

The Secretary of State for Justice has a duty to provide Offending Behaviour Programmes in prison – submissions to the contrary are lacking in realism!

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R (on the application of Walker) v Secretary of State for Justice; R (on the application of James) v Secretary of State for Justice

[2008] EWCA Civ 30

Introduction

The cases which form the subject of this review brought into focus the interface and tension between two major developments in criminal justice over the last two decades: the trend towards longer than normal sentencing for ‘dangerous’ offenders and the rise of accredited offending behaviour programmes.

Successive governments in the United Kingdom have legislated for more severe punishment for certain categories of offenders. The *Criminal Justice Act 1991* introduced longer than commensurate sentences and revised extended sentences for violent and sexual offenders. The *Crimes Sentences Act 1997* brought in automatic life sentences for a second serious offence. More recently, sentencing legislation was overhauled in the *Criminal Justice Act 2003* (the ‘Act’), which represented a further shift towards public protection as the primary rationale in sentencing serious offenders². One consequence of this shift has been the increasing availability of, and requirement for, indeterminate sentences³. The general approach of the Act is to introduce a new framework whereby offenders convicted of at least moderately severe violent or sexual offences must be assessed for ‘dangerousness’ and if found to be a significant risk of causing serious harm must receive heavier sentences for the purpose of public protection. The Act introduced a statutory assessment of dangerousness containing a ‘statutory assumption of dangerous’, meaning that an adult offender found guilty of a second or subsequent ‘specified’ violent or sexual offence is assumed to be dangerous unless that assumption can be rebutted under s229(3). Specified offences are listed in Schedule 15 of the Act, but are simply all violent or sexual offences carrying a maximum sentence of two or more years’ imprisonment. Violent and sexual offences carrying a maximum sentence of ten or more years’ imprisonment are further identified as ‘serious offences’. The Act created new sentences for those identified as dangerous, including ‘imprisonment for public protection’ (‘IPP’) - an indeterminate sentence for offenders convicted of a serious offence, but not meeting the requirements of

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2 Ashworth A. (2005) *Sentencing in Criminal Justice* (Fourth Edition) Cambridge University Press; Cambridge: 218.

3 Bickle A. (2008) *The Dangerous Offenders Provisions of the Criminal Justice Act 2003 and Their Implications for Psychiatric Evidence in Sentencing Violent and Sexual Offenders*. *Journal of Forensic Psychiatry and Psychology* (in press).

imprisonment for life⁴. In the first two years after the Act came into force, more than 2,200 IPPs were handed down⁵ and the number of 'lifers' detained on the prison estate rose by nearly 10%⁶. Official estimates suggest over 10,000 prisoners will be detained in custody under an IPP by 2014⁷ and they have been identified as a cause of prison overcrowding⁸.

Historically, indeterminate sentences were largely reserved for offenders in whom a degree of 'mental instability' had been demonstrated *as per R v Hodgson* (1967) 52 Cr App R 113⁹. In *R v Wilkinson* (1983) 5 Cr App R (s) 60, Lord Lane went so far as to state that discretionary life sentences were reserved, broadly speaking, for those who could not be dealt with under mental health legislation, yet were in a mental state which made them dangerous¹⁰.

Therefore, it can be seen that under previous regimes, indeterminate sentences were given to offenders exhibiting some degree of mental abnormality in a broader sense. Presumably, the new indeterminate sentences introduced by the Act, including the IPP, 'capture' a similar group of mentally abnormal offenders, as well as other serious offenders who are likely to have deficits in a range of domains including interpersonal behaviour, social skills, pro-social problem-solving and consequential thinking in addition to having histories of substance misuse.

The notion that one cause of offending is deficits in cognitive skills which can be made good (or least diminished) through cognitive-behavioural therapeutic approaches, and in turn reduce recidivism, forms the theoretical underpinning of cognitive skills programmes that have been introduced to UK prisons. In the 1970s there was considerable pessimism about the effectiveness of rehabilitation interventions aimed at reducing re-offending, encapsulated in the widely-held view that 'nothing works'¹¹. From the mid-1980s, a body of research assembled which asserted that offending behaviour groupwork could produce a

4 The dangerous offender provisions of the Act (set out within ss 225-228) introduced three new sentences for adult offenders: (new) extended sentences, imprisonment for public protection and imprisonment for life. Extended sentences are for dangerous offenders who have committed a specified, but not serious, offence. The extension period should be of such length as the court considers necessary for protection of the public from serious harm from further specified offences.

