



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

**CASE OF JAMES, WELLS AND LEE v. THE UNITED KINGDOM**

*(Applications nos. 25119/09, 57715/09 and 57877/09)*

JUDGMENT

STRASBOURG

18 September 2012

**FINAL**

***11/02/2013***

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of James, Wells and Lee v. the United Kingdom,**

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Lech Garlicki, *President*,

David Thór Björgvinsson,

Nicolas Bratza,

George Nicolaou,

Zdravka Kalaydjieva,

Nebojša Vučinić,

Vincent A. De Gaetano, *judges*,

and Fatoş Aracı, *Deputy Registrar*,

Having deliberated in private on 28 August 2012,

Delivers the following judgment, which was adopted on that date:

**PROCEDURE**

1. The case originated in three applications (nos. 25119/09, 57715/09 and 57877/09) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by three British nationals, Mr Brett James, Mr Nicholas Wells and Mr Jeffrey Lee (“the applicants”), on 7 May 2009, 27 October 2009 and 27 October 2009 respectively.

2. The applicants, who had been granted legal aid, were represented by Ms E. Restall, a lawyer practising in Bradford; Ms R. Walsh, a lawyer practising in Bolton; and Mr M. Pemberton, a lawyer practising in Wigan. The United Kingdom Government (“the Government”) were represented by their Agents, Ms H. Moynihan and Ms A. Sornarajah, of the Foreign and Commonwealth Office.

3. The applicants alleged, in particular, that their detention in prison pursuant to indeterminate sentences following the expiry of their tariff periods was unlawful under Article 5 § 1 of the Convention and that there was no meaningful review of the legality of their post-tariff detention by a body with the power to order their release, in violation of Article 5 § 4.

4. On 14 December 2010 the Vice-President of the Fourth Section decided to give notice of the applications to the Government. It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

5. Mr James was born in 1985 and lives in Wakefield. Mr Wells was born in 1983 and is currently in detention. Mr Lee was born in 1965 and lives in Fleetwood.

#### **A. The introduction of the IPP sentence**

6. On 4 April 2005, by virtue of section 225 of the Criminal Justice Act 2003 (“the 2003 Act”), indeterminate sentences for the public protection (“IPP sentences”) were introduced. These sentences are indeterminate sentences (i.e. sentences of no fixed length), and, like sentences of life imprisonment, require the direction of the Parole Board in order for the prisoner to be released. A minimum term which has to be served before a prisoner can be released, known as the “tariff”, is fixed by the sentencing judge. In cases involving IPP prisoners, it would appear that in practice the tariff fixed is generally short: in the year following the entry into force of the provisions on IPP sentences, when the applicants in the present case were sentenced, the median tariff for IPP prisoners was thirty months, and seventy per cent of IPP sentences imposed involved tariffs of three years or less.

7. When IPP sentences were first introduced, they were mandatory in all cases where an individual was convicted of a “serious offence” and was deemed by the sentencing judge to be at risk of committing a further “specified offence”. Risk was to be assumed in cases where the individual in question had previously been convicted of a “relevant offence”, unless the sentencing judge considered it unreasonable to conclude that there was a risk of further specified offences being committed. The terms “serious offence”, “specified offence” and “relevant offence” were defined in the 2003 Act.

8. Pursuant to section 28 of the Crime (Sentences) Act 1997 (“the 1997 Act”), the Parole Board was given the power to direct the release of indeterminate sentence prisoners to whom the section applied if it was satisfied that detention was no longer necessary for the protection of the public.

9. The consequence of the entry into force of the legislative provisions introducing IPP sentences was that a large number of individuals were sentenced to an IPP sentence. Although it had been intended that the new provisions would be resource-neutral, it soon became clear that existing resources were insufficient and the large number of IPP prisoners swamped the system in place for dealing with those serving indeterminate sentences.

10. The IPP scheme was subsequently amended by the Criminal Justice and Immigration Act 2008 (“the 2008 Act”) to deal with the problems encountered. In particular, the IPP sentence is no longer mandatory. Further, it now only applies to cases where, if imposed, the tariff would be fixed at more than two years, subject to certain limited exceptions.

11. The domestic law, including the changes introduced by the 2008 Act, is set out in greater detail below (see paragraphs 124-142).

### **B. The first applicant (Mr James)**

12. On 28 September 2005 Mr James pleaded guilty in the Crown Court to unlawful wounding with intent. He had previous convictions for, among other things, battery, common assault, affray, disorderly behaviour, racially abusive behaviour and assault occasioning actual bodily harm. A pre-sentencing report dated 27 September 2005 prepared by the Probation Service referred to the offence forming part of a pattern of violence and threatening behaviour largely linked to Mr James’ excessive drinking. It recommended counselling to address alcohol and substance abuse. The sentencing judge accepted that Mr James was dangerous, particularly when he drank alcohol. He was sentenced to an IPP sentence pursuant to section 225 of the 2003 Act, with a tariff of two years, less time spent on remand. His tariff therefore expired one year and 295 days after the date of sentencing.

13. After being sentenced, Mr James remained at his local prison, HMP Doncaster, and while there took all courses that he was able to take. The courses he completed included a short alcohol awareness course, an IT course, a first aid course and a Think First course. Parole Board reports indicated that he should also undertake the ETS (Enhanced Thinking Skills) course, the ASRO (Addressing Substance Related Offending) course and the CALM (Controlling Anger and Learning to Manage it) course, none of which were available to him at HMP Doncaster.

14. On 31 May 2006 the chairman of the Independent Monitoring Board (a statutory body established to monitor the welfare of prisoners) wrote to Mr James’ solicitors saying that Mr James had completed all the courses that were available to him at HMP Doncaster and that he was unable to move to a first stage lifer prison to complete the rest of the courses needed for release because all the places at the first stage lifer prisons were full.

15. On 8 September 2006 the Lifer Governor at HMP Manchester wrote to Mr James’ solicitors explaining that he was thirty-fifth on the first stage lifer prison waiting list. He said:

“As you will be aware we must now treat Indeterminate Public Protection (IPP) sentenced prisoners as lifers and they are all serving short tariff sentences ... The massive influx of IPPs along with other sentenced lifers from our courts has inflated our lifer/IPP numbers to 160 (and increasing) against a profiled maximum of 131.

This increase above our profiles numbers, without any additional resources, has meant that we have not been able to accept anyone from our first stage waiting list for almost a year.

Unfortunately, this trend shows no sign of slowing down and I cannot predict when we might be able to accommodate Mr James.”

16. On 9 January 2007 Mr James’ solicitors wrote to the Secretary of State explaining his situation and requesting that he be transferred to a first stage lifer prison in order to complete the relevant courses, or that the courses be made available to him at HMP Doncaster. The letter highlighted that Mr James’ tariff would expire in seven months and that he wished to complete the relevant courses before tariff expiry and his Parole Board hearing.

17. On 12 January 2007 the Lifer Governor at HMP Manchester wrote that the number of lifer/IPP prisoners had increased to 192:

“The increase in Lifer/IPP numbers and the fact that most of these individuals have come to us with short tariffs means that we now seem to do mostly report writing and are largely unable to get on with our ‘real’ job of risk assessment and sentence planning work.”

18. On 3 March 2007 Mr James’ case was referred to the Parole Board in accordance with the standard procedure.

19. The Progress Report Summary prepared for the Parole Board by Mr James’ Indeterminate Sentences Manager at HMP Doncaster, dated 2 April 2007, stated:

“... The Court obviously considered Mr James to be a danger to the public when it imposed an Indeterminate Sentence for Public Protection, but that risk would seem to have been reduced somewhat both by his increasing maturity and by the work he has already undertaken. A full assessment will only be done at the Sentence Planning stage, at his First Stage Lifer Centre, and the suggestion is that he is likely to need to undertake CALM and PASRO [Prison: Addressing Substance Related Offending] courses prior to release in order to ensure that his risk is reduced to an acceptable level. He professes himself happy to do these.”

20. Under the heading “Recommendation for allocation or release”, the report continued:

“As Mr James has not as yet had his Sentence Plan or undertaken any work related to his offending, I cannot with any confidence recommend him for release or for transfer to open conditions.”

21. On 21 May 2007 Mr James applied to the High Court for permission to seek judicial review of the management and treatment of prisoners by the Secretary of State in light of the failure to provide him with the relevant courses to address his offending behaviour.

22. On 20 July 2007 Mr James’ tariff period expired.

23. Handing down his judgment in the judicial review proceedings on 20 August 2007, Mr Justice Collins outlined the background to the judicial review application as follows:

“2. ... [Mr James’] tariff expired on 20th July of this year and the result is that he is now detained solely as a result of the IPP on the basis that he is dangerous. He has therefore the right to apply to the Parole Board for his release on the basis that he is no longer to be regarded as dangerous and that therefore the continued detention would not be justified.

3. In order to make a meaningful submission to the Parole Board, it was necessary that he undertake courses to seek to deal with his problems, particularly those of drink and anger management. There are such courses which are made available by the prison service. Unfortunately, the resources have not been provided to enable such courses to be provided for [prisoners] such as the claimant, who has a short tariff period. Indeed, he has been incarcerated at Doncaster Prison, which is a local prison, and which does not have the facilities for the necessary courses. He has, as I understand it, undertaken a short course in relation to alcohol and an equally short one in relation to anger management but it is recognised that they would be likely to be insufficient to provide the necessary information to the Parole Board and the Parole Board would be likely to be in the same position as the Board was in the case of Wells (which was dealt with by the Divisional Court together with Walker). In that case, the Board, when Wells, who was a post-tariff prisoner, came before it, commented that he had not undertaken any offence focused work, which was not his fault because he wanted to do so, but it was not the remit of the Parole Board to make up the deficiencies of the prison service and, because he had not been able to do any of the appropriate courses, he was unable to demonstrate any reduction in risk from the time that he was sentenced. That, Mr Weatherby [counsel for Mr James] submits, is likely to be the approach of the Parole Board, before whom the claimant at the moment has a hearing fixed, as I understand it, for 14th September next.”

24. Collins J, relying on the decision of the Divisional Court in *Walker v. the Secretary of State* (“*Walker*” – see paragraphs 51-54 below), declared Mr James’ detention unlawful and ordered his release, but stayed relief pending an appeal by the Secretary of State. He did not decide on Mr James’ argument that there had been a violation of Article 5 § 4 as a result of the failure to provide the courses, although he recognised the possible force of the argument and indicated that it would be “desirable” for the Court of Appeal to consider it.

25. The Secretary of State appealed the decision of Collins J.

26. On 14 September 2007 the Parole Board convened to consider Mr James’ case. His representative applied for a deferral of the hearing on the grounds that the absence of a satisfactory life sentence plan and the non-availability of relevant offending behaviour courses meant that the Parole Board would be unable to carry out a sufficiently informed risk assessment to decide whether the test for release was satisfied, referring to the conclusions of the Parole Board in the case of Mr Wells (see paragraph 49 below) and in the case of *Walker*. He further advised the Parole Board that the case of *Walker* was pending before the Court of Appeal. In the circumstances the Parole Board agreed that the hearing before it would serve no useful purpose and directed that the hearing be deferred until after the determination of the appeal in Mr James’ case and in the case of *Walker*. The Parole Board hearing was re-listed for January 2008.

27. The Court of Appeal heard the appeal in Mr James' case together with the appeal in *Walker* in November 2007.

28. On 21 December 2007 Mr James was transferred to HMP Lindholme, a first stage prison.

29. On 1 February 2008 the Court of Appeal allowed in part the appeal of the Secretary of State in Mr James' case, holding that his continued detention following the expiry of his tariff was not unlawful in light of the express terms of section 225 of the 2003 Act and section 28 of the 1997 Act, which rendered detention lawful until the Parole Board was satisfied that he was no longer dangerous (see paragraphs 128 and 139-142 below); and that the detention would not cease to be justified under Article 5 § 1 (a) of the Convention until it was no longer necessary for the protection of the public that Mr James be detained or so long had elapsed without a meaningful review of the question that the detention had become disproportionate or arbitrary. However, it upheld the declaration made in *Walker* that the Secretary of State had breached his public law duty.

30. Lord Phillips of Worth Matravers CJ, delivering the judgment of the court, considered the primary object of the IPP sentence to be clear from the wording of sections 224 and 225 of the 2003 Act (see paragraphs 124-125 below), namely to detain in prison serious offenders who posed a significant risk to members of the public of causing serious harm by the commission of further serious offences until they no longer posed such a risk. He noted that in a previous case the Secretary of State had conceded that it would be irrational to have a policy of making release dependent upon the prisoner undergoing a treatment course without making reasonable provision for such courses, and that his position in the present case was that the concession stood. As to the Secretary of State's contention that the concession did not assist in the present case as it was for the Parole Board to decide whether to release an IPP prisoner, and not for the Secretary of State; and that it was for the Parole Board to decide what evidence satisfied it that an IPP prisoner should be released, he said:

"39. We found [these] submissions lacking in realism. Courses are provided because experience shows that these are usually necessary if dangerous offenders are to cease to be dangerous. It is for this reason that performance of the appropriate courses is likely to be a prerequisite to a prisoner satisfying the Parole Board that he has ceased to be dangerous ... The reality is that the possibility for dangerous prisoners both to cease to be dangerous and to show that they have ceased to be dangerous lies largely in the hands of the Secretary of State. It has been his policy to provide the necessary courses and to do so within a time scale that gives lifers a chance to demonstrate that they are safe for release by the time that they complete their tariff periods, or reasonably soon thereafter."

31. Lord Phillips referred to the decision of the Secretary of State to bring into force the provisions introducing IPP sentences without having first ensured that there existed the necessary resources to give effect to the policy that would ordinarily have given IPP prisoners a fair chance of



demonstrating to the Parole Board, once the time for review arrived, that they were no longer dangerous (see paragraphs 145-150 below). He continued:

“40. ... This cannot simply be regarded as a discretionary choice about resources, which is pre-eminently a matter for the government rather than the courts. We are satisfied that his conduct has been in breach of his public law duty because its direct and natural consequence is to make it likely that a proportion of IPP prisoners will, avoidably, be kept in prison for longer than necessary either for punishment or for protection of the public, contrary to the intention of Parliament (and the objective of Article 5 of which Parliament must have been mindful).”

32. Having established that the Secretary of State had breached his public law duty in failing to provide the necessary courses, the court went on to examine the lawfulness of the continued detention. Lord Phillips indicated that the court could see no answer to the submission of the Parole Board and the Secretary of State that the 2003 Act made express statutory provision for the circumstances in which IPP prisoners could be released and that the Divisional Court’s judgment would require them to be released in disregard of the express requirements of the Act. He noted that section 225 of the 2003 Act made the release of IPP prisoners subject to the provisions of the 1997 Act, section 28 of which provided for the circumstances in which an IPP prisoner had to be released once he had served the tariff period. He considered that it was not possible to describe a prisoner who remained detained in accordance with these provisions as ‘unlawfully detained’ under common law, and that in any event the common law had to give way to the express requirements of the statute.

33. Lord Phillips accordingly concluded that IPP prisoners who had completed their tariff terms remained lawfully detained.

34. As to whether there was a violation of Article 5 § 4 in Mr James’ case, he distinguished between the role of treatment in changing the prisoner so that he ceased to be dangerous and the opportunity that treatment provided for assessing whether the prisoner was dangerous. He considered that without a sentence plan and monitoring of the prisoner’s performance against that plan, realistically the outcome of any review by the Parole Board would be a foregone conclusion.

35. He concluded that the fact that the claimants remained in the local prison to which they were first sent would not formally prevent a review by the Parole Board. However, as a matter of substance rather than form, any such review would, in the circumstances of the case, be an empty exercise. He found this to be an unacceptable situation which, if it continued, was likely to result in a breach of Article 5 § 4.

36. Addressing the possibility of a violation of Article 5 § 1 arising on the basis that Article 5 § 4 had been violated, Lord Phillips considered that so long as the prisoner remained dangerous, his detention would be justified under Article 5 § 1 (a) whether or not it was subject to timely periodic

review that satisfied the requirements of Article 5 § 4. He noted, however, that if a very lengthy period elapsed without a review, a stage could be reached at which the detention became arbitrary and no longer capable of justification under Article 5 § 1 (a).

37. On the question of the compliance with Article 5 § 1 of the continued detention in the applicant's case, Lord Phillips noted that the primary object of the IPP sentence was to protect the public, and not to rehabilitate offenders. Accordingly, detention of the applicants would cease to be justified only when the stage was reached that it was no longer necessary for the protection of the public that they be confined, or if so long elapsed without a meaningful review of this question that their detention became disproportionate or arbitrary. He found that this stage had not yet been reached.

