Neutral Citation Number: [2017] EWCA 1052 (Crim)

Case No: 2015/05200/A1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT, IPSWICH
HHJ GOODIN
T20080135

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2017

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
LADY JUSTICE THIRLWALL DBE
and
MR JUSTICE GILBART

Between :

JAMES KNIGHTS	**Appellant**
- and -	
THE QUEEN	**Respondent**
-and-	
SECRETARY OF STATE FOR JUSTICE	**Intervener**

Mr Philip Rule (instructed by **the Registrar of Criminal Appeals**) for the **Appellant**

Mr John McGuinness QC and **Mr Simon Heptonstall** (instructed by **CPS Appeals and Review Unit**) for the **Respondent**

Ms Melanie Cumberland (instructed by **Government Legal Department**) for the **Intervener**

Hearing date: 10th May 2017

Approved Judgment

Lady Justice Thirlwall :

1. This is the judgment of the court to which we have all contributed.

2. The appellant (now 35) was sentenced to Indefinite Imprisonment for Public Protection (IPP) on 26th June 2008. The minimum term specified to be served was 8 months based on a notional determinate term of 24 months' imprisonment (from which a 12-month term is calculated less 20 days on remand in custody). The sentence was passed in accordance with the provisions of the Criminal Justice Act 2003 (CJA) in force at the date of sentence.

3. The 8 month term expired on 26th February 2009. The appellant remains in custody, two releases on licence having ended in recall. The appeal is before us on a reference by the Criminal Cases Review Commission.

4. The CJA was amended by the Criminal Justice and Immigration Act 2008 (CJIA) which received the Royal Assent on 9th May 2008. The effect of one of the amendments was to remove IPP from the sentences available to a judge where the notional determinate sentence was less than four years' imprisonment. The CJIA was brought into force on 14th July 2008, 16 days after the appellant was sentenced. It is not in dispute that had the appellant been sentenced after 14th July 2008 for whatever reason a sentence of IPP would not have been open to the judge on the facts of this case. In short it is the appellant's case that he should have the benefit of the amendments.

The Facts

5. The offences to which, on 30th May 2008, at Ipswich Crown Court, the appellant pleaded guilty were committed over an eighteen month period between January 2006 and July 2007. Counts 1-3 of the indictment were offences of distributing indecent photographs of a child contrary to s1(1)(b) of the Protection of Children Act 1978. Counts 4 to 17 were offences of making indecent photographs of a child contrary to s1(1)(a) of that Act. Count 18 was a charge of possession of indecent photographs of children contrary to s160(1) of the Criminal Justice Act 1988.

6. The facts can be summarised shortly. On 17th July 2007, the police executed a search warrant at the home of the appellant and seized computer and CD equipment. He was arrested. Of 705 images retrieved from what had been seized, 652 images were at level 1; 29 at level 2; 8 at level 3; and 16 at level 4. 8 of the images were movie files. The three distribution offences related to the distribution of a level 4 image via a chat room. All the photographs related to young girls aged between 6 and 14.

7. The appellant had two previous convictions for 9 offences. In 2004, he was sentenced to a community punishment and rehabilitation order for 7 charges of making and distributing indecent photographs of children. In 2007, he was convicted of two offences of exposure; on two separate occasions, he had masturbated in front of young girls. He was sentenced to concurrent sentences of 6 and 7 months' imprisonment, suspended for two years; he was also subject to supervision for 2 years and a requirement to attend a 2 year sex offender programme.

8. A pre-sentence report was ordered. The probation officer considered that, taking account of his convictions and other factors, the risk of reconviction was high. She said that there had been a clear escalation from viewing and distributing indecent images, to enticing young girls to send images, and into approaching young girls whilst masturbating and asking them to perform oral sex. The targeting had continued with internet use while on bail. At the date of the pre-sentence report he was registered under the Multi Agency Public Protection arrangements and assessed as posing a high risk of harm.

9. At the sentencing hearing on 27th June 2008 the judge concluded that the appellant was dangerous, as defined in the CJA 2003, as amended. He imposed IPP concurrently on all 18 counts and directed that the appellant be the subject of a Sexual Offences Prevention Order for 7 years, pursuant to s. 104 of the Sexual Offences Act 2003. As a consequence of the convictions he was subject to notification requirements pursuant to part 2 and Schedule 3 of that Act. In fact, the offence on Count 18 is not included in the list of serious offences in Schedule 15 to the 2003 Act. Accordingly, IPP was not available to the judge. He sought to remedy that at a later stage by revoking the order of IPP on that count and imposing no separate penalty.