Imprisonment for life is reserved for offenders who stand convicted of an offence with a maximum sentence of life imprisonment and, having satisfied the other conditions for identification as a 'dangerous offender', also have their offence considered serious enough by the court to justify the imposition of a life sentence. Imprisonment for public protection must be given to a dangerous offender committing a serious offence for which life is unavailable or where the other condition for life imprisonment is not considered to be met.

It should be noted that (1) the obligation to pass one of these sentences, if the criteria are met, may be overridden if the criteria requisite to the imposition of a hospital order under section 37 Mental Health Act 1983, are satisfied (see paragraph 38 Schedule 32 Criminal Justice Act 2003), and (2) greater judicial discretion is likely to be re-introduced by the Criminal Justice and Immigration Bill 2007, currently before Parliament.

5 Ministry of Justice (2007a) Penal Policy – A Background

Paper. Ministry of Justice: London.

6 Epstein R (2007) Prison Crisis: Why The Rising Numbers? Justice of the Peace, 171: 671.

7 Ministry of Justice (2007b) Ministry of Justice Statistical Bulletin: Prison Population Projections 2007-2014 England and Wales. Ministry of Justice: London.

8 Thomas D.A. (2007) Sentencing: Overcrowding of Prisons. Criminal Law Review, Jun: 501.

9 Except, of course, for offences where the sentence was fixed by law. In effect, this meant the mandatory life sentence, and before that the death penalty, for murder.

10 It should also be remembered that Hospital Orders (s37 of the Mental Health Act 1983) and Interim Hospital Orders (s38 of the Mental Health Act 1983) require the court to be of the opinion that these orders are the most suitable means of disposing of the case. This is in addition to the requirement for the presence of a mental disorder of a nature or degree to warrant detention in a hospital (and in the cases of mental impairment and psychopathic disorder additional evidence of 'treatability'). Therefore, it must be possible that some offenders who would otherwise meet the criteria for detention in hospital are detained in prison because the court does not regard hospital admission as the most suitable disposal.

11 Hollin C.R. (1999) Treatment Programs for Offenders: Meta-Analysis, 'What Works' and Beyond. International Journal of Law and Psychiatry, 22(3-4), 361.

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small but significant reduction in offending and became subsumed under the 'What Works' banner of interventions^{12 13}. These programmes are not without their critics and several studies have failed to replicate positive findings¹⁴. Nevertheless, meta-analyses seem to support the view that well-designed, structured and targeted cognitive-behavioural approaches can reduce recidivism by around ten percentage points¹⁵ and they were incorporated into a UK government strategy which adopted the 'What Works' brand in 2000¹⁶.

These interventions are typically focussed, time-limited, structured and are delivered by trained staff in prison and probation with the assistance of a training manual. In the UK, HM Prison Service now offers thirteen fully or partially-accredited programmes covering such areas as enhanced thinking skills, anger management and specific criminogenic attitudes such as those underpinning sexual offending¹⁷, although the problem of access to such courses forms the basis of the current case. The need for such courses is commonly written into sentence plans and reports from course facilitators are reviewed by the Parole Board, as noted in *James and Walker*.

The Facts

Mr Walker was convicted of two offences of sexual assault and given an IPP with a minimum term of 18 months, which expired in October 2007. Mr James was convicted of wounding with intent and given an IPP with a minimum term of one year and 295 days which expired in July 2007. Both were detained at HMP Doncaster, a local remand prison. This establishment had very limited resources for offending behaviour work. Furthermore, neither offender was moved on to a 'first stage' lifer establishment or had a sentence plan drawn up¹⁸.

