . . 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. 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

A Executive and Parliament under the powers granted under section 128 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 since such a change would not amount to any impermissible interference with the sentence passed by the courts but would be to correct a position which might have been unforeseen when the IPP sentencing regime had been enacted (post, paras 19–21, 42).

Dictum of Lord Bingham of Cornhill CJ in *R v A and B* [1999] 1 Cr App R (S) 52, 56, CA applied.

B (2) That in each case the sentence had been passed in accordance with the statutory criteria as interpreted in the relevant decisions of the Court of Appeal (Criminal Division) (post, paras 23, 43).

R v Lang (Stephen) [2006] 1 WLR 2509, CA, *R v Johnson (Practice Note)* [2007] 1 WLR 585, CA and *R v C (P) (Practice Note)* [2009] 1 WLR 2158, CA considered.

(3) That a sentence of IPP was not in itself a violation of articles 3 or 5 of the Convention; that, even if the way in which a person subject to IPP had been dealt with C long after sentence might render the detention arbitrary, that would not make the original decision of the court wrong; that only if the system of review broke down or ceased to be effective could the detention become arbitrary and, if it did, that would be the consequence not of the original sentence providing for arbitrary detention but of subsequent events; that any such arbitrariness would not, therefore, be a matter for the Court of Appeal (Criminal Division) but, being the result of a failure by the Secretary of State properly to carry out the sentence of the court or by the Parole Board, was challengeable only by way of judicial review; and that, accordingly, D applying established principles, in each case the extension of time sought would not be granted (post, paras 30, 31).

The following cases are referred to in the judgment of the court:

Hamilton v The Queen [2012] UKPC 31; [2012] 1 WLR 2875; [2013] 1 Cr App R 13, PC
James v United Kingdom (2012) 56 EHHR 12
E *Pham v Secretary of State for the Home Department (Open Society Justice Initiative intervening)* [2015] UKSC 19; [2015] 1 WLR 1591; [2015] 3 All ER 1015, SC(E)
R v A and B [1999] 1 Cr App R (S) 52, CA
R v Burinskas (Attorney General's Reference (No 27 of 2013)) (Practice Note) [2014] EWCA Crim 334; [2014] 1 WLR 4209; [2015] 1 All ER 93, CA
R v Burley (Donald) The Times, 9 November 1994, CA
R v C (P) (Practice Note) [2008] EWCA Crim 2790; [2009] 1 WLR 2158; [2009] 2 All ER 867, CA
F *R v Docherty* [2014] EWCA Crim 1197; [2014] 2 Cr App R (S) 76, CA
R v Jogee [2016] UKSC 8; [2016] 2 WLR 681; [2016] 2 All ER 1; [2016] 1 Cr App R 31, SC(E)
R v Johnson (Practice Note) [2006] EWCA Crim 2486; [2007] 1 WLR 585; [2007] 1 All ER 1237, CA
R v Lang (Stephen) [2005] EWCA Crim 2864; [2006] 1 WLR 2509; [2006] 2 All ER 410, CA
G *R v McCook (Jason)* [2014] EWCA Crim 734, CA
R v Thorsby [2015] EWCA Crim 1; [2015] 1 WLR 2901, CA
R v Turner (Bryan) (1975) 61 Cr App R 67, CA
R v Williams (Francis) [2010] EWCA Crim 3289, CA
R v Wilson (David) [2016] EWCA Crim 65, CA
R v ZTR [2015] EWCA Crim 1427; [2016] 1 Cr App R (S) 15, CA
R (GJD) v Governor of Her Majesty's Prison Grenton; R v GJD [2015] EWHC 3501 H (Admin); [2015] EWCA Crim 599, DC and CA
R (Kaiyam) v Secretary of State for Justice [2014] UKSC 66; [2015] AC 1344; [2015] 2 WLR 76; [2015] 2 All ER 822, SC(E)
R (King) v Parole Board [2016] EWCA Civ 51; [2016] 1 WLR 1947, CA
R (Sturnham) v Parole Board (No 2) [2013] UKSC 47; [2013] 2 AC 254; [2013] 3 WLR 281; [2013] 4 All ER 177, SC(E)

R (Walker) v Secretary of State for Justice (Parole Board intervening) [2009] UKHL 22; [2010] 1 AC 553; [2009] 2 WLR 1149; [2009] 4 All ER 255, HL(E)
Scoppola v Italy (No 2) (2009) 51 EHHR 12

