EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2015] CSIH 59
P326/13

Lord Menzies
Lady Clark of Calton
Lord McGhie

OPINION OF THE COURT

delivered by LADY CLARK OF CALTON

in the Reclaiming Motion

by

BILLY JOHN BROWN (AP)

Petitioner and Reclaimer;

against

(FIRST) THE PAROLE BOARD FOR SCOTLAND and (SECOND) THE SCOTTISH MINISTERS

Respondents:

Petitioner: Bain, QC, Leighton; Drummond Miller LLP
First Respondents: No appearance
Second Respondents: D Ross; Scottish Government Legal Directorate

31 July 2015

Summary of the legal issues

[1] The scope of this appeal relates to the impact of article 5 of the European Convention on Human Rights ("ECHR") in circumstances where the petitioner and reclaimer ("the reclaimer") is serving an extended sentence under and in terms of section 210A of the Criminal Procedure (Scotland) Act 1995. The reclaimer contends that he has not been given certain courses in prison recommended by the first respondents. The main disputed issues are (1) whether in the circumstances of this case there is a breach of article 5; and (2) if there is a breach what is the remedy in damages afforded in just satisfaction.

History of legal proceedings

[2] The reclaimer was convicted of culpable homicide in January 2006. A dispute arose between a male and the reclaimer who was armed with a flick knife. The male left and returned with a metal pole with which he struck the reclaimer. The reclaimer stabbed the male victim in the chest penetrating his heart and killed him. The reclaimer had previous convictions for carrying knives and other offensive weapons. He was given an extended sentence of 10 years by the trial judge in terms of section 210A of the Criminal Procedure (Scotland) Act 1995 backdated to 3 August 2005. Said sentence comprised a custodial term of 7 years and an extension period of 3 years.

[3] In 2013, the reclaimer raised an action of judicial review directed against the decision of the first respondents who refused to order the reclaimer's release. By amendment of the pleadings, the reclaimer introduced averments and pleas in law in relation to the second respondents. Various orders were sought by the reclaimer including an order to release the reclaimer from custody.

[4] At a hearing on 6 September 2013, the Lord Ordinary heard submissions from counsel for all parties relevant to all the issues in the judicial review then disputed by the parties. The Lord Ordinary refused the prayer of the petition, and accordingly all the orders sought were refused. The opinion of the Lord Ordinary is reported at [2013] CSOH 200. The task of the Lord Ordinary was made more difficult in that

there was conflicting reasoning and decision-making reflected in the decision of the European Court of Human Rights in the case of *James Wells* and *Lee* v *United Kingdom* (2013) 56 EHRR 12 and the earlier decision of the House of Lords in the same case reported as *James Wells* and *Lee* v *Secretary of State for Justice* (2010) 1 AC 553. These cases related to consideration of article 5 ECHR in relation to the new statutory regime of sentences of imprisonment for public protection (IPP sentences) which was introduced in England and Wales in 2005. Such sentences were of indeterminate length and required a direction from the Parole Board for the prisoner to be released. The sentencing judge fixed a minimum term which had to be served before the prisoner could be considered for release by the Parole Board.

[5] During the procedural stages of the reclaiming proceedings, counsel for the parties were aware that the law relating to the main issues disputed by the parties was to be considered by the Supreme Court in a case which is now reported as *R (On the application of Haney & Others)* v *Secretary of State for Justice* 2015 2 WLR 76. Counsel for the reclaimer and the second respondents ("the respondents") properly focused the issues in dispute in the reclaiming motion to take account of the decision and reasoning of the Supreme Court in *Haney.* This resulted in a narrowing and reformulating of the issues between the reclaimer and the respondents taking into account the decision in *Haney* and focused on the issue whether declarator should be granted that the reclaimer's Convention rights under article 5 ECHR were breached, and whether an award of damages should be pronounced to afford the reclaimer just satisfaction in respect of said breach. The alleged breach was based on averments alleging failure and delay by the respondents in the provision of courses recommended by the first respondents as relevant to the progress of the reclaimer towards release. The first respondents took no part in the hearing of the reclaiming motion.

The post-conviction history of the reclaimer

[6] The reclaimer was detained initially at HM Young Offenders Institution, Polmont ("Polmont"). He completed the Anger Management programme in June 2006 and the Constructs programme in August 2007. He was transferred to National Top End conditions at HMP Friarton in September 2008. His case was considered by the first respondents on 9 December 2008. Their decision was that he was not a suitable candidate for release. In January 2009, the reclaimer was downgraded and returned to Polmont. He reached his parole qualifying date in February 2009. This is the date at which the reclaimer became eligible for discretionary release. He completed an Alcohol Awareness course and a First Steps Drugs Awareness course in September 2009. In October 2009, he was transferred to HMP Edinburgh ("Edinburgh").

[7] On 1 April 2010 the reclaimer was released on licence, having reached the two-thirds stage of the custodial part of the sentence, in terms of s.1(2) read in light of s.26A(4) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act"). In terms of said statutory provisions release on licence is mandatory. Such release is not dependent on the first respondents or any other body concluding that it was no longer necessary for the protection of the public from serious harm that the prisoner be confined. The mandatory release on parole was automatic on the date when the reclaimer had served two-thirds of the seven year custody period of the extended sentence imposed on him by the court.