The report for the Parole Board prepared by Mr Walker's Life Manager stated that although his behaviour may have justified transfer to open conditions or release, the facts that he had no sentence plan and had not undertaken work around relapse prevention meant that no recommendation could be made for release or transfer to open conditions. Like Mr Walker, Mr James had received no formal sentence planning. He had undertaken a short (2 week) alcohol-related course, but he had not the opportunity to undertake several other courses that Parole Board reports indicated he probably needed. His Life Manager similarly reported to the Parole Board that as he had not yet been given a sentence plan or

12 *Blud L, Travers R, Nugent F & Thornton D. (2003) Accreditation of offending behaviour programmes in HM Prison Service: 'What Works' in practice. Legal and Criminological Psychology, 8, 69.*

13 *McGuire J. (1995) What Works: Reducing reoffending. Guidelines from research and practice. Chichester: Wiley.*

14 *See, for example, Falshaw L, Friendship C, Travers R. & Nugent F. (2004) Searching for 'What Works': HM Prison Services accredited cognitive skills programmes. British Journal of Forensic Practice 6(2), 3, which found that two of the oldest and most established offending behaviour programmes (Reasoning & Rehabilitation and Enhanced Thinking Skills) did not reduce the short term recidivism of prisoners released from English and Welsh prisons.*

15 *Hollin C.R. (1999) Treatment Programs for Offenders: Meta-Analysis, 'What Works' and Beyond. International Journal of Law and Psychiatry, 22(3-4), 361.*

16 *Chapman T. (2005) Publication Review: What Works in Probation and Youth Justice: Developing Evidence-Based Practice. British Journal of Criminology, 45(5), 785.*

17 www.hmprisonservice.gov.uk/adviceandsupport/beforeafterrelease/offenderbehaviourprogrammes/

18 *At the Court of Appeal, reference was made to the Prison Service's policy on the management of life sentence prisoners (PSO 4700). This explains that a typical male lifer will generally pass through a remand centre/local prison, a first stage establishment (high security or category B), a second stage establishment (high security, category B or category C) and a third stage establishment (category D, open, semi-open or resettlement) before release. The same policy states an intention that lifers will move on from their local prison within approximately six months.*

undertaken any work related to his offence, no recommendation for release or transfer to open conditions could be made.

At Mr Walker's judicial review, Laws LJ stated that it was an underlying premise of the new legislation (the CJA 2003) that courses in the prison would be available to "maximise the opportunity for lifers to demonstrate that they were no longer a danger to the public by the time their tariff expired (or as soon as possible thereafter)"¹⁹ and that failure to provide the same was unlawful. He reasoned that an indeterminate sentence comprised of a tariff element for punishment and a post-tariff element for public protection. Only periodic assessment of the need for public protection could justify continued detention. In the absence of effective assessment, detention could not be justified and was unlawful in common law (although the decision in *Cawser* [2004] UKHRR 101 closed off any possibility that detention of a lifer beyond his tariff period was in breach of ECHR article 5(1)).

At Mr James's judicial review, Collins J applied the decision in *Walker* and held detention beyond tariff to be unlawful. In this case the stakes were higher as James, unlike Walker, was already post-tariff. Collins J decided that although it was, "potentially disastrous"²⁰ his immediate release must be ordered. Mindful, not unlikely, of the immense consequences of this decision to the population of post-tariff life prisoners, the judge stayed his decision to give the Secretary of State the opportunity to appeal.

The Decision

The appeal was allowed in part. On the decision to order James's immediate release, the Court of Appeal, presided over by Lord Chief Justice Phillips, ruled that the finding that the detention of life prisoners beyond their tariff in such circumstances was unlawful, was itself erroneous. Primarily, the Court accepted the 2003 Act had made express statutory provision for the circumstances in which IPP prisoners may be released:

*"Central to this is the requirement that the Parole Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. It is not possible to describe a prisoner who remains in accordance with these provisions as 'unlawfully detained' under common law. The common law must give way to the express requirements of the statute"*²¹

The Secretary of State's success was limited to this (albeit important) aspect of the cases.

The Secretary of State's submission that he was not under any relevant duty to provide treatment or training in prison was found to be "lacking in realism"²². His counsel asserted that there was no basis for saying it was an underlying premise of the Act that he would provide IPP prisoners with the maximum opportunity to demonstrate to the Parole Board that it was no longer necessary to detain them for the protection of the public²³. Furthermore, the appellant claimed it was for the independent Parole Board to decide what evidence satisfied it that an IPP prisoner should be released and any fettering of its discretion (such as by making release dependent on the completion of courses) would itself be unlawful²⁴. In rejecting this submission, the Court of Appeal decided that the performance of the appropriate courses is likely to be a prerequisite to a prisoner satisfying the Parole Board because experience had shown that

19 *Walker v Secretary of State for the Home Department* [2007] All ER (D) 479, para 26.

