PLP JR North Conference 12 July 2012

10:30am Break out session

Prison Law Update

It would be impossible to deal with all the different topic areas in which prison law has evolved over the last year in such a short session, but we will try and deal with some of the main ones.

The obvious sourcesof up to date material in this area are the rather excellent LAG updates from Simon Creighton and Hamish Arnott, partners at Bhatt Murphy. On 25 October 2012 Garden Court North will hold a prison law update concentrating on oral hearings and transfer to open conditions.

1. Imprisonment for Public Protection

- IPP sentences are prospectively abolished by the **Legal Aid Sentencing and Punishment of Offenders Act 2012**. The Act received Royal Assent on 1 May 2012. The dire changes to legal aid are proposed to be commenced in Spring 2013, but it is unclear when or if the abolition of IPPs and other measures will come into force. However…
- **LASPO s119**; in force immediately, allows for the SSJ to release and deport indeterminate sentenced prisoners on or after tariff expiry without direction from the Parole Board, by inserting new **s32A** into the **Crime (Sentences) Act 1997**, and provides for their return to prison if they come back to this country; **s32B**.
- **S122** creates 'new' 'two strike' life sentences where the offender is over 18, has a previous conviction for a **Schedule 15B** offence and would otherwise be sentenced to a term of at least ten years for the index offence.
- …and **s123** abolishes IPPs and existing extended sentences. The latter are replaced with new extended sentences in **s124** and 'new' release provisions in **s125** which make some such sentences paroleable.
- **S128** provides that the SSJ may by Order amend the release test for indeterminate prisoners. Such Order can only be by SI approved by both Houses of Parliament.
- Simple eh?

- The immediate commencement of **s119** relates to resources. The delay in replacing IPPs with 'new' 'two-strike' life sentences is less explainable as it would appear to lead to savings of resources. It is unlikely to lead to a major backlash because there is still a harsh indeterminate sentencing power replacing IPPs and it is likely to draw some favourable coverage from prison reformers because anything is better than the dreaded IPP and the new sentences are in fact quite restricted because of the requirement not only for a previous conviction but a notional determinate sentence of ten years or more. The delay may be uncertainty and a perceived need to train judges in yet another sentencing overhaul.
- It is unlikely that the SSJ will use his new power under **s128** to relax the extremely restrictive release test as there has been no consensus as to how it should be changed and it would be politically risky.
- Hence the provisions should eventually stem the tide of new indeterminate sentences but do little for the huge number of existing IPP prisoners.
- In; **Sturnham v SSJ [2012] EWCA Civ 452**, the Court dismissed a somewhat hopeful argument that the test for release of IPP prisoners is in fact already different to that for 'proper' lifers. The contention was that the statutory test for imposition was; "a significant risk of serious harm occasioned by the commission by him of further specified offences", so the release test should be construed as the corollary to that. The CoA held that there was justification for allowing the detention of prisoners on the basis of a lower test than imposition.

2. James v UK

- The European Court of Human Rights has still to determine the applications in the leading IPP cases relating to compatibility with **Article 5**.
- Mr James is an IPP prisoner who was still in a local prison without having been provided with any course work by the time of his tariff expiry. The PB review did not take place for 9 months thereafter. The issues before the Court are whether the post-tariff detention was arbitrary and in violation of **Article 5(1)** or in the alternative was it in breach of **5(4)**. The issues in the other two cases are similar. The cases have been communicated to the Government and a decision of the Court is awaited.

3. Delay and damages under **Article 5(4)**

- In; **Sturnham v SSJ [2012] EWCA Civ 452**,the CoA has all but ruled out damages for breach of **Article 5(4)** where PB reviews are delayed but the prisoner cannot prove on the balance of probabilities that he would have been released earlier had the hearing been held on time. On the facts the delay did not affect detention, and the Court allowed the SSJ's appeal against an award of £300 for stress and anxiety caused by the delay. It seems that such claims can now only succeed where the delay prevents timely release or results in a diagnosable illness.