[8] On 18 August 2010, the reclaimer, while under the influence of alcohol and acting along with another, stole a motor vehicle. On 28 September 2010 he was recalled to prison in terms of s.17(1) of the 1993 Act. On 30 September 2010 at Livingston Sheriff Court he was convicted and sentenced to 40 days' imprisonment in respect of that offence, to run concurrently with the extended sentence in respect of which he had been recalled to prison. The reclaimer was returned to the High Court in terms of s.16 of the 1993 Act and the sentencing judge made no further order.

[9] On 12 November 2010 a Case Conference was held. The Conference recommended that the reclaimer be referred for a Violence Prevention Programme ("VPP") assessment.

[10] The reclaimer as a recalled extended sentence prisoner was subject to regular review by the Extended Sentence Prisoner Tribunal ("ESPT") of the first respondents. In terms of s.3A(4) of the 1993 Act, the ESPT "shall, if it is satisfied that it is no longer necessary for the protection of the public from serious harm that the prisoner should be confined (but not otherwise), direct that he should be released". On 8 December 2010 there was an ESPT hearing at Edinburgh. The Tribunal decided not to direct the reclaimer's release and gave reasons.

[11] The reclaimer was transferred from Edinburgh to HMP Addiewell ("Addiewell") on 30 June 2011. The VPP is not available at Addiewell. Between August and September 2011 the reclaimer completed the alcohol awareness course.

[12] On 6 December 2011 the ESPT again considered the reclaimer's case. The Tribunal decided not to direct the reclaimer's release and gave reasons. On 6 December 2012 the ESPT again considered the reclaimer's case. The Tribunal decided not to direct the reclaimer's release and gave reasons. The reclaimer completed the Constructs programme between 21 January and 9 April 2013. The reclaimer completed the CARE programme between May and September 2013. In December 2013 the reclaimer was transferred to the Open Estate at HMP Castle Huntly ("Castle Huntly"). On 9 December 2013, the ESPT again considered the reclaimer's case. The Tribunal decided not to direct the reclaimer's release and gave reasons. The reclaimer was downgraded and returned to closed conditions at Addiewell on 24 February 2014. On 14 August 2014 the ESPT considered the reclaimer's case. The reclaimer returned to the Open Estate at Castle Huntly on 18 August 2014. On 22 August 2014 the reclaimer was downgraded from the Open Estate, having presented on 21 August 2014 as being under the influence of an unknown substance. On 26 September 2014 the ESPT again considered the reclaimer's case. The Tribunal decided not to direct the reclaimer's release. The reclaimer has incurred a significant number of Governor's reports during the period of his imprisonment.

[13] The reclaimer will be released at his extended sentence expiry date on 2 August 2015.

The legal framework

Article 5 of the European Convention on Human Rights

[14] Article 5(1) states:-

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with the procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by competent court;
> ….
>
> 4. 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.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation".

The statutory provisions in domestic law

[15] The extended sentence imposed on the reclaimer was passed under and in terms of section 210A of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") which states:

> "**Extended sentences for sex and violent offenders**
>
> (1) Where a person is convicted on indictment of a sexual or violent offence, the court may, if it –
> (a) intends, in relation to –
>
> (i) a sexual offence, to pass a determinate sentence of imprisonment; or
> (ii) a violent offence, to pass such a sentence for a term of four years or more; and
>
> (b) considers that the period (if any) for which the offender would, apart from this section, be subject to a licence would not be adequate for the purpose of protecting the public from serious harm from the offender,
>
> pass an extended sentence on the offender.

(2) An extended sentence is a sentence of imprisonment which is the aggregate of –

(a) the term of imprisonment ('the custodial term') which the court would have passed on the offender otherwise than by virtue of this section; and

(b) a further period ('the extension period') for which the offender is to be subject to a licence and which is, subject to the provisions of this section, of such length as the court considers necessary for the purpose mentioned in subsection (1)(b) above.

(3) The extension period shall not exceed, in the case of –

(a) a sexual offence, ten years; and
(b) a violence offence, ten years.

(4) A court shall, before passing an extended sentence, consider a report by a relevant officer of a local authority about the offender and his circumstances and, if the court thinks it necessary, hear that officer. ……".

[16] As a result of the imposition of the extended sentence, the respondent was classified as a long term prisoner, that is a person serving a sentence of imprisonment for a term of 4 years or more. The 1993 Act, section 1(2) states:-

"As soon as a long-term prisoner has served two-thirds of his sentence, the Secretary of State shall release him on licence unless he has before that time been so released, in relation to that sentence, under any provision of this Act".

This is commonly referred to as mandatory release.

[17] Section 17 of the 1993 Act provides for revocation of licence. Section 17 states:-

"**Revocation of licence**

(1) Where –

(a) a long-term prisoner has been released on licence under this Part of this Act and is not detained as mentioned in section 12A(1)(a) or (b) of this Act; or …..

the Scottish Ministers –

(i) shall, if recommended to do so by the Parole Board; or
(ii) may, if revocation and recall are, in their opinion, expedient in the public interest and it is not practicable to await such a recommendation,

revoke the licence and recall the prisoner to prison.

