



Detaining prisoners indefinitely on grounds of risk without giving them access to rehabilitative courses was arbitrary

In today's Chamber judgment in the case of [James, Wells and Lee v. the United Kingdom](#) (application nos. 25119/09, 57715/09 and 57877/09), which is not final¹, the European Court of Human Rights held:

unanimously, that there had been a **violation of Article 5 § 1 (right to liberty and security)** of the European Convention on Human Rights concerning the applicants' detention following the expiry of their 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; and,

by six votes to one, that there had been **no violation of Article 5 § 4 (right to have lawfulness of detention decided speedily by a court)** concerning Mr Wells' and Mr Lee's complaint about the possibility of their release.

The Court found in particular that the considerable delays in the applicants making any progress in their sentences had been the result of lack of resources, planning and realistic consideration of the impact of the sentencing scheme introduced in 2005, despite the fact that it had been premised on the understanding that rehabilitative treatment would be made available to those prisoners concerned. Indeed, these deficiencies had been the subject of universal criticism in the domestic courts and had resulted in a finding that the Secretary of State had breached his public law duty.

Principal facts

The case concerned prisoners who were subject to indeterminate sentences of imprisonment for the public protection ("IPP sentences") in the United Kingdom. IPP sentencing was introduced in April 2005 by virtue of section 225 of the Criminal Justice Act 2003 (the "2003 Act"). It was initially mandatory where a future risk existed of further offending. Risk was assumed where there was a previous conviction for violent or sexual offences, unless the sentencing judge considered it unreasonable to make such an assumption. A minimum term, known as the "tariff", was fixed by the sentencing judge. After the expiry of the tariff, IPP sentences required the Parole Board's decision that the prisoner was no longer dangerous before he could be released. Following the entry into force of this new legislation, large numbers of IPP prisoners swamped the system. The IPP scheme was amended in 2008 and, no longer mandatory, only applies in cases where – if imposed – the tariff would be fixed at more than two years, subject to certain limited exceptions. Further, risk is no longer assumed, even where a defendant has relevant previous convictions.

1 Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

The applicants, Brett James, Nicholas Wells and Jeffrey Lee, are British nationals who were born in 1985, 1983 and 1965 respectively. Mr James lives in Wakefield (England), Mr Wells is currently in detention and Mr Lee lives in Fleetwood (England). Following their convictions for violent offences and in the light of their offending histories, all three men were given automatic IPP sentences in 2005 with tariffs of, respectively, two years, 12 months and nine months.

They were recommended to take part in a number of rehabilitative courses, such as ETS (Enhanced Thinking Skills), ASRO (Addressing Substance Related Offending), CALM (Controlling Anger and Learning to Manage it), Victim Awareness and Healthy Relationships Programme. However, by the time their respective tariffs expired, all three applicants remained in their local prisons, without access to the relevant courses, awaiting transfer to first stage lifer prisons to begin progressing through the prison system. They were only transferred five months (Mr James), 21 months (Mr Wells) and 25 months (Mr Lee) after the expiry of their tariffs.

Meanwhile, all three men brought judicial review proceedings before the national courts, which were eventually joined on appeal before the House of Lords. They complained in particular that their post-tariff detention and lack of access to courses was unlawful and in breach of Article 5 §§ 1 and 4 of the European Convention.

Throughout the domestic proceedings the Secretary of State was criticised for the systemic failure to put in place the resources necessary to enable the provisions of the 2003 Act to function as intended and he was found to have breached his public law duty. In particular, before the House of Lords, Lord Judge referred to "seriously defective structures" and the fact that the new sentencing provisions were "comprehensively unresourced" with the result that numerous prisoners continued to be detained after the expiry of the punitive element of their sentences "without the question either of their rehabilitation or the availability of up to date, detailed information about their progress". He indicated that as tariff periods expired, nothing had been done to enable an informed assessment by the Parole Board of the question whether the protection of the public required the prisoner's continued detention.

Nonetheless, on 6 May 2009 the House of Lords unanimously dismissed the applicants' appeals, finding no breach of either Article 5 § 1 or 4 of the Convention. It held that, despite the above concerns, the applicants' detention could not be said to be arbitrary or unlawful as notwithstanding the failure to provide access to courses the causal connection between the ground for the detention and the detention itself had not been broken. It also found that the procedure before the Parole Board satisfied the requirement for a speedy review of the legality of their detention.

Complaints, procedure and composition of the Court

Relying on Article 5 §§ 1 and 4 (right to liberty and security), the three applicants complained about the failure to ensure their access to courses to address their offending behaviour while in prison and the impact of this failure on their ability to show that they were rehabilitated and able safely to be released. Mr Wells and Mr Lee further argued under Article 5 § 4 that neither the Parole Board nor the domestic courts had been able to order their release due to the provisions of the primary legislation and the absence of any such power in the 2003 Act.

The applications were lodged with the European Court of Human Rights on 7 May 2009, 27 October 2009 and 27 October 2009, respectively.

Judgment was given by a Chamber of seven judges, composed as follows:

Lech **Garlicki** (Poland), *President*,
David Thór **Björgvinsson** (Iceland),
Nicolas **Bratza** (the United Kingdom),
George **Nicolaou** (Cyprus),
Zdravka **Kalaydjieva** (Bulgaria),
Nebojša **Vučinić** (Montenegro),
Vincent A. **de Gaetano** (Malta),

and also Fatoş **Aracı**, *Deputy Section Registrar*.