4. The position where the prisoner can show that delay caused extended detention is to be further considered by the Supreme Court which granted permission to appeal towards the end of last year in; **R (Faulkner) v SSJ [2011] EWCA Civ 349**.

5. New PSI 21/2012

- As result of a large number of challenges the SSJ has conceded that failing to transfer indeterminate sentence prisoners to open conditions within a reasonable time of the SSJ accepting a PB recommendation for transfer, is unlawful. The problem has arisen partly due to general prison overcrowding but also as the latest bottleneck in the IPP fiasco as there are insufficient places.
- As at September 2011 there were 600 such ISPs waiting for transfer. In response NOMS promulgated a new policy centralising the allocation to 'Population Management Section', prioritising tariff-expired prisoners over others, and further prioritising on the basis of the amount of time the prisoner had awaited such transfer.
- However, there have been a number of challenges. In post-tariff expiry cases the SSJ has been transferringprisoners who have issued proceedings, and they claim to be dealing with the problem and reducing the numbers in the queue.
- In one pre-expiry case the prisoner challenged the SSJ's approach as unlawful but asked for alternative relief of ROTLs from closed conditions. This was prohibited by previous policy. As a result the SSJ conceded and has issued **PSI 21/2012** which allows for ISPs to have ROTLs by which to start rehabilitation in closed conditions which would hitherto have had to await transfer. Although the PSI is worded in terms of exceptionality it was designed to deal with the current problems and should be significant.

6. Oral Hearings

- The requirement for oral hearings is a real current issue in relation to two distinct areas; PB hearings and Category A decisions.
- In the former the Admin Court has signalled a willingness to intervene on the basis of procedural fairness. In; **R (Holdsworth) v Parole Board [2011] EWHC 2924 (Admin)**, a tariff-expired IPP prisoner was refused an oral review. The panel which considered the matter had not been provided with the solicitor's written representations. On receipt of the provisional negative decision the solicitor submitted the reps again and asserted that the matter should be considered afresh by a new panel. However, a single member of the original panel declined so to do and rejected the submissions, confirming the provisional decision.
- The Court disagreed and quashed the decision, also upholding an insufficient reasons challenge.
- It is of note that the appeal in; **Osborn & Booth v The Parole Board [2010] EWCA Civ 1409**, is to be heard by the Supreme Court in early 2013 and there will hopefully be further guidance as to the criteria the PB must apply to the issue of when to hold oral hearings.
- In; **R (Longmire) v SSJ [2011] EWHC 1488 (Admin)**, the Claimant challenged the decision of the Director of High Security to refuse an oral hearing in a Cat A case. The Local Advisory Panel and prison psychologist had recommended downgrading, with some support from the latest PB review. Having filed no evidence the Defendant disclosed a statement at the full hearing indicating that the Director had taken further advice from a psychologist (by way of a phone call) about the Claimant's progress and the fact that he had been convicted of a further historical offence recently uncovered by cold case review. The Court held that an oral hearing was required in the circumstances.
- In; **R (Flinders) v Director of High Security [2011] EWHC 1630 (Admin)**, the Court ordered an oral hearing where the Claimant had mental health issues which were controlled by medication and there was a recommendation for downgrading by the LAP, but the Director had refused on the basis that there was insufficient evidence of risk reduction.
- The SSJ and Director appear to be approaching this subject with a view that oral hearings will only be held in exceptional circumstances, whereas the Courts are indicating they should be held where fairness requires them.

