Neutral Citation Number: [2021] EWCA Civ 805

Case No: C4/2020/1808

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Andrew Baker J
CO/1836/2020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/05/2021

Before :

LADY JUSTICE ELISABETH LAING
LORD JUSTICE BIRSS
and
LORD JUSTICE WARBY

- -

Between :

The Queen on the application of Lopes	**Appellant**
- and -	
Secretary of State for the Home Department & Anr	**Respondents**

- -
- -

Miss Jennifer Lanigan (instructed by **Kesar and Co. Solicitors**) for the **Appellant**
Mr Ben Watson QC (instructed by **Government Legal Department**) for the **Respondents**

Hearing dates : 19 May 2021

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Approved Judgment

Lady Justice Elisabeth Laing DBE :

Introduction

1. This is an appeal from a decision by Andrew Baker J ('the Judge') on 17 September 2020 to refuse, after an oral hearing, renewed applications for permission to apply for judicial review and for a writ of habeas corpus. Freedman J refused the applications on the papers on 15 July 2020.

2. The decisions challenged in the judicial review claim form are the 'ongoing failure to deport the claimant' and the 'ongoing failure to extradite/apply the public policy'. In the box headed 'Date of decision' the claim form says, 'ongoing failure to make a decision'.

3. Dingemans LJ granted permission to appeal on 22 December 2020. There was a compelling reason to give permission to appeal against the refusal of permission to apply for judicial review because the Appellant ('the A') had an unfettered right of appeal against the refusal of the writ of habeas corpus. Dingemans LJ added that the grant of permission to appeal would give the court an opportunity to decide whether, in the light of the decisions of the Divisional Court in *Jane v Westminster Magistrates' Court* [2019] EWHC (Admin) 394; [2019] 4 WLR 367 and *Cosar v Governor of Wandsworth Prison* [2020] EWHC 1142 (Admin); [2020] 1 WLR 3846, and in the circumstances of this case, habeas corpus is a permissible remedy.

4. On this appeal, the A was represented by Miss Lanigan. The Respondents ('the Secretaries of State') were represented by Mr Watson QC. We thank counsel for their written and oral submissions.

The facts

5. The summary which follows is a combination of assertions made by the parties in their various documents about the sequence of events. None of the correspondence I refer to in this summary was included in the bundles for this appeal.

6. The A is 53. He is a citizen of Guinea Bissau. On 18 December 2002, the Criminal Chamber of Lisbon issued an international warrant for his arrest. He was sought for offences of robbery, attempted robbery and unlawful possession of a prohibited weapon. It was alleged that he had committed those offences in the course of the evening, on 9,10 and 11 March 1999. In two cases he was alleged to have threatened a woman at a cash machine (in one case, with a gun), forced her to withdraw money, and then stolen her bank card, which he had used to draw more cash. In the third case it was alleged that the A had threatened a woman at a cash point with a lighter shaped like a gun. She escaped. The Secretaries of State infer from the terms of the Portuguese warrant that the A is a fugitive, having been bailed, and having failed to answer his bail. The warrant records that the statute of limitations was suspended on 25 November 2001 'on the grounds of the statement of contumacy'.

7. On his own account, the A came to the United Kingdom during 1999. The Secretaries of State suggest that the proper inference is that he fled here. On 6 December 1999, he claimed asylum. The Secretary of State for the Home Department refused that claim on 17 January 2000. The Government of Portugal made a request for the A's extradition. On 3 September 2003, the Secretary of State for the Home Department issued an authority to proceed under section 7 of the Extradition Act 1989 ('the 1989 Act').

8. On 14 October 2003, the A was convicted of murder at Norwich Crown Court. He was sentenced to life imprisonment with a minimum term of 15 years and 6 days. According to reports in the press, the A had collected his partner from work, hit her with a steering wheel lock, strangled her and put her body in the river Bure near Norwich. In his sentencing remarks, Butterfield J described the murder as 'the wicked, brutal killing of an innocent woman'. He added that there had been a 'significant degree' of planning and premeditation.

9. The A was arrested under an extradition warrant on 5 February 2004. He was committed on 14 July 2004 by a District Judge under section 9 of the 1989 Act to wait for the Secretary of State for the Home Department's decision whether he should be extradited to Portugal. He declined to challenge his committal by an application for habeas corpus.

10. On 4 April 2017, a case manager in HM Prisons and Probation Service ('HMPPS') replied to inquiries by the A's representatives. He said that the A was 'eligible' for the Tariff Expired Removal Scheme ('the TERS'). He would not be considered for this, however, until 'Immigration Enforcement' confirmed that there were no barriers to removal. What that was said to mean was that a deportation order would have to have been served, there would have to be no outstanding appeals and a travel document would have had to have been secured. It was not clear whether this case manager knew about the outstanding request for extradition.

