**Justifying Indefinite Detention – on what grounds?**

By

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*Summary*

This jurisdiction’s ‘love affair’ with life sentences may be diminishing. But there are still more than 11,000 people serving indeterminate sentences in prison today. This article explores this population, in the context of current law and practice. The article raises questions of principle, including the need for careful ‘supervision’ of all sentence decisions, especially when those decisions are indeterminate. It argues that the concept of the ‘minimum term’, in particular, needs to be considered further: it is suggested that the ‘punitive period’ should not necessarily be fixed from the beginning of the sentence. The case law provokes many questions which need to be explored further in order to justify not only indeterminate sentences – but also the length of time that individual prisoners serve in prison before release (or re-release).

At the end of June 2016, there were 11,359 (10,992 men; 367 women) indeterminate sentenced prisoners (ISPs), made up of those serving life sentences and Imprisonment for Public Protection (IPP) sentences, in prison in England and Wales[[2]](#footnote-2). The number of life sentenced prisoners (7,361) has dropped slightly (by 1%) compared to June 2015. Amongst the lifer population, there were 53 whole-life prisoners, with six additional life prisoners being held in secure hospitals[[3]](#footnote-3). As a result of the abolition of IPP in December 2012[[4]](#footnote-4), offenders no longer receive these sentences and so the IPP population is also declining. On 30 June 2016, there were 3,998 IPP prisoners[[5]](#footnote-5). In 2015-16, the Parole Board direct the release of 372 lifers, and 591 serving IPP. But the proportion of the IPP population who are post-tariff inevitably continues to increase: 82% of IPP prisoners are now post-tariff compared to 77% this time last year. And it may well be that the number of ISPs being recalled to prison is increasing[[6]](#footnote-6).

This article focuses on these 11,359 prisoners, reflecting on the variety of indeterminate sentences being served by prisoners today. It considers the process by which their minimum terms are imposed, and explores the life sentence process they follow through the ‘system’, including the role of the National Offender Management System and of the Parole Board. An examination of recent case law raises important questions of principle, which must be answered in order to justify the current sentencing regime.

**Background: Indeterminate sentences**

The National Offender Management Service (NOMS) may simply count people as IPP or lifers, but the reality is rather more complex. The number of different indeterminate sentences, and the criteria for their imposition, has not remained static. In *Saunders[[7]](#footnote-7)*, the Court of Appeal said that ‘there are now four situations in which the sentence of imprisonment for life arises for consideration’ (at para 5). In fact, there may well be at present in prison those serving eleven[[8]](#footnote-8) different forms of indeterminate sentence (and probably others serving variations imposed abroad):

1. The life sentence for murder: the sentence has long been mandatory (since the abolition of the death penalty), but the way that the minimum term is calculated changed very significantly with the enactment of section 269 and Schedule 21 of the Criminal Justice Act (CJA) 2003. The statutory ‘starting points’ have been amended three times in the last ten years.
2. The automatic life sentence: this was introduced in s. 2 of the Crime (Sentences) Act 1997 for anyone convicted of a second serious offence, unless there were exceptional circumstances permitting the court not to take that course. Section 2 was replaced by s. 109 of the Powers of Criminal Courts (Sentencing) Act 2000. After the Human Rights Act 1998 came into force, the way this sentence was applied changed significantly[[9]](#footnote-9), and a decade later, the sentence was abolished[[10]](#footnote-10).
3. The discretionary life sentence: ‘dangerous’ offenders have long been liable to be sentenced to a discretionary life sentence if they commit a very serious offence. Parliament has made a life sentence the possible maximum for very many offences, and the trial judge has the discretion to impose one in appropriate cases[[11]](#footnote-11). The 1967 *Hodgson* criteria[[12]](#footnote-12) still apply:

When the following conditions are satisfied, a sentence of life imprisonment is in our opinion justified: (1) where the offence or offences are in themselves grave enough to require a very long sentence; (2) where it appears from the nature of the offences or from the defendant's history that he is a person of unstable character likely to commit such offences in the future; and (3) where if the offences are committed the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence

After the introduction of IPP (see (ix) below), it appeared that the discretionary life sentence was becoming obsolete[[13]](#footnote-13). But now that IPP has been abolished, there will probably once again be a space for the discretionary life sentence (in the gaps that (iv) and (xi) below do not come to fill)[[14]](#footnote-14).

1. The Criminal Justice Act (CJA) 2003 discretionary life sentence: [s.225](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&&context=8&crumb-action=replace&docguid=I5F97C0A0E42311DAA7CF8F68F6EE57AB) of the CJA 2003 created a discretionary life sentence applicable to those convicted of specified offences to be found in Schedule 15 of that Act. The Court of Appeal in *Saunders* (above) seemed to think that it is no longer necessary to distinguish (iii) and (iv), but noted the commentary to *Cardwell[[15]](#footnote-15)*, where David Thomas QC[[16]](#footnote-16) pointed out that (iii) may well still be available to a court dealing with a non-specified offence (e.g. a grave Class A drug dealing or importation offence). Clearly a discretionary life sentence under the 2003 Act remains available following conviction for a ‘specified offence’[[17]](#footnote-17).
2. Detention during Her Majesty’s Pleasure: this is the mandatory life sentence imposed on offenders who commit murder when under the age of 18 (see s. 90 of the Powers of the Criminal Courts (Sentencing) Act 2000 for the current statutory formulation).
3. Detention for life: this is the maximum sentence for a person aged 10 or over but under 18, who is convicted of offences for which a discretionary life sentence may be passed on a person over 21[[18]](#footnote-18).
4. Custody for life: imposed on offenders under the age of 21 but 18 or over when they are convicted of murder (see s. 93 of the Powers of Criminal Courts (Sentencing) Act 2000).
5. Custody for life as a discretionary sentence: section 94 of the Powers of Criminal Courts (Sentencing) Act 2000 makes it clear that custody for life may also be imposed as a discretionary sentence. Although this provision was repealed by the Criminal Justice and Court Services Act 2000 [Sch.8 para.1](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&&context=25&crumb-action=replace&docguid=I54A5C820E44811DA8D70A0E70A78ED65), this repealing provision has never been brought into force. Young adult offenders sentenced to custody for life appear to be treated in the same way as other adult lifers. Should (vii) and (viii) be abolished, so as to remove a redundant and undue complexity which can lead to confusions in practice[[19]](#footnote-19)?
6. Imprisonment for Public Protection[[20]](#footnote-20): this was introduced (from 4 April 2005) by s. 225 of the Criminal Justice Act 2003, originally imposed more or less automatically whenever a person was convicted of any one of a very large number of offences designated as ‘serious offences’ in Schedule 15 of the Act and the court considered there to be a significant risk of serious harm to members of the public by the commission of a further ‘specified offence’. The risk of serious harm had to be assumed in cases where the person had previously been convicted of a ‘relevant offence’. The judge was given much more discretion in the application of the rules in the Criminal Justice and Immigration Act 2008, with effect from 14 July 2008, and IPP was subsequently abolished by the Legal Aid, Punishment and Sentencing of Offenders Act (LASPOA) 2012, for offenders sentenced after 3 December 2012[[21]](#footnote-21).
7. Detention for Public Protection: the IPP for offenders under the age of 18. This was always rather more flexible than the original 2003 provisions for adults, but still has produced harsh results[[22]](#footnote-22).
8. The automatic life sentence for a second ‘listed’ offence: this was created by s. 122 of the LASPOA 2012, which adds a new s. 224A into the CJA 2003. It was brought into effect for offences committed after 3 December 2012. This represents a new ‘two strikes’ policy (see (ii) above for a predecessor), an automatic life sentence for anyone convicted of a second ‘listed’ offence[[23]](#footnote-23) involving serious sexual or violent crime. The offence must deserve a sentence of 10 years or more[[24]](#footnote-24). The Court of Appeal in *Saunders* (above) described this as a statutory life sentence where “there is a discretionary power in the court to disapply what would otherwise be a provision requiring an obligatory sentence” (at para 7).

It appears to be impossible to discover the numbers of prisoners serving each of these variations: is the information even centrally recorded? It remains too early to say whether the ‘new’ automatic life sentence will be applied so broadly that ‘common law’ discretionary life sentences remain rare, as they have been since 2005. They may become more common, to fill a gap perceived to have been left by the abolition of IPP[[25]](#footnote-25). But perhaps life for the second listed offence will not actually apply in many cases because of the requirement of current and past sentences of 10 years or more. Data would be helpful.

The argument for indeterminate sentences, that ‘dangerous’ people should be locked up until they are proved no longer to be dangerous, is superficially attractive. But it is not very difficult to debunk that argument. Of course, it all depends on how you define ‘dangerous’. For example, any person, especially a drunk person, who rides a bicycle on the roads at night without bright lights on the bicycle, is ‘dangerous’. But not all such cyclists, even drunk cyclists, should be subject to an indeterminate sentence of imprisonment. Why not? First, there is a question of proportionality. Whether retributivist or utilitarian in our penal instincts, we all agree that sentences should be proportionate. Even drunk cyclists don’t deserve a life sentence. The difficulty is, of course, in deciding who is ‘dangerous’ and what is proportionate: assessing both ‘seriousness’ and ‘culpability’ are minefields (many ‘lifers’ have committed a one-off ‘moment of madness’ crime and are arguably less dangerous than those who plot their crimes in advance). I would argue that life sentences should only be imposed exceptionally, and only on an exceptionally ‘dangerous’ offender[[26]](#footnote-26). Bottoms and Brownsword (1983) argued that people should only be detained because of the risk that they present if that risk is ‘vivid’[[27]](#footnote-27). The concept of vivid danger has three main components: **seriousness** (what type and degree of injury is in contemplation?); **temporality**, which breaks down into **frequency** (over a given period, how many injurious acts are expected?) and **immediacy** (how soon is the next injurious act?), and **certainty** (how sure are we that this person has acted as predicted?). The need to limit the numbers by asking such questions may be obvious. But there is a second factor to add to proportionality. It is important to ensure that the sentence is fair: we have to be particularly vigilant that the ‘system’ works ‘fairly’. If it cannot be made to work fairly, we may have to take the drastic step of arguing for the abolition of all indeterminate sentences. We return to this discussion later in this paper. For now we consider briefly how the indeterminate sentence ‘works’ or is served in practice.