- In **R(Shaffi) v SSJ [2011] EWHC 3113 (Admin)**, the Court ordered an oral hearing where the LAP and psychologist and other reporters all recommended downgrading but the Director disagreed.
- However, not all the decisions have been in the same direction, and even where oral hearings are granted the success rate is poor. This is an area which is very much 'work in progress'.
- For example in **R (Downs) v SSJ [2011] EWCA Civ 1422** an independent psychologist had recommended downgrading but other reporters and the CART rejected the psychologists view, and both the Admin Court and CoA refused to intervene. There was no reason to believe that an oral hearing would resolve the difference of view. Likewise in;**R(Willoughby) v CART [2011] EWHC 3463 (Admin)** an oral hearing was deemed not necessary to deal with evidential disputes relating to expert opinions rather than disputes of fact, and an alleged impasse in the case. Fairness did not require a hearing but the judge was concerned regarding the length of time the Claimant had been a Cat A prisoner.
- So far it is clear that Cat A cases are very fact specific and judges are keen to note that the requirement for oral hearings will be few and far between. Nevertheless there has been a willingness to intervene in a number of cases. It should be noted that where fairness demands there is a requirement for an oral hearing, it is not an exceptionality test albeit that hearings will be rare. Conflicts between experts, an inordinate period of time in Cat A, disputed facts, split recommendations between reporters, and the impact of the decision on prospects of release are all criteria of relevance.

7. Licence Conditions

- The Courts continue to give substantial deference to the Probation Service in terms of licence conditions, ruling in; **R (MA) v National Probation Trust and SSJ [2011] EWHC 1332 (Admin)**, that very restrictive licence conditions did not violate either **Article 5** or **Article 8**on the facts. The cumulative effect of the conditions was not sufficient to constitute a deprivation of liberty (applying the control order cases; **SSHD v JJ [2008] 1 AC 385**), and the conditions did not prevent the Claimant from working which had been his main contention on the **Article 8** issue.
- Further, the jr procedure was sufficient for the purposes of **Article 6**. It has been commented by Creighton and Arnott that this appears to conflict with; **R (Gunn) v SSJ [2009] EWHC 1812 (Admin)** where the Court held that the prisoner was

entitled to at least the gist of material considered by a MAPPA meeting, which made recommendations for licence conditions, in order that written representations could be submitted prior to the decision being taken.

8. Whole Life Tariffs

- The ECtHR determined that 'whole life' tariffs do not necessarily breach **Article 3** (inhuman and degrading treatment) in; **Vinter v UK (66069/09) 17 January 2012**. The main argument was that however serious the crime, the imposition of a whole life sentence without prospect of release was inherently inhuman and degrading from the date it was imposed.
- The domestic courts had rejected this argument. The issue had not previously been definitively decided in Strasbourg, although it had been carefully considered in; **Kafkaris v Cyprus (2009) 49 EHRR 35**, in which the Court had ultimately decided that the sentence was not truly life-long.
- The Court held that **Article 3** would only be violated if the sentence was disproportionate, or the sentence could no longer be justified on any penological grounds, and the sentence was truly irreducible. It had not been argued that the sentences in the three leading cases before the court were disproportionate (as they each involved multiple and heinous murders). The Court determined the case on the basis that the point had not yet arisen when it was arguable that the sentence could no longer be justified.
- The decision was by a bare majority of 4 votes to 3. The UK judge, Justice Bratza, had asserted in **Kafkaris**; "I consider that the time has come when the Court should clearly affirm that the imposition of an irreducible life sentence, even on an adult offender, is in principle inconsistent with **Article 3** of the Convention". In **Vinter** it appears he changed his mind as he voted with the majority. A decision is currently awaited as to whether the Grand Chamber will consider the cases further. Of all the countries subject to the Convention only the UK and the Netherlands have such sentences.

9. Prisoner Voting

- In;**Scoppola v. Italy (No. 3)(Application no. 126/05)**, the ECtHR Grand Chamber retreated somewhat on the prisoner voting issue, but held firm to the decision in

Hirst (no 2) v UK to the effect that a blanket ban on prisoner voting is unlawful. The retreat means that States have a wide margin of discretion in determining which categories of prisoner can and cannot vote.