38. He concluded:

“72. This appeal has demonstrated an unhappy state of affairs. There has been a systemic failure on the part of the Secretary of State to put in place the resources necessary to implement the scheme of rehabilitation necessary to enable the relevant provisions of the 2003 Act to function as intended. So far as the two claimants are concerned the appropriate remedy is limited to declaratory relief. For the reasons that we have given, however, the prevailing situation is likely to result in infringement of article 5(4) and may ultimately also result in infringement of article 5(1) ...”

39. Mr James appealed to the House of Lords against the judgment of the Court of Appeal. His appeal was eventually joined with the appeals in the cases of Mr Wells, the second applicant, and Mr Lee, the third applicant.

40. While the appeal was pending, a full Parole Board review in respect of Mr James took place on 14 March 2008. Mr James had still been unable to undertake the recommended courses. The Parole Board had before it, in addition to the hearing dossier: a victim contact report; MALRAP (Multi Agency Lifer Risk Assessment Panel) minutes dated January 2006; a report by an external psychologist dated 7 March 2008; a progress report from an HMP Lindholme Life Manager, dated 12 March 2008; and a report prepared by the intended supervising probation officer dated 12 March 2008. The Parole Board also heard oral evidence.

41. At the hearing, Mr James requested his release and undertook to comply with the proposed licence conditions. The Secretary of State was of the view that Mr James should remain in closed conditions for the completion of the coursework. The Parole Board noted that a release plan had been constructed for Mr James involving his accommodation at a hostel and further cognitive skills work, relapse prevention work and the completion of the CALM course to be conducted in the community. Following the hearing, the Parole Board directed Mr James' release on licence, explaining:

“The panel noted the strong recommendations for your release and therefore took some time to gain an understanding from you of your responses and attitudes; they

were satisfied, within your intellectual boundaries, that you have achieved a level of understanding and insight which mean that you will willingly engage with the careful structure of the Westgate hostel which has been outlined for you. The panel recognised that further work is required ... but after careful consideration of all available evidence the panel saw that work as developmental more than core risk reduction and agreed ... that your risk of violent offending has now reached a level such that it could safely be managed within the community ...

In making their decision the panel recognised that their decision was exceptional: however, the reasons for their conclusions have been clearly set out ...”

42. On 28 March 2008 Mr James was released on licence.

43. On 6 May 2009 the House of Lords published its judgment in the three linked appeals (see paragraphs 100-121 below), finding that there had been no violation of Article 5 §§ 1 or 4 in Mr James’ case.

### **C. The second applicant (Mr Wells)**

44. Mr Wells was convicted of the attempted robbery of a taxi driver. He had previous convictions for both violent and acquisitive offences, linked to the misuse of drugs. On 14 November 2005 he was sentenced at Bolton Crown Court to an IPP sentence with a tariff of 12 months, less 58 days spent on remand. Pre-sentence reports assessed him at high risk of reconviction but as posing a low risk of causing serious harm save for a medium risk with regard to prison staff.

45. In March 2006 HMP Forest Bank, the local prison where Mr Wells was at that time detained, reported that he was motivated to address his offending behaviour but was having difficulties in prison and had seven adjudications against him. The report recommended that he engage in programmes for PASRO, ETS, CALM and Victim Awareness. None of these, however, were available to him at HMP Forest Bank.

46. Mr Wells’ tariff expired on 17 September 2006. A Parole Board hearing was fixed for 25 October 2006. However the dossier in his case was not available and was only received by his solicitor and the Home Office on 9 November 2006. As a result, the hearing did not take place. Further Parole Board hearings were fixed for 18 January 2007 and 29 March 2007 but had to be deferred because insufficient Parole Board members were available. A hearing was subsequently fixed for 9 May 2007.

47. On 23 March 2007 Mr Wells issued an application for judicial review seeking an order that his case should be heard by the Parole Board forthwith, relying on Article 5 § 4 of the Convention.

48. On 19 April 2007, on the Parole Board’s concession, Sullivan J made a declaration that Mr Wells’ rights under Article 5 § 4 had been violated and ordered the Parole Board to hear Mr Wells’ case on 9 May 2007. He adjourned the judicial review proceedings for evidence to

be served and for consideration to be given to whether it would be appropriate to grant any further declaratory relief.

49. The Parole Board heard Mr Wells' case on 9 May 2007. However, on 15 May 2007 it decided not to direct Mr Wells' release, noting:

"... Whilst in custody you have accumulated a number of adjudications both for drug taking and for bad behaviour. You have not undertaken any offence-focussed work. It is fair to say that that is not your fault. There are no appropriate offending behaviour courses at your current prison. The Panel accept your evidence that you would like to undertake such courses. However, this will require your move to another prison, which the prison authorities have failed to arrange ...

In her most recent report your home probation officer states that your risk will remain high until you have satisfactorily completed appropriate courses, such as P-ASRO, ETS, CALM and Victim Awareness and Empathy.

In evidence that probation officer urged the panel to release you so that you could undertake these courses in the community subject to strict conditions ...

Unfortunately it is not the remit of the Parole Board to make up for the deficiencies of the prison service. We are charged with a duty not to release life prisoners while their risk of serious offending remains high. Because you have not been able to do any of the appropriate courses you are unable to demonstrate any reduction in risk from the time of your sentence. Because your risk remains high, the Panel cannot direct your release as requested."

50. Following the decision of the Parole Board, the applicant pursued the judicial review proceedings, arguing that his continued detention was unlawful. His case was joined with the case of *Walker*. However, at the hearing Mr Wells' counsel indicated that she was content to await the delivery of the judgment in *Walker* and then put in amended judicial review grounds or seek a fresh judicial review permission if either such course seemed appropriate

51. On 31 July 2007 the Divisional Court handed down its judgment in the judicial review proceedings regarding Mr Walker (Lord Justice Laws delivering an opinion with which Mr Justice Mitting agreed). Laws LJ considered that it was clear at the time the 2003 Act was passed that there was a settled understanding shared by Government, relevant agencies and professionals that upon the coming into force of the new sentencing provisions, procedures would be put in place to ensure that courses in prison would be available to maximise the opportunity for lifers to demonstrate they were no longer a danger to the public by the time their tariff expired, or as soon as possible thereafter, so as to allow the prisoner's release once that was shown. He was of the view that this understanding was a premise of the legislation, and that it was certainly inherent in the way the legislation was intended to work in practice, and to be given effect by the Secretary of State's policy set out in PSO 4700 (see paragraphs 145-150 below).

52. As to the numbers of IPP sentences imposed and the evidence of how the system had operated in practice, he said:

“28. ... Statistics ... show that the number of serving lifers was 5,475 on 30 November 2003 (the 2003 Act was passed on 18 December 2003), 5,807 on 31 March 2005 (s.225 came into force on 4 April 2005) and 8,977 on 31 March 2007. Mr Robson accepts there was an increase in the lifer population of 31% in 2006. On 20 April 2007 there were 2,547 prisoners serving IPP (the median tariff for IPP prisoners at April 2006 was 30 months). Yet the number of funded first stage and second stage prison places, within the meaning of PSO 4700, has not risen since April 2005 (though the number of core offending behaviour courses has risen from 13,265 in 2004/2005 to 16,959 in 2006/2007) ...

Mr Robson [Deputy Head of the Public Protection Unit at the National Offender Management Service] believes ... that in present circumstances the Prison Service can deal ‘satisfactorily’ with about 6,500 lifers. IPP prisoners with a tariff of less than five years are languishing in local prisons where, as Mr Robson acknowledges ..., there are few offending behaviour programmes ... The stark consequence is that IPP prisoners, or at least a very high proportion of them, at present have no realistic chance of making objective progress, with the assistance of appropriate initiatives within the prison, towards a real reduction or even elimination of their risk factor by the time their tariff expires.”

53. Laws LJ explained that the tariff element of the IPP sentence fulfilled the aims of punishment, while the post-tariff element fulfilled the aim of public protection. He considered that the justification that was required for a prisoner’s detention after tariff expiry was not at all justified by or at the time of sentence, because the extent to which, or the time for which, the prisoner would remain a danger was unknown at the time of sentence. It could only be ascertained on a continuing basis, by periodic assessment. Laws LJ emphasised that section 225(1)(b) of the 2003 Act (see paragraph 124 below) required the sentencing court to assess the presence or absence of danger, and its extent, at the time of sentence, and not at any other time. Accordingly, when sentence was passed it was not to be presumed against the prisoner that he would still be dangerous after his tariff expires, let alone months or years later. To the extent that the prisoner remained incarcerated after tariff expiry without any current and effective assessment of the danger he posed, his detention could not be justified and was therefore unlawful.

54. Granting Mr Walker’s application for judicial review, Laws LJ concluded:

“48. ... The Crown has obtained from Parliament legislation to allow – rather, require: the court has no discretion – the indefinite detention of prisoners beyond the date when the imperatives of retributive punishment are satisfied. But this further detention is not arbitrary. It is imposed to protect the public. As soon as it is shown to be unnecessary for that purpose, the prisoner must be released (see ss.28(5)(b) and 28(6)(b) of the 1997 Act). Accordingly there must be material at hand to show whether the prisoner’s further detention is necessary or not. Without current and periodic means of assessing the prisoner’s risk the regime cannot work as Parliament intended, and the only possible justification for the prisoner’s further detention is altogether absent. In that case the detention is arbitrary and unreasonable on first principles, and therefore unlawful.

49. Such a consequence would not be averted merely by prompt and regular sittings of the Parole Board ... Periodic reviews by the Parole Board (or any person or institution) only have value to the extent that they are informed by up-to-date information as to the prisoner's progress. So much is at least required. But so also are measures to allow and encourage the prisoner to progress, for without them the process of review is a meaningless one ... Reducing the risk posed by lifers must be inherent in the legislation's purpose, since otherwise the statutes would be indifferent to the imperative that treats imprisonment strictly and always as a last resort. Whether or not the prisoner ceases to present a danger cannot be a neutral consideration, in statute or policy. If it were, we would forego any claim to a rational and humane (and efficient) prison regime. Thus the existence of measures to allow and encourage the IPP prisoner to progress is as inherent in the justification for his continued detention as are the Parole Board reviews themselves; and without them that detention falls to be condemned as unlawful as surely as if there were no such reviews."

55. An OASys (Offender Assessment System) report dated 18 December 2007 rated Mr Wells as being at high risk of reconviction and as posing a high risk of harm to the public.

56. On 29 March 2008 Mr Wells was recommended for the same courses as had been recommended two years previously (see paragraph 45 above) and which still remained unavailable to him.

57. On 29 May 2008 Mr Wells' supervisor recorded his "almost intolerable" frustration with his lack of progress.

58. Mr Wells issued a second judicial review application on 4 June 2008, arguing that his continued detention constituted a breach of his rights under Article 5 §§ 1 and 4. His case was joined with that of the third applicant in the present case, Mr Lee.

59. On 25 June 2008 Mr Wells completed an Alcohol Free Good Life course.

60. On 26 June 2008 Mr Wells was transferred to HMP Risley.

61. On 25 July 2008 Lord Justice Moses handed down his judgment in the judicial review proceedings involving Mr Wells and Mr Lee. He indicated at the outset:

"2. Their cases highlight the fundamental difficulty inherent in IPP sentences where short minimum terms have been imposed. That difficulty has now been recognised by the amendment to the law. That fundamental difficulty was the failure to ensure that there were in place methods not only of timely assessment as to whether a prisoner remained dangerous, but also systems, such as accredited courses which would enable a prisoner to reduce or extinguish his level of dangerousness and to demonstrate that he had done so to the satisfaction of the Parole Board."

62. Considering the applicants' Article 5 § 1 complaint, Moses LJ considered it essential to identify the objectives which were sought to be achieved by the original imposition of the IPP sentence. Like Laws LJ, he indicated that there could be no assumption that, although a prisoner had been regarded as dangerous at the time when the original sentence was imposed, he would remain dangerous throughout his time in prison, although he added that the amount of time which had passed since sentence

or the offender's behaviour in prison could provide ample justification for such a conclusion.

63. Moses LJ emphasised that it was for the Parole Board to assess the danger posed by a prisoner: if the Parole Board was in a position to judge that the prisoner remained a danger, it could not direct his release even if the reason it reached its conclusion was through no fault of the prisoner's but rather because the Secretary of State had deprived him of the opportunity of reducing his level of dangerousness or of demonstrating that he had ceased to be a danger. He considered that where the Parole Board was entitled on the material before it to reach a conclusion that the prisoner remained a danger, there could be no breach of Article 5 § 1 as the primary objective and rationale for his continued detention remained. However, he contrasted this position with one where, by reason of the lack of course work, the Parole Board could not determine the level of dangerousness. In such circumstances, the justification for continuing to detain him would no longer exist, and there would be a breach of Article 5 § 1. He concluded that there would have to be clear evidence before the court that the failure to provide courses and opportunity for assessment with up-to-date information had led to a situation where it could safely be concluded either that the prisoner was not a danger or that it could not be ascertained whether he was a danger or not.

64. In respect of Mr Wells, he concluded that there had been no breach of Article 5 § 1, noting:

"31. ... The evidence shows that Mr Wells has been frustrated by the lack of progress which was inevitable following the loss of opportunity to go on those courses which he sought to attend. It is dispiriting to record that position when one appreciates that he is still a very young man and was only 22 when the sentence was originally passed. But the fact of the matter remains that the evidence before this court is that on assessment he remains at risk of reconviction, a risk assessed as high/medium with some risk of violent offences. Until he undergoes the accredited work, his past, coupled with his prison behaviour, affords what is described as an indication of the nature of the ongoing risk. It requires no imagination to appreciate that the frustration which has led to his bad behaviour in prison has no doubt been aggravated by the fact that he has been unable to undergo the necessary programmes of work. But that of itself does not break the link between the purpose for which the original sentence was passed and his continuing detention. There is no basis for saying that the current level of dangerousness cannot be ascertained, and, in those circumstances, no basis for saying that the link between the original sentence and his continued detention has been broken."

65. However, he found that the continuing failure to provide the relevant courses following the declaration of Sullivan J amounted to a breach of Article 5 § 4 of the Convention.

66. Mr Wells appealed the finding that there had been no breach of Article 5 § 1. The Secretary of State did not appeal the finding that there had been a breach of Article 5 § 4.

67. Mr Wells subsequently completed the PASRO course (between 22 August and 26 September 2008) and the ETS course (between 28 October and 3 December 2008).

68. On 11 December 2008 the Court of Appeal adjourned the appeal for inquiries to be made about an appeal from the decision of Moses LJ direct to the House of Lords. On 17 December 2008 Moses LJ certified that the cases involved points of law of general public importance in respect of which the judge was bound by the Court of Appeal decision in *Walker and James* (see paragraphs 29-38 above) and which were fully considered by the Court of Appeal in that appeal. The House of Lords subsequently heard Mr Wells' appeal, together with the appeals of Mr James and Mr Lee, between 27 and 29 January 2009.

69. On 27 February 2009 Mr Wells requested a Parole Board hearing.

70. Mr Wells subsequently completed the CALM course (between 6 January 2009 and 3 March 2009).

71. On 6 May 2009 the House of Lords published its judgment in the three linked appeals (see paragraphs 100-121 below) and found that there had been no violation of Article 5 § 1 in Mr Wells' case. It also disagreed with the unappealed finding of Laws LJ that there had been a violation of Article 5 § 4.

72. A Parole Board hearing took place in Mr Wells' case on 6 November 2009. The Parole Board directed that Mr Wells be released on 30 December 2009.

73. On 23 February 2010 Mr Wells was recalled to custody for breaching the conditions of his licence. He currently remains in custody.

#### **D. The third applicant (Mr Lee)**

74. On 13 April 2005, while under the influence of alcohol, Mr Lee caused criminal damage to a flat in which his former wife and young children were present. He was arrested and remanded in custody the following day. He had a total of eight previous convictions, including offences of assault occasioning actual bodily harm and criminal damage. Following his conviction, on 2 September 2005 Mr Lee was sentenced at Bolton Crown Court to an IPP sentence with a tariff of nine months, less time spent on remand. His tariff period therefore expired 163 days after sentence.