Decision of the Court

[Article 5 § 1 \(whether detention was lawful\)](#)

The Court noted that in these cases, once risk of re-offending had been established by way of the statutory presumption, the sentencing judge had no power to impose any sentence but an indeterminate sentence of imprisonment. It was therefore important to ensure a genuine correlation between the aim of the detention and the detention itself. The Court reviewed statements made by Baroness Scotland of Asthal, then Minister of State at the Home Office, during the Parliamentary debate on the draft legislation, and the Government's policy as regards the management and treatment of prisoners serving indeterminate sentences. It also considered the findings of the judges in the domestic proceedings in the High Court, the Court of Appeal and the House of Lords. It concluded that in cases concerning indeterminate sentences of imprisonment for the protection of the public, a real opportunity for rehabilitation was a necessary element of any part of the detention which was to be justified solely by reference to public protection.

Turning to assess the operation of the IPP scheme in practice, the Court referred to the harsh criticism in the domestic courts. In the Court of Appeal it was found that there had been a systemic failure on the part of the Secretary of State to put in place the resources necessary to implement the scheme of rehabilitation necessary to enable the provisions of the 2003 Act to function as intended. In the House of Lords the Secretary of State was found to have failed "deplorably" in the public law duty that he had to be taken to have accepted when he had persuaded Parliament to introduce IPP sentences. References were also made to the "seriously defective structures" and to the "comprehensively unresourced" sentencing provisions. The Court noted that the specific impact of these general deficiencies on the progress of the applicants through the prison system in the present cases could be clearly seen.

The Court found that indeterminate detention for the public protection could be justified under Article 5 § 1, but that it could not be allowed to open the door to arbitrary detention. Where a prisoner was in detention solely on the grounds of the risk that he was perceived to pose, regard had to be had to the need to encourage his rehabilitation. In the applicants' cases, this meant that they had to be given reasonable opportunities to undertake courses aimed at addressing their offending behaviour and the risks they posed. Experience had shown that courses were necessary for dangerous prisoners to cease to be dangerous. While Article 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.

It was therefore significant that the Secretary of State had failed to anticipate the demands which would be placed on the prison system by the introduction of IPP sentencing, despite the relevant legislation having been premised on the understanding that rehabilitative treatment would be made available to IPP prisoners. Indeed, this

failure had been the subject of universal criticism in the domestic courts and resulted in a finding that the Secretary of State had breached his public law duty.

Substantial periods of time had passed as concerned each of the applicants before they had even begun to make any progress in their sentences, and this despite the clear guidance in relevant policy documents. It was clear that the delays had been the result of a lack of resources. The inadequate resources had apparently been the consequence of the introduction of the measures for indeterminate detention without the necessary planning and without realistic consideration of their impact. Further, the length of the delays in the applicants' cases had been considerable: for around two and a half years, they had simply been left in local prisons where there had been few, if any, offending behaviour programmes. The stark consequence of the failure to make available the necessary resources was that the applicants had no realistic chance of making objective progress towards a real reduction or elimination of the risk they posed by the time their tariff periods expired. Moreover, once the applicants' tariffs had expired, their detention had been justified solely on the grounds of the risk they had posed to the public and the need for access to rehabilitative treatment at that stage became all the more pressing.

In those circumstances, the Court considered that 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. Although in the cases of Mr James and Mr Wells the Court was satisfied that following their transfer there was no evidence of any unreasonable delay in providing them with access to courses, it noted that Mr Lee had experienced a further five-month delay following the recommendation for prior motivational work. By the time the recommendation was made, Mr Lee was already two years and ten months post-tariff, in the context of a nine-month tariff. It had accordingly been imperative that his treatment be progressed as a matter of urgency and, in the absence of any explanation from the Government for the delay, the Court concluded that that period of detention had also been arbitrary and therefore unlawful within the meaning of Article 5 § 1. There had therefore been a violation of Article 5 § 1 of the Convention as concerned all three applicants.

[Article 5 § 4 \(whether lawfulness of detention was decided speedily by a court\)](#)

The Court found that no separate issue arose under Article 5 § 4 regarding the applicants' complaint about lack of access to courses as it had already been examined in the context of their complaint under Article 5 § 1. Furthermore, there had been no violation of Article 5 § 4 as concerned Mr Wells' and Mr Lee's complaint about the possibility of their release, as the Court found that they had failed to establish that the combination of the Parole Board and judicial review proceedings could not have resulted in an order for their release.

[Just satisfaction \(Article 41\)](#)

The court held that the United Kingdom was to pay Mr James 3,000 euros (EUR), Mr Wells EUR 6,200 and Mr Lee EUR 8,000 in respect of non-pecuniary damage. For costs and expenses, the applicants were awarded EUR 12,000, each.

Separate opinion

Judge Kalaydjieva expressed a dissenting opinion regarding Article 5 § 4 which is annexed to the judgment.

The judgment is available only in English.

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Press contacts

echrpres@echr.coe.int | tel: +33 3 90 21 42 08

Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)

Céline Menu-Lange (tel: + 33 3 90 21 58 77)

Nina Salomon (tel: + 33 3 90 21 49 79)

Denis Lambert (tel: + 33 3 90 21 41 09)

The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.