The following additional cases were cited in argument:

R v Ballinger [2005] EWCA Crim 1060; [2005] 2 Cr App R 29, CA
R v Gilbert (Stephen) [2007] EWCA Crim 1244, CA
R v Offen [2001] 1 WLR 253; [2001] 2 All ER 154; [2001] 1 Cr App R 24, CA
R v Pedley [2009] EWCA Crim 840; [2009] 1 WLR 2517, CA
R v Pritchard (Nichola) [2011] EWCA Crim 2703, CA

APPLICATIONS for extensions of time in which to apply for permission to appeal against sentence

R v Roberts

On 28 April 2006 in the Crown Court at Newcastle-upon-Tyne, before Judge Milford, the applicant, Mark Robert, pleaded guilty to attempted robbery for which on 17 May 2007 he was sentenced to imprisonment for public protection with a minimum specified term of 359 days. He also pleaded guilty to breaching an anti-social behaviour order for which no separate penalty was passed.

He applied for an extension of time to apply for permission to appeal against sentence.

R v Precado

On 31 May 2006 in the Crown Court at Snaresbrook the applicant, Natasha Precado, pleaded guilty to one count of arson. On 14 September 2006 she was convicted of five further counts of arson, two counts of common assault and one of criminal damage. On 17 January 2007 she was sentenced by Judge Richardson to imprisonment for public protection with a minimum specified term of six months for the arson offences. No separate penalty was imposed for the assault or the criminal damage.

She applied for an extension of time to apply for permission to appeal against sentence.

R v Quaglia

On 22 February 2007 in the Crown Court at Stoke-on-Trent the applicant, David Craig Quaglia, having earlier pleaded guilty to one count of arson being reckless as to whether life was endangered, was sentenced by Mr Recorder Bowers QC to imprisonment for public protection with a minimum specified term of 21 months.

He applied for an extension of time to apply for permission to appeal against sentence.

R v Woodward

On 6 October 2008 in the Crown Court at Maidstone, before Judge O'Mahoney and a jury, the applicant, Paul Anthony Woodward, was convicted on counts 1, 3–6 and 8–11 of inciting a child to engage in sexual activity, on count 2 of inciting a child under the age of 13 to engage in sexual activity, on count 7 of sexual activity with a child, contrary respectively to sections 10, 8 and 9 of the Sexual Offences Act 2003 and on count 12 of

possessing indecent photographs of children, contrary to section 160 of the Criminal Justice Act 1988. On 10 November 2009 he was sentenced on count 4 to imprisonment for public protection, with a minimum specified term of $2\frac{1}{2}$ years; no separate penalty was passed on the other counts.

He applied for an extension of time to apply for permission to appeal against sentence.

R v Gittens

On 13 December 2006 in the Crown Court at Worcester, before Judge Cavell and a jury, the applicant, Simeon Peter Gittens, was convicted of robbery and was sentenced to imprisonment for public protection, with a minimum specified term of 931 days.

He applied for an extension of time to apply for permission to appeal against sentence.

R v Powney

On 4 May 2007 in the Crown Court at Oxford the applicant, Joseph Steven Powney, following his earlier plea of guilty to an offence of rape was sentenced by Judge Hall to detention for public protection, with a minimum specified term of three years.

He applied for an extension of time to apply for permission to appeal against sentence.

R v Garbutt

On 11 July 2006 in the Crown Court at Sheffield, before Mr Recorder Jackson, the applicant, Nigel Darren Garbutt, pleaded guilty to robbery and was sentenced to imprisonment for public protection, with a minimum specified term of six years. On 12 July 2006, under the slip rule, the minimum term was reduced to three years.

He applied for an extension of time to apply for permission to appeal against sentence.

R v Warwick

On 20 October 2006 in the Crown Court at Cambridge, the applicant, Jason William Warwick, pleaded guilty to manslaughter and on 7 February 2007 he was sentenced by Judge Worsley QC to imprisonment for public protection, with a minimum specified term of 18 months.

He applied for an extension of time to apply for permission to appeal against sentence.

R v Fay

On 8 November 2007 in the Crown Court at Manchester the applicant, Martin Lee Fay, pleaded guilty to two counts of causing grievous bodily harm with intent and was sentenced by Judge Hammond on 8 April 2008 to imprisonment for public protection, with a minimum specified term of 32 months.

He applied for an extension of time to apply for permission to appeal against sentence.