75. A probation officer's pre-sentence report assessed Mr Lee as a medium risk of reconviction but a high risk of causing serious harm to Mrs Lee "or alternatively any other woman with whom he may form a close attachment". A consultant forensic psychiatrist said that during childhood Mr Lee had developed a range of emotional and behavioural problems with poor temper control and had a limited ability to cope with stress. He concluded that Mr Lee could therefore be said to suffer from a personality



disorder with a mixture of dissocial, emotionally unstable and obsessional traits.

76. Following sentence, reports at his local prison, HMP Forest Bank, described Mr Lee as motivated to change and actively seeking out offending behaviour programmes. However, none of the relevant courses were available to him.

77. Mr Lee's tariff expired on 12 February 2006.

78. A Parole Board hearing took place on 30 June 2006 and the Board decided not to direct Mr Lee's release. The Parole Board noted that:

"The risk factors identified by Dr Wilson have yet to be addressed by attendance at offending behaviour programmes. Through no fault of your own these have not been available, but the Panel note your willingness and motivation to engage in the same."

79. It concluded that:

"... the alcohol and violence risk factors must be addressed in closed conditions before your risk is sufficiently reduced to enable you to be transferred to open conditions."

80. In a report dated 13 August 2007 the prison probation officer reported that "due to the current overcrowding and difficulties with allocation of IPP prisoners to first stage lifer prisons, Mr Lee has not had the opportunity to sit a sentence plan Board" and that he needed accredited courses.

81. The Parole Board fixed a further review of Mr Lee's case to take place in January 2008. However, the hearing was postponed due to the failure of the authorities to provide the necessary assessments and reports.

82. Mr Lee issued a judicial review claim on 27 February 2008 alleging that his detention breached Article 5 §§ 1 and 4. His case was joined with that of the second applicant, Mr Wells.

83. On 7 March 2008 Mr Lee was transferred to HMP Wymott where a number of assessments were carried out. On 20 June 2008 it was recommended that Mr Lee be assessed for the Healthy Relationships Programme ("HRP") to explore what psychological risk factors were present.

84. In the context of the judicial review proceedings, the Secretary of State made the following concession:

"the defendant concedes that Mr Lee has not had a speedy review of the lawfulness of his detention and thus there has been a breach of article 5(4) in this case."

85. As noted above (see paragraph 61), judgment in the judicial review claim was handed down on 25 July 2008. Specifically as regards Mr Lee's claim, Moses LJ noted that there has been a very serious failure to provide the courses which he should have attended not only to reduce his level of dangerousness but to demonstrate that he had done so. Moses LJ also recalled that Mr Lee would not have ever been sentenced to IPP under the amended IPP regime (see paragraphs 134-138 below). He observed that the

reports available showed a dramatic change in Mr Lee's attitude and in his character, and that he had proved a model prisoner. There was therefore ample material to suggest that he was not a danger but, he emphasised, that assessment was the function of the Parole Board and not of the court. However, the court was nonetheless required to determine whether the continued detention of Mr Lee was lawful, a question which could not be deferred to the Parole Board.

86. On the facts of the case, Moses LJ concluded that there had been no violation of Article 5 § 1 in Mr Lee's case:

"46. In Lee's case, there is, as I have said, much material to show a recognisable difference in the level of danger from that which pertained when he was originally sentenced. But that is not an end of the matter. There has been laid before the court material from a forensic psychologist in training based at Her Majesty's Prison Wymott. That psychologist has reached the conclusion that there are areas relevant to Mr Lee's risk of committing violence within the domestic context in the future which, as she puts it, need to be targeted, and until those matters have been 'targeted', she takes the view that the overall risk of domestic violence is medium to high ... Given that conclusion ... she recommends further treatment under an accredited programme known as the Healthy Relations Programme in closed conditions. It will be for the Parole Board to say whether it agrees with that conclusion, and the hearing before the Parole Board will no doubt permit not only that conclusion to be challenged, but also the process by which she reached that conclusion ...

47. All of that leads to my conclusion that it is not possible on the material before me to say that it cannot be ascertained whether Mr Lee remains a danger or not, and thus the causal link between the original sentence and his continuing detention has been broken. In those circumstances, I decline to find in his case also a breach of article 5(1)."

87. Mr Lee appealed the finding of Moses LJ that there had been no violation of Article 5 § 1 in his case. His appeal was heard directly by the House of Lords together with the appeal of Mr Wells.

88. Also on 25 July 2008 the Parole Board reviewed Mr Lee's case. However, it deferred its decision until receipt of Moses LJ's judgment (which it did not receive until 6 October 2008).

89. On 18 September 2008 Mr Lee was transferred to HMP Erlestoke to be assessed for the moderate version of the HRP.

90. On 24 October 2008 the Parole Board again deferred its review of the case until after Mr Lee's assessment for and, if appropriate, completion of the moderate HRP. It was anticipated that this would be done by January 2009.

91. Mr Lee was due to commence the three-month HRP programme on 30 October 2008. In the event, he did not do so, for reasons which are in dispute between the parties. A psychologist report dated 1 December 2008 recorded that there were aspects of the course which Mr Lee did not wish to undertake because of his concern about their impact on his mental health as he had previously suffered from depression. She concluded that Mr Lee should complete an accredited domestic violence programme preceded by

motivational enhancement work. However, such motivational enhancement work was not available at HMP Erlestoke in the short term.

92. The Parole Board issued a decision on 22 December 2008 expressing concern about recent developments:

“In summary, it would appear that Mr Lee’s current sentence plan is that he should remain in closed conditions in HMP Erlestoke doing nothing to reduce his risk until he is prepared voluntarily and without support to ask to see ... a psychologist and then persuade that psychologist that he is sufficiently motivated to undertake the Moderate HCP, that he is then assessed as suitable for that programme and then await the next available place on that course and then completes that programme. This impasse could continue indefinitely. The Secretary of State and those concerned with Mr Lee’s sentence and current status as a category C prisoner do not appear to have considered whether it is proportionate to continue to detain Mr Lee.”

93. On 12 January 2009, the Parole Board adopted another decision, in which it summarised the position regarding Mr Lee:

“Mr Lee will not be offered one-to-one work nor will he be provided with motivational work to assist him in overcoming his fears about taking the moderate HRP. The offender manager has not made any proposals as to the way forward save that, if Mr Lee unilaterally changes his mind and demonstrates (in ways not specified) that he is prepared to take the moderate HCP, he can then be assessed for that programme and, if assessed as suitable, take the programme and as part of that programme be risk assessed. The initial assessment for suitability is not a risk assessment but merely a programme selection process to test motivation and ability to understand and participate in the programme. No timetable for this open-ended sentence pathway is offered and Mr Lee’s future in closed conditions is apparently both open ended and not subject to any finality save for that provided for by the Parole Board at the current or any future review hearing.”

94. As noted above, on 6 May 2009 the House of Lords published its judgment in the three linked appeals (see paragraphs 100-121 below). It found that there had been no violation of Article 5 § 1 in Mr Lee’s case. It further disagreed with the concession of the Secretary of State that Article 5 § 4 had been breached.

95. A hearing of the Parole Board took place on 7 May 2009. In the week prior to the hearing, Mr Lee was assessed by a senior forensic psychologist. His concerns regarding the HRP were discussed and he demonstrated a willingness and motivation to participate in the HRP. It was therefore arranged that Mr Lee would commence the HRP “in the near future” at HMP Erlestoke, with a view to completion in October 2009 and a report being available by January 2010. The Parole Board hearing was adjourned to the first reasonably practicable date after 22 February 2010.

96. A Parole Board hearing took place in Mr Lee’s case on 29 March 2010. In a reasoned decision dated 7 April 2010, the Parole Board declined to direct Mr Lee’s release but recommended a transfer to open conditions. The Parole Board noted:

“... In summary, having balanced your interests in sentence progression against the interests of public protection, the panel were satisfied that sufficient evidence exists

that your risk of violent offending has been reduced to a level such that ... it is safely manageable in open prison conditions. The panel did not consider that sufficient evidence of risk reduction exists to enable them to make a direction that you be released; there is a necessity, in the panel's view (in the interests of public protection), for there to be a period of testing and gradual reintegration into the community before release."

97. The Secretary of State authorised a transfer to open conditions on 4 May 2010.

98. On 1 October 2010 Mr Lee was transferred to HMP Kirkham. The delay in the transfer was due to transportation problems in the prison estate.

99. A Parole Board hearing took place on 11 July 2011. On 25 July 2011 the Parole Board directed Mr Lee's release. In its decision letter, the Parole Board noted, *inter alia*:

"(g) You are five years over tariff.

(h) You were one of the first prisoners to be sentenced for public protection, at a time when dangerousness was, by statute, assumed, and there was no real assessment of your actual dangerousness despite a probation report indicating that a suspended sentence would be the appropriate disposal."

### **E. The proceedings involving all three applicants before the House of Lords**

100. On 6 May 2009 the House of Lords unanimously dismissed the applicants' appeals.

#### *1. General comments regarding the IPP regime*

101. Lord Judge referred to the five specific purposes of sentencing set out in section 142(1) of the 2003 Act (see paragraph 132 below), which included reform and rehabilitation of offenders and protection of the public. However, he noted that this section was expressly disappplied to IPP sentences and considered the reason to be plainly that the first and obvious purpose of these provisions was the protection of the public from the risks posed by dangerous offenders. A second purpose was punishment, which was not concerned with the potential dangerousness of the offender.

102. In his view, the sentencing court was required to make an informed predictive assessment of the risk at the date of sentence, and that the justification for detention beyond the tariff period was therefore found in the judgment of the court that an IPP sentence was necessary. Disagreeing with the views expressed by Laws LJ and Moses LJ (see paragraphs 53 and 62 above), he indicated that in his judgment detention beyond the tariff period was justified because the sentencing court had decided that the prisoner would continue to be dangerous at the expiry of the punitive element of the sentence: the necessary predictive judgment would have been made. He

explained that the statutory regime for dealing with indeterminate sentences was predicated on the possibility that, in most cases, prisoners could be reformed or would reform themselves. A fair opportunity for their rehabilitation and the opportunity to demonstrate that the risk they presented at the date of sentence had diminished to levels consistent with release should therefore be available to them. He continued:

“ ... The IPP sentence does not require the abandonment of all hope for offenders on whom it is imposed. They are not consigned to penal oblivion. To the contrary, common humanity, if nothing else, must allow for the possibility of rehabilitation ...

106. We cannot be blind to the realities. The reality for the offender subject to IPP is that the prison regime in which he may (or may not) be provided with the opportunity for rehabilitation is dependent on the structures provided by the Secretary of State. The similar reality for the Parole Board is that the material on which to form its decision that the offender may (or may not) have ceased to represent a public danger is equally dependent on the regime structured for this different purpose by the Secretary of State.”

103. Finally, Lord Judge considered that it was an inevitable consequence of the legislation, and the application of the statutory presumption in section 229(3) of the Act (see paragraph 129 below), that even when the tariff was measured in months rather than years, IPP sentences would arise for consideration. He explained that sentencing judges loyally followed the unequivocal terms of the statute and very many more defendants than anticipated were made subject to IPP sentences. However no extra resources were made available to address the inevitable increase in the number of inmates subject to indeterminate custody, and the result was the “seriously defective structures” identified in the applicants’ cases. He noted that numerous prisoners continued to be detained in custody after the expiration of their tariff periods, without the question either of their rehabilitation or of the availability of up-to-date, detailed information becoming available about their progress. He concluded that the preparation for the inevitable consequences of the new sentencing provisions relating to IPP sentences was wholly inadequate and continued:

“121. ... To put it bluntly, they were comprehensively unresourced ...

122. Notwithstanding the undoubted improvements, the appellants and indeed other prisoners were victims of the systemic failures arising from ill considered assumptions that the consequences of the legislation would be resource-neutral. Having applied the identical policies and rules relating to life imprisonment to IPPs, the Secretary of State failed to provide the resources to implement them. As tariff periods expired, nothing had been done to enable an informed assessment by the Parole Board of the question whether the protection of the public required the prisoner’s continued detention ...”

104. Several others of their Lordships commented on the problems incurred following the entry into force of the legislation introducing IPPs. Lord Hope of Craighead indicated that the Secretary of State had failed deplorably in the public law duty that he had accepted when he

persuaded Parliament to introduce IPP sentences. He had failed to provide the systems and resources that prisoners serving those sentences needed to demonstrate to the Parole Board by the time of the expiry of their tariff periods, or reasonably soon thereafter, that it was no longer necessary for the protection of the public that they should remain in detention. He observed that the Secretary of State had accepted that it was implicit in the statutory scheme that he would make provision which allowed IPP prisoners a reasonable opportunity to demonstrate to the Parole Board that they should be released; the scheme was such that it was not rational for him to fail to do so.

105. Lord Carswell referred to the “draconian provisions” of section 225 of the 2003 Act (see paragraphs 124-128 below), which he said left no room for the exercise of any judicial discretion and created entirely foreseeable difficulties when sentences for imprisonment for public protection were passed with short tariff terms.

106. Lord Brown of Eaton-under-Heywood noted that IPP prisoners rapidly swamped the prison system with increasing numbers of life sentence prisoners, many with comparatively short tariffs. As a consequence, for much if not all of the time until the amendment of section 225 in July 2008 (see paragraphs 134 and 138 below), it was not possible to give effect to the Secretary of State’s published policy to give all life sentence prisoners “every opportunity to demonstrate their safety for release at tariff expiry” (see paragraph 150 below).

107. He later added:

“65. ... I cannot, however, part from this case without registering a real disquiet about the way the IPP regime was introduced. It is a most regrettable thing that the Secretary of State has been found to be – has indeed now admitted being – in systemic breach of his public law duty with regard to the operation of the regime, at least for the first two or three years. It has been widely and strongly criticised, for example by the Select Committee on Justice. Many of the criticisms are to be found in the judgments below and I shall not repeat them. The maxim, marry in haste, repent at leisure, can be equally well applied to criminal justice legislation, the consequences of ill-considered action in this field being certainly no less disastrous. It is much to be hoped that lessons will have been learned.”

## *2. Findings on the alleged violation of Article 5 § 1*

108. As to whether there had been a violation of Article 5 § 1 of the Convention, Lord Hope referred to this Court’s jurisprudence on the need for a causal connection between the sentence and the detention and concluded that it was hard to see how there could ever be an absence of such a causal connection in the case of a prisoner whose case has been referred to, and was still under consideration, by the Parole Board. He considered that such a prisoner’s continued detention could not be said to be arbitrary, or in any other sense unlawful, until the Parole Board had determined that detention was no longer necessary.

109. However, he envisaged limited circumstances in which detention could become arbitrary, namely in circumstances where the system broke down entirely, with the result that the Parole Board was unable to perform its function at all. Continued detention could be said to be arbitrary in such a case because there was no way in which it could be brought to an end in the manner that the original sentence contemplated. However, in Lord Hope's view, the failures for which the Secretary of State accepted responsibility, while highly regrettable, could not be said to have created a breakdown of that extreme kind.

110. Lord Brown noted the Secretary of State's acknowledgment that it was implicit in the statutory scheme that he would make reasonable provision to enable IPP prisoners to demonstrate to the Parole Board, if necessary by completing treatment courses, their safety for release, and his concession that during the systemic failure to make such provision he was in breach of his public law duty. As to whether the provision of such courses was one of the objectives of the IPP sentence, Lord Brown, like Lord Judge, emphasised that the sentencing objectives were expressly disappplied in the case of IPP sentences and that rehabilitation was accordingly not an objective of the sentence. Thus a decision not to release an IPP prisoner because the Parole Board remained unsatisfied of his safety for release could never be said to be inconsistent with the objectives of the sentencing court or to have no connection with the objectives of the legislature and the court.

111. Lord Brown concluded that the only possible basis upon which Article 5 § 1 could ever be breached in these cases was that contemplated by the Court of Appeal in *James and Walker*, namely after "a very lengthy period" without an effective review of the case (see paragraph 36 above), involving an inability on the part of the Parole Board to form any view of dangerousness for a period of years rather than months.

112. On the question of compliance with Article 5 § 1, Lord Judge agreed with the conclusions of Lord Brown. He considered that if one of the purposes of an IPP were rehabilitation, and if the continued detention after the expiry of the tariff period were dependent on a specific finding by the Parole Board that it would be inappropriate to direct the prisoner's release, then it would be arguable that the causal link was broken. However, in his view that proposition was ill-founded.

113. Lord Judge concluded:

"128. ... 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."

### 3. Findings as to the alleged violation of Article 5 § 4

114. The question whether there had been a violation of Article 5 § 4 of the Convention remained live solely in respect of Mr James. Lord Hope referred to the principles set out by this Court in *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009 and considered that the procedure and the role of Parole Board complied with these principles.