11. On 30 September 2017, the Secretary of State for the Home Department sent the A a 'stage 1' notice of a decision to deport him to Guinea Bissau under section 120 of the Nationality Immigration and Asylum Act 2002. On 3 October 2017, the A signed a document disclaiming his right of appeal.

12. The Secretary of State for the Home Department approached the Portuguese authorities. In February 2018, they confirmed that they were still interested in the A's extradition.

13. The A applied for the TERS to be applied to him on 19 June 2019. The A's representatives wrote to the National Offender Management Service. They said that the A's tariff had expired. He still claimed to be innocent of the offence. He wanted to be removed to Guinea Bissau. They referred to the Secretary of State for the Home Department's TERS policy. The A wanted to take advantage of it. There were 'no applicable reasons for refusal'. They asked the Secretary of State for the Home Department to confirm that, in principle, there was no objection to the removal of the A to Guinea Bissau. They also asked for confirmation that the Secretary of State for the Home Department had approached the authorities in Guinea Bissau so that arrangements could be made for him to be removed. They included a form which they had filled in and which gave various details about the A.

14. On 3 July, the A's representatives asked about 'the TERS application'. On 2 August 2019, an official in HMPPS replied. He said that '…Immigration Enforcement' had said that the A had not been served with a deportation order. He was said to the subject of 'an extradition Order, which would exclude him from being considered for removal under TERS/deportation'. The A's representatives were invited to contact Immigration Enforcement for more information.

15. On 17 October 2019 the Head of Extradition Casework wrote to the A, referring to the provisions of the 1989 Act. Those, it was said, meant that the Secretary of State for

the Home Department could not order the A's extradition while he was serving the custodial part of his sentence. If at any stage the Parole Board decided that he could be released from his sentence of imprisonment, the Secretary of State for the Home Department would decide, under section 12 of the 1989 Act, whether to order the A's extradition to Portugal. The A was invited to make representations against his extradition. On 31 October 2018, he said that he did not want to make any.

16. On 31 October 2019, the Secretary of State for the Home Department told the Portuguese authorities that the A's hearing before the Parole Board was listed for March 2020, and that if parole was granted, extradition could be ordered. In late December 2019 and early January 2020, emails were exchanged between the A's representatives and the Secretary of State for the Home Department. The Portuguese authorities were copied in. The A could not be deported because of the extradition proceedings, which meant that he could not be considered for removal under the TERS. A case could be considered for the TERS scheme once there were no barriers to removal.

17. In particular, on 31 December 2019, an official on behalf of the Secretary of State for the Home Department said that '…extradition takes precedence over deportation' and that she could not proceed with deportation or consideration of the TERS while there were extant extradition proceedings. The Secretary of State for the Home Department would have to wait for a decision from the Parole Board before being able to decide whether to sign the surrender warrant.

18. On 12 May 2020, an official on behalf of the Secretary of State for the Home Department explained why the A had not been served with a deportation order, relying on paragraph 2.4.5 of the Immigration Directorate Instructions on deporting non-EEA nationals. I quote that passage in paragraph 36, below. The official said that the extradition proceedings were a barrier to the A's removal and he was not, therefore, eligible for the TERS. The A would only be subject to deportation proceedings if the Parole Board ordered his release and the Secretary of State then decided not to order his extradition to Portugal.

19. In the event the A's hearing by the Parole Board was adjourned to 6 August 2020 because the A's 'legal representative was unable to attend due to sickness' (oral hearing decision letter dated 14 August 2020).

20. After that hearing, which took place remotely, the Parole Board was not satisfied that the A's detention was no longer necessary for the protection of the public (ibid). The decision mentioned that the A had not done any 'offending behaviour work' during his imprisonment: he had been assessed as unsuitable for it because he had been 'maintaining his innocence'. There are now programmes for people who deny their offences. All the witnesses considered that the A's risk could be reduced if he took part in those. The A had been 'completely resistant' to that idea. He considered that, because his tariff had expired, he was wrongly imprisoned. It was considered that if the A were moved to open conditions, there was a possibility that he could abscond if he were able to get a false passport. There was considered to be an absconding risk because the A had 'previously breached immigration rules'. The Parole Board agreed with an assessment that the A posed a high risk of harm to the public (based on the offences which he was alleged to have committed in Portugal) and a medium risk to known adults and children. The Parole Board did not recommend the A's release or his transfer to open conditions.

The statutory and policy framework
Sentences of imprisonment for life

21. Section 28 of Crime (Sentences) Act 1997 ('the 1997 Act') applies to a life prisoner in respect of whom a minimum term order has been made (section 28(1)). 'Minimum term order' is defined in section 28(8A). Any reference to 'the relevant part of such a prisoner's sentence is a reference to the part of the sentence specified in the order' (ibid).