R v Diveney

On 15 November 2005 in the Crown Court at Manchester (Minshull Street), the applicant, Kelly Georgina Diveney, pleaded guilty to wounding with intent and on 6 February 2006 she was sentenced by Judge Thomas to imprisonment for public protection, with a minimum specified term of four years which was later in the same month reduced to two years.

She applied for an extension of time to apply for permission to appeal against sentence.

R v Byrne

On 30 March 2007 in the Crown Court at Woolwich the applicant, Darren Paul Byrne, pleaded guilty to causing death by dangerous and associated driving offences including driving whilst disqualified. On 5 May 2007 he was sentenced by Judge Tain to imprisonment for public protection, with a minimum specified term of $3\frac{1}{2}$ years.

He applied for an extension of time to apply for permission to appeal against sentence.

R v Wakeling

On 24 March 2006 in the Crown Court at Oxford the applicant, Sonnie Michael Wakeling, pleaded guilty to two offences of robbery and one of theft. On 23 June 2006 he was sentenced by Mr Recorder Blackford in respect of the robberies to concurrent terms of imprisonment for public protection, with a minimum specified term of 18 months.

He applied for an extension of time to apply for permission to appeal against sentence.

R v Dowe

On 28 November 2005 in the Crown Court at Birmingham the applicant, Sean Dowe, was convicted of false imprisonment, robbery, assault occasioning actual bodily harm and theft. On 16 December 2005 he was sentenced by Judge Stanley to imprisonment for public protection, with a minimum specified term of five years, for the offences of false imprisonment and robbery and to concurrent determinate terms of 18 months' imprisonment for the assault and the theft.

He applied for an extension of time to apply for permission to appeal against sentence.

Joel Bennathan QC (assigned by the Registrar of Criminal Appeals) for the applicants,

with *Emma Coverley* for Mark Roberts,
Benjamin Keith for Natasha Precado,
Clare Ashcroft for Joseph Steven Powney,
Nicholas Beechey for David Craig Quaglia and Darren Paul Byrne,
Robert Banks for Simeon Peter Gittens,
Katherine Thorne for Nigel Darren Garbutt and Sean Dowe,
Stephen Field for Jason William Warwick,
Carol Hawley for Martin Lee Fay,
Caroline Patrick for Kelly Georgina Diveney,

A *Thom Dyke* for Sonnie Michael Wakeling
(all assigned by the Registrar of Criminal Appeals).
Philip Rule (assigned by the Registrar of Criminal Appeals) for Paul Anthony Woodward.
John McGuinness QC and *Simon Heptonstall* (instructed by *Crown Prosecution Service, Appeals Unit*) for the Crown.

B The court took time for consideration.

18 March 2016. **LORD THOMAS OF CWMGIEDD CJ** handed down the following judgment of the court.

Introduction

C **1** There are before the court 13 applications for an extension of time in which to apply for leave to appeal against sentences of imprisonment or detention for public protection imposed between 2005 and 2008 under the Criminal Justice Act 2003 ("CJA 2003").

The sentence of imprisonment for public protection: 2005–2012

D *(a) The original sentence of IPP 2005–2008*

2 Sentences of imprisonment for public protection and, for offenders under 18, detention for public protection ("IPP"), were brought into effect on 4 April 2005 under the dangerous offender provisions contained in Chapter 5 of Part 12 of the CJA 2003. These provisions followed a review of sentencing carried out for the then Home Secretary by John Halliday, set out in a report published in July 2001 entitled *Making Punishments Work—a Review of the Sentencing Framework for England and Wales*.

E **3** Section 225 and section 226 of the CJA 2003 set out the detailed provisions for those convicted of serious specified offences, if the offender was dangerous. An offender was dangerous if the court assessed that there was "a significant risk to members of the public of serious harm occasioned by him of further specified offences".

F **4** The court was not given the usual freedom in making that assessment. The CJA 2003 required the court to make the assumption of dangerousness for those over 18 if the offender had been convicted on an earlier occasion of a specified offence, unless it was unreasonable to do so. Specified offences were violent and sexual offences listed in Schedule 15 and included wounding or causing grievous bodily harm under section 20 and assault occasioning actual bodily harm under section 47 of the Offences against the Person Act 1861 which carried a maximum sentence of five years' imprisonment.