……

(2) The Scottish Ministers shall, on the revocation of a person's licence under subsection (1), (1A) or (1B) above, inform that person of the reasons for the revocation.

(3) The Scottish Ministers shall refer to the Parole Board the case of a person whose licence is revoked under subsection (1), (1A) or (1B) above.

(4) Where on a reference under subsection (3) above the Parole Board directs a prisoner's immediate release on licence, the Secretary of State shall under this section give effect to that direction.

(4AA) Where the Parole Board directs the release of a prisoner under subsection (4) above it may recommend that the Scottish Ministers insert, vary or cancel conditions in the prisoner's licence.

(4A) Where the case of a prisoner to whom section 3A of this Act applies is referred to the Parole Board under subsection (3) above, subsection (4) of that section shall apply to that prisoner in place of subsection (4) above.

(5) On the revocation of the licence of any person under the foregoing provisions of this section, he shall be liable to be detained in pursuance of his sentence and, if at large, shall be deemed to be unlawfully at large. ….."

[18] The respondent who is serving an extended sentence is also subject to section 26A of the 1993 Act: "**Extended sentences.**

(1) This section applies to a prisoner who, on or after the date on which section 87 of the Crime and Disorder Act 1998 comes into force, has been made subject to an extended sentence within the meaning of section 210A of the 1995 Act (extended sentences).

(2) Subject to the provisions of this section, this Part of this Act, except section 1A, shall apply in relation to extended sentences as if any reference to a sentence or term of imprisonment was a reference to the custodial term of an extended sentence.

(3) Where a prisoner subject to an extended sentence is released on licence under this Part the licence shall, subject to any revocation under section 17 of this Act, remain in force until the end of the extension period.

(4) Where, apart from this subsection, a prisoner subject to an extended sentence would be released unconditionally –

(a) he shall be released on licence; and

(b) the licence shall, subject to any revocation under section 17 of this Act, remain in force until the end of the extension period.

(5) The extension period shall be taken to begin as follows –

(a) for the purposes of subsection (3) above, on the day following the date on which, had there been no extension period, the prisoner would have ceased to be on licence in respect of the custodial term;

(b) for the purposes of subsection (4) above, on the date on which, apart from that subsection, he would have been released unconditionally.

(6) Subject to section 1A(c) of this Act and section 210A(3) of the 1995 Act and to any direction by the court which imposes an extended sentence, where a prisoner is subject to two or more extended sentences, the extension period which is taken to begin in accordance with subsection (5) above shall be the aggregate of the extension period of each of those sentences.

(7) For the purposes of sections 12(3) and 17(1) of this Act, and subject to subsection (8) below, the question whether a prisoner is a long-term or short-term prisoner shall be determined by reference to the extended sentence.

(8) Where a short-term prisoner serving an extended sentence in respect of a sexual offence is released on licence under subsection (4)(a) above, the provisions of section 17 of this Act shall apply to him as if he was a long-term prisoner.

(9) In relation to a prisoner subject to an extended sentence, the reference in section 17(5) of this Act to the prisoner being '*liable to be detained in pursuance of his sentence*' shall be construed as a reference to the prisoner being liable to be detained until the expiry of the extension period.

(10) For the purposes of this section '*custodial term*', '*extension period*' and *'imprisonment'* shall have the same meaning as in section 210A of the 1995 Act.

(11) In section 1A(c) and section 16(1)(a) of this Act, the reference to the date on which a prisoner would have served his sentence in full shall mean, in relation to a prisoner subject to an extended sentence, the date on which the extended sentence, as originally imposed by the court, would expire".

Submissions by counsel for the reclaimer

[19] Senior counsel in developing her written submissions accepted that the developments of the law in *Haney* which post-dated the opinion of the Lord Ordinary made it unnecessary for her to seek to identify errors in the reasoning of the Lord Ordinary which would normally be an appropriate approach on appeal. In this case the analysis of the Lord Ordinary dealt with case law and issues which had been superseded by the Supreme Court decision in *Haney*. There was a new focus to the issues developed by the parties for the reclaiming motion. Counsel submitted that the proper analysis of the existence and scope of the duty in *Haney,* as applied to the facts and circumstances of the present case, would lead this court to decide the reclaiming motion in favour of the reclaimer and to grant declarator and damages for breach of the ECHR article 5 implied on ancillary duty.

[20] The written submissions on behalf of the reclaimer set out in detail the post conviction history which is not in significant dispute. On the basis of that history, counsel submitted that by 2 April 2010, the reclaimer had reached and passed the date of mandatory release on licence. From 2 April 2010 the justification for any recall to prison could only be the risk of his reoffending, rather than the original sentence of the court. In the event of recall, the ECHR article 5 implied ancillary duty to facilitate rehabilitation and release would be engaged. The mandatory release date should be recognised as the relevant dividing line. From the mandatory release date to the end of the period of sentence, any reimprisonment of the reclaimer, and any decisions thereafter about his release, would be determined by the first respondents based on their assessment and decision as to whether custody was necessary to protect the public from serious harm from the reclaimer.