22. As soon as such a prisoner has served the relevant part of his sentence, and the Parole Board has directed his release, the Secretary of State is obliged to release him (section 28(2)). The Parole Board shall not give such a direction unless the Secretary of State has referred the prisoner's case to it and it is satisfied that 'it is no longer necessary for the protection of the public that the prisoner should be confined'. Section 28(7) makes provision for the frequency of reviews by the Parole Board.

Extradition

23. Section 7(1) of Extradition Act 1989 Act ('the 1989 Act') provides that a person shall not be dealt with under Part 1 of the 1989 Act except in pursuance of an order by the Secretary of State ('an authority to proceed') issued in response to a request ('an extradition request') for the surrender of a person made by a person recognised by the Secretary of State as representing a foreign state.

24. Section 12 of the 1989 Act is headed 'Order for return'. So far as is relevant, it provides:

> '(1) Where a person is committed under section 9 above and is not discharged by order of the High Court…the Secretary of State may by warrant order him to be returned unless his return is prohibited, or prohibited for the time being, by this Act, or the Secretary of State decides under this section to make no such order in his case…
>
> (3) An order for return shall not be made in the case of a person who is serving a sentence of imprisonment or detention…in the United Kingdom …until the sentence has been served…'

25. The 1989 Act was repealed and replaced by the Extradition Act 2003 ('the 2003 Act'). Paragraph 3 of the Extradition Act 2003 (Commencement and Savings) Order 2003 SI No 3103 provides, however, that the coming into force of the 2003 Act does not apply for the purposes of a request for extradition under section 7 of the 1989 Act which was received by the Secretary of State on or before 31 December 2003.

Deportation

26. A person is liable to deportation under section 3(5) of the Immigration Act 1971 ('the 1971 Act') if he is not a British citizen and the Secretary of State deems his deportation to be conducive to the public good.

27. Section 5(1) of the 1971 Act gives the Secretary of State power to make a deportation order against a person who is liable to deportation, that is, an order requiring him to leave and prohibiting him from entering the United Kingdom. The Secretary of State may at any time, by a further order, revoke a deportation order (section 5(2)).

28. Part 13C of the Immigration Rules (which are required to be laid before Parliament pursuant to section 3(2) of the 1971 Act) makes provision about deportation. Paragraph 381 provides that when a decision to make a deportation order has been made, notice will be given to the person concerned informing him of the decision. Paragraphs 390-392 deal with the revocation of deportation orders. Paragraph 396 creates a presumption that where a person is liable to deportation, the public interest requires his deportation.

29. Section 32 of the UK Borders Act 2007 ('the 2007 Act') provides for the automatic deportation of 'foreign criminals' (as defined in section 32(1) of the 2007 Act). A 'foreign criminal' includes a person who is not a British citizen and who has been convicted in the United Kingdom of an offence and sentenced to not less than 12 months' imprisonment.

30. Section 32(4) of the 2007 Act provides that 'For the purpose of section 3(5)(a) of the Immigration Act 1971, the deportation of a foreign criminal is conducive to the public good'. Subject to section 33 of the 2007 Act, the Secretary of State must make a deportation order in respect of a foreign criminal (section 32(5)). By section 32(6), the Secretary of State may not revoke a deportation order made in accordance with section 32(5) unless he thinks that an exception in section 33 applies.

31. Section 33, as section 32(6) foreshadows, makes exceptions from the duty created by section 32(5). Exception 4, created by section 33(5), includes cases in which the foreign criminal is the subject of an authority to proceed under section 7 of the 1989 Act (see paragraph 23, above). By section 33(7), the application of an exception does not stop the Secretary of State for the Home Department from making a deportation order, and leads to no presumption about whether or not the deportation of the foreign criminal is conducive to the public good. Section 32(4) continues to apply, however, if Exception 4 applies. The effect of these provisions, therefore, is that whereas the deportation of a person to whom Exception 4 applies is conducive to the public good, the Secretary of State has a power, but not a duty, to make a deportation order in respect of that person. The A accepts this (see paragraphs 26 and 29 of the A's grounds for judicial review).

Section 32A of the 1997 Act

32. Section 119 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 inserted section 32A into the 1997 Act. Section 32A(1) of the 1997 Act (read with section 32A(5)) now gives the Secretary of State power, in the case of P, a person serving a sentence of imprisonment for life with minimum term, who is liable to removal from the United Kingdom, and who has served that minimum term, to remove P, whether or not the Parole Board has directed P's release under section 28 of the 1997 Act.

33. By section 32A(5) of the 1997 Act, 'Liable to removal from the United Kingdom' is defined by reference to the definition in section 259 of the Criminal Justice Act 2003 ('the CJA'). The definition includes a person who is liable to deportation under section 3(5)(a) of the 1971 Act who has been notified of a decision to make a deportation order against him (section 259(a) of the CJA).