G **5** Where the offender was found to be dangerous and over 18, the court was required to pass a sentence of IPP or life imprisonment. It is important to emphasise that the CJA 2003 removed all discretion from the court once it was found that the offender was dangerous. The sentence had to be IPP or life imprisonment.

H **6** The court was required to set a minimum term to be served. This was calculated as half of the notional determinate term that would have been passed if an IPP had not been imposed; this was intended to reflect the culpability and harm caused by the offence and the punishment required.

Otherwise the length of the sentence was indeterminate as, before an offender was released, he had to pass a threshold of showing that, under section 28(6) of the Crime (Sentences) Act 1997, it was "no longer necessary for the protection of the public that he should be confined", a test most recently examined in *R (King) v Parole Board* [2016] 1 WLR 1947.

7 12 of the applications before the court relate to those who were sentenced to IPP in the period before July 2008. In each case the minimum term has long expired; for example the minimum term for one of the appellants, Roberts, was under a year; he was sentenced when 18 in May 2006; that of Precado sentenced in January 2007 when aged 23 was six months.

(b) The amended sentence of IPP 2008–2012

8 In 2008 Parliament by the Criminal Justice and Immigration Act 2008 modified the sentence of IPP. The amended provisions removed the statutory assumption of dangerousness, removed the mandatory imposition of IPP where the offender was found to be dangerous and removed some offenders from the scope of the sentence by reducing the list of specified offences and by stipulating that the minimum term had to be at least two years save where the offender has committed an offence listed in yet another schedule. The amendments did not affect the position of those who had been sentenced between April 2005 and July 2008. One of the applications before the court, Woodward, relates to an offender sentenced after July 2008.

(c) The abolition of the sentence of IPP

9 In 2012 Parliament abolished the sentence of IPP by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO 2012") for all offenders convicted after 3 December 2012. The abolition did not affect those who had been sentenced to IPP in the period between 2005 and 2012, but section 128 enabled the Secretary of State to modify the threshold for release. No modification has so far been made, a point to which we return at para 45.

10 As at 4 March 2016, there are over 4,000 still in custody under a sentence of IPP (about 5% of the total prison population) and a significant further number who are subject to the licence terms of their IPP and therefore still subject to recall to continue to serve their sentence of IPP.

(d) The reason for these applications

11 In each of these applications the applicant seeks to appeal many years out of time against the sentence of IPP. No appeals were brought when they should have been within the 28-day period after sentence specified by section 18(2) of the Criminal Appeal Act 1968 for making applications for leave to appeal. It seems clear that it was perceived at the time there would be no prospect of success in any such application.

12 All the applicants have been either detained in custody long after the expiry of the minimum term or have been recalled for breach of licence as, for example, Gittens, Diveney and Wakeling. Some were very young when such sentences were imposed—for example Roberts, Powney and Fay.

13 The applicants now seek an extension of time under section 18(3) of the Criminal Appeal Act 1968 to challenge the correctness of the sentences

A imposed on them. In contrast to the period of 28 days normally allowed, the applicants seek extensions of between five and nine years either to apply for leave or, in one case, to renew the application after refusal by the single judge many years after the expiry of the 14-day period allowed for making an application to renew. They argue that because of the position in which they find themselves, the court should look again at the sentence, even if at the time no one would have thought they were wrong in principle or B manifestly excessive.

14 These cases were heard together so that the court could consider whether time should be extended.

The general principles

(a) The central submission of the applicants

C **15** The central submission of each of the applicants was that the imposition of the IPP was not justified by the statutory criteria as explained by the case law of this court, particularly *R v Lang (Stephen)* [2006] 1 WLR 2509 to which we refer at para 22(i) below and when considering the individual applications.

16 It was submitted that:

D (i) Whatever may have been the position at the time the sentences of IPP were passed, the court had power under section 11 of the Criminal Appeal Act 1968 to pass sentences that, in the light of what had happened over the intervening years, now would be the proper sentence.

(ii) This court should reconsider the assessments made by sentencing judges in the light of *R v Lang*. The court should examine with particular care cases where proper reasons were not given and cases where young E offenders were sentenced.

(iii) A time could and had been reached when the length of the imprisonment was so excessive and disproportionate compared to the index criminal offence that it could amount to inhuman treatment under article 3 or arbitrary detention under article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. That was because F the detention no longer had any meaningful link to the index offence. A much delayed review of a sentencing decision could therefore be a mechanism the court could employ to avoid a breach of these Convention Rights. As the period now served by each of the applicants was so much longer than any conceivable determinate sentence would have required, the continued detention amounted to preventative detention and was therefore G arbitrary.