[21] Counsel drew an analogy, which she said was compelling, between the circumstances of the reclaimer recalled after mandatory release to serve an extended sentence and the circumstances of a prisoner serving a life sentence, after the stage of the expiry of the punishment part; or the circumstances of a prisoner subject to a sentence of lifelong restriction after serving the custodial element. The continued custody of a prisoner in any of these categories is justified only for the protection of the public and the second respondents owe such a prisoner a duty to facilitate his progress towards release by providing appropriate opportunity for rehabilitation which may include courses which the first respondents have identified as appropriate and necessary to assist in rehabilitation and the reduction of risk to the public.

[22] Counsel accepted that the reclaimer was duly granted mandatory release. After release, the relcaimer committed another offence for which he was given a custodial sentence of 40 days on 30 September 2010. He

would have been entitled to release on 18 October 2010 in relation to that sentence. Thus from 18 October 2010, decision-making about the continued imprisonment of the reclaimer had passed from the original sentencing court to the first respondents and the justification for his continued imprisonment was based only on the requirement of protection of the public. Thus the reclaimer from 18 October 2010 was entitled to rely on the implied ancillary duty recognised in *Haney* to facilitate his progress towards his release.

[23] Following a detailed reading and analysis of *Haney*, counsel submitted that there was no logical distinction to be made between the reclaimer and the appellant in *Haney*. They were both in custody at a stage when their custody was justified only for the protection of the public and release was dependent only upon a decision of the need to protect the public. There was no reason in policy or principle to distinguish between the reclaimer in this case and the appellant in *Haney*.

[24] In developing her submission, counsel referred to *R (On the application of Whitson)* v *Secretary of State for Justice* (2015) AC 176. This case involved a prisoner serving a determinate sentence who was released not on mandatory but discretionary licence. Counsel accepted, to that extent, the case was distinguishable. Nevertheless counsel sought to draw support from the discussion by Baroness Hale of Richmond in particular at paragraphs 52-57. Baroness Hale states in paragraphs 53 - 54:

> "Thus it can be said that, once a prisoner has passed the point of mandatory release on licence, the basis for any later recall and detention is the risk of reoffending rather than the original order of the court, and article 5.4 applies…
>
> …furthermore it is difficult to characterise the position after a prisoner has reached the point of mandatory release as simply the administration of the sentence which has been imposed by the court. Parliament has decided that the prisoner is entitled to release and the criteria for recall and re-release are quite different from those which led the judge to impose the original sentence".

In paragraph 55 Baroness Hale concludes:

> "…while I entirely accept that there is no analogy between a determinate and an indeterminate sentence, so as to require a review while the prisoner is still in prison, the analogy between the recall of a determinate sentence prisoner who was entitled to be released and the recall of an indeterminate sentence prisoner is much closer".

Counsel also drew attention to *R (Giles)* v *Parole Board* (2004) AC 1, in particular the judgment of Lord Hope of Craighead and *R (Black)* v *Secretary of State for Justice* (2009) 1 AC 949, in particular the judgment of Lord Rodger of Earlsferry.

[25] Counsel was critical of the dividing line drawn by the second respondents. She submitted that the jurisprudence of the European Court of Human Rights exemplified in the admissibility decision dated 26 October 2004 in *Brown* v *The UK* (Application 968/04) should be considered out-dated in that the Court had not explored the subtleties of the complicated sentencing regimes which exist in Scotland and other parts of the UK. She submitted that on a proper analysis, the implied ancillary duty of article 5 was capable of applying to a case such as this in which there had been mandatory release of the reclaimer during the period of extended sentence and the reclaimer was now in custody, for reasons of public protection, subject to the decision-making of the first respondents.

[26] In her final chapter, counsel submitted that on the undisputed facts, there was a breach of the implied ancillary duty in the circumstances of this case. In particular she pointed to the period from November 2010 to January 2013 where there was a delay, through no fault of the reclaimer, to provide the courses which the first respondents considered necessary to advance the rehabilitation of the reclaimer. She referred to the frustration and distress caused to the reclaimer by the delay which held back his progress and his opportunity to be tested in more open prison conditions. The letters of complaint by the reclaimer set that out in detail. Counsel accepted that the reclaimer had some rehabilitation course work even before mandatory release; that he had the opportunity during release to assume responsibility and that he had failures and setbacks for which he was responsible. Nevertheless there was significant delay on the part of

the respondents, as the responsible authority, to provide course work which the first respondents had decided was necessary.

[27] The question of whether there had been a breach of the article 5 implied ancillary duty in the particular circumstances of this case and the relevant amount of damages could not be weighed in too fine scales. Having regard for example to the circumstances of the prisoners Haney and Massey described in paragraph 84 of *Haney*, she submitted that a sum in damages of some £600 per year might be an appropriate award to represent just satisfaction in damages for the breach suffered by the reclaimer.

Submissions on behalf of the second respondents

[28] Counsel adopted his written submissions and invited the court to refuse the reclaiming motion and adhere to the Lord Ordinary's interlocutor refusing the petition. He accepted that as a result of significant developments in the law, in particular the decision of the Supreme Court in *Haney*, certain issues which were the subject of lengthy discussion before the Lord Ordinary had been substantially overtaken and to that extent it was unnecessary to consider in any detail the issues with which the Lord Ordinary engaged. The law has moved on and the reclaiming motion should be considered in the context of the new legal framework.