10. The appellant applied to this court for leave to appeal against sentence and for an extension of time to do so of 2 years and 8 months. Those applications were granted. The appeal was heard on 5th October 2011: see *R v Knights* [2011] EWCA Crim 2533. It was the appellant's case that the judge had erred in concluding that there was a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences and so was wrong to impose a sentence of IPP. The court (Richards LJ, Macur and Sharp JJ) dismissed the appeal, and at paragraph 30 made plain that its "central concern" was the fact that the appellant had moved on to more serious contact offences that gave rise to a significant risk of serious harm, with the offences of downloading and distributing images offences looked at in the context of his other activities. The court noted that both the original sentence on Count 18 and its replacement were unlawful. Since they were immaterial to the overall length of the sentence the court did not interfere with the sentence on Count 18. No complaint is made about this and we say no more about it.

11. It is not necessary to set out the whole of the history of the appellant's time in custody. It is sufficient to record that after some delays in assessment and with the provision of courses his case was first considered by the Parole Board in August 2011. He was not released. He first came before the Parole Board at an oral hearing in 2012. He was not released. The Board concluded that he represented "a high risk of serious harm to children and a medium risk to a known adult". It was asserted that he "continued to pose an unacceptably high risk of committing an offence which could cause serious harm and … the level of this risk is such that it could not be managed in the community".

12. After further work on rehabilitation, on 1st July 2013, after a hearing in May 2013, the appellant was released on licence. He was recalled to prison on 19th September 2013 for breach of his licence conditions. On 3rd February 2014, the Parole Board directed his release on licence again, with a condition that he reside at approved premises. He was released in accordance with that decision on 12th March 2014. On 28th November 2014, after admitting using the internet in breach of conditions, and having unsupervised contact with his partner's nieces, he was recalled. On 17th April 2015,

the Parole Board directed that his licence be considered again. On 27th November 2015, the Board decided that he should not be released. It was concerned that he should receive a specific psychological programme (called "HSP"). It is clear that at that stage, notwithstanding the fact that he had completed some courses directed to rehabilitation he remained a risk to the public. He is still in prison.

13. In the meantime, the appellant had issued a claim for judicial review in August 2012. The claim was dismissed by Laing J on 11th February 2015 and the appellant sought permission to appeal to this court. Limited permission was granted and a single constitution heard both appeals together, sitting in the civil and criminal divisions of the Court of Appeal. The decision of the civil division dismissing that appeal is at [2017] EWCA 1053 (Civ).

Imprisonment for Public Protection

14. The history of the IPP from its introduction by the Criminal Justice Act 2003 to its abolition by LASPO is set out at paragraphs 1 to 4 of the judgment of Sir Brian Leveson P. We adopt it and for ease of reference incorporate it into this judgment below (original paragraph numbers in square brackets).

> "[1] The sentence of imprisonment for public protection ("IPP") was introduced into the law by s. 225 of the Criminal Justice Act 2003 ("the 2003 Act"). It provided for the mandatory imposition of an indeterminate sentence upon offenders who presented a significant risk to the public of causing serious harm from further serious offending and could follow conviction for a number of specified offences which carried a maximum punishment of imprisonment for ten years or more. The judge was required to specify the minimum period before which there was no eligibility for parole: this was calculated by reference to the conventional (but hypothetical) determinate sentence that would otherwise have been imposed. Parole, however, fell to be considered by the Parole Board which had to be satisfied that it was no longer necessary for the protection of the public that the offender be detained.
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> [2] A statutory presumption of dangerousness and restrictive exceptions to the imposition of an IPP meant that offenders qualified for the sentence having committed crimes which would have justified a conventional determinate sentence measured in weeks or months as well as years. As a result, some offenders became eligible for parole very quickly whereupon their cases required consideration by the Parole Board. The result was well-documented problems for the National Offenders Management Service and the Parole Board which were both overwhelmed by the large number of prisoners requiring assessments, sentence plans and access to courses to enable them to demonstrate their safety for release.
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> [3] In an attempt to address concerns that offenders were being detained for months and years following parole eligibility either