We will consider these in turn.

(b) The role of the Court of Appeal as a court of review

17 It was submitted on behalf of the applicants as their first general submission that section 11 of the Criminal Appeal Act 1968 permitted the court to allow an appeal if the court considered that the appellant should be H sentenced differently. This was in contrast to the power under the original Act, the Criminal Appeal Act 1907, where the court's power arose where the court considered a different sentence "should have been" passed. This court was therefore entitled to review the reality of the sentence, as it had turned out to be, even long after the judge had passed sentence. In the cases of these

sentences of IPP, they had been manifestly excessive in the result. Sentencing judges could not have foreseen the effect that the sentences would have had. The court was therefore entitled years later to sentence again on a different basis.

18 Section 11(3) provides:

> "On an appeal against sentence the Court of Appeal, if they consider that the appellant should be sentenced differently for an offence for which he was dealt with by the court below may— (a) quash any sentence or order which is the subject of the appeal; and (b) in place of it pass such sentence or make such order as they think appropriate for the case and as the court below had power to pass or make when dealing with him for the offence; but the court shall so exercise their powers under this subsection that, taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court below."

19 It is well established that this court is a court of review. In *R v A and B* [1999] 1 Cr App R (S) 52, 56 Lord Bingham of Cornhill CJ made this clear: "the Court of Appeal Criminal Division is a court of review; its function is to review sentences imposed by courts at first instance, not to conduct a sentencing exercise of its own from the beginning."

20 There is no basis for departing from the principle so clearly expressed by Lord Bingham CJ. This court considers the material before the sentencing court and any further material admitted before the court under well established principles. It considers whether on the basis of that information the sentence was wrong in principle or manifestly excessive. It does not, years after the sentence, in the light of what has happened over that period, consider whether an offender should be sentenced in an entirely new way because of what has happened in the penal system or because, as in *R v ZTR* [2016] 1 Cr App R (S) 15, the offender has supplied information long after conviction. This court was not established to perform the function suggested; it is not constituted to carry out the suggested function; and it could not do so as presently constituted.

21 There is under our constitution the available means to rectify any injustice in the way in which the operation of these sentences has in fact eventuated. The review of sentences in the light of events occurring long after the original sentence is a matter for the Parole Board or, if a change is required for the regime for release, as we discuss at paras 43 and following below, for the Executive and Parliament under the powers granted under section 128 of LASPO 2012. Such a change would not amount to any impermissible interference with the sentence passed by the courts. It would be to correct a position that may have been unforeseen when the IPP sentencing regime was enacted.

(c) The case law

22 The second general submission was that this court should carefully review the sentences in each case in the light of the case law developed during the period during which the sentence of IPP was part of the statutory sentencing framework laid down by Parliament. It is necessary briefly to refer to three significant cases.

A (i) On 3 November 2005, in a judgment of this court given by the Vice-President, Rose LJ, *R v Lang* [2006] 1 WLR 2509, this court gave guidance in relation to certain of the provisions of the CJA 2003 at paras 15–17.

(ii) On 20 October 2006, in a judgment of this court given by Sir Igor Judge P in *R v Johnson (Practice Note)* [2007] 1 WLR 585, this court made clear that the court should not, on well-established principles, interfere with the decision of a judge to impose an IPP if the sentence was one open to him.
B

(iii) On 26 November 2008 in a judgment of this court given by Lord Judge CJ in *R v C (P) (Practice Note)* [2009] 1 WLR 2158, this court stressed the need to consider the alternatives to IPP as it was a "draconian sentence".

23 We have carefully considered in each of the applications, whether the sentence of IPP imposed by the judge was imposed in accordance with the statutory criteria and the guidance given by this court, particularly in *R v*
C *Lang*, particularly in the applications before us where the guidance was given after the sentencing decision made by the judge. In each case, for the reasons we set out in respect of each application, we are satisfied that each of the sentences was passed in accordance with the statutory criteria as interpreted in the case law of this court.