[29] The first question addressed by counsel was the scope of the article 5 ancillary duty which the Supreme Court identified in *Haney*. He submitted that on a proper analysis of that decision, it is plain that the Supreme Court is of the opinion that the ancillary duty applies to life and indeterminate sentences and not to determinate sentences. Counsel submitted that there is a fundamental difference recognised in the jurisprudence of the European Court of Human Rights and in the Supreme Court between life and indeterminate sentences in comparison to determinate sentences. This reflects the philosophical and jurisprudential difference in the nature of the sentences. In a determinate sentence, the prisoner will be released even if he is still a risk to the public but in life or indeterminate sentences, the prisoner can only be released if a decision is taken that his detention is no longer required for public protection and it is safe to release him.

[30] Under reference to the case law in *R (Giles)*, *R (Black)* and *R (On the application of Whitson*) referred to by counsel for the reclaimer, counsel submitted that these cases when properly analysed did not assist the reclaimer.

[31] In his analysis of *Haney* counsel submitted, under reference for example to paragraphs 2, 35, 36, 39 and 107, that numerous passages in the judgment made it plain that the ancillary duty identified and relied on by the Justices is defined by them in relation to prisoners subject to life and indeterminate sentences. This restriction was deliberate and not by chance. It was in line with the jurisprudence of the European Court of Human Rights.

[32] In his second chapter, counsel submitted that the second question only arises if, contrary to his submission, the conclusion is reached that the implied article 5 duty applies to extended sentences. The second question is whether such a duty has been breached in the reclaimer's case. As the case was not presented on this basis to the Lord Ordinary, the Lord Ordinary does not deal with this. It was a matter for the court to decide or to remit back to the Lord Ordinary. Counsel, under reference to paragraph 60 in Haney, submitted that it was important to understand the content of the ancillary duty. Lord Mance in paragraph 60 states:

> "However, to say that more extensive course work could have been made available to him is a very long way from saying that he has not been provided with a reasonable opportunity to rehabilitate himself and to demonstrate that he no longer presented an unacceptable risk of serious harm to the public, and thus that there has occurred a breach of the implied ancillary obligation in article 5. Article 5 does not create an obligation to maximise the course work or other provision made to the prisoner, nor does it entitle the court to substitute, with hindsight, its own view of the quality of the management of a single prisoner and to characterise as arbitrary detention (in the particular sense of *James* v *United Kingdom* 56 EHRR 399) any case which it concludes might have been better managed. It requires that an opportunity must be afforded to the prisoner which is reasonable in all the circumstances, taking into account, among all those circumstances, his history and prognosis, the

risks he presents, the competing needs of other prisoners, the resources available and the use which has been made of such rehabilitative opportunity as there has been…."

[33] Counsel submitted that taking into account the facts of the present case and applying the guidance given by the Supreme Court, no breach of the ancillary article 5 duty arises. In the present case, the reclaimer has had access to a substantial amount of rehabilitative course work both before and after his release on licence. Although a small period of delay in accessing course work can be identified, that is only part of the picture. It should be noted that the reclaimer has exhibited problems in custody including misconduct reports. He has made poor use of the rehabilitative opportunities given to him. Properly analysed the reclaimer's complaint is essentially a complaint of administrative delay in provision of certain courses. His position appears to proceed on the basis that there is a breach of duty merely because courses for which the reclaimer was judged eligible by the first respondents were not provided within a reasonable time. Counsel submitted that this court should approach the question of breach of duty in the way that Lord Mance described in paragraph 60 in *Haney*. Further counsel submitted that the period of breach could not extend from November 2010 to September 2013 as submitted by counsel for the reclaimer. A reasonable period in order to assess the reclaimer and make courses available must be given. In any event, the reclaimer started a relevant course in January 2013. If contrary to submissions for the respondents, the court found that there was a breach of the ancillary duty of article 5 ECHR, counsel submitted that modest damages of not more than £500 in total would be an appropriate sum.

Opinion

[34] There is no dispute by the parties that the Supreme Court has recognised in certain circumstances that there is an implied ancillary duty under article 5(1) of the ECHR to provide a reasonable opportunity to certain prisoners to work towards rehabilitation to facilitate release. We are asked to decide whether the implied duty applies in the present case, whether it has been breached and if so what is the remedy in damages.

Article 5 ECHR

[35] The primary disputed issue is whether the article 5 implied ancillary duty applies to a case such as this. In summary, the reclaimer submitted that it does because the reclaimer was being held in custody for reasons of public protection and his release was dependent upon the decision making of the first respondent. The respondents submitted that was the wrong analysis and the article 5 implied duty was confined to cases involving indeterminate sentences and, as the extended sentence being served by the relaimer was a determinate sentence, there was no such implied duty.

[36] The first question we consider is how an extended sentence under and in terms of section 210A of the 1995 Act should be classified. We note that in terms of section 210A(2), an extended sentence is defined as the aggregate of "the custodial term" and a further period "the extension period" for which the offender is to be subject to a licence. The extension period is selected by the court but the maximum period is limited to ten years. We also note in particular the terms of section 26A(9),(10) and (11) of the 1993 Act. A person subject to an extended sentence is liable to be detained until the date, on which the extended sentence as imposed by the sentencing court expires. Such a prisoner may in fact be released, for example, on mandatory release or at the end of the custodial term but if he is in breach of his licence, he is liable to be returned to custody until the end of the sentence.