**Fixing the tariff**

All indeterminate sentence prisoners will nowadays know the minimum term they must serve, but these are calculated in different ways[[28]](#footnote-28).

*Adults convicted of murder*

For mandatory lifers, the judge first chooses the appropriate ‘starting point’ from Schedule 21 of the CJA 2003, as amended[[29]](#footnote-29). Having identified this, he or she then ‘weighs up’ any aggravating or mitigating factors not covered by the starting point to decide if the minimum term should be set higher or lower.

The starting points include provision for ‘whole life’ tariffs. In these cases, no Parole Board review date is set, meaning that the prisoner will never have an opportunity to be released. The legality of these life sentences without possibility of release (except on the very narrow grounds of compassionate release) has frequently been challenged. In *Vinter v UK[[30]](#footnote-30)*, the Grand Chamber of the ECHR upheld a complaint, concluding that a ‘whole life’ prisoner is entitled to know what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. By a majority of 16-1, they held that this applies from the moment the sentence is imposed. Thus the majority said (at para 122):

Although the requisite review is a prospective event necessarily subsequent to the passing of the sentence, a whole life prisoner should not be obliged to wait and serve an indeterminate number of years of his sentence before he can raise the complaint that the legal conditions attaching to his sentence fail to comply with the requirements of Article 3 in this regard. This would be contrary both to legal certainty and to the general principles on victim status within the meaning of that term in Article 34 of the Convention. Furthermore, in cases where the sentence, on imposition, is irreducible under domestic law, it would be capricious to expect the prisoner to work towards his own rehabilitation without knowing whether, at an unspecified, future date, a mechanism might be introduced which would allow him, on the basis of that rehabilitation, to be considered for release. A whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration.

This seems to me quite clearly right. Legal certainty requires that any life sentence prisoner knows at the beginning of his sentence how he may, even if not until a long time in the future, seek to secure his release from custody.

Sadly the Court of Appeal did not agree. In *Attorney General’s Reference (No 69 of 2013*) (also known as *Newell and McLoughlin*)[[31]](#footnote-31), a strong five-judge court held that whole-life sentences were not incompatible with the European Convention on Human Rights 1950 Art.3. Judges were to continue to impose them in exceptional cases. The compassionate release scheme provided for by s.30 of the Crime (Sentences) Act 1997 was compatible with Art.3, in that it provides offenders serving whole-life sentences with the possibility of release in exceptional circumstances. And in *Hutchinson v UK[[32]](#footnote-32)*, the Fourth Chamber of the European Court of Human Rights, by a majority[[33]](#footnote-33), appeared to climb down: they accepted the reasoning of the Court of Appeal

that it was of no consequence that the Lifer Manual[[34]](#footnote-34) had not been revised, since it was clearly established in domestic law that the Secretary of State was bound to exercise his power under section 30 in a manner compatible with Article 3. If an offender subject to a whole life order could establish that “exceptional circumstances” had arisen subsequent to the imposition of the sentence, the Secretary of State had to consider whether such exceptional circumstances justified release on compassionate grounds. Regardless of the policy set out in the Lifer Manual, the Secretary of State had to consider all the relevant circumstances, in a manner compatible with Article 3. Any decision by the Secretary of State would have to be reasoned by reference to the circumstances of each case and would be subject to judicial review, which would serve to elucidate the meaning of the terms “exceptional circumstances” and “compassionate grounds”, as was the usual process under the common law. In the judgment of the Court of Appeal, domestic law therefore did provide to an offender sentenced to a whole life order hope and the possibility of release in the event of exceptional circumstances which meant that the punishment was no longer justified (at para 23).

Following these disappointing decisions, it remains totally unclear when or indeed whether the Government might consider releasing a ‘whole life’ sentence prisoner on rehabilitative grounds, rather than on grounds of terminal ill-health. Is it not, as the Court said in *Vinter*, capricious (or simply unfair?) to expect the prisoner to work towards his own rehabilitation without knowing whether, at an unspecified, future date, a mechanism might be introduced which would allow him, on the basis of that rehabilitation, to be considered for release?

So much for the ‘whole life’ sentence, currently imposed on 53 convicted murderers. All other people convicted of murder will have their minimum term calculated in accordance with the rules laid down in Schedule 21 of the CJA 2003 (as amended). This lays down a hierarchy of rigid ‘starting points’ (30 years, 25 years, 15 years or 12 years). Are these starting points designed to reflect retribution and deterrence (or other penological justifications) or simply periods somewhat randomly introduced by punitive Parliaments? The minimum term for adults is unchangeable (subject to the ordinary rules of appeal). It would be useful to see analyses of the tariffs fixed over the years – it would seem likely that they are ‘clustering’ around the starting points. In any case, they are definitely very much longer than they were 50 years ago[[35]](#footnote-35).

*Detention during Her Majesty’s Pleasure (HMP)*

With offenders subject to the mandatory life sentence for juveniles, detention during Her Majesty’s Pleasure, there is a single starting point of 12 years. Since the decision of the House of Lords in *R (Smith) v Secretary of State for the Home Department[[36]](#footnote-36)*, HMP detainees whose tariffs have not expired, are exceptionally entitled to periodic reviews of progress in custody with the possibility of reduction in tariff. This case involved a girl convicted of murdering an elderly woman in 1993, an offence committed when she was 17, and the original minimum term had been fixed at 15 years. By the time of the hearing she was 30 years old. Counsel for the Crown had argued that the welfare principle, laid down in s. 44 of the Children and Young Persons Act 1933[[37]](#footnote-37), only applied to children and young persons and so any duty of continuing review was in effect spent. But Lord Bingham (with whom all members of the House agreed), disagreed with Counsel’s interpretation:

The requirement to impose a sentence of HMP detention is based not on the age of the offender when sentenced but on the age of the offender when the murder was committed, and it reflects the humane principle that an offender deemed by statute to be not fully mature when committing his crime should not be punished as if he were. As he grows into maturity a more reliable judgment may be made, perhaps of what punishment he deserves and certainly of what period of detention will best promote his rehabilitation. It would in many cases subvert the object of this unique sentence if the duty of continuing review were held to terminate when the child or young person comes legally of age (para 12).

The House of Lords held that the Secretary of State had a duty to keep the tariffs of HMP detainees under review. Interestingly, the purpose of the review is to determine if the existing tariff is still appropriate in the light of the detainee’s progress in custody; it is not simply a review of the original penological justifications (punishment, retribution, deterrence?). Detainees become eligible for a review once they have reached the halfway point of their current tariffs. Such reviews are not automatic; once the halfway point is reached, the detainees will be contacted by Team A in Public Protection Casework Section (PPCS) of the National Offender Management Service (NOMS) in the Ministry of Justice and invited to apply for a review[[38]](#footnote-38). The decision in *Smith* applied only to HMP detainees sentenced before 30 November 2000, but the Government decided to extend it to all HMP prisoners, irrespective of when they were sentenced. In subsequent cases, the courts seem to have accepted that there are three possible grounds on which to reduce the specified term:

* i) The prisoner has made exceptional progress in prison, resulting in a significant alteration in the detainee's maturity and outlook since the commission of the offence, and a significant reduction in the level of risk posed to public safety. The exceptional progress must have been sustained over a lengthy period of time and in more than one establishment.
* ii) The prisoner's welfare may be seriously prejudiced by his continued imprisonment in a way that cannot be safely managed in custody.

 iii) There is a new matter which calls into question the basis of the decision to set the term at a particular level.

There are a number of such reviews now reported, and all appear to turn on (i): most are unsuccessful in that the offender is unable to show ‘exceptional’ progress[[39]](#footnote-39). However, there have been two recent successful applications:

* *F[[40]](#footnote-40)*. F was 14 when convicted of murder in 2010. Wilkie J in the Divisional Court reduced his tariff from 9 years to 8 years on the basis of exceptional and maintained progress in custody, concluding that

a reduction in his tariff of a period of one year would enable those planning his sentence to move at *an appropriate pace[[41]](#footnote-41)* towards placing him in open conditions, so as to give him the best opportunity of ensuring that the progress which he has made is maintained and built on so that, when he is eventually released, he is in the best position to pursue a useful, law abiding and responsible life (para 34).

* *Bonelli[[42]](#footnote-42)*. In 2008, Bonelli (then aged 17) was sentenced to HMP with a minimum term of 18 years, later reduced on appeal to 15 years. In 2016, Jeremy Baker J noted many positive aspects of Bonelli's “maturing character”, sustained over a lengthy period of time, concluding that none of these criteria would be conclusive in establishing exceptional progress, nor will they collectively.