115. Lord Hope concluded that there had been no violation of Article 5 § 4 in the circumstances of the cases before the court. He further indicated that, in his view, the Court of Appeal in *James and Walker* went too far in terms of this Court's jurisprudence when it said that the claimants' Parole Board reviews would be an empty exercise that would be likely to result in a breach of Article 5 § 4 if they were unable to make a meaningful challenge to the lawfulness of their detention at the time their cases were heard by the Parole Board (see paragraph 35 above). He indicated that Article 5 § 4 required that a system which met the requirement of procedural fairness be in place for making an assessment at reasonable intervals; how that system worked in practice in any given case was a matter for the Parole Board itself to determine and it was open to it to decide how much information it needed. It would only be if the system broke down entirely because the Parole Board was denied the information that it needed for such a long period that continued detention had become arbitrary that Article 5 § 4 would be violated and the prisoner would be entitled to a remedy in damages.

116. Lord Brown noted that the Parole Board dossier would always contain a good deal of information. He observed that even when, as in Mr James' case, it never became possible to provide the Board with a full risk assessment, the Parole Board was in fact able to determine risk and order his release largely through the evidence of an independent psychologist commissioned by Mr James himself, and the Court of Appeal's own forecast was thus belied. However, he accepted that there would be occasions when, unless a prisoner could undertake a course necessary to demonstrate his safety for release, it would be impossible for the Parole Board to reach any judgment as to his dangerousness so that the review would in that sense be an empty exercise and the default position of continued detention would inevitably result.

117. As to whether the Secretary of State's concession that in such cases Article 5 § 4 would be breached, he concluded that the Article required no more than that a court, in this case the Parole Board, had to decide speedily whether the prisoner continued to be lawfully detained. He accepted that it was inherent in this requirement that the basic dossier be made available, but he did not accept that it required anything more in the way of enabling the parole Board to form its judgment.

118. Lord Brown therefore held that Mr James Article 5 § 4 claim failed. He further regarded Mr Lee's and Mr Wells' claims as having been



unsustainable, but since the former was conceded and the latter held established and unappealed, he considered that there was no alternative but to remit their claim for damages to the Administrative Court for assessment, referring to the terms of Article 5 § 5 of the Convention.

119. Lord Judge considered that Article 5 § 4 was not directed to the operational inadequacies of a prison regime which might make it impossible for the prisoner to address his offending with a view to his reform and rehabilitation. It addressed a prisoner's ability to take proceedings to demonstrate that his continued detention was no longer justified just because the basis on which it would otherwise continue no longer applied. He agreed with Lord Brown's conclusions about the proper disposal of the Article 5 § 4 claims of Mr Wells and Mr Lee.

#### *4. Views as to available remedies*

120. Although no violation of Article 5 § 1 was found in the applicants' cases, and thus the question of remedies did not fall to be decided, some views were nonetheless expressed as to the availability of remedies had the court held that there was a violation of Article 5 § 1. Lord Hope noted that Mr James was no longer in custody, so the remedy which he seeks is compensation for delay in his being released. Mr Lee and Mr Wells, on the other hand, were still serving their sentences, and so sought a direction that they should be released, and compensation for delay. He noted that these remedies were not available at common law. He continued:

“8. The question then is whether the appellants are able to show that the Secretary of State has acted in a way which was incompatible with their Convention rights. If he has, his act is made unlawful by section 6(1) of the Human Rights Act 1998. This in turn opens up the possibility of obtaining a judicial remedy under section 8, which enables the court to award damages. But regard must also be had to section 6(2)(a) of the 1998 Act, which provides that section 6(1) does not apply to an act if, as a result of one or more provisions of primary legislation, the public authority could not have acted differently. The effect of that provision is to narrow the scope for argument as to the respects in which the Secretary of State's conduct was unlawful within the meaning of section 6(1).

9. Section 28(7) of the 1997 Act provides that a prisoner to whom that section applies may require the Secretary of State to refer his case to the Parole Board at any time after he has served the minimum term ordered by the sentencing judge. It has not been suggested by the appellants that the Secretary of State was in breach of that duty in their cases. The effect of section 28(5), which provides that it is the duty of the Secretary of State to release the prisoner on licence when directed to do so by the Parole Board, is that he has no power to release the prisoner until the Parole Board gives him that direction. Notwithstanding the criticisms that may be made of the Secretary of State's failure to provide the means by which the appellants could demonstrate to the Parole Board that their continued detention was no longer necessary, the terms of the legislation are such that it cannot be said that he was acting unlawfully in not releasing them until directed to do so by the Parole Board. The court, for its part, would not be acting unlawfully if it too declined to order their release until the Parole Board was satisfied that it was no longer necessary for the

protection of the public that they should be confined. Section 6(2)(a) of the 1998 Act leads inevitably to these conclusions.”

121. Lord Brown noted considered that, had the applicants succeeded on their Article 5 § 1 claims, section 6(2)(a) of the Human Rights Act 1998 would have presented them with acute difficulty because, given section 28 of the 1997 Act, it was difficult to see how either the Secretary of State or the Parole Board could have acted differently. However, he concluded that in light of the findings on the substantive claims, such discussion was academic and he preferred to express no further view upon the question.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. Sentencing of dangerous offenders

#### 1. *The position prior to 4 April 2005*

122. Before the entry into force of the IPP provisions in the Criminal Justice Act 2003 on 4 April 2005, section 80 of the Powers of Criminal Courts (Sentencing) Act 2000 (“the 2000 Act”) already provided for a longer than commensurate sentence to be passed on dangerous offenders.

123. Any longer than commensurate sentence imposed under section 80 remained a determinate (i.e. fixed) sentence and release was subject to the ordinary principles which applied to determinate sentences.

#### 2. *The position following 4 April 2005*

124. IPP sentences were introduced with effect from 4 April 2005 by section 225 of the 2003 Act. The bulk of the provisions remain in force, although some were the subject of later amendment (see paragraphs 134-138 below). Pursuant to subsection (1) thereof, section 225 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 court is of the opinion that there is significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.”

125. “Serious offence”, defined in section 224(2), covers 153 specified categories of violent or sexual offences punishable by imprisonment for life or for ten years or more. Section 224(3) defines “serious harm” as “death or serious personal injury, whether physical or psychological”. The term “specified offences” is defined in section 224(1) and (3); almost all “specified offences” involve danger to life or limb or interference with sexual autonomy.

126. Section 225(2) provides that if the offence is one which renders the offender liable to a sentence of life imprisonment and the court considers

that the seriousness of the offence is such as to justify the imposition of such a sentence, then the court must impose that sentence.

127. At the relevant time, section 225(3) provided that in a case not falling within section 225(2), the court “must impose a sentence of imprisonment for public protection”.

128. Section 225(4) defines a sentence of imprisonment for public protection as:

“... a sentence of imprisonment for an indeterminate period, subject to the provisions of Chapter 2 of Part 2 of the Crime (Sentences) Act 1997 as to the release of prisoners and duration of licences.”

129. Section 229 of the 2003 Act applies where a person has been convicted of a specified offence and it falls to the court to assess whether there is a significant risk to members of the public of serious harm by the commission by the offender of further specified offences posed by an offender. At the relevant time, section 229(2) provided that in making its assessment where the applicant had not previously been convicted of any relevant offence, the court:

“(a) must take into account all such information as is available to it about the nature and circumstances of the offence,

(b) may take into account any information which is before it about any pattern of behaviour of which the offence forms part, and

(c) may take into account any information about the offender which is before it.”

130. Where the offender had previous relevant convictions, that is convictions for any specified offence, section 229(3) provided that:

“... the court must assume that there is [a significant risk to members of the public of serious harm by the commission by the offender of further specified offences] 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.”

131. Section 239 of the 2003 Act provides:

“(3) The [Parole] Board must, in dealing with cases as respects which it makes recommendations under this Chapter or under ... the 1997 Act, consider—

(a) any documents given to it by the Secretary of State, and

(b) any other oral or written information obtained by it;

and if in any particular case the Board thinks it necessary to interview the person to whom the case relates before reaching a decision, the Board may authorise one of its

members to interview him and must consider the report of the interview made by that member.

(4) The Board must deal with cases as respects which it gives directions ... on consideration of all such evidence as may be adduced before it.

...

(6) The Secretary of State may also give to the Board directions as to the matters to be taken into account by it in discharging any functions ...; and in giving any such directions the Secretary of State must have regard to—

(a) the need to protect the public from serious harm from offenders, and

(b) the desirability of preventing the commission by them of further offences and of securing their rehabilitation.”

132. Section 142(1) of the 2003 Act imposed a general obligation on every court passing sentence to have regard to five specific purposes of sentencing, namely:

“(a) the punishment of offenders,

(b) the reduction of crime (including its reduction by deterrence),

(c) the reform and rehabilitation of offenders,

(d) the protection of the public, and

(e) the making of reparation by offenders to persons affected by their offences.”

133. However, at the relevant time section 142(2)(c) expressly disapplied section 142(1) to sentences imposed under “any of sections 225-228 of the Act (dangerous offenders)”, which included IPP sentences.

### *3. Position after 14 July 2008 – amendments to the 2003 Act*

134. The 2003 Act was amended by the Criminal Justice and Immigration Act 2008. In particular, IPP sentences are no longer mandatory: amended section 225 now provides that in a case not falling within subsection (2), the court “may impose a sentence of imprisonment for public protection” if the condition in subsection (3A) (“at the time the offence was committed, the offender had been convicted of an offence specified in Schedule 15A”) or subsection (3B) (the tariff which would be set together with time spent on remand is at least two years) is met. Schedule 15A sets out a list of fifty serious offences in England and Wales, Scotland and Northern Ireland.

135. Section 229, regarding the assessment of dangerousness, was also amended by the 2008 Act. Section 229(2) now provides that in making the assessment of whether there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences, whether the individual in question has previous conviction or not, the court:

“(a) must take into account all such information as is available to it about the nature and circumstances of the offence,

(aa) may take into account all such information as is available to it about the nature and circumstances of any other offences of which the offender has been convicted by a court anywhere in the world,

(b) may take into account any information which is before it about any pattern of behaviour of which any of the offences mentioned in paragraph (a) or (aa) forms part, and

(c) may take into account any information about the offender which is before it.”

136. Section 229(3) (see paragraph 130 above) has accordingly been repealed.

137. Section 142(2)(c), which previously disapplied the five sentencing objectives in IPP cases, was amended to delete the exclusion of IPP sentences from the five sentencing objectives.

138. The new provisions apply to all sentences passed on or after 14 July 2008.

## **B. The release of indeterminate sentence prisoners**

139. The Parole Board is responsible for the release of prisoners sentenced to life imprisonment. Under section 28(5) of the Crime (Sentences) Act 1997 (“the 1997 Act”):

“As soon as—

(a) a life prisoner to whom this section applies has served the relevant part of his sentence, and

(b) the Parole Board has directed his release under this section,

it shall be the duty of the Secretary of State to release him on licence.”

140. Section 28(6) provides:

“The Parole Board shall not give a direction under subsection (5) above . . . unless—

(a) the Secretary of State has referred the prisoner’s case to the Board; and

(b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.”

141. Section 28(7) provides that a life prisoner may require the Secretary of State to refer his case to the Parole Board at any time after tariff expiry and:

“(b) where there has been a previous reference of his case to the Board, after the end of the period of two years beginning with the disposal of that reference.”

142. Section 34(1)(2)(d) of the 1997 Act (as amended by the 2003 Act) clarifies that “life prisoner” includes a person serving an IPP.

143. The Secretary of State has issued directions to the Parole Board pursuant to section 239 of the 2003 Act. Direction 6, issued in 2004, provides, in so far as relevant:

“In assessing the level of risk to life and limb presented by a lifer, the Parole Board shall consider the following information, where relevant and where available, before directing the lifer’s release, recognising that the weight and relevance attached to particular information may vary according to the circumstances of each case:

...

(d) whether the lifer has made positive and successful efforts to address the attitudes and behavioural problems which led to the commission of the index offence;

...

(h) the lifer’s awareness of the impact of the index offence, particularly in relation to the victim or victim’s family, and the extent of any demonstrable insight into his/her attitudes and behavioural problems and whether he/she has taken steps to reduce risk through the achievement of life sentence plan targets...” (original emphasis)

144. Prison Service Order 6010 (“PSO 6010”) on the generic parole process came into effect on 1 April 2009. It includes detailed provisions on the dossier which should be made available to the Parole Board in the case of IPP prisoners.

### **C. Policy on treatment and management of life sentence prisoners**

#### *1. Prison Service Order 4700*

145. The Secretary of State’s policy on the management and treatment of life sentence prisoners, including IPP prisoners, is primarily contained in chapter 4 of the “Lifer Manual” PSO (Prison Service Order) 4700 (“PSO 4700”). This chapter was substantially amended in July 2010 (see paragraph 151 below).

146. At the relevant time, PSO 4700 set out the various phases of detention under a life sentence:

“4.1.1 A typical male lifer will generally go through the following stages of his life sentence in custody prior to release on licence:

Remand Centre/Local prison

First Stage – High Security/Category B

Second Stage – High Security/Category B/Category C

Third Stage – Category D/Open/Semi-open/Resettlement.

While no two life sentences will be identical, the majority of life sentences will conform to this general pattern. It will be necessary, however, to fast-track short-tariff lifers (see 4.13 below) if they are to have the opportunity to be released on tariff expiry if risk factors permit ...”

147. It continued:

“4.3.14 ... Wherever possible, lifers should be allocated to a cell on a landing ... where there are other long or medium-term prisoners. In most cases newly sentenced lifers will remain there to await a vacancy in a First Stage lifer prison. Local prisons are an integral part of the lifer system and it is at this stage that Life Sentence planning begins.”

148. Paragraph 4.3.17 continued:

“... The intention is that lifers will move on from their local prison to a First Stage prison within approximately six months of the date of their sentence subject of the availability of places. Local prisons should provide lifers with information about the role and location of First Stage prisons.”

149. Paragraph 4.4.2 of PSO 4700 explained that the period spent at first stage:

“is generally from 18 months upwards, but ... may be reduced for some prisoners especially those with short tariffs or those who are making exceptionally good progress.”

150. PSO 4700 contained specific provisions on short-tariff lifers:

“4.13.1 Short tariff lifers are normally regarded as those who have a tariff of five years or less ...

4.13.2 Lifers with short tariffs are managed differently from lifers with longer tariffs because of the overall objective to release lifers on tariff expiry if risk factors permit. The statutory entitlement to a review by the Parole Board may for a short tariff lifer be triggered relatively shortly after conviction ... The essential elements of the policy for short tariff lifers and arrangements for their management through their period in custody are as follows:

**They must be prioritised for offending behaviour programmes according to the length of time left till tariff expires. The same principle must apply for all lifers, so that length of time to tariff expiry is taken into account when allocating offending behaviour programme resources. In other words, lifers must be given every opportunity to demonstrate their safety for release at tariff expiry.”**  
(original emphasis).

151. The policy for management of indeterminate sentence prisoners was substantially amended from 12 July 2010 by PSI 36/2010, which introduced a new chapter 4. In particular, indeterminate sentence prisoners no longer have to move through set stages in order to progress through their sentences. Pursuant to Paragraph 4.1.8 of the revised policy, it must be ensured that indeterminate sentence prisoners in a given region are not disadvantaged in their ability to work towards, or demonstrate, reduction in their risk factors, particularly in terms of prospects for release post-tariff, compared to indeterminate sentence prisoners in other regions. Paragraph 4.13.1 and 4.13.2 have been replaced with the following:

“4.10.1 Short tariff ISPs [indeterminate sentence prisoners] are normally regarded as those who have a tariff of three years or less ...

4.10.2 ISPs with short tariffs may need to be managed differently from ISPs with longer tariffs because of the overall aim to ensure the Parole Board has appropriate

information upon which to make its risk-based decision as to whether a prisoner should be released ...The essential elements of the policy for short tariff ISPs and arrangements for their management throughout the period in custody are as follows:

- all ISPs should be prioritised for interventions and offending behaviour programmes according to the risk of harm they pose and length of time left till tariff expiry. In other words, and taking into account the ISP's own responsibility to address the risk of harm they present to the public and known victims, the ISP must be offered reasonable opportunity, as far as possible given the available resources, to address their risk factors in time for their Parole Board review.

..."