24 It must be recalled that in many of the 12 applications which relate to the sentence of IPP before the changes made in July 2008, the judge had,
D by the express terms of the CJA 2003, no discretion as to whether to pass such a sentence if the offender was found to be dangerous. It is also important to stress that the CJA 2003 required the judge to assume that the offender was dangerous if he had committed a previous specified offence, unless the assumption was unreasonable. The case of Quaglia is an illustration of the way in which the assumption operated. As we explain,
E each judge faithfully and properly gave effect to the terms of the CJA 2003; they had no discretion under the CJA 2003 until it was amended in 2008, if they could not find the assumption was unreasonable.

25 As an alternative to the submission which we have just considered, it was submitted that this court should not follow *R v Johnson* in upholding a sentence which was within that area of judgment open to a judge to pass, but
F should instead, in the light of the observations such as those of Lord Carnwath JSC at para 60 in *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591, give anxious scrutiny to each decision as human rights were engaged as sentences of custody deprived persons of their liberty. We cannot accept this approach. The Criminal Appeal Act 1968 sets out the approach this court should take. That approach has been carefully developed under the common law and the Human Rights Act 1998 in a
G manner entirely consistent with its function as a court of review of sentences passed by the sentencing court.

26 We have also carefully considered any case where a judge did not give full reasons as to why the offender was dangerous. As is set out in the paragraphs of this judgment addressing the specific application where this happened, we are satisfied that the sentence was entirely justified—see Gittens. We have applied the same approach to the application where what
H the judge said on sentence cannot now be found—see Diveney.

27 If we had concluded that the sentences of IPP had been wrongly imposed and a determinate sentence should have been imposed, a question would have arisen as to the determinate sentence that should be substituted given the fact that, in some of the applications, the offender would have

been in custody for more than twice the minimum term imposed and there would be obvious difficulties in releasing an offender without any licence conditions that would have provided for supervision in the community As the issue does not arise, we would simply record that we would have considered imposing extended sentences (as was done in the decision in *R v GJD* [2015] EWCA Crim 599 to which we refer at para 42 below).

28 We would have also considered the submission made for the first time on behalf of the applicants in the course of the hearing that, as under section 29(4) of the Criminal Appeal Act 1968 the court had power to impose a determinate sentence that commenced from the date of this court's decision, that power could be used to ensure that a licence period could be imposed. There would be no infringement of the principles that the sentence imposed could be more onerous, as any such licence would be less onerous than the licence to which the offender was subject under the sentence of IPP. The respondent accepted that there was such a power, but as the only case in which the court had exercised it was in *R v Turner (Bryan)* (1975) 61 Cr App R 67, 92, the court would be "breaking new ground" and would have to consider some difficult issues to which that would give rise. Whether it would be right to exercise the power in the way suggested and in the light of the difficulties to which our attention was drawn must await a decision of this court where the issues arise for decision; we express no view.

(d) The European Convention on Human Rights

29 We turn to the third general submission advanced to us as set out at para 16(iii) that reviewing a sentence decision many years after the sentence could be a mechanism through which the court could prevent detention being in breach of articles 3 or 5 of the Convention.

30 There is nothing to suggest that a sentence of IPP in itself is a violation of articles 3 or 5. All that has been suggested is that the way in which a person subject to IPP has been dealt with long after sentence may render the detention arbitrary. This would not make the original decision of the court wrong. In *James v United Kingdom* (2012) 56 EHHR 12 the Fourth Section of the Strasbourg court concluded that the failure to provide those serving IPPs access to courses to enable them to satisfy the conditions for release could render their continued detention arbitrary. In *R (Kaiyam) v Secretary of State for Justice* [2015] AC 1344, the Supreme Court analysed that decision. It held that although the Secretary of State had a duty to provide facilities for rehabilitation, if he failed to do so, the remedy was damages rather than a declaration that the detention was unlawful. As Lord Mance and Lord Hughes JJSC said at para 39 in giving the judgment of the court: "his detention remains the direct causal consequence of his indefinite sentence until his risk is judged by the independent Parole Board to be such as to permit his release on licence."

31 It is only if the system of review breaks down or ceases to be effective could it possibly be the case that the detention becomes arbitrary: see *R (Walker) v Secretary of State for Justice (Parole Board intervening)* [2010] 1 AC 553 as explained at para 11 of *R (Kaiyam) v Secretary of State for Justice*. If such a state of affairs was reached, this would not be the consequence of the original sentence providing for arbitrary detention, but of subsequent events. It would not, therefore, be a matter for this court. It would be as a result of a failure by the Secretary of State to properly carry

A out the sentence of the court or a failure by the Parole Board. Thus it would be a matter for judicial review of the actions of the Secretary of State or the Parole Board by the procedures provided before the Administrative Court with the evidence necessary for such an application.