because they could not access courses or because of delays at the Parole Board, the criteria for the imposition of the sentence were amended by s. 13 of the Criminal Justice and Immigration Act 2008 ("the 2008 Act"). The effect of the amendments were, first, to remove the mandatory requirement to impose IPP and to give judges the power to impose it when certain criteria were met; secondly, to remove the presumption of dangerousness in s. 229; and, thirdly, to restrict the imposition of IPP to those offenders who had relevant previous convictions or where the offending warranted a determinate sentence of at least 4 years. On 8 May 2008, the Act was granted Royal Assent and the relevant provisions were brought into force on 14 July 2008: see article 2(1) and Schedule 1, paragraph 4 of (Commencement No 2 and Transitional and Savings Provisions) Order 2008 (SI 2008/1586), which was published on 17 June 2008.

[4] Problems remained with the operation of the sentence and, by s. 123 of the Legal Aid, Sentencing and Punishment of Offenders Act 20123 ("LASPO"), the sentence of IPP was abolished being replaced by a new life sentence the imposition of which was obligatory (unless unjust) following conviction for a second time of one of a defined group of violent or sexual offences where both previous and current offences have been met by or would call for, determinate sentences of 10 years or more: see Schedule 15B of the 2003 Act as inserted by Schedule 18 of LASPO. There is also a new form of extended sentence: see s. 226A of the 2003 Act inserted by s. 124 of LASPO. These provisions came into force on 3 December 2012 but were not made retrospective so that existing IPP sentences remained to be served by those upon whom they had been imposed notwithstanding that the sentence had been abolished."

15. One of the effects of the amendments has been that more life sentences are now passed than were passed during the currency of the IPP regime.

The Appeal

16. The CCRC referred the appeal on a single ground, namely "that there is a real possibility that the Court of Appeal would not, on the basis of Article 7 of the Convention and pursuant to the *lex mitior* principle, uphold Mr Knights' sentence of IPP". Mr Philip Rule, on behalf of the appellant, has sought to rely on two further grounds (for which he seeks leave to appeal, the CCRC having declined to refer them). These are, first, that the sentence was unlawful because it was a violation of Article 14 ECHR on the basis that there was a differential treatment between him and others who are convicted of this offence, were assessed as dangerous, but were not sentenced to an IPP. The second additional ground is that the "continuing sentence of imprisonment" is grossly disproportionate or arbitrary and so contravenes Article 3 and/or Article 5 of the ECHR.

17. In February 2016, Treacy LJ stayed the appeal pending the decision of the Supreme Court in *R v Docherty,* which was handed down on 14th December 2016 and is now reported at [2016] UKSC 62 [2017] 1 WLR 181. Treacy LJ also gave permission to the Secretary of State for Justice to intervene. We received written and oral submissions from Mr Rule, from Mr John McGuinness Q.C. and Mr Simon Heptonstall on behalf of the Crown Prosecution Service and from Ms Melanie Cumberland on behalf of the Secretary of State.

Lex Mitior and Article 7 ECHR

18. Mr Rule submits that there is an internationally recognised principle of *lex mitior* (the law of lesser punishment). Its effect is that where a person commits an offence and between that date and the date of sentence the punishment for the offence is reduced then the offender must be sentenced in accordance with the later, more lenient penalty. He submits that this principle required the sentencing judge (and now this court) to sentence in accordance with the regime as amended by s13 of the CJIA notwithstanding that the CJIA was not yet in force.

19. The same argument was deployed in *R v Docherty* where it was directed to the situation which pertained in 2012 when LASPO abolished IPP and (amongst other things) introduced the new life sentence and a new form of extended sentence. Docherty was sentenced to IPP in the period between the passage of LASPO and its coming into force. The argument was summarised by Lord Hughes in *Docherty* at [1] in these terms:

> "(a) the new scheme was less severe than the earlier one, and therefore to apply the earlier was unlawful as contrary to an international principle of "lex mitior", which is binding on the English court via Article 7 of the ECHR, as explained by the Strasbourg Court in *Scoppola v Italy* (No 2) (2010) 51 EHRR."