[37] We have no hesitation in concluding that, on a proper analysis of the legislation, an extended sentence is a determinate sentence. We accept that as in many sentences which are not extended sentences, the judge in imposing the extended sentence has regard to public protection in the sentencing process along with other sentencing considerations. It is an essential element however of an extended sentence that the court specifies both the custodial element and the period of extension. Under current statutory provisions, the person serving an extended sentence will be eligible for consideration both for discretionary release, and as happened in this case, will be released on mandatory release after serving two thirds of the custodial term. That is a statutory privilege (or in the case of mandatory release a statutory right) given to the prisoner

subject to licence conditions. Where the sentence includes an extension period, the licence will continue for longer than the period of custody until the period of extension has expired. Where an extended sentence is imposed, the court in sentencing has made a specific determination of what public protection requires in relation to both custody and the extension period. In our opinion, a critical difference, in comparison to various forms of indefinite sentences for the purposes of public protection, is that at the end of the period of the extended sentence, the prisoner must be released. That applies even if the prisoner is considered to be a serious threat to public safety at the end date of the sentence.

[38] We note that the case of *Brown* was not referred to in the *James* case. It is instructive in considering whether the distinction between determinate and indeterminate sentences are relevant to article 5 ECHR to consider the approach taken by the European Court of Human Rights. The applicant, Mr Brown was a UK National who was sentenced to a determinate sentence of eight years imprisonment for supplying heroin. In accordance with the relevant legislation, he was given mandatory release on licence at the two thirds point of his sentence. Thereafter his licence was revoked as he was stated to be in breach of his licence conditions. The applicant complained that his recall was unlawful and disproportionate and that there was insufficient causal connection between the detention following recall and his original detention so that there was a breach of article 5(1)(a). The Court rejected the applicant's submission that his situation was analogous to conditional liberty allowed to those on life sentence and restricted patients on release from hospital. The Court found that there was a crucial distinction in that

> "…discretionary and mandatory lifers, after the expiry of the punitive element of their sentence, are detained on the basis of risk – the justification for a continued detention is whether it is safe for the public for them to live in the community once more. Similarly the recall of restricted patients is based on factors arising from their mental health. The applicant however has been sentenced to a fixed prison term by a court as a punishment for his offence. The lawfulness of his detention does not depend, in Convention law terms, on whether or not he ceases to be at risk of re-offending. The fact that the applicant before the end of the sentence may expect to be released on licence does not affect this analysis. When such a prisoner is recalled his detention is again governed by the fixed term imposed by the judge conforming with the objectives of that sentence and thus within scope of article 5(1)(a) of the Convention.
>
> Article 5(1) does provide that at all times detention must be 'in accordance with the law'. The Court notes that the basis for the applicant's recall was considered by the Parole Board, which found that he was in breach of the terms of its licence and that its decision was in turn subject to judicial review. In the judicial review proceedings the applicant's arguments concerning the lawfulness of this recall and the Parole Board's procedure were rejected by the High Court and the Court of Appeal… the Court detects no arbitrariness or other feature that would justify it departing from their assessment.
>
> It follows that this part of the application is manifestly ill-founded and must be rejected, pursuant to article 35(3)(4) of the Convention."

[39] In our opinion there is clear reasoning apparent in the decision of the Court to explain why the Court considers that a different approach is justified when considering the effect of article 5(1) in relation to determinate and indeterminate sentences.

[40] It is also helpful to consider the approach of the Court in *James*. *James* is a case which deals with the implications of indeterminate sentences introduced by the UK Parliament for the purposes of public protection. Some of the specialities of the sentences, as understood by the Court, are that such a sentence was mandatory in all cases where an individual was convicted of a "serious offence" and was deemed by the sentencing judge to be at risk of committing a further "specified offence". Risk was to be assumed in cases where the individual in question had previously been convicted of a "relevant offence" unless the sentencing judge considered it unreasonable to conclude that there was such a risk. Although a minimum term was fixed by the sentencing judge, it was the Parole Board who was given the power to direct the release of indeterminate sentenced prisoners to whom the section applied. The Parole Board required to be satisfied

that detention was no longer necessary for the protection of the public (paragraphs 7 and 8). The starting point for the consideration by the Court is the object and purpose of article 5(1) ECHR. The Court states in paragraph 187:

> "… the object and purpose of art. 5(1) is to ensure that no-one is dispossessed of his liberty in an arbitrary fashion. It has frequently emphasised the fundamental importance of the guarantees contained in art. 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities"

The Court further states in paragraph 191:

> "Having regard to the object and purpose of art. 5(1), it is clear that compliance with national law is not sufficient in order for a deprivation of liberty to be considered 'lawful'. Article 5(1) also requires that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. The Court has not previously set out an exhaustive list of what types of conduct on the part of the authorities might constitute arbitrariness for the purposes of article 5(1) but some key principles can be extracted from the court's case-law in this area to date…"

Having discussed the general principles in paragraphs 192 to 195 the Court states in paragraph 202:

> "…It is clear from the terms of the legislation that the IPP sentence was intended to protect the public from the risk posed, or assumed under the provisions of the 2003 Act to be posed, by certain offenders. The court reiterates that where reasons of dangerousness are relied on by the sentencing courts for ordering an indeterminate period of deprivation of liberty, these reasons are by their very nature susceptible of change with the passage of time."