32 A final submission was made based on Mr Rule's submissions in *R v Docherty* [2014] 2 Cr App R (S) 76. In that case the appellant was convicted of an offence of wounding with intent on 13 November 2012. As the B provisions abrogating the sentence of IPP to which we have referred in para 9 did not come into force until 3 December 2012, although enacted by Parliament on 1 May 2012, the judge applied, as he was bound to do, the law as set out in section 225 and following of the CJA 2003. He found that he was dangerous and sentenced him to IPP. Apart from the conventional submission that the sentence of IPP should not have been imposed, it was C submitted that the imposition of such a sentence after Parliament had decided to abolish it was a breach of the Convention (articles 7, 5 or 14) and of the principle of what is known as the lex mitior.

33 As we understand the argument, it was submitted that there was unlawful discrimination against the appellant as he was being subjected to a sentence of IPP when Parliament enacted LASPO 2012 in May 2012 with effect from a date to be appointed, but he was none the less subject to that D sentence by reason of the date of his conviction being between that date and the date the abolition was brought into force on 3 December 2012. It was also submitted that article 7, as interpreted by the Strasbourg court in *Scoppola v Italy (No 2)* (2009) 51 EHHR 12, required a court, in the event that the legislature had reduced the penalty between the time the crime was committed and the conviction, to impose the reduced penalty. This court did E not accept these arguments, but a point of law was certified and permission to appeal was granted in February 2015. The appeal is to be considered by the Supreme Court in May 2016.

34 If the Supreme Court accepts the arguments advanced on behalf of Docherty, it can make no difference whatsoever to the present applications, as all were convicted and sentenced many years before Parliament enacted LASPO 2012 in May 2012 abolishing the sentence of IPP with effect from a F date to be appointed. We cannot see how it can be suggested that a sentence lawfully and properly passed many years before Parliament enacted the change in the law can be invalidated by that subsequent change in the law by Parliament.

35 We would add one further point simply to record an argument addressed to us by the respondent to the effect that the position was much G more complex than suggested. That further submission was based on the decision in *R v Burinskas (Attorney General's Reference (No 27 of 2003)) (Practice Note)* [2014] 1 WLR 4209 where this court considered the circumstances in which a sentencing court could exercise the power under section 224A and section 225 of the CJA 2003 as amended by LASPO 2012 to pass sentences of life imprisonment for those convicted after 3 December 2012. At paras 12–23, the court considered the submission that it would be H inappropriate to pass a sentence of life imprisonment under the provisions as amended by LASPO 2012 when an offender might have been sentenced to IPP in respect of an offence committed after 3 December 2012 had IPP continued as an available sentence. The court concluded that it was inevitable that there might be circumstances where a person who would

have been sentenced to IPP might be sentenced to life imprisonment under the new provisions. A

(e) The principles applicable to an extension of time

36 Crim PR r 36.4(b) requires the applicant to give reasons for requiring an extension of time. Any application for an extension of time to renew is within the discretion of the court which always requires reasons to be provided by the application as to why the court should grant an extension of time. As this court made clear in *R v Wilson* [2016] EWCA Crim 65, the reasons for the extension must always give an explanation for the delay in making the application. B

37 In deciding whether to grant an extension, the court will consider all the material circumstances, including the explanation for the delay and the cogency of the reasons in seeking an extension when determining whether it is in the interests of justice to grant an extension: see, for example, *Hamilton v The Queen* [2012] 1 WLR 2875, para 17 and *R v Thorsby* [2015] 1 WLR 2901, paras 12–18. There is no limit on the court's discretion. C

38 As is clear from the detailed reasons given by us in respect of each application before us, we have not based our decision in any of these cases simply on the fact that the application is made years out of time, but on a consideration of all the circumstances, including our review of each of the sentencing decisions. We have taken that course in these applications to enable the court to review the general position of those sentenced to an IPP who are still in custody or subject to licence years after the expiry of a minimum term. We have done this in the particular circumstances of these applications which were specially conjoined so that the court could consider the general approach this court should take given the nature of the sentences of IPP, the controversy that the outcome which has resulted from this sentencing regime has caused, as reflected in the concern raised in Parliament and elsewhere and the time the applicants have actually spent in custody. D E

39 However, this is not any indication of any change in the practice of this court summarised in *R v Thorsby*, para 15. Time limits are set for good reason and in the interests of justice. They must be strictly observed unless there are good and exceptional reasons for their not being so observed. As was made clear by Lord Taylor CJ in *R v Burley (Donald)*—a decision reported in The Times, 9 November 1994 and referred to in *R v Williams* [2010] EWCA Crim 3289 at [5]—the interests of justice as a whole require the strict observance of time limits. It is particularly important in the case of a sentence appeal that it is brought within the time frame required so that the offender knows as soon as possible what his position is with finality and so that his rehabilitation can be planned accordingly by those who manage him in HM Prisons. F G

(f) Obligation to consult the former lawyers.