20. It is useful to set out the facts of *Scoppola (No 2)* in brief. In September 1999 Scoppola murdered his wife. As at that date the mandatory sentence was life imprisonment. In December 1999, a new procedure was introduced: if an offender elected to be subject to the new shorter procedure (which removed some of the procedures from which he would otherwise benefit), the sentence would then be imprisonment for 30 years instead of for life. Scoppola elected the new procedure. He was convicted on 24th November 1999 and was sentenced to 30 years' imprisonment. Later that day a further change was implemented which meant that someone in Scoppola's position was liable to life imprisonment, albeit without some punitive features of the detention. The prosecution appealed and a life sentence was substituted. The Strasbourg court found that this was a breach of Article 6 and of Article 7 ECHR.

21. Article 7 (1) ECHR provides for no punishment without law in these terms:

> (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be

imposed than the one that was applicable at the time the criminal offence was committed."

22. Article 15 of the UN International Covenant on Civil and Political Rights is in the same terms as Article 7 but contains an additional sentence which provides a different slant to the problem and is in these terms:

> "If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby."

23. As Lord Hughes identified in *Docherty* (at [31]):

> "As pointed out in the dissenting judgment of the minority in *Scoppola (No 2)* at O-111, this represents a norm of a different order from the principle of no punishment without law. Whilst the lex gravior principle is a fundamental and essential condition of freedom, lex mitior
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> > "expresses a choice that reflects the development of a social process in the context of criminal law. It circumscribes the scope of criminal law by preserving benefits accruing to defendants as a result of substantive laws subsequent to the commission of the offence and applicable while the case was pending."
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> The difference between the two principles is underlined by the fact that whereas lex gravior prohibits applying to a case a rule which was not the law when the acts under judgment were committed, lex mitior, when it operates, actually requires such a rule to be applied."

24. Relying on the decision of the majority of the Strasbourg court which held that the additional sentence in Article 15 should be read into Article 7, Mr Rule submits that the same principle should be applied in this case. It is, however, necessary to examine the analysis of *Scoppola No 2* in *Docherty* and the reasoning in the latter case in rather more detail.

25. Thus, at [38]-[39], Lord Hughes identified a difference in approach between what appeared at [108] and following of *Scoppola* (affirming "that article 7(1) of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law") and what was said in respect of Scoppola himself at [119] to the effect that he "was given a heavier sentence than the one prescribed by the law which, of all the laws in force during the period between the commission of the offence and delivery of the final judgment, was most favourable to him". This caused Lord Hughes to say (at [40]):

> "There is a very clear difference between (1) a principle which prevents a court from imposing a penalty above and outside the

range currently provided for by the State as appropriate to the crime and (2) a principle which requires the court to seek out and apply the most favourable rule which has existed at any intervening time since the offence was committed, even if it has since been abandoned. The first would fall within the rationale of confining the court to a range currently considered appropriate for the offence; the latter would not. The difference between the two is not adverted to, still less explored in the judgment of Scoppola. It is, accordingly, by no means clear that the court intended to expand its incorporation of lex mitior into article 7 by including the latter proposition."

26. At [42], Lord Hughes goes on:

> "English criminal courts sentence according to the law and practice prevailing at the time of sentence, whenever the offence was committed, subject only to scrupulous observance of the lex gravior principle of Article 7, namely that no sentence must be imposed which exceeds that to which the defendant was exposed at the time of committing the offence."

27. At [44], he set out the English practice by reference to s. 125(1) of the Coroners and Justice Act 2009 and, in particular to the observations of Lord Judge CJ in *R v H (J)* [2011] EWCA Crim 2753, observing at (e) that:

> "appeals against sentence to the Court of Appeal are not conducted as exercises in re-hearing ab initio, as is the rule in some other countries; on appeal a sentence is examined to see whether it either erred in law or principle or was manifestly excessive, and those questions are determined by reference to the law and practice obtaining at the time that the sentence was passed by the trial judge; see *R v Graham [1999] Cr. App R (S)* 312 and *R v Boakye [2012] EWCA* Crim 838; accordingly the situation which arose in *Scoppola* out of a change in the law between sentence and appeal could not raise a similar difficulty here"