## 2. *Ministerial comments during the passage of the bill*

152. On 14 October 2003 in the House of Lords, during the passage of the Bill which led to the 2003 Act through Parliament, Baroness Scotland of Asthal, then Minister of State at the Home Office, explained the new provisions:

"The new sentence will ensure that such offenders cannot be released until their risk is considered manageable in the community. It therefore provides for indeterminate custody for that small group of offenders for whom a determinate sentence would not provide a sufficient guarantee of public safety. However, that must be seen in the context of everything that we are trying to achieve in prisons; that is, first, to address the nature of the underlying offending behaviour and, secondly, to try and rehabilitate, if rehabilitation is possible, some of the more serious offenders through training, education and opportunities. I have mentioned that once an offender is in prison, there will be an assessment of the nature of his difficulties and the risks that he poses so that, while he is in prison, we can seek to address those problems.

... I reassure the noble Lord that we intend to make sure that all prisoners benefit from the risk assessment procedure. If we are able to roll it out, and we hope to be able to do so over a period of time, the Prison Service will have the kind of tools necessary to make the assessment which will help to bring about change, but which will also identify those people who may not be as amenable to change as we would like and who therefore continue to pose a risk to members of the public."

## D. Extracts from relevant reports

### 1. *Report by the Chief Inspector of Prisons on HMP Doncaster dated November 2005*

153. In her report on HMP Doncaster, the Chief Inspector of Prisons noted:

"The Prison Service has withdrawn the enhanced thinking skills programme for reasons of economy. This meant that there were no programmes for prisoners who are likely to spend a significant part of their sentence at Doncaster. This was particularly important for those who had received the new Indeterminate Sentence for Public Protection (ISPP). For these prisoners, who often have short tariff dates, the absence



of any opportunity to address offending behaviour inevitably meant that they risked a longer time in custody.”

## 2. *The Lockyer Review dated 17 August 2007*

154. The Lockyer Review was commissioned by the Secretary of State to assess the seriousness of the problems facing those serving IPP sentences and to make recommendations for improving the situation. The report noted that reliance on the lifer management arrangements for dealing with all IPP prisoners had failed and that IPP prisoners were stacking in local prisons and are not moving to establishments where their needs could be assessed or better met.

155. The report continued:

“1. IPPs are dealt with through the lifer system: they spend time in local prisons until space is found at a first stage life centre; intensive assessment is conducted at the first stage lifer centre; IPPs are then transferred on within the training estate for further interventions.

2. The reliance on a small number of specialised lifer centres creates a bottleneck. This prevents timely access to interventions necessary to reduce risk in some cases. Over 2500 ISPs (of which 1500 are IPPs) are currently being held in local prisons since space in lifer centres is simply unavailable and turnover is slow.”

## III. RELEVANT INTERNATIONAL MATERIALS

### A. Council of Europe

156. Committee of Ministers Resolution 76(2) of 17 February 1976 made a series of recommendations to member States regarding long-term and life sentence prisoners. These included:

“2. take the necessary legislative and administrative measures in order to promote appropriate treatment during the enforcement of [long-term] sentences;

...

9. ensure that the cases of all prisoners will be examined as early as possible to determine whether or not a conditional release can be granted;

10. grant the prisoner conditional release, subject to the statutory requirements relating to time served, as soon as a favourable prognosis can be formulated; considerations of general prevention alone should not justify refusal of conditional release;

11. adapt to life sentences the same principles as apply to long-term sentences ...”

157. Committee of Ministers Recommendation Rec (2003) 22 of 24 September 2003 recommended that member State governments be guided in their legislation, policies and practice on conditional release by the principles contained in the appendix to the recommendation. The appendix set out, *inter alia*, the following general principles:

“3. Conditional release should aim at assisting prisoners to make a transition from life in prison to a law-abiding life in the community through post-release conditions and supervision that promote this end and contribute to public safety and the reduction of crime in the community.

4.a. In order to reduce the harmful effects of imprisonment and to promote the resettlement of prisoners under conditions that seek to guarantee safety of the outside community, the law should make conditional release available to all sentenced prisoners, including life-sentence prisoners.”

158. Regarding the granting of conditional release, it noted, *inter alia*:

“16. The minimum period that prisoners have to serve to become eligible for conditional release should be fixed in accordance with the law.

17. The relevant authorities should initiate the necessary procedure to enable a decision on conditional release to be taken as soon as the prisoner has served the minimum period.

18. The criteria that prisoners have to fulfil in order to be conditionally released should be clear and explicit. They should also be realistic in the sense that they should take into account the prisoners’ personalities and social and economic circumstances as well as the availability of resettlement programmes.”

159. Committee of Ministers Recommendation Rec (2003) 23 of 9 October 2003 sets out three objectives for the management of life sentence and other long-term prisoners. One is to increase and improve the possibilities for these prisoners to be successfully resettled in society and to lead a law-abiding life following their release.

160. The general principles for the management of life sentence and other long-term prisoners include:

“3. Consideration should be given to the diversity of personal characteristics to be found among life sentence and long-term prisoners and account taken of them to make individual plans for the implementation of the sentence (individualisation principle).

...

8. Individual planning for the management of the prisoner’s life or long-term sentence should aim at securing progressive movement through the prison system (progression principle).”

161. On sentence planning, the recommendation indicates that comprehensive sentence plans should be developed for each individual prisoner, and should include a risk and needs assessment in order to inform a systematic approach to, *inter alia*, the prisoner’s participation in work, education, training and other activities that provide for a purposeful use of time spent in prison and increase the chances of a successful resettlement after release; and interventions and participation in programmes designed to address risks and needs so as to reduce disruptive behaviour in prison and re-offending after release.

162. Recommendation Rec (2006) 2 of the Committee of Ministers to member States on the European Prison Rules of 11 January 2006 (“the European Prison Rules”) includes in its basic principles:

“6. All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty.”

163. Paragraph 103 concerns sentence planning and provides:

“103.1 The regime for sentenced prisoners shall commence as soon as someone has been admitted to prison with the status of a sentenced prisoner, unless it has commenced before.

103.2 As soon as possible after such admission, reports shall be drawn up for sentenced prisoners about their personal situations, the proposed sentence plans for each of them and the strategy for preparation for their release.

...

103.4 Such plans shall as far as is practicable include:

- a. work;
- b. education;
- c. other activities; and
- d. preparation for release.”

164. On the release of sentenced prisoners, the European Prison Rules provide:

“107.1 Sentenced prisoners shall be assisted in good time prior to release by procedures and special programmes enabling them to make the transition from life in prison to a law-abiding life in the community.

...”

## **B. International reports and instruments**

165. Article 10 of the International Covenant on Civil and Political Rights 1966 provides:

“1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

...

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.”

166. The United Nations Standard Minimum Rules for the Treatment of Prisoners (“the UN Rules”), adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955 and approved by the Economic and Social Council on 13 May 1977, include in their general principles the following:

“58. The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as

possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.

59. To this end, the institution should utilize all the remedial, educational, moral, spiritual and other forces and forms of assistance which are appropriate and available, and should seek to apply them according to the individual treatment needs of the prisoners.”

167. Specific provisions on treatment include:

“65. The treatment of persons sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length of the sentence permits, to establish in them the will to lead law-abiding and self-supporting lives after their release and to fit them to do so. The treatment shall be such as will encourage their self-respect and develop their sense of responsibility.

66(1) To these ends, all appropriate means shall be used, including religious care in the countries where this is possible, education, vocational guidance and training, social casework, employment counselling, physical development and strengthening of moral character, in accordance with the individual needs of each prisoner, taking account of his social and criminal history, his physical and mental capacities and aptitudes, his personal temperament, the length of his sentence and his prospects after release.”

168. The United Nations Report on Life Imprisonment 1994 notes, at paragraph 38:

“Specific treatment programmes thus serve a dual function: they offer the prisoner an opportunity for self-examination, whereby he or she can confront previous or present problems and they provide the prison staff with a better opportunity to understand particular behavioural patterns.”

169. The report continues at paragraph 40:

“In the absence of structured treatment programmes, long term prisoners are left on their own to find the means with which to cope with their sentences. This has detrimental effects, not only for the prisoner but also for the prison authorities in that a situation of ‘them’ and ‘us’ often develops ...”

170. Finally, at paragraph 69, the report concludes:

“International instruments on imprisonment and human rights suggest that the deprivation of liberty may only be justified if accompanied by review and assessment procedures that operate within commonly accepted judicial standards. Indeterminate life sentencing cannot be allowed to open the door for arbitrary detention. Fair, unprejudiced assessment programmes offer possible checks against this.”

## THE LAW

### I. JOINDER

171. Given their similar factual and legal background, the Court decides that the three applications should be joined pursuant to Rule 42 § 1 of the Rules of Court.

### II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

172. The applicants complained that their detention following the expiry of their tariff periods was unlawful and arbitrary and was therefore not compatible with Article 5 § 1 of the Convention, which reads, in so far as relevant, as follows:

“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;

...”

173. The Government contested that argument.

#### A. Admissibility

174. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

#### B. Merits

##### *1. The parties' submissions*

###### **a. The applicants**

175. The applicants did not dispute that their detention until tariff expiry was lawful. It was also not disputed that as a matter of domestic law, their post-tariff detention remained lawful until it was brought to an end by the operation of section 28 of the 1997 Act, namely on a direction from the Parole Board (see paragraphs 139-142 above). However, the applicants contended that their post-tariff detention nonetheless violated Article 5 § 1 of the Convention. Mr Wells and Mr Lee accepted that a violation of Article 5 § 1 did not arise immediately after the expiry of their tariffs. However, they argued that the threshold was crossed at some later stage, and certainly

by the time that they issued proceedings, in February 2008 in the case of Mr Lee and in June 2008 in the case of Mr Wells. Mr James appeared to consider that a violation of Article 5 § 1 arose immediately after his tariff expired. He pointed out that there was no effective determination of his risk for about nine months after his tariff had expired and that there was no post-tariff decision that he remained a risk at any point (see paragraphs 26 and 40-41 above). The applicants disputed in particular the Government's contention that the original sentence contained a predictive assessment that they would remain a risk at tariff expiry and relied in this regard on Lord Hope's view and views expressed in the lower courts to the effect that the sentencing judge made an assessment of the risk posed by the prisoner at the time of sentence but made no assessment as to the danger that the prisoner would represent once he had served his minimum term (see paragraphs 53, 62 and 108 above).

176. Mr Wells and Mr Lee submitted that the Government were wrong to suggest that rehabilitation was not one of the objectives of IPP sentences at the relevant time. In their view, section 142 of the 2003 Act, which was concerned with the exercise of a sentencing judge's discretion, was understandably excluded given that at the time the IPP sentence was mandatory, and not discretionary. It was significant that following the 2008 reform, when IPP sentences became discretionary (see paragraph 134 above), they were brought back into the scope of section 142 (see paragraph 137 above). Taking into account the statements of the courts and the comments of Baroness Scotland in Parliament, it was clear that while IPP sentences were concerned with protecting the public from dangerous offenders, they were also concerned with rehabilitation.

177. In any event, the applicants considered that as a matter of this Court's jurisprudence, rehabilitation had to be one of the objectives of an IPP sentence in order for it to be a lawful sentence. An indeterminate sentence without such an objective would, in their view, be disproportionate. They pointed in this regard to the Committee of Ministers' Resolution 76(2) of 1976, its recommendations Rec (2003) 22 and 23 and the European Prison Rules, which made reference to the need for appropriate treatment during long-term or indeterminate detention (see paragraphs 156-164 above). They also relied on the fact that the ICCPR and the UN Standard Minimum Rules and 1994 Report included provisions on assistance and treatment aimed at reforming and rehabilitating prisoners (see paragraphs 165-170 above).

178. The applicants emphasised that the key issue in their cases was the alleged arbitrariness of the post-tariff detention. Mr Wells and Mr Lee considered a number of factors to be relevant in this regard. First, they maintained that the sentencing objectives included punishment and rehabilitation. Second, they argued that rehabilitation in this context meant both actual rehabilitation, namely making reasonable resources available,

and the means of demonstrating rehabilitation. In their submission, once the punitive phase of the IPP sentence had expired and an individual was detained solely on the basis of risk, then where there existed no means of either reducing that risk or demonstrating a reduction in risk, it was clear that a detention was capable of being arbitrary. Whether it was in any given case depended on the particular facts of that case. In an extreme example, a failure to provide treatment could render detention arbitrary immediately. However, in cases like the present ones a number of considerations had to be taken into account, including the reason for the failure to offer the means of rehabilitation, the duration of the failure and the significance of the risk posed by the prisoner. The question was whether, in light of all the circumstances, there was still sufficient causal connection with what the sentence or the sentencing court had been trying to achieve, or whether the State's failure had robbed that original purpose of meaning such that the continuing detention had become arbitrary.

179. In the present cases, the applicants contended that the scale of the failure was colossal: the Government had failed to do what it had assured Parliament it would do, and what sentencing judges and IPP prisoners themselves assumed would happen. Mr James emphasised that the Secretary of State had chosen to bring in a new regime for dealing with "dangerous" offenders at a time when he had failed to provide systems for their assessment and progression. This had led to substantial problems, identified by the domestic courts (see paragraphs 31, 38, 52, 61 and 103-107 above), which were not unforeseeable. The introduction of the new IPP regime was heavily criticised and the Secretary of State was found to be in breach of his public law duty (see paragraphs 31, 104 and 107 above). The measures were substantially amended within a few years (see paragraphs 134-138 above). In Mr Wells' case, he had to wait until two years after his tariff of twelve months had expired to be given the opportunity to make any meaningful progress. Mr Lee had to wait almost three years after the expiry of a nine-month tariff. Mr Wells and Mr Lee further argued that the risks they presented, and therefore the necessity for the measures applied, were low. They pointed out that it was no longer suggested that a sentence of this nature was appropriate for those of their level of offending, as the amendments to the legislation, which introduced, in most cases, a two-year minimum tariff requirement for IPP sentences to be imposed (see paragraph 134 above), demonstrated.

180. The applicants concluded that they were simply victims of bad law-making which had denied them years of their liberty.

#### **b. The Government**

181. The Government contended that the legislative provisions applicable at the relevant time made it clear that the sentencing court's task when determining whether the offence was one for which an IPP sentence

should be imposed was to consider the future risk to the public posed by the offender. Pursuant to section 28(6) of the 1997 Act (see paragraph 140 above), the Parole Board was required to start from the position that the offender should continue to be detained unless it was satisfied that the detention was no longer necessary for the protection of the public. The Government accepted that the causal link between conviction and detention might be broken if the grounds of the continuing detention were inconsistent with the objectives of the original sentence. However, in the present cases there could be no doubt that the continued detention of the applicants after the expiry of their minimum terms was entirely based on their original sentences and on the prediction of future risk that had been made by the sentencing courts. The role of the Parole Board was to consider whether the predictive judgment of the sentencing court remained valid, in other words whether the offender continued to pose a risk to public safety. Until it determined that this was not the case, the causal connection remained.

182. As to the suggestion that one of the aims of the IPP sentence at the relevant time was to rehabilitate and reform offenders and that the causal connection was therefore broken on the facts of the applicants' cases, the Government emphasised that the purpose of the introduction of the IPP sentence was the protection of the public. The legal requirement for sentencing courts to have regard to reform and rehabilitation was expressly excluded in respect of IPP sentences (see paragraphs 110 and 133 above). In this regard the Government attached no significance to the fact that under the 2008 reforms the exclusion of IPP sentences from the scope of section 142 was repealed. They explained that while the Secretary of State had hoped and intended that IPP prisoners would reform their behaviour while in prison, there was no express statutory duty on him to provide any rehabilitative facilities to them. In particular, they refuted the suggestion that the failure to provide rehabilitative courses in prison could break the causal connection and render the detention unlawful. The fact that the Secretary of State had a public law duty to provide reasonable opportunities for the prisoner to reform and rehabilitate himself did not have any relevance to whether the causal connection between sentence and detention remained intact. The Government considered that if the failure to provide such courses could lead to the breaking of the causal connection, this would produce an absurd result in the case of a prisoner who had been denied access to courses but was clearly still dangerous such that his release would pose a serious risk to the public.