40 In all of the applications except that of Precado (see para 60), all of the applications are made by those who did not either represent the offender as a solicitor or appear as an advocate at the sentencing hearing. In *R v McCook (Jason)* [2014] EWCA Crim 734, this court made clear that it was the duty of any new representative to make inquiry of those who represented the offender at the trial so that they are apprised of all relevant information. H

A Although that decision concerned an application for leave to appeal against conviction, the same duty applies in an application for leave to appeal against sentence.

Conclusion on the general principles

(a) The position of this court

B **41** We have reviewed these 13 cases in detail. In each we are satisfied that the judge correctly applied the law and passed a sentence in accordance with the CJA 2003 as interpreted in the decisions of this court.

42 There may of course be cases where in certain specific circumstances the judge made an error of law (such as imposing such an IPP for an offence committed before the coming into force of the provisions as happened in
C *R(GJD) v Governor of Her Majesty's Prison Grendon* [2015] EWHC 3501 (Admin), *R v GJD* [2015] EWCA Crim 599). However, we wish to make clear that where the judge has followed the provisions of the CJA 2003 as interpreted by the decisions of this court and passed a sentence of IPP in circumstances where it was properly open to the judge to pass such a sentence, this court will not now revisit sentences of IPP on the bases argued in these applications. Unless clear new points are raised, the court will in all
D such cases in the future simply refuse an extension of time without more. The remedy, if any, is one that the Executive and Parliament must address.

(b) The issue for Parliament

43 As the principles on which this court exercises its jurisdiction are clear and as the judges were passing sentences faithfully and properly
E following the clear terms of the CJA 2003, as they were bound to do, it is not permissible for the reasons we have given for this court to set aside sentences that were properly and lawfully passed.

44 We are mindful of the substantial criticism that many years after the expiry of minimum terms, sometimes of a very short period, many sentenced to IPP remain in custody or have been recalled to custody for breach of their licence conditions. It is clear to us from the applications before us that:
F (i) the effect of a long term of imprisonment with no certain date of release is that in some cases it may increase the likelihood that an offender will offend again on release; (ii) the effect of the license provisions will mean that offenders are subject to long periods of licence and, if they offend, are recalled: see for example Roberts and Diveney.

45 Criticism has also been made of the imbalance between the threshold
G test that brought an offender within the scope of an IPP, namely a significant risk to members of the public of serious harm occasioned by him of further specified offences and the threshold test for release, namely it was no longer necessary for the protection of the public that he should be detained. An analysis of the difference is set out in *R (Sturnham) v Parole Board (No 2)* [2013] 2 AC 254, paras 40–48. As we have set out at para 9, Parliament has
H given to the Secretary of State power to alter the threshold test for release. 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.

46 It will not be easy to find a ready solution, for simply to release those who have completed their tariff periods would have the consequence that many would be put into the community without any supervision and they might well pose a risk of danger. It would appear that there is no likely solution other than (1) that 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 section 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.

47 This is not a case where the common law took a wrong turning as it did in the case of joint enterprise as recently set out in the judgment of the Supreme Court in *R v Jogee* [2016] 2 WLR 681 in which the courts corrected the common law. It was Parliament which legislated to establish a regime of sentences of IPP in terms which the courts have faithfully and properly applied. It must, in our democracy and in accordance with the rule of law, be for Parliament to provide a correction for the outcome if it so wishes. Such a correction will in the circumstances not in any way interfere with the fundamental constitutional principle that the independent decision of the court must be respected, because the sentences were premised on the condition that it would be for the Parole Board to determine the terms of release.

[In paras 48–182 the court considered the individual applications but in all cases refused to grant extensions of time in which to apply for permission to appeal against sentence.]

Applications refused.

CLARE BARSBY, Barrister