28. At [45], Lord Hughes records that English practice does not include an examination of all rules and laws which have obtained between the offence and sentencing with a view to finding a period when a more lenient regime applied and that if this is what the Strasbourg court meant in [108], [109] and [119] of the judgment, English practice does not accord with it but that:

> "there is no injustice to the defendant if he is sentenced according either to the law as it existed at the time of his offence or, if more lenient, according to the law as it exists when he is convicted and sentenced. To insist that a defendant should not be sentenced on a basis now authoritatively regarded as excessive is one thing. It is quite another to say that he should be sentenced according to a practice which did not obtain when he committed the offence and does not obtain

now, merely because for some time in the interim, however short, a different practice was adopted which has now been abandoned as wrong."

29. In [46]-[48], Lord Hughes gave a number of illustrations of the operation of English legislative and judicial practice and, at [50]-[52] dealt with the phased commencement of legislation. He then disposes of Mr Rule's argument in terms which we can do no better than repeat:

> "53. The reality is that all changes in sentencing law or practice have to start somewhere. It is perfectly rational, indeed sensible, for a date to be fixed and for the sentencing of any offender which takes place after that date to be governed by the new rule/practice, whenever the offence was committed, in accordance with the usual English approach and subject only to avoiding lex gravior. That is the practice now adopted by the Sentencing Council when promulgating new guidelines. Such guidelines are issued on the explicit basis that they are to become applicable from a stated date, as soon after publication as it is practicable for courts and practitioners to be equipped with and digest copies. The new guidelines are made applicable to any sentence passed after that date, whenever the offence was committed. In 2012 a guideline for drug offences included the recommendation that the offences of some couriers from abroad, where they were vulnerable and exploited by others, ought not to be treated as quite so grave as other drug importation cases. The guideline was stated to operate for sentences from 27 February 2012, whenever the offence had been committed. It had been preceded in the usual way by a public consultation, in which this change, like others, had been canvassed as a possibility. A number of previously sentenced defendants who said they were in this category (although they were not) abstained from appealing their sentences until after the new guideline was published. Their offences and sentences had been between 2008 and 2011; all the appeals were very much beyond the time limit. In *R v Boakye* [2012] EWCA Crim 838 the Court of Appeal held that even if these cases had been within the new assessment of gravity, it was not possible retrospectively to re-visit unappealed sentences. That was to apply well established law: see *R v Graham* [1999] 2 Cr App R (S) 312, where the court had considered a reference to the court by the Criminal Cases Review Commission long after sentence and following a change in sentencing practice. Rose LJ had there said, at p 315:
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> "A defendant sentenced lawfully, in accordance with the prevailing tariff, and when all factors relevant to sentence were known to the sentencing judge, can, in our view, hardly be described as the victim of [a miscarriage of justice]. Secondly, an alteration in the statutory maxima or minima

penalty between sentence and reference cannot, in our view, give rise to legitimate grievance. ..."

54. Whilst a court will faithfully give effect to a change in a sentencing regime from the time that it is introduced, it is not permissible for it to anticipate its commencement. That way lies chaos. Sometimes, indeed, changes which are legislated for in statute are never brought into force. That was the case with a raft of new provisions for intermittent custody enacted by the Criminal Justice Act 2003. The present appeal amounts to a claim by Docherty to anticipate the commencement of the change of regime, to the extent that he wishes the disappearance of IPP to be effective for him before the Commencement Order (by article 6(a)) abolishes it. He can no more do that than it would be possible for him to contend that IPP should be treated as unavailable for every court from the day that LASPO received the Royal Assent on 1 May 2012. Anticipation of a change which is yet to take effect is no part of lex mitior. Lex mitior, as explained in *Scoppola* at para 108, prevents the imposition of a sentence which the system has now adjudged, by a change of law, to be excessive. But if the change has yet to be made, that judgment has not yet been given effect; it is in prospect only. The fixing of the date for the change is part of the change itself. If a conscious decision has been made not yet to commence the new law/practice, it cannot yet be said that "society now considers excessive" the old. And it may well consider, rationally, that a penalty shall be regarded as excessive for the future but not for the past.