The Court is of the opinion that it is also of relevance that under the scheme, as it was enacted and brought into force, the IPP sentence was mandatory and judges were required to impose an IPP sentence where a future risk existed. The discretion of the sentencing court was further circumscribed by the operation of the statutory assumption contained in section 229(3) of the 2003 Act, which stipulated that future risk was to be assumed in a case where there was a relevant previous offence, unless it would be unreasonable to conclude that there was such a risk. The Court notes that judges in the House of Lords criticised the "draconian provisions" of the 2003 Act which left no real exercise of any judicial discretion; created entirely foreseeable difficulties when IPP sentences with short terms were passed; and observed that sentencing judges loyally followed the unequivocal terms of the legislation and imposed IPP sentences, even when the punitive element appropriate to the crimes was measured in months rather than years. Having completed its consideration of IPP sentences, the Court concludes in paragraph 209:

> "The Court is therefore satisfied that in cases concerning indeterminate sentences of imprisonment for the protection of the public, a real opportunity for rehabilitation is a necessary element of any part of the detention which is to be justified solely by reference to public protection. In the case of the IPP sentence, it is in any event clear that the legislation was premised on the understanding that rehabilitative treatment would be made available to those prisoners on whom an IPP sentence was imposed, even if this was not an express objective of the legislation itself…"

The Court does not conclude that IPP sentences *per se* were in breach of article 5 but concludes in paragraph 218:

> ".. While its case-law demonstrates that indeterminate detention for the public protection can be justified under art. 5(1)(a), it cannot be allowed to open the door to arbitrary detention. As the Court has indicated above, in circumstances where a government seek to rely solely on the risk posed by offenders to the public in order to justify their continued detention, regard must be had to the need to encourage the rehabilitation of those

offenders. In the applicants' cases, this meant that they were required to be provided with reasonable opportunities to undertake courses aimed at helping them to address their offending behaviour and the risks they posed.."

It is in that context that the Court concludes in paragraph 221:

"In these circumstances, the Court considers that following the expiry of the applicants' tariff periods and until steps were taken to progress them through the prison system with a view to providing them with access to appropriate rehabilitative courses, their detention was arbitrary and therefore unlawful within the meaning of article 5(1) of the Convention…"

[41] Although the Supreme Court in *Haney* did not agree with the conclusion of the Court in *James*, the reasoning and conclusions of the Justices are also based on a recognition of the important features of indeterminate sentences.

[42] The *Haney* case considered an indeterminate sentence in the form of a life sentence with a minimum term. After the expiry of the minimum term, Mr Haney sought judicial review that the failure to transfer him to open prison conditions was unlawful and in breach of his rights under articles 5 and 14 of the Convention on the basis that the delay or failure had prejudiced his prospects of being considered for release by the Parole Board. The Supreme Court also considered a number of other associated cases involving applicants who challenged the lawfulness of their detention in relation to sentences for public protection. The Supreme Court held:

"that the purpose of a sentence of imprisonment for public protection or a sentence of life imprisonment with a short tariff included rehabilitation of the offender; that it followed that such an offender had to be afforded a reasonable opportunity to rehabilitate himself, including the provision of rehabilitative courses and facilities in prison, and thereby to demonstrate to the Parole Board that he no longer presented an unacceptable danger to the public; that a duty to provide such an opportunity in order to facilitate release could not be found in express words of either article 5.1 or article 5.4 of the Convention but was to be implied as an ancillary duty as part of the overall scheme of article 5; that failure to comply with that duty did not directly impact on the lawfulness of the offender's detention but could give rise to a right to compensation for the frustration and anxiety which could properly be inferred to have been occasioned; that only in the rarest cases would it be possible to establish that the failure to provide appropriate courses had led to a prolongation of detention; and that, accordingly, the damages would not be at a similar level to those previously awarded by the European Court of Human Rights but were likely to be similar to those recognised as appropriate under article 5.4 in frustration and anxiety cases where a Parole Board hearing had been wrongly delayed…"

[43] It is not disputed that the group of cases considered by the Supreme Court related to indeterminate sentences. We consider that counsel for the respondents was well founded in submitting that the Justices were careful to express their views in the context of indeterminate sentences.

[44] It is however the submission of counsel for the reclaimer that the parallels between the circumstances of the reclaimer at this stage of his extended sentence and the circumstances of the prisoners considered in *Haney* is so strong that the same conclusion should be reached and it should be recognised that the article 5 implied ancillary duty applies to a prisoner, such as the reclaimer, serving an extended sentence following recall from mandatory release.