However, I am satisfied that, by reason of the further roles which he has undertaken, including his gym mentoring of injured and disabled offenders, the support which he gives to those undertaking the Resolve course, and when trained, his services as a listener, amply fulfill the extra element of his assumption of responsibility, whereby he has shown himself to be trustworthy for a sufficient period of time. In the circumstances I am satisfied that his progress has not only been exceptional but also, given the low base from which he started, unforeseen. Therefore I consider that although his eventual release, if at all, will be entirely a matter for the Parole Board, these factors should be recognised by a reduction in his tariff of one year, to 14 years” (paras 31-32).

*Other indeterminate sentences*

Turning to other forms of life sentence, as well as IPP when it was still available, the trial judge fixes the minimum term in order to reflect the seriousness of the offence or the combination of the offence and other offences connected with it. There are no statutory starting points, but the rules are laid down in s. 82A of the Powers of the Criminal Courts (Sentencing) Act 2000[[43]](#footnote-43). The minimum term is not meant to reflect concerns about risk, but is calculated by deciding on the notional determinate period which would have been imposed had the judge not decided upon a life sentence, and then halving it. (The law permits a judge to decline to set a specified part for the sentence, but I know of no examples[[44]](#footnote-44)). The current version of s.82A provides that:

(1) This section applies if a court passes a life sentence in circumstances where the sentence is not fixed by law.

(2) The court shall, unless it makes an order under subsection (4) below, order that the provisions of [s. 28(5) to (8)](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=152&crumb-action=replace&docguid=I6652EDA0E44811DA8D70A0E70A78ED65) of the [Crime (Sentences) Act 1997](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=152&crumb-action=replace&docguid=I5FBD22F1E42311DAA7CF8F68F6EE57AB) (referred to in this section as the *“early release provisions”*) shall apply to the offender as soon as he has served the part of his sentence which is specified in the order.

(3) The part of his sentence shall be such as the court considers appropriate taking into account—

(a) the seriousness of the offence, or of the combination of the offence and one or more offences associated with it;

(b) the effect that the following would have if the court had sentenced the offender to a term of imprisonment—

(i) [s. 240ZA](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=152&crumb-action=replace&docguid=IE0BF26209FEB11E1A0E3F917BE5C12F7) of the [Criminal Justice Act 2003](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=152&crumb-action=replace&docguid=I5F97C0A0E42311DAA7CF8F68F6EE57AB) (crediting periods of remand in custody);

(ii) [s. 246](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=152&crumb-action=replace&docguid=IC2E2A3A07D2011DB9833E1CC4921FF0C) of the [Armed Forces Act 2006](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=152&crumb-action=replace&docguid=I87BB26F07CF611DB8CB9C33D1B0B4462) (equivalent provision for service courts);

(iii) any direction which the court would have given under [s. 240A](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=152&crumb-action=replace&docguid=I15F52C50261911DDA4CACD152F86E460) of the [Criminal Justice Act 2003](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=152&crumb-action=replace&docguid=I5F97C0A0E42311DAA7CF8F68F6EE57AB) (crediting periods of remand on bail subject to certain types of condition);

(c) the early release provisions as compared with [s. 244(1)](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=152&crumb-action=replace&docguid=ID769FE70E45211DA8D70A0E70A78ED65) of the [Criminal Justice Act 2003](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=152&crumb-action=replace&docguid=I5F97C0A0E42311DAA7CF8F68F6EE57AB)[[45]](#footnote-45).

(4) If the offender was aged 21 or over when he committed the offence and the court is of the opinion that, because of the seriousness of the offence or of the combination of the offence and one or more offences associated with it, no order should be made under subsection (2) above, the court shall order that, the early release provisions shall not apply to the offender…..

The Criminal Practice Direction 2015 explains the process in this way, summarising current practice (at para L.1 and L.2):

1. Section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 empowers a judge when passing a sentence of life imprisonment, where such a sentence is not fixed by law, to specify by order such part of the sentence (‘the relevant part’) as shall be served before the prisoner may require the Secretary of State to refer his case to the Parole Board. This is applicable to defendants under the age of 18 years as well as to adult defendants.
2. Thus the life sentence falls into two parts:

(a)  the relevant part, which consists of the period of detention imposed for punishment and deterrence, taking into account the seriousness of the offence, and

(b)  the remaining part of the sentence, during which the prisoner’s detention will be governed by consideration of risk to the public.

The mention of deterrence here is worth noting. Section 142 of the CJA 2003 provides that any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing—

(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.

But is well known that deterrence is ineffective unless offenders believe they will be caught and are prepared to desist[[46]](#footnote-46). Why is deterrence mentioned so often by sentencers in this context – and not reform and rehabilitation?

To sum up so far, all life sentence prisoners (except those subject to a whole life tariff) will have a minimum term imposed at the time of sentence. The process and the criteria for murderers, sentenced to a mandatory life sentence, is not the same as that for other ISPs. For murderers the criteria are based on the statutory ‘starting points’ of the Criminal Justice Act 2003. For all other ISPs, the length is based on ‘ordinary’ sentencing principles. But for all categories, this minimum term remains absolutely irreducible, except for those convicted of murder as juveniles, where we are starting to see some possibility of reducing the minimum term.

**The time in prison**

ISPs are treated differently to other prisoners, in part because of the length of time that they are likely to serve[[47]](#footnote-47), but also because the Parole Board is responsible for deciding when and if they will be released from prison. They are ‘managed’ by NOMS (the National Offender Management Service), where the PPCS (Public Protection Casework Section) is the single point of contact between prison and probation staff and the Parole Board, overseeing the whole sentence and parole process for ISPs [[48]](#footnote-48).

Until 2010, male[[49]](#footnote-49) ISPs had to move through set stages in the prison estate, starting in a ‘lifer centre’ and progressing through the system, eventually to an open prison, but more flexibility has now been introduced into the system, in part because of the short tariffs being served by so many of those serving IPPs, but also because of financial cuts and severe staff shortages which have encouraged more flexibility. Thus, ISPs may now be sent to a lower security category prison soon after sentence, if they are not perceived to be particularly risky. All ISP prisoners follow an ‘individual sentence pathway’, as PSO 4700, para 4.1.2. explains:

Identified risks will be addressed by a range of interventions, having regard to the availability of resources, and the ISP sentence plan must take account of what may be reasonably delivered through the sentence. Moreover, and fundamentally, it is the ISP’s responsibility to work to reduce his/her risk of harm to the point where the Parole Board can consider it safe to release them into the community.

This is an important statement, frequently repeated to ISPs: it is the prisoner’s responsibility to work to reduce his or her risk of harm. Yet they often feel powerless to do so, living within a difficult prison environment, and a creaking system. Back in 1991, Lord Woolf recommended in his *Report on the* *Prison Disturbances of 1990* that each prisoner should have a ‘compact’ or ‘contract’ setting out the prisoner’s expectation and responsibilities[[50]](#footnote-50). The Prison Service (or the Government?) has of course been wary of allowing anything which might be legally enforceable by the prisoner, but for Lord Woolf these compacts were a deliberate attempt to extract greater accountability from the system. It would be invaluable if an independent research project could evaluate the use and effectiveness of today’s sentence plans or ‘pathways’. My concern is that they are drafted in such general terms that they do little effectively to encourage swift progress through the system. Prisoners move from prison to prison, sometimes in line with their progress through the categorization process: aiming to get to an open prison (Category D). They can, of course, be moved for administrative or security reasons, or in order to better facilitate their rehabilitation (courses may be more readily available in some prisons than others). It is surely quite as much the prison system’s responsibility, as the prisoner’s, to facilitate reduction of risk and rehabilitation.

There has been much litigation in this area, despite the difficulty of obtaining legal aid. Here we focus on challenges to the failure of prisons to provide the courses which prisoners have been required to complete before they are likely to be released[[51]](#footnote-51). Interestingly the Government readily accepted that it was in breach of its public law duty “… to provide systems and resources necessary to afford to [ISPs] a reasonable opportunity to demonstrate that they are no longer dangerous”[[52]](#footnote-52), but the main debate has concerned whether this failure resulted in the sentences becoming unlawful. In *R* (*Wells, James, Lee, Walker) v Parole Board, Secretary of State for Justice*[[53]](#footnote-53) where Jack Straw, as Minister of Justice, admitted the breach of his public law duty, the House of Lords held that that did not make the sentences unlawful. The European Court of Human Rights, however, in *James, Wells and Lee v UK*[[54]](#footnote-54) held that, following the expiry of their ‘tariffs’ and until steps had been taken to progress them through the prison system with a view to their access to appropriate rehabilitative courses, their detention had been arbitrary and therefore unlawful within the meaning of Art 5(1). However, the Supreme Court insisted and in *R (Kaiyam) v Secretary of State for Justice[[55]](#footnote-55)* it held that it is implicit in the scheme of ECHR Art.5 that the state had a duty to provide a reasonable opportunity for a prisoner subject to an indeterminate sentence to rehabilitate himself and to demonstrate that he no longer presented a danger to the public. However, for the unanimous Supreme Court, that was an ‘ancillary duty’ which could not be brought within the express language of either Art.5(1)(a) or Art.5(4) and did not therefore affect the lawfulness of detention. The Supreme Court held that the appropriate remedy for any breach of such a duty was not release of the prisoner but an award of damages for legitimate frustration and anxiety[[56]](#footnote-56).