Conclusion: *lex mitior*

55. There are real difficulties in interpreting the decision in *Scoppola,* both with the insertion of a new sentence into article 7 when such was deliberately left out at the time of drafting, and with its extent if it is to be considered inserted. As to the first, the decision is the considered view of the Grand Chamber. It is not necessary to revisit the controversy because English practice recognises *lex mitior* in its ordinary form, namely the principle that an offender should be sentenced according to the law and practice prevailing at the time of his sentence, subject to not exceeding the limits (ie in England normally the maximum) provided for at the time the offence was committed. If it were necessary to investigate the second difficulty, and the possibility that a defendant is entitled to insist on being sentenced according to any more favourable law or practice which has at any time obtained between the commission of the offence and the passing of sentence, that extended rule is not clearly adopted by the Grand Chamber, appears not to be within the stated rationale for the principle of *lex mitior,* and would entail unwarranted consequences. Such an extended

concept of the principle should, with great respect, not be applied.

56. Given these conclusions, the various other examples, to which we were referred, of express inclusions in national and international instruments of an additional sentence stating the *lex mitior* rule, do not take the matter any further forward. Unlike ECHR article 7 they are not part of domestic English law. They do not in any event shed any light on the second question examined above, as to the extent of the *lex mitior* principle, assuming it is to be read into article 7."

30. Mr Rule submits that we should distinguish the case of *Docherty* on two bases. The first is that the Supreme Court was there dealing with a fundamental change of regime including the abolition of IPP whereas the 2008 amendments did not affect the regime but eligibility only. Thus, he argues, this court may and should take a different approach. We disagree. The 2008 Act introduced important changes to the statutory test for the imposition of IPP; if certain criteria were met an indefinite sentence or extended sentence for public protection could be passed, but doing so was no longer automatic. The sentencing judge had discretion. For those offenders who had not previously been convicted of certain grave offences, set out in the amended Schedule 15B of CJA 2003, the Act also inserted the requirement that there be a minimum length of notional determinate sentence of four years before IPP was available to the judge. This removed IPP as an option for many offenders. Both of these changes went to the heart of the regime. True it is that fewer arrangements were necessary for the amendments to be implemented than were required at the time of the abolition of IPP and the introduction of a different type of extended sentence but that does not change the fact that the new requirements were integral to the changed regime. This is not a basis upon which *Docherty* can be distinguished.

31. Second, Mr Rule argues that by the passing of the CJIA in May 2008, Parliament and society had expressed the view that the sentence of IPP should be abolished for an offender in the appellant's position and that prevailing view should have been implemented immediately. He submits, effectively, that the appellant has been sentenced "on a basis now authoritatively regarded as excessive" *(Docherty*, paragraph 45). Again, we disagree. An Act of Parliament very rarely comes into force on the day it receives the Royal Assent (in this case, May 2008). When passing the CJIA, Parliament must be taken to have known that there would be a later statutory instrument which would provide for an implementation date. That is the usual order of things. It was open to Parliament to require transitional arrangements and, for that matter, to abolish all existing indefinite sentences. It did neither. The effect of the Act was not retrospective. The Commencement Order, published on 17th June 2008 reflects the fact that the change is for the future. It provides (at Schedule 2 para. 2) that the amendments under the CJIA are of no effect in respect of any person sentenced before the date upon which the amendments came into force. Mr Rule submits that the "Commencement Order could lawfully and properly have chosen to apply the coming into force to any person sentenced on or after 17 June 2008 (or May 2008 by providing transitional or revision provisions.)." This submission wholly ignores that nothing in the Act required or even foreshadowed such a course. The course taken by the minister was not unlawful. It was not arbitrary. We cannot see

that this argument is a basis for distinguishing this case from that of *Docherty*. On the contrary, the same argument is dealt with comprehensively at [53] of the judgment of Lord Hughes.

32. We are bound by the decision in *Docherty* which, in any event, in our judgment accords both with the law and with sound practice: we can identify no flaw in its reasoning and agree with it. Neither are we prepared to accept Mr Rule's invitation to adjourn this appeal so that he may challenge the reasoning in respect of *lex mitior* in Strasbourg. This ground of appeal, referred by the Criminal Cases Review Commission, is dismissed; indeed, had *Docherty* been available before the reference, we have little doubt that it would not have been referred at all.