183. The Government accepted that over a prolonged period of time it would be increasingly difficult to maintain the causal connection between the detention and the original sentence. However, where the original sentence was based on a prediction of future risk, and particularly where the tariff period was short thus placing the sentencing judge in a good position to assess future risk, the time over which the causal connection might



possibly be broken was necessarily a lengthy one (see paragraph 111 above). The fact that the Secretary of State in the present cases might not have provided appropriate courses and that the applicants had therefore had limited opportunities to minimise their risk did not lead to a situation where the Parole Board was simply unable to ascertain whether the applicants were dangerous: the evidence before it enabled it to determine the level of risk posed. Further, extensive steps had been taken to seek to remedy the problem, in particular by the introduction of new legislation (see paragraphs 134-138 above).

184. In the case of Mr James, the Government emphasised that the Parole Board hearing scheduled for 14 September 2007, two months after the expiry of his tariff, was adjourned at his own request. Following a hearing on 14 March 2008, the Parole Board ordered Mr James' release, notwithstanding the fact that he had completed no accredited courses by that date. The evidence presented to the Parole Board was sufficient, even in the absence of accredited courses, for it to reach conclusions about his risk.

185. In the case of Mr Wells, although the facts showed that he was not provided with the appropriate accredited courses specified in his sentence plan while in prison, there was evidence before the Parole Board at each of the hearings held in his case to support the conclusion that he remained dangerous.

186. Finally, in Mr Lee's case, a series of hearings was held or adjourned by the Parole Board, which found that he continued to pose a risk, including a hearing in April 2010 prior to which Mr Lee had undertaken work to address his offending behaviour.

## 2. The Court's assessment

### a. General principles

187. The Court reiterates at the outset that the object and purpose of Article 5 § 1 is to ensure that no-one is dispossessed of his liberty in an arbitrary fashion (see *Lawless v. Ireland* (no. 3), 1 July 1961, p. 52, Series A no. 3; *Engel and Others v. the Netherlands*, 8 June 1976, § 58, Series A no. 22; *Winterwerp v. the Netherlands*, 24 October 1979, § 37, Series A no. 33; *Guzzardi v. Italy*, 6 November 1980, § 92, Series A no. 39; *Johnson v. the United Kingdom*, 24 October 1997, § 60, *Reports of Judgments and Decisions* 1997-VII; *Saadi v. the United Kingdom* [GC], no. 13229/03, § 66, 29 January 2008; and *M. v. Germany*, no. 19359/04, § 89, ECHR 2009). It has frequently emphasised the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities (see *Kurt v. Turkey*, 25 May 1998, § 122, *Reports* 1998-III; *Çakıcı v. Turkey* [GC], no. 23657/94, § 104, ECHR 1999-IV; and *Clift v. the United Kingdom*, no. 7205/07, § 62, 13 July 2010).

188. It is well established in the Court's case-law that any deprivation of liberty must fall within one of the exceptions set out in sub-paragraphs (a)-(f) and must also be "lawful". The parties do not dispute that the exception to the general right to liberty set out in Article 5 § 1 which is relevant in the present cases is that contained in Article 5 § 1 (a) of the Convention, namely detention after conviction by a competent court.

189. For the purposes of Article 5 § 1 (a), the word "conviction" has to be understood as signifying both a finding of guilt after it has been established in accordance with the law that there has been an offence and the imposition of a penalty or other measure involving deprivation of liberty (see *M. v. Germany*, cited above, § 87; and *Grosskopf v. Germany*, no. 24478/03, § 43, 21 October 2010). The Court has also made it clear that the word "after" in sub-paragraph (a) does not simply mean that the detention must follow the conviction in point of time: in addition, the detention must result from, follow and depend upon or occur by virtue of the conviction (see *Van Droogenbroeck v. Belgium*, 24 June 1982, § 35, Series A no. 50; and *Grosskopf*, cited above, § 44). In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue (see *Weeks v. the United Kingdom*, 2 March 1987, § 42, Series A no. 114; *Stafford v. the United Kingdom* [GC], no. 46295/99, § 64, ECHR 2002-IV; *Kafkaris v. Cyprus* [GC], no. 21906/04, § 117, 12 February 2008; and *M. v. Germany*, cited above, § 88). In this connection the Court observes that, with the passage of time, the link between the initial conviction and a later deprivation of liberty gradually becomes less strong. Indeed, as the Court has previously indicated, the causal link required by sub-paragraph (a) might eventually be broken if a position were reached in which a decision not to release or to re-detain was based on grounds that were inconsistent with the objectives of the initial decision by the sentencing court or on an assessment that was unreasonable in terms of those objectives (see *Weeks*, cited above, § 49; and *Grosskopf*, cited above, § 44).

190. Where the "lawfulness" of detention is in issue, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law (see *Saadi*, cited above, § 67).

191. However, having regard to the object and purpose of Article 5 § 1 (see paragraph 187 above), it is clear that compliance with national law is not sufficient in order for a deprivation of liberty to be considered "lawful". Article 5 § 1 also requires that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see *Bouamar v. Belgium*, 29 February 1988, § 47, Series A no. 129; *Chahal v. the United Kingdom*, 15 November 1996, § 118, *Reports* 1996-V; *Stafford*, cited above, § 63; *Saadi*, cited above, § 67; *Kafkaris*, cited above, § 116; *A. and Others*, cited above, § 164; and *Medvedyev and Others v. France* [GC], no. 3394/03, § 79, 29 March 2010). The Court has not previously set

out an exhaustive list of what types of conduct on the part of the authorities might constitute arbitrariness for the purposes of Article 5 § 1 but some key principles can be extracted from the Court's case-law in this area to date (see *Saadi*, cited above, § 68). These principles should be applied in a flexible manner having regard to the degree of overlap among them and given that the notion of arbitrariness varies to a certain extent depending on the type of detention involved (see *Saadi*, cited above, § 68).

192. First, detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities (see *Saadi*, cited above, § 69). Thus, by way of example, the Court has found violations of Article 5 § 1 in cases where the authorities resorted to dishonesty or subterfuge in bringing an applicant into custody to effect his subsequent extradition or deportation (see *Bozano v. France*, 18 December 1986, §§ 59-60; and Series A no. 111; *Conka v. Belgium*, no. 51564/99, § 40-42, ECHR 2002-I).

193. Second, the condition that there be no arbitrariness demands that both the order to detain and the execution of the detention genuinely conform with the purpose of the restrictions permitted by the relevant subparagraph of Article 5 § 1 (see *Saadi*, cited above, § 69). Where, for example, detention is sought to be justified by reference to Article 5 § 1 (c) in order to bring a person before the competent legal authority on reasonable suspicion of having committed an offence, the Court has insisted upon the need for the authorities to furnish some facts or information which would satisfy an objective observer that the person concerned may have committed the offence in question (see *O'Hara v. the United Kingdom*, no. 37555/97, §§ 34-35, ECHR 2001-X). In the context of Article 5 § 1 (d), which permits the detention of a minor for the purpose of educational supervision, the Court found that a period of detention in a remand prison which did not in itself provide for the person's educational supervision would be compatible with that Article only if the imprisonment was speedily followed by actual application of such an educational regime in a setting designed and with sufficient resources for that purpose (see *Bouamar*, cited above, §§ 50 and 52). Likewise, in the case of the detention of a person of unsound mind pursuant to Article 5 § 1 (e), the Court has held that there must be medical evidence establishing that his mental state is such as to justify his compulsory hospitalisation (see *Winterwerp*, cited above, § 39).

194. Third, for a deprivation of liberty not to be arbitrary there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention (see *Saadi*, cited above, § 69). Thus, as noted above, detention for educational supervision pursuant to Article 5 § 1 (d) must take place in a setting and with the resources to meet the necessary educational objectives (see *Bouamar*, cited above, § 50). Where Article 5 § 1 (e) applies, the detention of a person for reasons relating to his mental health should be effected in a hospital, clinic or other

appropriate institution (see *Aerts v. Belgium*, 30 July 1998, § 46, *Reports* 1998-V; and *Brand v. the Netherlands*, no. 49902/99, § 62, 11 May 2004). In the context of Article 5 § 1 (a), a concern may arise in the case of persons who, having served the punishment element of their sentences, are in detention solely because of the risk they pose to the public if there are no special measures, instruments or institutions in place, other than those available to ordinary long-term prisoners, aimed at reducing the danger they present and at limiting the duration of their detention to what is strictly necessary in order to prevent them from committing further offences (see *M. v. Germany*, cited above, § 128; and *Grosskopf*, cited above, § 51). However, in assessing whether the place and conditions of detention are appropriate, it would be unrealistic, and too rigid an approach, to expect the authorities to ensure that relevant treatment or facilities be available immediately: for reasons linked to the efficient management of public funds, a certain friction between available and required treatment and facilities is inevitable and must be regarded as acceptable (see *Brand*, cited above, § 64). Accordingly, a reasonable balance must be struck between the competing interests involved. In striking this balance, particular weight should be given to the applicant's right to liberty, bearing in mind that a significant delay in access to treatment is likely to result in a prolongation of the detention (see *Brand*, cited above, § 65). In the *Brand* case itself, the Court found that even a delay of six months in the admission of the applicant to a custodial clinic could not be regarded as acceptable in the absence of evidence of an exceptional and unforeseen situation on the part of the authorities (see § 66 of the Court's judgment).

195. Fourth, the requirement that detention not be arbitrary implies the need for a relationship of proportionality between the ground of detention relied upon and the detention in question. However, the scope of the proportionality test to be applied in a given case varies depending on the type of detention involved. For example, in the context of detention pursuant to Article 5 § 1 (a), the Court has generally been satisfied that the decision to impose a sentence of detention and the length of that sentence are matters for the national authorities rather than for this Court (see *T. v. the United Kingdom* [GC], no. 24724/94, § 103, ECHR 2000-I; and *Saadi*, cited above, § 71). However, as noted above, it has indicated that in circumstances where a decision not to release or to re-detain a prisoner was based on grounds that were inconsistent with the objectives of the initial decision by the sentencing court, or on an assessment that was unreasonable in terms of those objectives, a detention that was lawful at the outset could be transformed into a deprivation of liberty that was arbitrary (see *Grosskopf*, cited above, §§ 44 and 48; *Weeks*, cited above, § 49; and *M. v. Germany*, cited above, § 88). Where detention of an alcoholic pursuant to Article 5 § 1 (e) is in issue, the Court has indicated that a deprivation of liberty is only justified where other, less severe measures

have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained (see *Witold Litwa v. Poland*, no. 26629/95, § 78, ECHR 2000-III; and *Hilda Hafsteinsdóttir v. Iceland*, no. 40905/98, § 51, 8 June 2004). An individual cannot be deprived of his liberty as being of “unsound mind” unless the mental disorder is of a kind or degree warranting compulsory confinement, and the validity of continued confinement depends upon the persistence of such a disorder (see *Winterwerp*, cited above, § 39; *Johnson*, cited above, § 60; and *Varbanov v. Bulgaria*, no. 31365/96, § 45, ECHR 2000-X). In the case of the detention of a person “for the prevention of the spreading of infectious diseases”, it must be established that the spreading of the infectious disease is dangerous to public health or safety, and that the detention of the person infected is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest (see *Enhorn v. Sweden*, no. 56529/00, § 44, ECHR 2005-I). In the context of detention under Article 5 § 1 (f), the Court has indicated that as long as a person is being detained with a view to deportation or for the purpose of preventing an unauthorised entry, there is no requirement that the detention be reasonably considered necessary. However, the length of the detention should not exceed that reasonably required for the purpose pursued (see *Chahal*, cited above, §§ 112-113; and *Saadi*, cited above, §§ 72-74).

**b. Application of the general principles to the facts**

196. The applicants do not dispute that their detention during their tariff periods fell within the exception set out in Article 5 § 1 (a). The question for the Court is whether their post-tariff detention for the public protection was compatible with that Article. The Court must therefore examine whether there was a causal link between the continuing detention and the original sentence; whether the detention complied with domestic law; and whether it was free from arbitrariness, having regard to the considerations outlined above.

*i. Existence of a causal connection*

197. The Court has previously found that various forms of preventive detention, where ordered by the sentencing court in accordance with domestic law, constituted detention “after conviction by a competent court” (see *Van Droogenbroeck*, cited above, §§ 33-42; *Eriksen v. Norway*, 27 May 1997, § 78, *Reports* 1997-III; *M. v. Germany*, cited above, § 96; and *Grosskopf*, cited above, § 47). In the present cases, the Court notes that the IPP sentences were imposed by the sentencing courts following the applicants’ convictions for relevant offences in accordance with the legislation then in force. The Court is therefore satisfied that the applicants’

post-tariff detention was based on their “conviction” for the purposes of Article 5 § 1 (a) of the Convention.

198. The Court further accepts that there was a sufficient causal connection between the applicants’ convictions and the deprivations of liberty at issue. It is clear from the terms of the legislation that indeterminate sentences were imposed on the applicants because they were considered, albeit by the operation of a statutory assumption (see paragraph 130 above), to pose a risk to the public. Their release was contingent on their demonstrating to the Parole Board’s satisfaction that they no longer posed such a risk. As Lord Hope pointed out (see paragraphs 108-109 above), this was not a case where the Parole Board was not able to carry out its function: its role was to determine whether the applicants were safe to be released and it had before it a number of documents to allow it to make this assessment, even if without evidence that the applicants had undertaken treatment to reduce the risk they posed, the Parole Board was unlikely to give an affirmative answer to this question.

199. The Court is therefore satisfied that the applicants’ continued detention was the consequence of the risk that they were perceived to pose to the public and their failure to address that risk to the satisfaction of the Parole Board. However, the lack of availability of courses and the impact of this on the applicants’ detention will be considered further in the context of the Court’s examination of whether the detention was free from arbitrariness, below.

*ii. Compliance with domestic law*

200. The Court observes that the domestic courts found the applicants’ post-tariff detention to be compatible with domestic law, having regard to the provisions of the 2003 and the 1997 Acts (see paragraphs 32-33 and 112 above). The applicants do not contend that this conclusion was incorrect and it is in any case not for this Court to substitute its own interpretation of national law for that of the domestic courts. The Court is therefore satisfied that the applicants’ post-tariff detention was lawful, as a matter of domestic law.

*iii. Freedom from arbitrariness*

201. In order to assess whether the applicants’ detention post-tariff was arbitrary, the Court must have regard to the detention as a whole, by reference to the various considerations outlined above (see paragraphs 191-195).

202. Turning first to examine the general context, the Court observes that the 2003 Act introduced for the first time the possibility of imposing indeterminate sentences for offences of the nature and level of gravity of those committed by the applicants. It is clear from the terms of the legislation that the IPP sentence was intended to protect the public from the

risk posed, or assumed under the provisions of the 2003 Act to be posed, by certain offenders. The Court reiterates that where reasons of dangerousness are relied on by the sentencing courts for ordering an indeterminate period of deprivation of liberty, these reasons are by their very nature susceptible of change with the passage of time (see *Weeks*, cited above, § 46).

203. It is further of relevance that, under the scheme as it was first enacted and brought into force, the IPP sentence was mandatory: judges were required to impose an IPP sentence where a future risk existed (see paragraph 127 above). In the applicants' case, the discretion of the sentencing court was further circumscribed by the operation of the statutory assumption contained in section 229(3) of the 2003 Act, which stipulated that future risk was to be assumed in a case where there was a relevant previous offence, unless it would be unreasonable to conclude that there was such a risk (see paragraph 130 above). Judges in the House of Lords criticised the "draconian provisions" of the 2003 Act which left no room for the exercise of any judicial discretion and created entirely foreseeable difficulties when IPP sentences with short tariffs were passed (see paragraph 105 above) and observed that sentencing judges loyally followed the unequivocal terms of the legislation and imposed IPP sentences, even when the punitive element appropriate to the crimes was measured in months rather than years (see paragraph 103 above).

204. Restrictions on judicial discretion in sentencing do not *per se* render any ensuing detention arbitrary and therefore incompatible with the provisions of Article 5 § 1. As noted above, the decision to impose a sentence of detention and the length of that sentence are matters which generally fall within the discretion of the national authorities. However, it does not follow that such restrictions are entirely irrelevant to the Court's examination of the question whether an applicant's detention is, or was, arbitrary. In particular, the Court is of the view that in the circumstances which arose in the present cases, where the applicants were assumed to constitute a risk and there was little scope to counter that assumption (see paragraph 130 above) and where, risk having been established, the sentencing judge had no power to impose any sentence but an indeterminate sentence of imprisonment (see paragraph 127 above), the need to ensure that there was a genuine correlation between the aim of the detention and the detention itself is all the more compelling.