20 *James v Secretary of State for the Home Department* [2007] EWHC 2027 (Admin), para 10.

21 *R v (on the application of Walker) v Secretary of State for*

Justice; R (on the application of James) v Secretary of State for Justice [2008] EWCA Civ 30 para 47.

22 *Ibid*, para 39.

23 *Ibid*, para 36.

24 *Ibid*, para 37.

such courses are usually necessary if dangerous offenders are to cease to be dangerous, and highlighted the significance of such evidence in current practice. The Court noted the Secretary of State had chosen to bring the Act into force and yet had not provided the resources to give effect to his own policy of offering these courses²⁵. It concluded that this conduct breached his public law duty because its direct and natural consequence was the detention of some prisoners beyond the time necessary either for punishment or for the protection of the public, contrary to the intention of Parliament (and the object of Article 5 of which Parliament must have been mindful).

The Court turned lastly to claims made on behalf of the prisoners that their treatment constituted infringement of certain of their rights under article 5(1) and 5(4) of the European Convention of Human Rights²⁶. The Court reviewed the Strasbourg and domestic jurisprudence on indefinite detention. In lengthy considerations it agreed that the legality of the post-tariff period of an indeterminate sentence imposed for the public protection is dependent on the prisoner remaining a threat to the public and reasoned:

“Article 5(4) requires this legality to be subject to periodic review by a body with the qualities of a court. If, in the period between two such reviews a prisoner ceases to be dangerous, this will not mean that his detention in the remainder of that period infringes Article 5(1). That article must be read in conjunction with Article 5(4) so as to produce a practical result. If, however, a review is unreasonably delayed and it is shown that, by reason of the delay, the prisoner has been detained after the time that he should have been released, that period of detention will constitute an infringement of Article 5(1).”²⁷

Applying these tests to the cases before them, the Court considered whether the Parole Board could review detention as required by Article 5(4) when offenders had not completed treatment courses. They concluded that whilst this state of affairs would not formally prevent a case being heard, the review would be an empty exercise and the outcome a foregone conclusion. For each claimant it found that if the situation continued it would be likely to result in a breach of Art 5(4). However, their Lordships did not apparently feel the delays were yet long enough for that breach to have taken place.

There remained the question as to whether in the absence of periodic review the offenders were no longer being detained for the object for which the IPPs were imposed, which would mean their detention could not be justified under Article 5(1)(a). The Court accepted that if so long a time elapsed without a meaningful review, detention would become disproportionate or arbitrary. However, without further explanatory comments they decided that this stage had not been reached, and emphasised that failure to comply would not in itself result in infringement of Article 5(1)(a). Nevertheless, the decision explicitly left open the possibility that this article could be so infringed in the future.

Comment

The Secretary of State’s partial success has avoided the “*potentially disastrous*” prospect (identified by Collins J. at first instance) of indeterminately detained dangerous offenders being released without demonstrating they no longer represented a significant risk of serious harm to the public. However, the conduct of the Secretary of State has been strongly criticised and held to be in breach of his public law

²⁵ *Ibid*, para 40.

²⁶ Mr Walker, who made his application before his tariff had been reached, claimed that the unavailability of courses had the potential to infringe his human rights. Mr James, as a post-tariff lifer, submitted that in his case Article 5

had actually been breached.