A reading of the case law makes it transparently clear how frustrating it must be for a prisoner to be told that it is up to him to reduce his risk of harm. And it is not only the lack of availability of courses. Another obvious example is the use of ROTL (Release on Temporary License). ROTL releases have long been seen as a way for prisoners to prove that it is no longer necessary for them to be detained. Yet the rules on who gets ROTLs can be changed administratively and without warning[[57]](#footnote-57). Prisoners who deny their offences, or who cannot recall them, also face frustration as they are held to be unsuitable for courses which might help them show they have lowered their risk of re-offending[[58]](#footnote-58). Another barrier for ‘lifers’ is the administration’s reluctance to move prisoners from closed to open conditions without any Parole Board review, but as *R (Guittard) v Secretary of State for Justice[[59]](#footnote-59)* shows, there can be real delays built into the process. Why had it become the administration’s invariable practice to wait for the advice of the Parole Board before moving suitable ISPs to open conditions[[60]](#footnote-60)?

This brief review of the way an ISP prisoner moves through the system serves simply to illustrate how difficult it can be for a prisoner to progress, and how long it can take for ‘progress’ to happen. For those with short minimum terms, in particular, the slow pace of prison life, the lack of urgency, can be excruciatingly frustrating[[61]](#footnote-61). An even more remarkable fact about the ISP’s journey through the system is the absence of any change in status once the prisoner has completed the minimum term. It might be expected that post-tariff prisoners, now ‘only’ detained for reasons of public protection, would enjoy improved conditions, privileges or status. But this is not the case. The only change is ‘regular’ hearings before the Parole Board, to which we now turn.

**The role of the Parole Board**

It is the Parole Board who decides when and if an ISP should be released. As long ago as 1991, Parliament introduced a statutory test for the Parole Board to apply in relation to the release of a discretionary life prisoner[[62]](#footnote-62). This test is now to be found in section 28(6)(b)[[63]](#footnote-63) of the Crime (Sentences) Act 1997, and applies to all life sentence prisoners for whom a minimum term has been fixed:

(6) The Parole Board shall not give a direction under subsection (5) above with respect to a life prisoner to whom this section applies 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.

Controversially, the Secretary of State still maintains the right to issue Directions to the Board: see s. 32(6) of the Criminal Justice Act 1991. However in July 2013, the Secretary of State withdrew all Directions, other than those relating to consideration of suitability for open conditions[[64]](#footnote-64). This was, as Chris Grayling, then Minister of Justice, explained in a Written Ministerial Statement, because the Legal Aid, Sentencing and Punishment of Offenders Act 2012

contains a clear and consistent statutory release test that the board must apply in making those decisions—that is, the board must not direct a prisoner’s release unless their detention is no longer necessary for the protection of the public. The LASPO Act applies this ‘public protection’ test to all cases which come before the board and also provides a power for the [Secretary of State](https://en.wikipedia.org/wiki/Secretary_of_State) to amend the test by order. In view of this, I consider that it is no longer necessary or appropriate for the directions to remain in place[[65]](#footnote-65).

The statutory test suggests that the prisoner bears a very real burden: he or she has to satisfy the Parole Board that it is no longer necessary for the protection of the public that he should be confined before the Board may direct his or her release. The details of the process has varied over the years, but are now governed by the Parole Board Rules 2011[[66]](#footnote-66), the Parole Board (Amendment) Rules 2014[[67]](#footnote-67), the Generic Parole Process for Indeterminate and Determinate Sentenced Prisoners[[68]](#footnote-68), and the Parole Board’s Oral Hearing Guide (published in August 2014)[[69]](#footnote-69). In brief, an ISP prisoner’s case enters the ‘generic parole process’ 26 weeks before the date on which the Parole Board lists the case for hearing. Six weeks before this period starts, PPCS completes the core dossier and advises the prisoner of the commencement of their parole process together with their right to instruct legal representatives. They also remind prisons of the outstanding issues identified at previous hearings which need to be covered in the new reports. During the 26 ‘GPP period’ fresh reports are written and disclosed, the case will be considered under the Member Case Assessment (MCA) process, and directions will be issued. The MCA is done by a single member of the Parole Board who decides whether:

* + the case is appropriate for an oral hearing and instructs that a date be secured for the hearing.
	+ the case is not quite ready for an oral hearing and issue Directions for additional or missing information, as well as identifying potential witnesses that may be required.
	+ the case is not ready for full assessment and Directions will be issued, and the case is adjourned for a set period of time.
	+ to make a negative decision based on the papers. This remains provisional for 28 days, after which it will become final, unless the prisoner has successfully requested an oral hearing (through a review by the duty member of the Parole Board).
	+ to defer the case for a defined period of time

There were significant changes to the Parole Board oral hearing process as a result of the Supreme Court’s judgment in *Osborn, Booth v Parole Board[[70]](#footnote-70)*. The Court held that the removal of the ‘right’ to an oral hearing in the Parole Board (Amendment) Rules 2009[[71]](#footnote-71) was not lawful. Lord Reed was explicit that the decision was grounded in the common law, and not simply on the European Convention: “Common law standards of procedural fairness” mean that the Parole Board should hold an oral hearing whenever fairness to the prisoner requires such a hearing, in the light of the facts of the case and the importance of what is at stake. Lord Reed’s concern was for the practical importance of fairness: he suggested that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested (see para 67). He also identified two other important values:

 - the avoidance of a sense of injustice which the person who is the subject of the decision will otherwise feel (“justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions” para 68). He cited research which

reveals the frustration, anger and despair felt by prisoners who perceive the board’s procedures as unfair, and the impact of those feelings upon their motivation and respect for authority (see Padfield, *Understanding Recall 2011,* University of Cambridge Faculty of Law Research Paper No 2/2013 (2013)). The potential implications for the prospects of rehabilitation, and ultimately for public safety, are evident (at para 70).

- “the rule of law”. He pointed out many flaws in current practices and procedures; discusses the “institutional reluctance” to hold oral hearings, and criticizes a narrow concern for costs:

In the context of parole, where the costs of an inaccurate risk assessment may be high (whether the consequence is the continued imprisonment of a prisoner who could safely have been released, or re-offending in the community by a prisoner who could not), procedures which involve an immediate cost but contribute to better decision- making are in reality less costly than they may appear (para 72).

The Board should not give way to the temptation …. to discount the significance of matters which are disputed by the prisoner in order to avoid the trouble and expense of an oral hearing (para 91).

As a result of *Osborn and Booth*, oral hearings (often by video link from the Parole Board headquarters in the Ministry of Justice) are much more common. But the test for release remains the same. In *R (Sturnham) v Parole Board[[72]](#footnote-72)*, the Court explored in detail the proper test to be applied by the Parole Board when determining whether to direct the release of a person subject to a sentence of IPP. The Court dismissed Sturnham’s appeal against the Parole Board’s refusal to release him. Sturnham had been sentenced in January 2007 to IPP, with a minimum term or tariff of 2 years 108 days, for an offence of manslaughter resulting from a fight outside a pub. The sentencing judge had said that, had it not been appropriate to impose IPP, a sentence of six years’ imprisonment would have been appropriate. Deducting half of that, and the time spent in custody on remand[[73]](#footnote-73), gave the minimum term.

This minimum term expired in May 2009. Shockingly, Sturnham’s first Parole Board review took place only in May 2010 – i.e. he had already served a year more than the minimum term before the possibility of release was even considered. Normally ISP cases are referred to the Parole Board some two years before the expiry of their ‘tariff’ as they are expected to serve perhaps two years being ‘tested’ in open conditions before they are recommended as being suitable for release by the prison and probation authorities in their reports to the Parole Board[[74]](#footnote-74). When the Board met in May 2010, it decided that Sturnham had made significant progress, but still presented a low risk of re-offending and a medium risk of serious harm. It therefore did not order release, but recommended that he be transferred to an open prison. This transfer took place in August 2010. At a hearing the next year, the Parole Board directed his release on licence, in a decision dated 7 September 2011.

Meanwhile, after the Parole Board declined to order his release in May 2010, Sturnham issued judicial review proceedings. He claimed that the Parole Board had applied the wrong test and claimed damages for the delay in holding the review[[75]](#footnote-75). The Supreme Court (Lord Mance, with whom Lords Neuberger, Sumption, Reed and Carnwarth simply agreed) dismissed the appeal. Much of the argument concerned the question whether it was right that the bar should be set so high, especially for IPPs, who will only have received their indeterminate sentence because they posed a significant risk of serious harm. The argument the Court rejects is that once they come below that threshold they should be released. Perhaps surprisingly, in *Sturnham*, Lord Mance gives prominence in his analysis to the judgment of Stuart-Smith LJ in *R v Parole Board, ex p Bradley[[76]](#footnote-76)*, a judgment handed down on 4 April 1990 and which therefore preceded the major changes to release procedures introduced by the Criminal Justice Act 1991, let alone the introduction of IPP in the CJA 2003. He cites the following passage:

the sentencing court recognises that passing a life sentence may well cause the accused to serve longer, and sometimes substantially longer, than his just deserts. It must thus not expose him to that peril unless there is compelling justification for such a course. That compelling justification is the perception of grave future risk amounting to an actual likelihood of dangerousness. But of course the court’s perception of that future risk is inevitably imprecise. It is having to project its assessment many years forward and without the benefit of a constant process of monitoring and reporting such as will be enjoyed by the Parole Board. When at the post-tariff stage the assessment comes to be made by that board they are thus much better placed to evaluate the true extent of the risk which will be posed by the prisoner’s release. And they are a more expert body, custom built by Parliament for the purpose. Given those considerations, and given too that their recommendation for release on licence, if accepted by the Secretary of State, will have immediate effect in terms of endangering public safety – quite unlike the decision of the trial judge whose sentence would in any event have protected society for an appreciable time – it seems to us perfectly appropriate for the Parole Board to apply some lower test of dangerousness, i.e. one less favourable to the prisoner (*Bradle*y, at page 145).