205. In order to assess whether the applicants' detention was arbitrary, it is necessary to identify the purpose of their detention under Article 5 § 1 (a). It is clear that a central purpose of the IPP sentences imposed was protection of the public. However, the applicants have argued that a further purpose was the rehabilitation of offenders, a contention which was disputed by the Government. The Court acknowledges that by virtue of section 142 of the 2003 Act the sentencing objectives were disapplied in the case of IPP sentences and that, as emphasised by the House of Lords, rehabilitation was

therefore not an express objective of the IPP sentence. However, the Court is not persuaded that section 142 alone can provide an answer to the question whether one of the purposes of the applicants' detention was their rehabilitation. This question must be seen in the context of the overall framework of the legislation, including the reasons behind its introduction.

206. In this regard, the Court observes that during the debate on the draft legislation, the Home Office Minister responsible for the reforms emphasised that the indeterminate nature of the new sentence had to be seen in the context of everything that the Government were trying to achieve in prisons, namely to address the nature of the underlying offending behaviour and to try and rehabilitate offenders through education, training and opportunities. She went on to explain that an imprisoned offender would have the nature of his difficulties and the risks he posed assessed so that while in prison the problems could be addressed (see paragraph 152 above). This approach was reflected in the Secretary of State's published policy at the time as regards prisoners serving life sentences (see paragraphs 145-150 above). That policy indicated that lifers with short tariffs had to be prioritised for offending behaviour programmes according to the time which remained until the expiry of their tariffs. The underlying principle of the policy was that lifers had to be given every opportunity to demonstrate their safety for release at tariff expiry (see paragraph 150 above). It is clear from the information provided to the Court that the satisfactory completion of rehabilitative courses was a central element of the Parole Board's assessment of the reduction of the risk posed to the public by an individual prisoner (see paragraphs 19-20, 26, 41, 49, 78, 92-93 and 96 above). It is also noteworthy in this regard that the Secretary of State conceded in the context of Mr James' case 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 (see paragraph 30 above).

207. This understanding of how the system would operate in practice was shared by judges in the High Court, the Court of Appeal and the House of Lords. Lord Justice Laws, in the case of *Walker*, considered it clear that at the time that the 2003 Act was passed there was a settled understanding that once the new sentencing provisions came into force procedures would be put in place to ensure that initiatives, and in particular courses in prison, would be available to maximise the opportunity for indeterminate sentence prisoners to demonstrate, at the expiry of their tariffs or as soon as possible thereafter, that they were no longer a danger to the public (see paragraph 51 above). He considered that reducing the risk posed by indeterminate sentence prisoners had to be inherent in the legislation's purpose, since otherwise the statutes would be indifferent to the imperative that treats imprisonment strictly and always as a last resort (see paragraph 54 above). Lord Justice Moses, in the cases of Mr Wells and Mr Lee, agreed that the



statutory scheme was designed to make available to IPP prisoners a regime by which they would be given a fair chance of ceasing to be and showing that they had ceased to be dangerous (see paragraph 62 above). Lord Phillips in the Court of Appeal, noting the Secretary of State's concession that it would be irrational to have a policy of making release dependent upon a prisoner undergoing a treatment course without making provision for that course, indicated that the decision of the Secretary of State to bring into force the provisions on IPP sentences without first ensuring that the necessary resources existed to give effect to the policy for release was not to be regarded as a discretionary choice about resources (see paragraph 30 above). Lord Judge in the House of Lords explained that the statutory regime for dealing with indeterminate sentences was predicated on the possibility that prisoners might be reformed or would reform themselves, adding that a fair opportunity for their rehabilitation and the opportunity to demonstrate that the risk they presented at the date of sentence had diminished to a level consistent with release into the community should be available to them. He concluded that if nothing else, common humanity required the possibility of rehabilitation for IPP sentence prisoners (see paragraph 102 above).

208. It should further be borne in mind that in introducing a new form of indeterminate sentence, the respondent State must be presumed to have intended to comply with its international obligations in respect of prison regimes. Article 10 of the ICCPR stipulates that the penitentiary system is to comprise treatment of prisoners the essential aim of which is to be their reformation and social rehabilitation (see paragraph 165 above). The Committee of Ministers of the Council of Europe, in its recommendation 23 of 2003, sets out the general principle that individual planning for the management of a life prisoner's sentence should aim at securing progressive movement through the prison system and notes that participation in education and training is important to increase the chances of a successful resettlement after release (see paragraphs 159-161 above). The European Prison Rules also refer to the need for detention to be managed so as to facilitate the reintegration of persons who have been deprived of their liberty into society, and the importance of sentence plans, including treatment, to achieve this end (see paragraphs 162-164 above). The UN Rules explain that imprisonment should use, *inter alia*, all remedial and educational assistance which is appropriate and available and should be applied according to the individual treatment needs of the prisoner. Specifically regarding treatment, the UN Rules state that its purpose should be, as far as the length of the sentence permits, to establish in offenders the will to lead law-abiding lives after release and to prepare them to do so. All appropriate means are to be used to achieve this (see paragraphs 166-167 above).

209. The Court is therefore 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 paragraphs 31, 104 and 107 above). The Court accordingly agrees with the applicants that one of the purposes of their detention was their rehabilitation.

210. The Court observes that the operation of the IPP regime following its introduction in April 2005 was the subject of harsh criticism in the domestic courts. Lord Phillips concluded that there had been a systemic failure on the part of the Secretary of State to put in place the resources necessary to implement the scheme of rehabilitation necessary to enable the provisions of the 2003 Act to function as intended (see paragraph 38 above). As noted above, he considered that the decision of the Secretary of State to bring into force the new legislation introducing the IPP sentence without first ensuring that the necessary resources were in place could not be viewed as a discretionary choice about resources, because the direct consequence was likely to be that a proportion of IPP prisoners would be kept in prison for longer than was necessary for punishment or public protection, contrary to the intention of Parliament and the objective of Article 5. He therefore found that the Secretary of State had breached his public law duty by failing to provide the necessary courses (see paragraph 31 above). Lord Hope considered that there was no doubt that the Secretary of State had failed "deplorably" in the public law duty that he had to be taken to have accepted when he had persuaded Parliament to introduce IPP sentences (see paragraph 104 above). Lord Brown commented that it was most regrettable that the Secretary had been found to be and admitted being in systemic breach of his public law duty with regard to the operation of the regime for at least the first two or three years (see paragraph 107 above). Lord Judge referred to the "seriously defective structures" identified in the appeals before the House of Lords and the resultant continued detention of numerous prisoners after the expiry of the punitive element of their sentences "without the question either of their rehabilitation or the availability of up to date, detailed information becoming available about their progress". The new sentencing provisions, he said bluntly, were "comprehensively unresourced", adding that the applicants were victims of the systemic failures arising from ill-considered assumptions that the consequences of the legislation would be resource-neutral. He indicated that as tariff periods expired, nothing had been done to enable an informed

assessment by the Parole Board of the question whether the protection of the public required the prisoner's continued detention (see paragraph 103 above).

211. The specific impact of these general deficiencies on the progress of the applicants through the prison system in the present cases can be clearly seen. The 2005 report on HMP Doncaster, where Mr James was incarcerated, indicated that the withdrawal of the ETS course, which had been recommended for Mr James (see paragraph 13 above), for reasons of economy was particularly important for new IPP prisoners as the absence of any opportunity to address offending behaviour inevitably meant that they risked a longer time in custody (see paragraph 153 above). When his tariff expired on 20 July 2007, Mr James was still detained in his local prison despite having taken steps to press for his progress through the prison system (see paragraph 16 above), because of the substantial increase in indeterminate sentence prisoners following the introduction of the IPP sentence and the lack of resources to deal with this increase (see paragraphs 14-15 and 17 above). He was finally transferred to a first stage prison on 21 December 2007, five months after his tariff had expired (see paragraph 28 above). It is not clear why he did not complete any of the recommended courses during the three months from 21 December 2007, when he was transferred to a first stage lifer prison, to 14 March 2008, the point at which the Parole Board ordered his release on the basis that he would complete the necessary treatment work in the community (see paragraph 41 above).

212. The Court notes that a Parole Board hearing scheduled for two months after the expiry of Mr James' tariff was deferred at his own request and that when the Parole Board finally heard Mr James' case, it ordered his release notwithstanding the fact that he had yet to complete the recommended courses. The issue therefore arises whether Mr James can complain of a violation of Article 5 § 1 of the Convention. In this regard, the Court observes that in ordering Mr James' release, the Parole Board emphasised the exceptional nature of its decision (see paragraph 41 above). Its previous practice had demonstrated a more rigorous approach in cases where appropriate treatment had not been completed (see paragraphs 23 and 49 above). This approach was noted by the High Court and by the Court of Appeal, which commented that any review of dangerousness which took place in the absence of the completion of relevant treatment courses was likely to be an empty exercise (see paragraphs 23 and 34-35 above). In these circumstances, the Court considers that Mr James is not to be criticised for seeking to defer his hearing in the reasonable belief that a review at a point at which he had not undertaken work which would demonstrate that he had reduced his risk would be meaningless. Had a hearing been held when originally scheduled, and had the outcome been as anticipated by Mr James and the domestic courts, Mr James would likely have had to wait for some time before being entitled to a further hearing in his case, thus prolonging

his detention yet further. In any event, the Court is of the view that even if Mr James bore some responsibility for the continuation of his detention by seeking the postponement of his Parole Board hearing, this does not affect the responsibility of the respondent State to ensure that the continued detention was not arbitrary.

213. In the case of Mr Wells, he was recommended for various courses in March 2006 but was unable to undertake the courses because he was detained in a local prison where such courses were not available (see paragraph 45 above). By the time his tariff expired on 17 September 2006, he remained in his local prison (see paragraph 46 above). When his case finally came before the Parole Board in May 2007, almost eight months after the expiry of his one-year tariff, the Parole Board noted that he had not undertaken any offender-focused work as no appropriate courses were available to him at his current prison and the prison authorities had failed to arrange his move to another prison. Refusing his early release, the Parole Board noted that it was not its remit to make up for the deficiencies of the prison service and concluded that because Mr Wells had not been able to do any of the relevant courses he was unable to demonstrate any reduction in risk from the time of his sentence (see paragraphs 49 and 64 above). In March 2008, still at his local prison, Mr Wells was recommended for the same courses, despite the fact that they remained unavailable to him (see paragraph 56 above). He was eventually transferred to a first stage prison on 26 June 2008, one year and nine months after his tariff had expired (see paragraph 60 above). Over the following eight months, he completed the courses which had been recommended for him (see paragraphs 67 and 70 above).

214. Similarly, Mr Lee remained incarcerated in his local prison, without access to necessary courses, when his nine-month tariff expired on 12 February 2006 (see paragraphs 76-77 above). At a first Parole Board hearing some four months after the expiry of his tariff, the Board noted that the risk factors identified by his psychiatrist had yet to be addressed by attendance at offending behaviour programmes which had not been available, through no fault of Mr Lee's. It considered that Mr Lee could not be transferred to open conditions until his alcohol and violence risk factors had been addressed (see paragraphs 78-79 above). An August 2007 report blamed overcrowding and difficulties with the allocation of IPP prisoners to first stage prisons for the failure to provide Mr Lee with access to appropriate courses (see paragraph 80 above). Mr Lee was finally transferred to a first stage prison on 7 March 2008, over two years after his tariff had expired (see paragraph 83 above). In June 2008, following assessment, it was recommended that he be specifically assessed for an HRP course (see paragraph 83 above). He was transferred again in September 2008 for further assessment (see paragraph 89 above) before finally being scheduled to commence the recommended course in October 2008 (see

paragraph 91 above). Even then, he failed to commence the course as scheduled for reasons that are in dispute. However, it appears that prior motivational enhancement work was recommended for him in early December 2008, but such treatment was not available at the prison in which he was detained (see paragraph 91 above). It was not until early May 2009, some five months later, that he met with a psychologist, permitting his participation in the HRP course in the following months (see paragraph 95 above). The Court observes that as regards this period of delay, the Parole Board appeared to consider the conduct of the relevant authorities to have been at fault (see paragraphs 90 and 93 above). The Government have provided no explanation for the delay.

215. It is further important to recall as regards all three applicants that their failure to progress timeously through the prison system was at odds with the Secretary of State's policy at the time, set out in PSO 4700. As short-tariff IPP prisoners, they ought swiftly, and in any event within six months of being sentenced, to have been transferred to first stage lifer prisons to undertake appropriate courses (see paragraphs 145, 148 and 150 above). All three spent far longer at their local prisons, with no possibility of completing the courses recommended for them, before being transferred. Indeed, they were still in their local prisons at the expiry of their tariffs, despite the fact that PSO 4700 made reference to the overall objective to release lifers on tariff expiry if risk permitted and emphasised that lifers should be given every opportunity to demonstrate their safety for release at tariff expiry.

216. The Court accepts that there was no bad faith on the part of the authorities in the introduction or implementation of the IPP sentence. Once the growing problems were identified, steps were taken, albeit belatedly, to seek to address them. In particular, the legislation was amended to limit the circumstances in which an IPP sentence would be imposed by stipulating, in most cases, a minimum tariff period of two years. Thus it seems probable that in the cases of Mr Wells and Mr Lee, it would no longer be possible under the amended legislation to impose an IPP sentence; indeed Moses LJ noted as much in the case of Mr Lee (see paragraph 85 above). Moreover, the IPP sentence is now a discretionary one, allowing judges to choose not to impose such a sentence where they consider that the risk presented can be safely managed in an alternative way (see paragraph 134 above). There is no longer a statutory assumption that an offender who has previous relevant convictions necessarily poses a risk to the public (see paragraph 135 above). However, while these amendments, and the Government's willingness to take steps to address the problems identified, undoubtedly go some way to providing important protection against arbitrary detention, they have no relevance to the present cases brought by the applicants, who were all convicted, sentenced and detained prior to the new provisions entering into force.

217. 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. However, this does not appear to be the case here. It must be recalled that the dangerousness of the applicants was largely a product of the statutory assumption contained in section 229(3), and it is far from clear that the sentencing judges concerned would have imposed an IPP sentence had they enjoyed the judicial discretion now available to them under the amended legislation. Indeed, as the Court has already noted, it appears that neither Mr Wells nor Mr Lee could have received an IPP sentence under the amended provisions.

218. The Court reiterates that the right to liberty is of fundamental importance. While its case-law demonstrates that indeterminate detention for the public protection can be justified under Article 5 § 1 (a), it cannot be allowed to open the door to arbitrary detention. As the Court has indicated above, in circumstances where a Government seek to rely solely on the risk posed by offenders to the public in order to justify their continued detention, regard must be had to the need to encourage the rehabilitation of those offenders. In the applicants' cases, this meant that they were required to be provided with reasonable opportunities to undertake courses aimed at helping them to address their offending behaviour and the risks they posed. As Lord Phillips observed, courses are provided to prisoners because experience shows that they are usually necessary if dangerous offenders are to cease to be dangerous (see paragraph 30 above). While Article 5 § 1 does not impose any absolute requirement for prisoners to have immediate access to all courses they may require, any restrictions or delays encountered as a result of resource considerations must be reasonable in all the circumstances of the case, bearing in mind that whether a particular course is made available to a particular prisoner depends entirely on the actions of the authorities (see paragraphs 30 and 102 above). It is therefore significant that the failure of the Secretary of State to anticipate the demands which would be placed on the prison system by the introduction of the IPP sentence was the subject of universal criticism in the domestic courts and resulted in a finding that he was in breach of his public law duty.

219. Mr James' tariff expired almost one year and 295 days after he was sentenced. He was not progressed through the prison system during that period and recommended courses were unavailable to him. He was not transferred to a first stage lifer prison until five months after his tariff had

expired. He was released three months later. Mr Wells' tariff expired 307 days after he was sentenced. He was also not progressed through the prison system during that period and recommended courses remained unavailable to him. He was not transferred to a first stage lifer prison until twenty-one months after his tariff had expired. Thereafter he was given access to relevant courses and completed three such courses over a period of approximately eight months. Mr Lee's tariff expired 163 days after he was sentenced. Like Mr James and Mr Wells, he was not progressed through the prison system during that period and recommended courses remained unavailable to him. He was not transferred to a first stage lifer prison until twenty-five months after his tariff had expired. Although assessments for the course recommended for him then commenced, a further five-month period of delay occurred following a recommendation for prior motivational work which was not available to him.