Differential Treatment

33. Permission can be granted in respect of additional grounds only in exceptional circumstances (if the same argument has already been presented on appeal, see s. 13(2) of the Criminal Appeals Act 1995 and *R v Thomas* [2012] EWCA Crim 94 and compare *R v Mills (no.2)*[2003] EWCA Crim 1753). Mr Rule seeks to overcome that hurdle by arguing that imposing indefinite detention upon him is starkly differential treatment of him compared to others in the comparable situation when considering any justification advanced for preventative detention. Thus, IPP imposed upon him after enactment of the CJIA 2008 is unjustifiable and in violation of Article 14 ECHR. That raises the questions whether the appellant possesses a relevant "other status" so as to trigger Article 14 and, if so, whether there is an objective justification for treating him differently.

34. The arguments developed in this appeal overlapped significantly with those in the civil appeal where, it seems to us, they were more aptly deployed. We do not repeat them. In dealing with the question of "other status" Sir Brian Leveson P (with whom the other members of the court agreed) said at paragraph [43]

> "As to the proper approach to the concept of 'other status' in article 14, I can do no better than refer to the decision of the Divisional Court in *R (Stott) v Secretary of State for Justice* [2017] EWHC (Admin) 214 in which Clift is analysed both domestically and in the ECtHR along with the subsequent decisions in *Haney* (supra) and *R v Docherty* [2017] 1 WLR 191, [2016] UKSC 62. Unless and until the Supreme Court revisit the House of Lords decision in *R(Clift) and others v Secretary of State for the Home Department* [2007] 1 AC 484, it remains binding".

35. We there upheld the decision of Laing J that the appellant's position as an IPP prisoner sentenced before the change in the law did not constitute "other status". We remain of that view but even if, following further consideration of the Strasbourg jurisprudence, a different view is taken by the Supreme Court, *Docherty* provides an insuperable hurdle to the argument. The court was there dealing with the issue of alleged discrimination arising from abolition of the IPP by operation of LASPO but that does not affect the applicability of what Lord Hughes said (at [63]):

> " [63] The suggested discrimination is said to arise as between a defendant in the position of the appellant, and a defendant who committed an identical offence on a similar date, but who was convicted on 4 December 2012. It is certainly true that the effect of the Commencement Order is that IPP is available to be imposed in the case of the appellant but not in the case of that comparator. The appellant submits that this discriminates objectionably against him on grounds of "other status", namely either (i) his status as a convicted person prior to 3 December or (ii) his status as a prisoner who is subject to an indeterminate sentence. Assuming for the sake of argument that status as a prisoner subject to a particular regime can in some circumstances amount to sufficient status to bring article 14 into question (*Clift v UK* [2010] ECHR 1106), it cannot do so if the suggested status is defined entirely by the alleged discrimination; that was not the case in *Clift*. For that reason, the second suggested status cannot suffice. As to the first, even if it be assumed in the appellant's favour that the mere date of conviction can amount to a sufficient status, which is doubtful, the differential in treatment is clearly justified. All changes in sentencing law have to start somewhere. It will inevitably be possible in every case of such a change to find a difference in treatment as between a defendant sentenced on the day before the change is effective and a defendant sentenced on the day after it. The difference of treatment is inherent in the change in the law. If it were to be objectionable discrimination, it would be impossible to change the law. There are any number of points which may be taken as triggering the change of regime. The point of conviction is clearly one, and the point of sentence is another. Neither is, by itself, irrational or unjustified."

36. The appellant's case cannot be distinguished from *Docherty*. This ground is unarguable and we refuse leave.

Retrospectiveness

37. Starting from the proposition that because the maximum sentence for the offences for which the appellant was convicted is 10 years and underlining that he has now served 9 years (compared to the notional determinate sentence of 2 years leading to the 12-month tariff punitive period), he argues that even if the sentence was lawful at the time it was passed, it has become disproportionate to the crime committed and now constitutes a breach of Articles 3 and 5 of the ECHR.

38. Although Mr Rule acknowledges that there are two separate elements of the sentence with different purposes, he overlooks the differences between them. The minimum term to be served represents the punishment for the offence whilst the indeterminate period is for the protection of the public – see *James, Walker and Lee v Secretary of State for Justice* [2010] 1 AC 553. An offender subject to an IPP who has served the minimum term is no longer detained as a punishment but because of the risk that he poses and then only for as long as the Parole Board consider him to be a risk to the public.