The appellant in *Sturnham* appears to have argued that *Bradley* was wrongly decided and should either be distinguished or overruled. This was because Bradley had lost his application: the test for dangerousness applied at that time was acceptable[[77]](#footnote-77). Lord Mance criticises the decision in *Bradley* as going too far in equating significant risk with mathematical likelihood, though it is not clear which part of Stuart-Smith LJ’s judgment does this. In *Bradley*, Stuart Smith LJ was clear that “the touchstone of acceptability remains unclear”. He denied a mathematical formula: he accepted that the level of risk required to justify continued detention of post-tariff discretionary lifers should remain undefined:

Yet undefined we fear it must remain. Unless the required test is expressed in percentage terms (in the same way that likelihood arguably implies more than 50 per cent.), which is surely impossible, it seems inevitable that one can say really no more than this: first, that the risk must indeed be “substantial” (Mr. Fitzgerald's fall-back position), but this can mean no more than that it is not merely perceptible or minimal. Second, that it must be sufficient to be unacceptable in the subjective judgment of the Parole Board to whom Parliament has of course entrusted the decision — the decision, that is, whether to recommend release on licence, which recommendation is itself a necessary precondition to the exercise of the Secretary of State's final discretion. Third, that, in exercising their judgment as to the level of risk acceptable, the Parole Board must clearly have in mind all material considerations. Certainly one such consideration should be the intrinsic and increasing unfairness of leaving the prisoner languishing in goal, ex hypothesi for longer than punishment requires, unless there is sufficient public risk to justify this.

And finally Stuart Smith LJ added:

The Parole Board have to carry out a balancing exercise between the legitimate conflicting interests of both prisoner and public. They must clearly recognise the price which the prisoner personally is paying in order to give proper effect to the interests of public safety. They should recognise too that it is a progressively higher price. Accordingly, the longer the prisoner serves beyond the tariff period, the clearer should be the Parole Board's perception of public risk to justify continued the deprivation of liberty involved.

Stuart Smith LJ was writing this in April 1990. It is intriguing how much time was spent by the Supreme Court in 2013 interpreting a case decided so long ago, indeed even before prisoners had secured the right to an oral hearing, and indeed at a time when the Human Rights Act 1998 was no more than a twinkle in New Labour’s imagination.

A key question in *Sturnham* was whether the criteria for imposing a particular sentence needed to line up with, or match, the criteria for release. The issue had been raised in *R v Smith[[78]](#footnote-78),* of which decision Lord Mance rather endearingly said “I am far from satisfied that it can be regarded as the last word”. Why not? According to Lord Mance, *Smith* was relied upon as establishing that, when considering whether to impose a sentence of IPP, the sentencing court was not making a predictive judgment of risk at the expiry of the tariff period:

If that is right, then there was a marked distinction between the criteria governing imposition of a discretionary life sentence (as hitherto understood) and a sentence of IPP. The reasoning in *Ex p Bradley* relies at least in part upon the predictive assessment in relation to the post-tariff period which a sentencing court makes when considering whether to impose a discretionary life sentence, and the distinction between that assessment and the contemporary evaluation of the Parole Board at the post-tariff review stage (para 32).

Tellingly, Lord Mance said that in *Smith*, the primary issue was whether it was “*legitimate*” (italics added) to pass a sentence of IPP for armed robbery and possession of a firearm on a career criminal who had already been recalled to prison to serve the remainder of a previous life sentence, also imposed for armed robbery. With respect, the question was much simpler than that – whether the sentence was lawful. The Court in *Smith* did not mention legitimacy or the word ‘legitimate’. It is hardly surprising that Smith lost his appeal: as Lord Phillips said,

it is implicit that the question posed by section 225(1)(b) must be answered on the premise that the defendant is at large. It is at the moment that he imposes the sentence that the judge must decide whether, on that premise, the defendant poses a significant risk of causing serious harm to members of the public (at para 15).

The imposition of IPP was therefore clearly justified on the basis of an assessment of future risk. For Lord Mance in *Sturnham*,

There is nothing unrealistic about asking a sentencing judge to assess whether an offender presents a risk for a period which cannot reliably be estimated and may well continue after the tariff period (para 36).

Whilst this is true, there have been a huge number of appeals in this area. Is this because the law is too complicated or is the judiciary concerned about the ‘legitimacy’ of the system? The fact that so many people struggle to make sense of the law is hugely costly, confusing those who run prisons, as well as prisoners and their legal advisers, judges and indeed appellate courts. On the question of whether the test which the Parole Board must apply when considering whether to direct release from IPP is the same as that which the sentencing judge had to apply in order to pass a sentence of IPP in the first place, Lord Mance identified three recent cases in the Court of Appeal which must be wrong “so far as they suggest that the test which the Parole Board must apply when considering whether to direct release from IPP is precisely the same as that which the sentencing judge had to apply in order to pass a sentence of IPP in the first place” (at para 40):

1. *R (Bayliss) v Parole Board[[79]](#footnote-79)*, where a sentence of IPP with a minimum period of four years had been imposed on a man following his plea of guilty to an offence of causing death by dangerous driving. He had been on his way to buy drugs in a stolen car when he had crashed, killing his girlfriend. His minimum term expired in April 2008, and a few months later the Parole Board refused to direct his release or direct that he be moved to open conditions. The Court was very clear that the Parole Board’s decision was lawful, but both Cranston J. and the Court of Appeal had been content to proceed on the basis accepted by counsel that the test for release from IPP mirrored the test for imposition of the sentence.
2. R v *Pedley[[80]](#footnote-80)*, where three prisoners lost their (separate) appeals against sentence, the imposition of IPP. Hughes LJ held that a sentence of IPP was Convention compatible, because *inter alia* it was “proportionate to the risk of serious harm, particularly since when the tariff sentence attributable to the instant offence has been served, the system provides for release once that significant risk no longer exists” (para 22). This case meant, as David Thomas pointed out[[81]](#footnote-81), the chances of a successful challenge to the imposition of a sentence of IPP on the ground that the sentence did not comply with the Convention were minimal. Yet now the Supreme Court doubts some of the reasoning.
3. *Ex p Walker* in the Court of Appeal[[82]](#footnote-82), where Lord Phillips CJ described the primary object of IPP as being “to detain in prison serious offenders who pose a significant risk to members of the public of causing serious harm by further serious offences until they no longer pose such a risk” (para 35). That was the case which went on to the Supreme Court, and thence to the European Court of Human Rights[[83]](#footnote-83). Lord Phillips was clearly wrong if he was saying that the Parole Board will direct release if the prisoner no longer poses a significant risk of causing serious harm.

On the law, Lord Mance is clearly right. Although IPP could only be imposed if the court was satisfied of “a significant risk to members of the public of serious harm occasioned by the commission of further specified offences”, release depends upon the Parole Board being “satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined”. As Lord Mance says,

In introducing a sentence of IPP into the same framework for release as applies to discretionary life sentences, Parliament must on the face of it have intended to apply to sentences of IPP the same test for release as for discretionary life sentences, again even though that differed from the test for imposition (at paragraph 42).

*The approach of the European Court of Human Rights*

Perhaps surprisingly, in *Sturnham* Lord Mance dealt only very briefly with the submission that the Convention requires that any decision to maintain detention becomes “illegitimate” if “based on grounds that had no connection with the objectives of the legislature and the court or on an assessment that was unreasonable in terms of those objectives” (see para 47). He simply refers to three key paragraphs in *Van Droogenbroeck v Belgium[[84]](#footnote-84)*, *M v Germany[[85]](#footnote-85)* and *James v United Kingdom[[86]](#footnote-86)*. But the decision in *James* deserves a much fuller consideration. Here the Court was unanimous in holding that compliance with national law is not sufficient in order for a deprivation of liberty to be considered ‘lawful’ within the meaning of Article 5(1). There are in fact three tests:

1. *Existence of a causal connection* There must be a sufficient causal connection between the applicants’ convictions and the deprivations of liberty at issue.
2. *Compliance with domestic law*
3. *Freedom from arbitrariness* 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.

Although acknowledging that the notion of ‘arbitrariness’ varies depending on the type of detention involved, the Court explained what might make detention arbitrary (at para 192-194):

1. 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[[87]](#footnote-87) ;
2. both the order to detain and the execution of the detention must genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5(1) [[88]](#footnote-88);
3. there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention[[89]](#footnote-89).
4. There must also be a relationship of proportionality between the ground of detention relied upon and the detention in question.[[90]](#footnote-90)

The prisoners in *James* won their case in the European Court of Human Rights. The Court was 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, it was the lack of offending behaviour courses and the impact of this on their detention, which rendered it unlawful.

Where a prisoner is in detention solely on the grounds of the risk that he is perceived to pose, regard has to be had to the need to encourage his rehabilitation. This means that prisoners have to be given reasonable opportunities to undertake courses aimed at addressing their offending behaviour and the risks they posed.  The European Court of Human Rights was quite clear: while Art. 5(1) did not impose any absolute requirement for prisoners to have immediate access to all courses they might require, any restrictions or delays due to resource considerations had to remain “reasonable”.  Following the expiry of the applicants’ tariff periods and until steps had been taken to progress them through the prison system with a view to their access to appropriate rehabilitative courses, their detention had been arbitrary and therefore unlawful within the meaning of Article 5(1). This is the surely the issue which troubles Lord Mance in *Sturnham* when he worries about the legitimacy of the sentence. In fact, the important aim of rehabilitation should be relevant even before tariff expiry. The punitive part of the sentence does not exclude the powers-that-be from helping the prisoner start on the long road to ‘re-integration’. It is surely appropriate for efforts towards rehabilitation to be made throughout the sentence.