²⁷ *R v (on the application of Walker) v Secretary of State for Justice; R (on the application of James) v Secretary of State for Justice* [2008] EWCA Civ 30 para 61.

duty. The effect of such a ruling on policy and resource allocation is unclear. Ultimately, the likely future infringement of Article 5(4) and potential future infringement of Article 5(1) may well prove to be more important drivers for change, especially if a breach were to be determined at the ECtHR. The possibility of an individual case progressing to the point at which a breach may be said to have occurred does not seem fanciful. In its deliberations, the Court of Appeal endorsed the observations that flowed from *R (Noorkoiv) v Secretary of State* [2002] EWCA Civ 770, in which the claimant successfully argued that a delay of 2 months before a parole hearing (brought about by a policy of holding hearings quarterly to make best use of resources) infringed his Article 5(4) right. A report published by the National Audit Office soon after *James & Walker* gave timely information about delays currently experienced in the parole system²⁸. They found that only 32% of oral hearings for indeterminate sentences were being held on time. One of the two most common reasons for deferrals was the Board not receiving the information required to make a decision. In particular, 97 of 276 indeterminate cases did not contain either an Offender Assessment System report (which would draw heavily on reports from offending behaviour courses) or a life sentence plan. In these circumstances it is not difficult to envisage how a lengthy delay might occur.

In the longer term, the problem of offending behaviour programme provision and other problems arising from having a large population of prisoners detained indeterminately with short tariffs may be ameliorated to some extent by provisions of the *Criminal Justice and Immigration Bill 2007*, which is currently before Parliament. Part of this wide-ranging bill seeks to amend the dangerous offender provisions of the Act. Most significantly, in a notable volte-face by the Government, it intends to remove the statutory assumption of dangerousness and also allow courts discretion in sentencing offenders who meet all the criteria for IPP and extended sentences. There would still remain ample opportunity to impose indeterminate sentences, but such amendments would probably reduce the numbers of those detained indeterminately whose short tariff perhaps hints at the courts' misgivings in handing down this type of sentence in the first place.

In conclusion, this judgement confirms the right of indeterminately detained prisoners to access appropriate offending behaviour programmes in a timely fashion. It affirms the regard in which cognitively-oriented psychological and educational interventions are now held and the importance placed on such work by criminal justice system. In the long view, all this seems far removed from the period less than three decades ago when little in the way of psychological rehabilitation was viewed as of any great proven worth. Debate may continue as to whether the statistically significant effects of these courses equate to a significant reduction in recidivism or to value for money, but it looks as though they will be offered ever more widely.

The relationship between mental disorder and crime is complex, controversial and well beyond the scope of this article. We can say that offending behaviour courses in their current form attempt to bring about changes in cognition (such as comparative thinking and paranoia) and behaviour (such as substance misuse and emotionally dysregulated violence) which in some individuals will form part of a syndrome of mental illness or other mental disorder. Indeed some courses, in particular substance misuse courses, might be said to treat or prevent classifiable mental disorders specifically. We do know that the prison

28 National Audit Office (2008) *Protecting the public: the work of the Parole Board*. TSO: London.

population as whole contains extremely high rates of mental disorder representing considerable unmet need²⁹. Thus, a significant proportion of those in line to participate in offending behaviour programmes in prison will suffer from a mental disorder. The gold standard for treatment for severe mental disorder may be transfer to hospital, but the majority of mentally disordered offenders are detained in prison. It is of interest when evaluating the status of prison-based programmes to reflect that psycho-educational interventions offered in secure hospitals bear many similarities to prison courses and in some institutions some of the very same courses are offered. In conclusion, it can be seen that many of the prisoners to whom this judgment applies will have mental disorders, and in confirming the duty to provide cognitive-behavioural interventions in prison, the Court of Appeal ought to have improved the likelihood of certain mental health treatment needs being met.

29 Several large epidemiological studies have highlighted the high rates of mental disorder in all types of prisoner, as summarised in: Birmingham L. (2003) *The mental health of prisoners*, *Advances in Psychiatric Treatment*, 9, 191. Mental disorder (including substance misuse diagnoses) was found in 37% of sentenced male prisoners and 57% of sentenced female prisoners in: Gunn J, Maden A. & Swinton M. (1991) *Mentally Disordered Prisoners*, London: Home Office. Amongst remand prisoners, mental disorder (also including substance misuse diagnoses) was found in 63% of male prisoners and 76% of female prisoners in: Maden A, Taylor C, Brooke D. et al (1995) *Mental Disorder in Remand Prisoners*, London: Home Office. Even excluding substance misuse diagnoses, about a quarter of men entering prison on remand were found to have some form of mental disorder in: Birmingham L, Mason D. & Grubin D. (1996) *Prevalence of mental disorder in remand prisoners: consecutive case study*, *British Medical Journal*, 313, 1521.