220. The Court considers it significant that substantial periods of time passed in respect of each of the applicants before they even began to make any progress in their sentences, and this despite the clear guidance in PSO 4700 (see paragraph 215 above). It is clear that the delays were the result of a lack of resources and while, as noted above, resource implications are relevant, it is nonetheless significant that the inadequate resources at issue in the present case appeared to be the consequence of the introduction of draconian measures for indeterminate detention without the necessary planning and without realistic consideration of the impact of the measures. Further, the length of the delays in the applicants' cases was considerable: for around two and a half years, they were simply left in local prisons where there were few, if any, offending behaviour programmes. As Laws LJ indicated, the stark consequence of the failure to make available the necessary resources was that the applicants had no realistic chance of making objective progress towards a real reduction or elimination of the risk they posed by the time their tariff periods expired (see paragraph 52 above). Further, once the applicants' tariffs had expired, their detention was justified solely on the grounds of the risk they posed to the public and the need for access to rehabilitative treatment at that stage became all the more pressing.

221. In these circumstances, the Court considers that 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 (see paragraphs 211 and 213-214 above), their detention was arbitrary and therefore unlawful within the meaning of Article 5 § 1 of the Convention. Although in the cases of Mr James and Mr Wells the Court is satisfied that following their transfer there is no evidence of any unreasonable delay in providing them with access to courses, it notes that a further five-month delay was encountered by Mr Lee following the recommendation in December 2008 for prior motivational work. The Court considers it significant that by December

2008 Mr Lee was already two years and ten months post-tariff, in the context of a nine-month tariff. It was accordingly imperative that his treatment be progressed as a matter of urgency and in the absence of any explanation from the Government for the delay, the Court concludes that this period of detention was also arbitrary and therefore unlawful within the meaning of Article 5 § 1.

222. There has accordingly been a violation of Article 5 § 1 of the Convention in the case of all three applicants.

### III. ALLEGED VIOLATIONS OF ARTICLE 5 § 4 AND 13 OF THE CONVENTION

223. The applicants complained that there had been no meaningful review of the legality of their post-tariff detention as a result of the failure to operate a system properly to assess the risk they posed and contended that there had been a violation of Article 5 § 4 of the Convention, which 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.”

224. Mr Wells and Mr Lee further complained under Article 13 that even if they had succeeded in their challenge to their detention, they would not have been able to secure their release because of the provisions of primary legislation. Article 13 provides:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

#### A. Admissibility

225. The Court considers that these complaints raise complex issues of fact and law which cannot be resolved at the admissibility stage. It follows that the complaints cannot be declared manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring them inadmissible has been established. They must therefore be declared admissible.

#### B. Merits

##### *1. The complaint regarding the review of the legality of the detention*

226. The Court notes that the issues raised by the applicants under this head have already been examined in the context of their complaint under Article 5 § 1. The Court accordingly concludes that the applicants’



complaint under Article 5 § 4 regarding the failure to provide relevant courses gives rise to no separate issue (see *Johnson*, cited above, § 72).

## *2. The complaint regarding release*

### **a. The parties' submissions**

227. Mr Wells and Mr Lee argued that neither the Parole Board nor the domestic courts were able to order their release as a result of the provisions of primary legislation and the absence of any such power in the 2003 Act.

228. The Government emphasised that if the Parole Board had concluded that Mr Wells or Mr Lee was no longer dangerous, then it had the power to release them pursuant to section 28 of the 1997 Act.

### **b. The Court's assessment**

229. It is clear from the Court's case-law that Article 5 § 4 provides a *lex specialis* in relation to the more general requirements of Article 13 (see, among many other authorities, *A. and Others*, cited above, § 202). The Court therefore considers it appropriate to examine this complaint under Article 5 § 4.

230. Article 5 § 4 entitles an arrested or detained person to institute proceedings bearing on the procedural and substantive conditions which are essential for the "lawfulness" of his deprivation of liberty (see *A. and Others*, cited above, § 202). The notion of "lawfulness" under Article 5 § 4 has the same meaning as in Article 5 § 1, so that the arrested or detained person is entitled to a review of the "lawfulness" of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1 (see *A. and Others*, cited above, § 202). As the text of Article 5 § 4 makes clear, the body in question must have not merely advisory functions but must have the competence to "decide" the "lawfulness" of the detention and to order release if the detention is unlawful (see *Weeks*, cited above, § 61).

231. The Court has found the applicants' post-tariff detention to have been arbitrary and therefore in breach of Article 5 § 1 during the periods in which they were not progressed in their sentences and had no access to relevant courses to help them address the risk they posed to the public. It was open to the applicants to commence judicial review proceedings in order to challenge the conduct of the Secretary of State in failing to provide relevant courses, and both Mr Wells and Mr Lee did so. Shortly after the lodging of their judicial review claims, both applicants were transferred to a first stage prison for access to relevant courses and assessments (see paragraphs 58, 60 and 82-83 above). 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.

232. The Court therefore concludes that Mr Wells and Mr Lee have failed to establish that the combination of the Parole Board and judicial review proceedings could not have resulted in an order for their release. It therefore follows that there has been no violation of Article 5 § 4 in this regard.

### III. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

233. Mr James further complained of a violation of Article 5 § 5 of the Convention as he was not compensated for his post-tariff detention. That Article provides:

“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.”

234. The Court observes at the outset that the domestic courts did not find a violation of Article 5 in Mr James’ case. In so far as he complains about the failure of the authorities to pay compensation, his complaint is accordingly manifestly ill-founded.

235. As regards the possibility of compensation in the event of a finding of a violation of Article 5 §§ 1 or 4, the Court reiterates that in order to find a violation of Article 5 § 5, it has to establish that the finding of a violation of one of the other paragraphs of Article 5 could not give rise, either before or after the Court’s judgment, to an enforceable claim for compensation before the domestic courts (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 184, ECHR 2012).

236. As regards the possibility of compensation for a violation of Article 5 § 4, the Court observes that had the domestic courts found a violation of Article 5 § 4 to have occurred in Mr James’ case, there was no evidence presented to the Court to suggest that it would not have been possible to award appropriate compensation to Mr James: the Court notes that in the cases of Mr Wells and Mr Lee, in respect of whom a finding of a violation of Article 5 § 4 had been made, the House of Lords, referring to Article 5 § 5 of the Convention, remitted their claims for damages to the Administrative Court for assessment (see paragraphs 118-119 above. Cf. *Stanev*, cited above, § 188).

237. In respect of the availability of compensation for a violation of Article 5 § 1 of the Convention, it is true that, even though the question of remedies did not fall to be considered, Lord Hope and Lord Brown expressed some views regarding the availability of compensation for unlawful detention and highlighted the difficulties which the applicants would face in this respect (see paragraphs 120-121 above). However, the Court is not satisfied, on the basis of these comments, that Mr James has established that a finding of a violation of Article 5 § 1 in his case could not

have given rise to an enforceable right to compensation (compare and contrast *A. and Others*, cited above, § 229). Pursuant to the Human Rights Act 1998, Mr James would have been entitled to seek damages had a violation of Article 5 § 1 been established. Both Lord Hope and Lord Brown indicated that they did not reach any final view on the matter and, in any event, their comments were not binding on the courts which would have been required to consider any claim lodged. The Court is therefore persuaded that there was a realistic prospect for Mr James to enforce his right to compensation under Article 5 § 5 had his domestic claim been successful (cf. *Stanev*, cited above, §§ 186-187).

238. This complaint is accordingly manifestly ill-founded and must be declared inadmissible pursuant to Article 35 §§ 3 and 4 of the Convention.

## V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

239. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

### A. Damage

#### 1. *The parties' submissions*

240. Mr James claimed 6,001.84 euros (EUR) in respect of pecuniary damage and EUR 25,000 in respect of non-pecuniary damage for his complaints under Article 5 §§ 1 and 4 of the Convention. He contended that he was detained arbitrarily from 20 July 2007 to 28 March 2008, a period of 251 days, or 35 weeks and 6 days. He sought damages for his loss of liberty and loss of earnings. His claim for loss of earnings was calculated at 26 weeks, assuming that he would not have returned immediately to work, at an average rate of EUR 461.68, discounted by half to reflect living and other expenses. The Government disputed the applicant's claim for the entire period of his post-tariff detention because there was no right to be released on tariff expiry and no reason to believe that Mr James would have been released before 28 March 2008. They argued that the finding of a violation in itself constituted adequate just satisfaction in the case. If the Court were minded to award non-pecuniary damage, the Government argued that it should be towards the lower end of the scale, referring to the Court's award in *Clift*, cited above. In respect of Mr James' claim for pecuniary damages, the Government argued that no evidence had been produced to show that he would have got the same job or any job had he been released earlier.

241. Mr Wells claimed 190,000 pounds sterling (GBP) in respect of non-pecuniary damage for his complaints under Articles 5 §§ 1 and 4 and 13. He argued that he spent almost three years unlawfully detained as, had he been progressed through the system properly, he would have been released approximately four months after his tariff period had expired. The Government repeated the general comments made in respect of Mr James as regards the claim for non-pecuniary damage. In so far as Mr Wells' specific claim was concerned, they argued that there was no reason to believe that he would have been released shortly after his tariff had expired and his poor behaviour in prison provided a clear basis for the finding of the Parole Board that he remain a risk and should not be released.

242. Mr Lee claimed GBP 150,000 in respect of non-pecuniary damage for his complaints under Articles 5 §§ 1 and 4 and 13. He contended that he was unlawfully detained for the entire period following the expiry of his tariff, namely 1,844 days. The Government repeated the general comments made in respect of Mr James as regards the claim for non-pecuniary damage. In so far as Mr Lee's specific claim was concerned, they contended that the evidence was clear that he would not have been released at any date close to the expiration of his tariff: in March 2010 the Parole Board had considered his case in full and found that he did not meet the statutory tests for release.

## *2. The Court's assessment*

243. The Court recalls that it has found a violation only of Article 5 § 1 in respect of the applicants. It follows that it cannot make any award in respect of the alleged violation of Article 5 §§ 4 and 5.

244. The basis for the finding of a violation of Article 5 § 1 was that the failure to give timeous access to the relevant courses rendered the applicants' detention after the expiry of their tariffs arbitrary. It therefore cannot be assumed that, if the violations in the present cases had not occurred, the applicants would not have been deprived of their liberty. It also logically follows that once the applicants were transferred to first stage prisons and had timeous access to relevant courses, their detention once again became lawful. In these circumstances, no clear causal link between the violation found and the pecuniary damage alleged by Mr James has been established; the Court accordingly rejects this claim. On the other hand, the Court accepts that the continued detention without access to necessary courses must have provoked feelings of distress and frustration which increased over time and which cannot be compensated by the mere finding of a violation. Having examined the individual circumstances of each case, the Court therefore awards, in respect of non-pecuniary damage, Mr James EUR 3,000 in respect of a period of five months, Mr Wells EUR 6,200 in respect of a period of twenty-one months and Mr Lee EUR 8,000 in respect of a period of thirty months.

## **B. Costs and expenses**

### *1. The parties' submissions*

245. Mr James claimed EUR 57,921.04 for the costs and expenses incurred before the Court. This sum was composed of EUR 18,357.80 in respect of counsel's fees incurred for preparing the application to the Court and Mr James' written submissions, and EUR 12,403.26 in respect of prospective counsel's fees; and EUR 6,720.53 for solicitors' fees incurred and 20,439.35 for prospective solicitors' fees. These included costs draftsman fees. The Government considered that prospective fees and the fees of the costs draftsman should not be awarded. They further argued that the hourly rate claim by counsel and the solicitors was excessive. They proposed the sum of GBP 9,000 in total.

246. Mr Wells claimed GBP 11,359.49 for the costs and expenses incurred before the Court. The sum was comprised of solicitors' fees of GBP 5,359.49 and counsel's fee of GBP 6,000 for preparing the application to the Court and Mr Wells' written submissions. The Government argued that the hourly rate claim by counsel and the solicitors was excessive. They proposed the sum of GBP 9,000 in total.

247. Mr Lee claimed GBP 12,367.80 for the costs and expenses incurred before the Court, which included solicitors' fees of GBP 6,367.80 and counsel's fees of GBP 6,000 for the preparation of the application to the Court and Mr Lee's written submissions. The Government argued that the hourly rate claim by counsel and the solicitors was excessive. They proposed the sum of GBP 9,000 in total.

### *2. The Court's assessment*

248. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the case of Mr James, the Court therefore rejects the claim for prospective costs and expenses and the claim for the fees incurred by the costs draftsman.

249. The Court observes that the submissions made by the applicants were substantially the same as those advanced before the domestic courts. Regard being had to the documents in its possession and the above criteria, and taking into consideration the sum of EUR 850 awarded to each of the applicants by the Council of Europe by way of legal aid, the Court awards the sum of EUR 12,000 in costs and expenses to each of the applicants.

### C. Default interest

250. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

### FOR THESE REASONS, THE COURT

1. *Decides* unanimously to join the applications;
2. *Declares* unanimously the complaints under Article 5 §§ 1 and 4 and Article 13 of the Convention admissible and the remainder of the applications inadmissible;
3. *Holds* unanimously that there has been a violation of Article 5 § 1 of the Convention in respect of the applicants' detention following the expiry of their 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;
4. *Holds* by six votes to one that the applicants' complaint under Article 5 § 4 of the Convention regarding the lack of access to courses gives rise to no separate issue;
5. *Holds* by six votes to one that there has been no violation of Article 5 § 4 of the Convention as regards the complaint concerning the possibility of release;
6. *Holds* unanimously
  - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into pounds sterling at the rate applicable at the date of settlement:
    - (i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage and EUR 12,000 (twelve thousand euros), inclusive of any tax that may be chargeable, in respect of costs and expenses to Mr James;
    - (ii) EUR 6,200 (six thousand two hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage and EUR 12,000 (twelve thousand euros), inclusive of any tax that may be chargeable, in respect of costs and expenses to Mr Wells; and

(iii) EUR 8,000 (eight thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage and EUR 12,000 (twelve thousand euros), inclusive of any tax that may be chargeable, in respect of costs and expenses to Mr Lee;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7 . *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 18 September 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı  
Deputy Registrar

Lech Garlicki  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Kalaydjieva is annexed to this judgment.

L.G.  
F.A.

## DISSENTING OPINION OF JUDGE KALAYDJIEVA

I find myself unable to share the opinion of the majority that, in the light of the examination of the applicants' complaints of arbitrary detention resulting from the authorities' failure to allow their timely participation in courses under the first paragraph of Article 5 of the Convention, no separate issue arises under Article 5 § 4.

The substantive right to personal liberty guaranteed by the first paragraph of Article 5 is clearly distinct from the procedural guarantees required by Article 5 § 4 for the purposes of effective protection against arbitrariness. While it is true that the notion of 'lawfulness' has the same meaning in both provisions (see paragraph 230 of the judgment), in the instant case the underlying statutory requirement to impose and order the continuation of the period of detention served as an assumption of lawfulness, which affected these distinct rights in a different manner. This assumption not only required the domestic courts to impose IPP sentences without any initial individual assessment, but also limited the scope of any subsequent assessment of the applicants' situation – despite the express criticism and censure of the quality of the law and the authorities' failure to enable prisoners to meet the statutory prerequisites for release imposed by it. This assumption of lawfulness pre-empted the proceedings before the Parole Board and limited the scope of the formally available review to an extent which ultimately acted as an obstacle to the exercise of the domestic authorities' competence to decide speedily on the lawfulness of the applicants' detention. It is true that "[s]hortly after the lodging of their judicial review claims, both [Mr Wells and Mr Lee] were transferred to a first stage prison for access to relevant courses and assessments" (see paragraph 231). However, the subject matter and outcome of these proceedings appear to be different from proceedings in which "the lawfulness of detention shall be decided speedily by a court and release ordered if the detention is not lawful" as required by Article 5 § 4.

The respondent Government failed to demonstrate any other available proceedings or practice established by the Parole Board and/or the competent domestic courts capable of affording a proper scope of review without consideration of the statutory assumption of the initial and continuing lawfulness of the applicants' detention, and which could have resulted in an order for release where appropriate. In this regard the "exceptional nature" of the decision of the Parole Board to release Mr James (see paragraph 212) only emphasises the problem as regards the effectiveness of the proceedings for the purposes of Article 5 § 4. In this regard I see no reason to disagree with the findings of Moses LJ (see paragraphs 61-66). Lastly, I find myself unable to accept the approach of shifting onto the applicants the burden of proof as to the effective operation of the Parole Board and the judicial review proceedings for the purposes of



Article 5 § 4 (see paragraph 232). The opposite approach by the Court in cases under Article 5 § 4 (as in cases concerning Article 13) seems well established.