*Is the Parole Board an independent court or tribunal?*

Inevitably, perhaps, most ISPs spend many years in custody. Art 5 (4) of the European Convention unsurprisingly provides that:

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.

It is extraordinary that the decision of the Court of Appeal in *R. (Brooke) v Parole Board[[91]](#footnote-91)* seems to have left not only the political agenda, but also the agenda of prisoners and their legal advisers. In *Brooke*, the Court of Appeal held that the Parole Board did not satisfy the requirements of Art 5(4) ECHR. The then Lord Chief Justice, Lord Phillips, concluded:

Neither the Secretary of State nor his Department has adequately addressed the need for the Parole Board to be and to be seen to be free of influence in relation to the performance of its judicial functions. Both by Directions and by the use of his control over the appointment of members of the Board the Secretary of State has sought to influence the manner in which the Board carries out its risk assessment. The close working relationship between the Board and the unit acting as its sponsor has tended to blur the distinction between the executive role of the former and the judicial role of the latter (at para.78).

The Ministry of Justice’s Consultation paper *The Future of Parole* (Consultation Paper 14/09) then set out options for the future status and functions of the Parole Board. Acknowledging that the Board was no longer just a body advising the executive (the Crown) on the exercise of its prerogative, but had evolved into a more court-like body that makes decisions about the safe release of offenders back into the community, the consultation asked whether the Board should be a court, a tribunal or hold some other status. Sadly, the debate seems to have frozen with the election of May 2010[[92]](#footnote-92).

The decision in *Brooke* was discussed in the Court of Appeal in *R (McGetrick) v Parole Board, Secretary of State for Justice[[93]](#footnote-93)* where the Court held unanimously (allowing the appeal from the Divisional Court) that the Board had the power to make an interlocutory direction requiring evidence submitted by the Secretary of State to the Board, in this case allegations and evidence of offences that had never been tried, to be excluded from the final dossier of material taken into account by the particular panel of the Board deciding on whether to release a prisoner on licence. The case turned on the interpretation of the words in [s. 239(3) of the Criminal Justice Act 2003](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&&context=21&crumb-action=replace&docguid=I9F0BA220E44F11DA8D70A0E70A78ED65):

The Board must, in dealing with cases in which it makes recommendations…, consider any documents given to it by the Secretary of State…

As Pill LJ put it,

I would uphold the power of the Board, acting judicially, to exclude a document or documents from consideration by the panel making the recommendation. I do not consider that would breach [section 239(3)](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&&context=21&crumb-action=replace&docguid=I9F0BA220E44F11DA8D70A0E70A78ED65) . The duty in the section is imposed on the Board, a statutory body, and not on a particular panel of its membership. The duty in the subsection is performed, in my judgment, provided a member or members of the Board have considered all documents given by the Secretary of State, even if the panel making the recommendation has not. That reading of the subsection is possible and should be followed to uphold the judicial independence of the Board (at para 36).

Whether or not the Parole Board should have the power to veto the material seen by an individual Panel is a difficult question. Any individual Panel of course has an obligation to act fairly and should be able to evaluate the weight that ought to be given to, for example, unsubstantiated hearsay evidence. But what is clear is that the Board is edging only very slowly to becoming an independent court or tribunal. The decision in *McGetrick* is welcome in that it reminds us of the vital importance of the need to protect the Board from an executive potentially interfering with its functions as a court. It is also welcome as a reminder of the unfinished business of the 2009 Consultation. The Court cites *Brooke* with approval – and yet the Government has still done nothing to transfer the Parole Board under the umbrella of Her Majesty's Courts and Tribunals Service or to increase and to safeguard its genuine ‘independence’ of Government. Indeed, in some ways, the Parole Board appears less ‘independent’ – now housed within the Ministry of Justice Headquarters, and with its website firmly embedded within that of the Ministry of Justice, for example.

**Questions arising**

It is not clear that it is an advance to repackage ‘lifers’ as ‘ISPs’. Not only does the term sound somewhat inhuman, it covers up one of the most extraordinary facts about the ‘ISP’ population: included within the label are the mandatory lifers, serving long minimum terms imposed under the rigid Schedule 21 of the CJA 2003, but also the IPPs, some of whom had a minimum term of less than a year[[94]](#footnote-94). Does it make sense to deal with both categories, indeed all eleven categories identified at the start of this article, together? The current law relating to ISPs is hugely complex. The courts find it difficult to apply the law with clarity and certainty.

No-one should receive an indeterminate sentence unless they have done a seriously heinous crime and are in some sense ‘dangerous’. The worst of the IPP regime was abolished in 2008, but there will continue to be many IPP prisoners in prison for many years. There is a strong argument for introducing a presumptive release date for all those with a minimum term of, say, less than five years. I would argue for a rebuttable presumption of release for all post-tariff ISPs. The burden of proof should rest squarely on the ‘system’ to justify post-tariff detention. It is worth remembering that the first declaration of incompatibility after the introduction of the Human Rights Act 1998 was in *R (ex p H) v Mental Health Review Tribunal, NELR and the SoS for Health[[95]](#footnote-95)* concerned the burden of proof before Mental Health Review Tribunals. The Government readily accepted then that the burden of proof there should lie on the state to prove the necessity of detention. Is the same argument applicable here? As well as a clear burden of proof, the current test for release should be examined. Is the bar too high?

It makes sense to divide indeterminate sentences into two different stages. The first part should be fixed according to ‘determinate’ rules[[96]](#footnote-96). But there is no obvious reason why this ‘punitive’ period cannot change (shrink) over time. First, the ‘balance’ between the various penological justifications for the sentence may change. And secondly, the assessment of both the offender and the seriousness of their offence may change[[97]](#footnote-97). We saw earlier how, since the decision in *R (Smith) v Secretary of State for the Home Department[[98]](#footnote-98)*, some minimum terms are now reviewed. This review process could be extended to all ISPs: either as an internal review, subject to judicial review, or externally by a court or strengthened Parole Board[[99]](#footnote-99).

If the punitive period should be reviewable, so too should be other decisions which influence a prisoner’s progress through the system. The focus throughout any ISP’s sentence should be on rehabilitation and re-integration, as well as public safety – what needs to be done to ensure that the prisoner can be ‘safely’ released. Prisons and the Parole Board are currently run on extraordinarily tight budgets. Many prisoners may be detained in prison well beyond their minimum term in part , or in large, measure because priority has not been given to speeding along and securing their release. The many ‘stories’ thrown up by the case law give pause for thought. A system which gave anxious consideration throughout a prisoner’s sentence to the justification for further detention would, it is argued, be both fairer and cheaper. And Stuart Smith LJ was surely right back in 1990 in *ex p Bradley* (*supra*) when he said that the price which the post-tariff prisoner pays in the interests of public safety is a progressively higher price. The longer an ISP serves beyond the tariff, the clearer should be the Parole Board's perception of public risk to justify continuing the deprivation of liberty.

Recently, in *R v Roberts[[100]](#footnote-100)*, which concerned appeals against sentence by thirteen IPP prisoners, the Lord Chief recognised the criticism which has

been made of the imbalance between the threshold test that brought an offender within the scope of an IPP, namely a significant risk to members of the public of serious harm occasioned by him of further specified offences and the threshold test for release, namely it was no longer necessary for the protection of the public that he should be detained

He also observed that,

there is some evidence that the effect of long periods of imprisonment or the recall to prison of those sentenced to IPP under their licence requirements may be either impeding their rehabilitation or increasing the risk they pose (both at para 45).

For the Lord Chief Justice,

It would appear that there is no likely solution other than (1) significant resources be provided to enable those detained to meet the current test for release which the Parole Board must apply or (2) for Parliament to use the power contained in [s.128](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=13&crumb-action=replace&docguid=I7522D1E0E44A11DA8D70A0E70A78ED65) of LASPO 2012 to alter the test for release which the Parole Board must apply or (3) for those in custody to be re-sentenced on defined principles specially enacted by Parliament (at para 46).

This is a welcome contribution to an important debate[[101]](#footnote-101). Building on the words of the Lord Chief Justice, I would suggest an urgent review of ISPs in theory, law, policy and practice. This article has sought to illustrate some of the confusions and complexities which currently surround the ISP today. Indeterminate or indefinite detention should be used sparingly, and monitored closely. Barriers to release should be legitimate, clearly articulated and fair.