39. As a matter of principle, we do not accept that a lawful sentence can become disproportionate and so lead to a breach of either Article 3 or Article 5 simply by reason of the passage of time, particularly where, as here, it is the appellant's own conduct that has caused his return to prison. The appellant has been released on two occasions. He was recalled on each occasion because he breached the conditions of his licence. He is detained because he still presents a danger to the public as we set out when dealing with similar arguments on the civil appeal (at [28] to [41]) but irrespective of the substance, the insuperable difficulty for Mr Rule in pursuing this ground is that the function of this court is review, not supervision.

40. In the context of an appeal against sentence the court considers whether the sentence the subject of the appeal was passed in accordance with the law and whether it was wrong in principle or manifestly excessive. If it is unlawful, wrong in principle or manifestly excessive the sentence is quashed and a different sentence is imposed (see Lord Judge CJ in *R v H supra*). Events which occur after sentence sometimes affect that review; thus, in a homicide case, where fresh medical evidence admissible under s23 of the Criminal Appeal Act 1968 reveals that an offender was suffering from a mental disorder at the time of the offence, the court will take that evidence into account when reviewing the original sentence. We contrast that with the situation where the evidence is of mental impairment occurring only after sentence. That can have no influence on the lawfulness of the sentence passed by the original court.

41. In some cases, the Mental Health Act 1983 allows for a change in the prisoner's status at the direction of the Secretary of State for Justice but this does not affect the status or lawfulness of the original sentence which remains in place. Furthermore, on occasion, something important has been overlooked at the time of sentence which may itself be admitted by the court reviewing the sentence. Sometimes, in the case of a young offender, evidence of later conduct casts a different light on the evidence at the time of sentence and, exceptionally, the court considers it, see Sir Igor Judge PQBD in *R. v Caines; R. v Roberts* [2006] EWCA Crim 2915 at [44]. Finally, where the court has quashed a sentence it may consider evidence about the conduct of an offender in prison before imposing a new sentence on appeal. None of these examples, however, transforms the court into a supervisory court.

42. Challenges arising out of the length of time an offender has spent in custody as a result of the sentence, or the lack of courses, or other failings by the Ministry of Justice can be pursued by way of a claim for judicial review (as this appellant has done). They do not found an appeal against sentence. If authority for this self-evident proposition is necessary it is to be found in *R v Roberts* [2016] EWCA Crim 71. The court was there considering appeals by a number of appellants against IPPs, based principally on a submission that the prolonged time spent in custody no longer had any meaningful link with the offence for which the sentence was passed. Lord Thomas CJ put the matter in this way:

> "[19] It is well established that this court is a court of review. In *R v A&B* [1999] 1 Cr App R (S) 52, Lord Bingham CJ made this clear at page 56:
>
> "the Court of Appeal Criminal Division is a court of review; its function is to review sentences imposed by courts at first

instance, not to conduct a sentencing exercise of its own from the beginning."

[20] There is no basis for departing from the principle so clearly expressed by Lord Bingham. This court considers the material before the sentencing court and any further material admitted before the court under well established principles. It considers whether on the basis of that information the sentence was wrong in principle or manifestly excessive. It does not, years after the sentence, in the light of what has happened over that period, consider whether an offender should be sentenced in an entirely new way because of what has happened in the penal system or because, as in *ZTR* [2015] EWCA Crim 1427, the offender has supplied information long after conviction. This court was not established to perform the function suggested; it is not constituted to carry out the suggested function; and it could not do so as presently constituted.

[21] There is under our constitution the available means to rectify any injustice in the way in which the operation of these sentences has in fact eventuated. The review of sentences in the light of events occurring long after the original sentence is a matter for the Parole Board or, if a change is required for the regime for release, as we discuss at paragraphs 43 and following below, for the Executive and Parliament under the powers granted under s.128 of LASPO 2012. Such a change would not amount to any impermissible interference with the sentence passed by the courts. It would be to correct a position that may have been unforeseen when the IPP sentencing regime was enacted."

43. We agree. We refuse leave to appeal on this ground also.

Conclusion

44. In the circumstances, we dismiss the appeal on the ground referred by the Criminal Cases Review Commission and refuse leave to appeal on the additional grounds advanced.