- It remains unclear whether the UK will now comply or whether the government will continue to use the issue to attack the Court, and thereby the Rule of Law itself. The UK signed up and ratified the Convention and must abide by its decisions in accordance with its international obligations. The GC gave the UK leave to make third party submissions in **Scoppola (No 3)** and gave the UK 6 months from the GC decision on 22 May 2012 to bring forward amending legislation. It is clear that the Court has gone to considerable efforts to accommodate the UK position in an attempt to avert a crisis of compliance.
- Feelings run high on this issue but in reality it is not one of the more important issues that the Court has determined.

10. ECtHR

- The prisoner voting crisis is indicative of a greater political issue regarding the Strasbourg Court and some politicians who see it as a foreign court meddling in UK affairs. Considering that the Court has been so successful, particularly in the arena of prisoners' rights, this is extremely unfortunate.
- Much of the media and political campaign against the Strasbourg Court is ill-informed. In recent weeks certain right-wing papers ran a successful campaign against Ben Emmerson QC in his bid to become the next UK judge in Strasbourg despite the fact that he had by far the best CV of the three candidates. UK politicians on the Parliamentary Assembly apparently mobilised right wing MPs from Russia and certain Eastern European countries to vote against Mr Emmerson, instead electing Paul Mahoney, a long-time official of the European Court of Human Rights, who will be 66 by the time he takes up his appointment. The term of office is for 9 years. The Rules currently require judges to stand down at age 70.
- However, Mr Mahoney has now come in for criticism from the Daily Mail which complained that he had written in an academic article that Strasbourg judges make law. Be careful what you wish for.
- The political crisis may be having an effect on the direction the Court is taking, with a number of disappointing judgments for UK Applicants this year, including **Vinter**, and a number of extradition cases involving **Article 3** and **6** issues.

- Difficulties with sentence calculation continue to abound, indeed they seem to proliferate, and the enactment of **LASPO** appears to continue the trend of having sentence and release calculations scattered across a plethora of criminal justice statutes, with no common approach to prospectivity or transition.
- In; **R (Modehej and Smith) v SSJ [2011] 2267 (Admin)**, the Court grappled with release provisions which were prospective and did not affect existing cases, but where the sentences were passed by the Court of Appeal after the new provisions had come into force. The Claimants had been re-sentenced from IPPto extended sentences. The court held that the sentence applied from the date of sentencing in the Crown Court, and therefore the release provisions in force at that date were applicable.
- **R (Elam) v SSJ [2012] EWCA Civ 29** relates to possibly the worst drafted and most litigated SI in British legal history; **CJA 2003 (Commencement No 8 and Transitional and Savings Provisions) Order 2005, SI 2005/950**. The case involved multiple sentences of 18 months for an offence committed prior to the coming into force of the 2003 Act and 5 ½ years for offences committed thereafter. The SSJ simply totalled these to 7 years and applied the 2003 Act release and licence provisions to the whole term accordingly.
- It was unsuccessfully argued that this retrospectively imposed a longer licence period on the Appellant than would have been the case at the time of commission contrary to the principle in **Stellato**. The case is awaiting permission at the SC. The SSJ's solution, adopted by the CoA, has the virtue of simplicity and it is easy to apply, but it is unprincipled and contrary to the scheme of the provisions, and acts to the detriment of the Appellant without such clear statutory intent.
- In; **R(Minter) v Chief Constable of Hampshire Constabulary [2011] EWHC 1610 (Admin)**, the Court resolved conflicting CoA decisions in;**R v Graham S [2001] 1 CrAppR 7**, and;**R v Wiles [2004] 2 CrAppR (S) 88**,preferring the latter. The cases involved the length of sex offender notification periods where there were extended sentences. The length of the notification period depended upon the overall length of the sentence. The Court determined that the 'sentence' constitutes the custodial period and the licence period including the extension period.

Pete Weatherby QC

4 July 2012