1. Reader in Criminal and Penal Justice, University of Cambridge; Master of Fitzwilliam College, Cambridge. I am grateful to anonymous reviewers for their comments and would welcome further debate: do email nmp21@cam.ac.uk. [↑](#footnote-ref-1)
2. A drop of 6% compared to June 2015. With some reluctance, this article adopts the term ISPs – is it somewhat dehumanising? [↑](#footnote-ref-2)
3. Data comes from Offender Management Statistics Bulletin, England and Wales Quarterly January to March 2016 with Prison Population as at 30 June 2016, pages 5-6, published 28 July 2016, available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/541499/offender-management-statistics-quarterly-bulletin-jan2-mar-2016.pdf> and Parole Board Annual Report 2015-16, available at https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/539946/parole-board-annual-report-accounts-2015-16.pdf. [↑](#footnote-ref-3)
4. By s. 123 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. [↑](#footnote-ref-4)
5. A drop of 34% since the June 2012 peak of 6,080. Over the last twelve months, the IPP population has reduced by more than 600 (13%). [↑](#footnote-ref-5)
6. In 2015/16, the Parole Board considered the cases of 145 recalled lifers, and 254 recalled IPP prisoners (directing the re-release of most of them: 90 lifers and 155 IPP prisoners). Space precludes a detailed discussion in this article of the very significant periods that ISPs are spending on recall. [↑](#footnote-ref-6)
7. [2013] EWCA Crim 1027. [↑](#footnote-ref-7)
8. The Court of Appeal was considering life options available to sentencing judges for adults only. The reality is more complex because there are those in prison who are serving now-abolished sentences, and those sentenced when children. [↑](#footnote-ref-8)
9. See *Offen (No 2)* [2001] 1 WLR 253, [2001] Crim LR 63, where the Court of Appeal narrowed the interpretation of s. 2, stating that it only applied where the defendant constituted a significant danger to the public, and that the types of offences committed, together with the time that had elapsed between them, was relevant in determining the degree of danger the defendant posed to the public. [↑](#footnote-ref-9)
10. It became unavailable for those sentenced after 4 April 2005: see CJA 2003, [Sch.37(7) para.1](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&&context=15&crumb-action=replace&docguid=IF902C450E44711DA8D70A0E70A78ED65). [↑](#footnote-ref-10)
11. Subject to Sentencing Guidelines: current Guidelines (e.g. sexual offences appear only to ‘authorise’ life under s. 224A or 225(2) CJA 2003. [↑](#footnote-ref-11)
12. See (1968) 52 Cr App R 113; these criteria have been developed in many cases, for example *Wilkinson* (1983) 5 Cr App R (S) 105, *Attorney General’s Reference No 32 of 1996 (Whittaker)* [1997] 1 Cr App R(S) 261; *Chapman* [2000] 1 Cr App R 77. [↑](#footnote-ref-12)
13. *Lang* [2005] EWCA Crim 2864; [2006] 1 WLR 2509, *Kehoe* [2008] EWCA Crim 819; [2009] 1 Cr App R(S) 41 [↑](#footnote-ref-13)
14. See Attorney-General's Reference No 27 of 2013 (R v Burinskas) [2014] EWCA Crim 334; Martin [2016] EWCA Crim 474. [↑](#footnote-ref-14)
15. [2012] EWCA Crim 3030. [↑](#footnote-ref-15)
16. at [2013] Crim LR 508. [↑](#footnote-ref-16)
17. Examples include [*Kehoe* [2009] 1 Cr App R (S) 9; *Wilkinson* [2009] EWCA Crim 1245](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&&context=8&crumb-action=replace&docguid=I5F81018061F711DE9B10F7761AEF35F5) [↑](#footnote-ref-17)
18. This might actually be two different forms of life sentence since the much amended s. 226 of the Criminal Justice Act 2003 and the even more amended s. 91 of the Powers of Criminal Courts (Sentencing) Act 2000 both provide for detention of life. I have been unable to find out whether there is anyone actually serving a sentence imposed under s. 91, but it is discussed in PSO 4700, para 1.7. [↑](#footnote-ref-18)
19. For an example of confusion in practice, see *McErlane* [2011] EWCA Crim 1717, where the Court of Appeal had to correct the terminology of two life sentences. If custody for life (of both varieties) was abolished, it would have to be made clear that the other options for ‘adults’ applied to those over the age of 18. [↑](#footnote-ref-19)
20. There are only two practical differences between discretionary life and IPP: the licence period in respect of an IPP can be brought to an end ten years after release (see s. 31A of the Crime (Sentences) Act 1997, as inserted by Schedule 18, paragraph 2, to the CJA 2003); and a whole life term could not be imposed in respect of IPP (Schedule 18, paragraph 4, to the 2003 Act). [↑](#footnote-ref-20)
21. The sentence of IPP had come under increasingly critical scrutiny, e.g. Jacobson, J, and Hough, M (2010) *Unjust Deserts: Imprisonment for Public Protection* Prison Reform Trust. [↑](#footnote-ref-21)
22. see *Pratt* [2106] EWCA Crim 923. [↑](#footnote-ref-22)
23. The list, to be found in a new Schedule 15B to CJA 2003 introduced by Schedule 18 of LASPOA, includes, it should be noted, offences which do not include life as their normal statutory maximum. There is a ‘get out’ clause in that the court may avoid the sentence if of the opinion in the particular circumstances it would be unjust to do so. [↑](#footnote-ref-23)
24. In compliance with s. 152(2) and s. 153(2) of the Criminal Justice Act 2003. [↑](#footnote-ref-24)
25. This was hinted at in *Saunders* (above). See *Burinskas* [2014] EWCA Crim 334; *Fernandez* [2014] EWCA 2405; *Meddlicott* [2016] EWCA Crim 55. What is clear is that, as the number of life sentence prisoners reduces, so the number of extended sentences being imposed increases. There has been a 50% increase over the last 12 months: at 30 June 2016, nearly 3,000 (2,949) prisoners were serving an extended sentence (see fn 1 at p. 5). These sentences too can be disproportionate, especially given the way the recall rules currently work: see Padfield, N. (2013) *Understanding Recall 2011* University of Cambridge: Legal Studies Research Studies Paper No 2/2013 (at papers.ssrn.com/sol3/papers.cfm?abstract\_id=2201039). [↑](#footnote-ref-25)
26. Padfield, N ‘The sentencing, management and treatment of ‘dangerous’ offenders’, 2010 Council for Penological Co-operation, Council of Europe, available at [http://www.coe.int/t/dghl/standardsetting/cdpc/PC-GR-DD/PC-CP(2010)10%20rev%205\_E%20\_vs%2026%2001%2011\_%20-%20THE%20SENTENCING%20MANAGEMENT%20AND%20TREATMENT%20OF%20DANGEROUS%20OFFENDERS.pdf](http://www.coe.int/t/dghl/standardsetting/cdpc/PC-GR-DD/PC-CP%282010%2910%20rev%205_E%20_vs%2026%2001%2011_%20-%20THE%20SENTENCING%20MANAGEMENT%20AND%20TREATMENT%20OF%20DANGEROUS%20OFFENDERS.pdf) [↑](#footnote-ref-26)
27. Bottoms, A.E. and Brownsword, R. (1983), ‘Dangerousness and Rights’ in J. Hinton (ed) *Dangerousness: Problems of Assessment and Prediction,* Allen & Unwin [↑](#footnote-ref-27)
28. For a history of ‘tariffs’, see Padfield, N., ‘Tariffs in Murder Cases’ [2002] Crim LR 192-204; a practical explanation of the law is to be found in PSI 29/2010, written for prison staff who manage prisoners serving an indeterminate sentence. [↑](#footnote-ref-28)
29. See s. 269 CJA 2003. [↑](#footnote-ref-29)
30. (2016) 63 EHRR 1 (decided July 2013). [↑](#footnote-ref-30)
31. [2014] EWCA Crim 188. [↑](#footnote-ref-31)
32. (2015) 61 EHRR 13. [↑](#footnote-ref-32)
33. Note the wise and witty dissenting judgment of the about-to-retire Judge Kalaydjieva, of Bulgaria. [↑](#footnote-ref-33)
34. Prison Service Order (PSO) 4700 used to be known as the Lifer Manual but is now known as the Indeterminate Sentence Manual. [↑](#footnote-ref-34)
35. See Padfield, N. (2002) Tariffs in Murder Cases [2002] *Crim LR* 192-204; Mitchell, B. and Roberts, J., (2012) *Exploring the Mandatory Life Sentence for Murder* Oxford: Hart; and Mitchell, B. Identifying and punishing the more serious murders [2016] *Crim LR* 467-477, in which the author makes a convincing case for a fundamental review of the sentencing of murderers. [↑](#footnote-ref-35)
36. [2005] UKHL 51. [↑](#footnote-ref-36)
37. “Every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training”. [↑](#footnote-ref-37)
38. See PSO 4700, para 3.2.6 for details; also PSI 29/2010; 36/2010. The role of PPCS is discussed further at page xx below. [↑](#footnote-ref-38)
39. ‘Extremely good progress’ is not exceptional: *Boot* [2016] EWHC 1363 (Admin); see also *Anderson* [2016] EWHC 1100 (QB); *Cunliffe* [2015] EWHC 919 (Admin); *Mozid* [2014] EWHC 968 (Admin). It is interesting to note that these cases were all heard by different High Court judges: there appears to be no developing ‘specialisation’ (as for example with Leveson LJ and deferred prosecution agreements). The decision in *Cunliffe* was unsuccessfully challenged by way of judicial review: despite the procedural unfairness that the Victim Personal Statement should not have been considered by the judge when not disclosed to the applicant, there was no need for a fresh hearing. In *Anderson*,