[45] We do not accept the criticisms by counsel for the reclaimer that the reasoning in *Brown* is out-dated. We consider the same fundamental approach by the Court can be identified in *James*. It is well settled that where a judge imposes a determinate sentence after conviction the case falls within article 5(1)(a) and there is no breach of the ECHR. The judge in a determinate sentence may take into account a wide range of considerations, including in an appropriate case, the necessity to protect the public. In our opinion, such a sentence is entirely different in effect from a sentence which is indeterminate in duration. In the latter case, no release date is identifiable. The release date will depend upon a decision about the risks the prisoner poses to public protection, taken not by the sentencing court, but by some other official or body at some later date. In the case of a determinate sentence, it is possible to identify at the time of the imposition of the sentence the end date when the prisoner must be released at the termination of his sentence no matter how great a risk to the public he might be considered to be as at that release date. We accept that in legislation there has been superimposed a scheme of discretionary and mandatory release and other schemes which complicate the sentencing framework. It is important to understand however that in the context of determinate sentences these schemes, which are the product of statutory innovation, permit early release if certain requirements are satisfied in particular that the prisoner is assessed as not posing a threat to public safety. The early release is an advantage to the prisoner as he is given the benefit of not having to serve the full custodial term imposed as a sentence by the court. Under the legislative provisions, the early release provisions are coupled with licence conditions and a person may be recalled to serve the remaining term of the sentence imposed by the court if licence conditions are breached.

[46] We accept the submissions by counsel for the reclaimer that there are strong analogies which can be drawn between the type of release provisions which apply to prisoners serving a determinate sentence after the date of mandatory release and those serving an indeterminate sentence. But there is a critical difference between these prisoners. In the former case, it is the court which has determined the end term as the maximum length of the sentence which must be served and a convicted person knows, at the date of sentence, the last possible date when he must be released. Where an indeterminate sentence is imposed, the court does not fix any final date for release and release cannot be obtained without the prisoner satisfying someone, other than the court, that he no longer presents a danger to the public.

[47] We consider that the European Court of Human Rights recognises that there is a fundamental difference in the nature of determinate and indeterminate sentences and the consequences thereof so that in certain circumstances that Court may conclude that the indeterminate sentence becomes so arbitrary that it constitutes a breach of article 5.

[48] We also consider that although the Supreme Court in *Haney* adopted different reasoning from the Court in developing the ECHR article 5 implied ancillary duty to facilitate rehabilitation and release, such implied duty was clearly embedded by the Supreme Court in the context of indeterminate sentences. The applications being considered by the Supreme Court were indeterminate sentences and we are unable to read the judgments as having any wider implication.

[49] In developing her submissions, counsel for the reclaimer prayed in aid the authorities to which we refer at paragraph [24]. The high point of this part of her submission was her reliance on the *dicta* of Baroness Hale of Richmond DPSE in *Whitson*. Baroness Hale in her dissenting comments in paragraph 55 states:

> "… that there is no analogy between a determinate and an indeterminate sentence, so as to require a review while the prisoner is still in prison, the analogy between a recall of a determinate sentence prisoner who was entitled to be released and the recall of an indeterminate sentence prisoner is much closer."

But we note that the *dicta* relied on were part of a dissent and the majority opinion of the court did not support this view. Mr Whitson was a prisoner released on discretionary licence who was recalled by the Secretary of State because of problems with his home detention curfew. The main issue in the case was

whether or not a recall to prison without his licence being reviewed by the Parole Board or any other judicial body was consistent with article 5.4 of the Convention. The judgment of Lord Neuberger of Abbotsbury PSC in paragraph 8, emphasises the distinction accepted in the European Court of Human Rights that, where a person is lawfully sentenced to a determinate term of imprisonment by a competent court there is (at least in the absence of unusual circumstances) no question of his being able to challenge his loss of liberty during the term imposed on the ground that it infringes article 5.4. We have no difficulty in accepting that there is a close analogy of the type referred to by Baroness Hale but as we have explained there is an essential difference between determinate sentence prisoners and indeterminate sentence prisoners for the purposes of article 5.

[50] We consider that *R (Giles)* and *R (Black)* also cited by counsel for the petitioner do not assist her submission. The decision in *Giles* was concerned with a sentence by an English court under section 2(2)(b) of the Criminal Justice Act 1991 which was a custodial sentence longer than the sentence, which should be commensurate with the seriousness of the offence, in order to protect the public from serious harm. This was considered to be a determinate sentence justified under article 5(1) of the Convention without the need for further reviews of detention under article 5(4). In particular the court held that the sentence imposed was not arbitrary since the length of time that was needed to satisfy the protective element was determined by a judge at the time of sentence. We consider this has some similarities with an extended sentence. In *R (Black)* the court again recognises a distinction between determinate and indeterminate sentences. We do not find any support in these cases for the reclaimer's submissions.

Damages

[51] Standing our opinion, we consider the question of just satisfaction and damages may be dealt with briefly. We have set out the history of the reclaimer in paragraphs [6] to [13]. We note the reclaimer did have access to some rehabilitative work both before and after his mandatory release. His response to rehabilitation and progress within the prison can only be described as unimpressive. Nevertheless we do accept that there was delay in providing additional rehabilitative courses recommended by the first respondent for the reclaimer. Looking at the matter broadly, we consider that a period of 18 months may be taken as the relevant period of delay in this case. That period allows some time for the respondents to assess and organise the relevant coursework. We also accept that the reclaimer was upset and frustrated by the delay. Again looking at the matter broadly, we consider that a sum in damages of £500 would have been an appropriate award to represent just satisfaction in damages if the implied article 5 ECHR duty had been breached in this case.

Decision

[52] For the reasons given, we therefore refuse the appeal reserving all questions of expenses.