Nicol J also heard an interesting argument based on the law of joint enterprise post-*Jogee* [2016] UKSC 8, but the Court held that this argument sought to impeach the conviction, not the sentence, and would be a matter for the Court of Appeal. [↑](#footnote-ref-39)
40. Unreported, 26 February 2016. [↑](#footnote-ref-40)
41. Italics added. [↑](#footnote-ref-41)
42. [2016] EWHC 1293 (QB). [↑](#footnote-ref-42)
43. Added by s.60 of the Criminal Justice and Court Services Act 2000. [↑](#footnote-ref-43)
44. The Court of Appeal allowed appeals against whole life orders in two rape cases in *Oakes and others* [2012] EWCA Crim 2435: the whole life order for Roberts was reduced to a minimum term of 25 years, and in the case of Simmons it was reduced to 10 years. [↑](#footnote-ref-44)
45. The much amended ‘duty to release’ provision. [↑](#footnote-ref-45)
46. Von Hirsch, A. et al (1998) *Criminal Deterrence and Sentence Severity*, Oxford, Hart. [↑](#footnote-ref-46)
47. Although many IPP prisoners received very short minimum terms. [↑](#footnote-ref-47)
48. See pages 10-11 of the 160-page *Generic Parole Process for Indeterminate and Determinate Sentenced Prisoners* (GPP) (PSI 22/2015); and PSO 4700, chapter 1 for a detailed description of their role. [↑](#footnote-ref-48)
49. Women have always been subject to a more flexible system, in large measure due to the small number of women ISPs. [↑](#footnote-ref-49)
50. See *Woolf Report* (1991), paras 1.183-1.185. [↑](#footnote-ref-50)
51. The problem also exists in Scotland: see *Quinn v Scottish Ministers* (No 2) [2016] CSOH 67. [↑](#footnote-ref-51)
52. As Lord Dyson formulated it (at para 28, in *R* (*Wells, James, Lee, Walker) v Parole Board, Secretary of State for Justice* [2009] UKHL 22). This is now sometimes known as the “*James* public law duty”. [↑](#footnote-ref-52)
53. [2009] UKHL 22; for a fuller analysis, see [2009] 9 *Archbold News* 6. [↑](#footnote-ref-53)
54. (2013) 56 EHRR 12; see my blog: <http://wp.me/p2Agn6-7T>. [↑](#footnote-ref-54)
55. [2014] UKSC 66. [↑](#footnote-ref-55)
56. The European Court of Human Rights may have conceded: see the admissibility decision in *Kaiyam v UK* at (2016) 62 EHRR SE13. [↑](#footnote-ref-56)
57. See for example *R (Gilbert) v Secretary of State for Justice* [2015] EWCA Civ 803. [↑](#footnote-ref-57)
58. Again, the prisoner loses: *R (Weddle) v SSJ* [2016] EWCA Civ 38. [↑](#footnote-ref-58)
59. [2009] EWHC 2951 (Admin). [↑](#footnote-ref-59)
60. It is not clear whether this practice has changed post-*Guittard*. Perhaps it has: but the main change appears to have been an increase in the proportion of ISPs released from closed prison conditions. In 2013, 27% of released ISPs were released from closed conditions, compared with 52% in 2015 (see NOMS data cited at footnote 3). [↑](#footnote-ref-60)
61. For more details on the challenges facing prisoners, see HM Inspectorate of Prisons’ Annual Report 2015-16: https://www.justiceinspectorates.gov.uk/hmiprisons/inspections/annual-report-2015-2016/ . [↑](#footnote-ref-61)
62. See s. 34(4)(b) CJA 1991. [↑](#footnote-ref-62)
63. What a ridiculous way laws are amended in this country: sections 1-27, and s. 29, of the Crime (Sentences) Act 1997 have long since been repealed (some even before they were brought into force, and by a variety of different statutes). Section 28 has itself been amended more than once, but continues in force. [↑](#footnote-ref-63)
64. These were first issued in 2004, but there is now a 2015 version on line, available at <https://www.gov.uk/government/publications/secretary-of-states-directions-to-the-parole-board-april-2015>. [↑](#footnote-ref-64)
65. Hansard, 11 July 2013, Col 45WS (available at http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130711/wmstext/130711m0002.htm). [↑](#footnote-ref-65)
66. SI 2011 No 2947. [↑](#footnote-ref-66)
67. SI 2014 No 240. [↑](#footnote-ref-67)
68. PSI 22/2015. [↑](#footnote-ref-68)
69. Available at <https://www.gov.uk/government/publications/oral-hearings-guide-parole-board>. [↑](#footnote-ref-69)
70. [2013] UKSC 61. [↑](#footnote-ref-70)
71. SI 2009/408. [↑](#footnote-ref-71)
72. [2013] UKSC 47. [↑](#footnote-ref-72)
73. A small improvement in the law in relation to determinate sentence prisoners was enacted in s. 108 of the Legal Aid Sentencing and Punishment of Offenders Act 2012: the sentencing judge no longer has to specify the time spent on remand: see the new (hopelessly numbered) s. 240ZA of the Criminal Justice Act (CJA) 2003. The time is deducted administratively. Why does the judge sentencing ISPs have to deduct the time spent on remand in custody? The minimum term should be the minimum term, and time should run from the date of remand in custody, as for other prisoners. [↑](#footnote-ref-73)
74. As we have seen, the Prison Service is unlikely to transfer ISPs to an open prison unless recommended to do so by the Parole Board. [↑](#footnote-ref-74)
75. See the judgments of Mitting J on 14 March 2011 [2011] EWHC 938 (Admin), and of the Court of Appeal on 23 February 2012 [2012] EWCA Civ 452; [2012] 3 WLR 476. The claim for damages was decided separately by the Supreme Court in a judgment handed down on 1 May 2013 [2013] UKSC 23; [2013] 2 WLR 1157, which restored Mitting J’s award at first instance of £300 damages for six months undue delay. [↑](#footnote-ref-75)
76. (1991) 1 WLR 134. [↑](#footnote-ref-76)
77. Indeed concepts of fairness and due process have moved on a long way since 1990: the Court of Appeal also then accepted that the Board was under no duty to inform the prisoner of reasons for its decision. [↑](#footnote-ref-77)
78. [2011] UKSC 37, [2011] 1 WLR 1795. [↑](#footnote-ref-78)
79. [2008] EWHC 3127 (Admin); [2009] EWCA Civ 1016. [↑](#footnote-ref-79)
80. [2009] EWCA Crim 840. [↑](#footnote-ref-80)
81. at [2009] Crim LR 669. [↑](#footnote-ref-81)
82. [2008] EWCA Civ 30; [2008] 1 WLR 1977. [↑](#footnote-ref-82)
83. See *James v UK* (above). [↑](#footnote-ref-83)
84. (1982) 4 EHRR 443, para 40. [↑](#footnote-ref-84)
85. (2009) 51 EHRR 976, para 88. [↑](#footnote-ref-85)
86. (2012) 56 EHRR 399, para 195. [↑](#footnote-ref-86)
87. e.g. where the authorities resorted to subterfuge in bringing an applicant into custody to effect his subsequent extradition or deportation. [↑](#footnote-ref-87)
88. e.g. where detention is sought to be justified by reference to Art. 5(1)(c), the Court has insisted on 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; or in the context of Art. 5(1)(d) (the detention of a minor for the purpose of educational supervision), 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 a suitable educational regime; or in the case of the detention of a person of unsound mind pursuant to Art. 5(1)(e), the Court has held that there must be medical evidence that his mental state is such as to justify his compulsory hospitalisation. [↑](#footnote-ref-88)
89. Where Art. 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. In the context of Art. 5(1)(a), where 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. However, in assessing whether the place and conditions of detention are appropriate, the Court is clear that 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”. [↑](#footnote-ref-89)
90. e.g. in the context of detention pursuant to Art. 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. However, 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. [↑](#footnote-ref-90)
91. [2008] EWCA Civ 29; [2008] 1 W.L.R. 1950. [↑](#footnote-ref-91)
92. See Padfield, N. (2011) ‘Amending the Parole Board Rules: a sticking plaster response?’ *Public Law* 691-698. [↑](#footnote-ref-92)
93. [2013] EWCA Civ 182. [↑](#footnote-ref-93)
94. See Jacobson, J, and Hough, M (2010) *Unjust Deserts: Imprisonment for Public Protection* Prison Reform Trust. [↑](#footnote-ref-94)
95. [2001] 3 WLR 512. [↑](#footnote-ref-95)
96. We may all agree that sentences should be ‘proportionate’, but agreeing on what they should be proportionate to has never been straight-forward. [↑](#footnote-ref-96)
97. For example, it is perfectly conceivable that the ‘seriousness’ currently accorded to particular aggravating factors, or a review of the starting points for murder, might change over future decades. ‘Proportionate’ sentence lengths, which have grown in recent years, may yet reduce. This suggests that the ‘minimum term’ or ‘starting point’ should be reviewable. The argument might apply too to those serving very long determinate sentences, whose sentences should perhaps also be kept under review by the courts. A fundamental reform would be the introduction of sentence review courts, on which see Herzog-Evans, M. and Padfield, N., The JAP: lessons for England and Wales? (2015), available at http://criminaljusticealliance.org/wp-content/uploads/2015/04/cja\_policy-briefing3\_200315.pdf). [↑](#footnote-ref-97)
98. [2005] UKHL 51. [↑](#footnote-ref-98)
99. See the French more flexible attitude to the minimum term or *période de* *sûreté:* the *Tribunal d’application des peines* changes it when the offender shows serious attempts at “social re-adaption”: see Padfield, N. An Entente Cordiale in Sentencing? (2011)175 *Criminal Law and Justice Weekly* 239-42, 256-9, 271-4 and 290-293. [↑](#footnote-ref-99)
100. [2016] EWCA Crim 71. [↑](#footnote-ref-100)
101. It needs to be an evidence-based debate, of course: with more data on each category of ISP, including details of the length of minimum terms and the time spent in custody post-tariff, published annually. [↑](#footnote-ref-101)