34. The Divisional Court considered the effect of section 32A of the 1997 Act in *R (Akbar) v Secretary of State for Justice* [2019] EWHC (Admin); [2020] HRLR 3. In paragraph 25 of the judgment, the Court said that the effect of section 32A was that P was removed, but not released, from prison. Section 32A(3) made it clear that P could

only be removed from prison for the purpose of his removal from the United Kingdom. If and for so long as P stays in the United Kingdom, he is liable to be returned to prison. Removal under section 32A 'merely suspends the sentence whilst the offender stays out of the UK'.

The relevant policies about deportation and extradition

Immigration Directorate Instructions on deporting non-EEA nationals

35. The Secretary of State for the Home Department has issued Immigration Directorate Instructions ('the IDI') on deporting non-EEA nationals. The IDI, like the Prison Service Instruction we consider next, are a published policy. They deal with deportation under the 2007 Act and under the 1971 Act (see section 1). Paragraph 2.3 provides that, if a foreign criminal does not meet the criteria for automatic deportation, officials must consider whether he should be deported under the 1971 Act, because it would be conducive to the public good.

36. Paragraph 2.4.5 of the IDI, reflecting Exception 4 in section 33(5) of the 2007 Act, says that if a foreign criminal is subject to current extradition proceedings, he is exempt from automatic deportation. It adds, '…any request for extradition takes precedence. Deportation must be put on hold while extradition is taken forward. If extradition fails: JCU will tell the case owner, who will proceed with deportation action'.

PSI 18/2012

37. The Secretary of State for Justice issued Prison Service Instruction (PSI 18/2012 Tariff Expired Removal Scheme) ('the PSI') in 2012. The PSI is directed at agency staff in the National Offender Management Service, prisons, probation services and immigration enforcement. Ten points emerge from the PSI. The PSI applies to 'IFNPs', that is, indeterminate foreign national prisoners.

    i. The TERS 'allows IFNPs who are confirmed by Immigration Enforcement to be liable for removal from the UK to be removed from prison and the country upon or any date after the expiry of their tariff without reference to the Parole Board' (summary, and paragraph 1.1).

    ii. The scheme is 'mandatory': all IFNPs who are liable to removal must be 'considered' by PPCS [Public Protection Casework Section] for removal under it (paragraph 1.2, repeated in paragraph 2.1). 'By definition, IFNPs can only be removed under TERS if Immigration Enforcement is able to effect their removal' (paragraph 1.2).

    iii. A 'desired outcome' is said to be 'Early identification of those IFNPs who must be considered for TERS and their early referral to Immigration Enforcement Criminal Casework' (paragraph 1.3).

    iv. PPCS must ensure that all IFNPs subject to the parole process are considered for TERS but 'should immigration enforcement confirm that the prisoner is not liable for removal, or should removal fail, PPCS must ensure that the prisoner is reviewed for parole' (paragraph 1.10).

    v. All IFNPs are presumed suitable for removal unless they meet criteria for refusal (paragraph 2.1).

    vi. 'IFNPs must not be removed under TERS before their tariff has expired nor without PPCS authorisation.' (paragraph 1.12).

vii. Section 2 deals with 'Eligibility'. All IFNPs 'will be presumed suitable for removal under the scheme unless they meet the criteria for refusal set out below' (paragraph 2.1).

viii. 'PPCS will consider the following criteria when deciding to refuse removal under TERS'. The list includes '...The removal of the prisoner from the prison would undermine the confidence of the public in the criminal justice system.' (paragraph 2.3).

ix. Section 3 is headed 'Process and Forms'. It is clear from paragraphs 3.6, 3.7 and 3.8 that it is necessary for Criminal Casework to confirm whether 'the IFNP can or cannot be removed', and that they are able to remove the prisoner.

x. 'If an IFNP is not presumed suitable to be removed under TERS on the grounds that one or more of the refusal criteria are met or because CC [Criminal Casework] has confirmed they are unable to remove the prisoner, PPCS must complete the TERS refusal form' (paragraph 3.8).

38. The associated guidance for Home Office staff was published on 18 August 2017. Its purpose is said to be to explain the TERS. Page 4 of the guidance says that the TERS 'does not affect the normal consideration or processes for deportation or removal'. Page 5 is headed 'Eligibility under the [TERS]'. It makes clear that removal under the TERS can only take place when there is a deportation order which has been signed. Page 8 says that when a TERS case is referred to the Home Office, 'CC will decide whether the FNO is liable to deportation and whether deportation will be pursued'. A decision to authorise or to refuse removal from prison under the scheme must be taken by the PPCS on behalf of the Secretary of State, rather than by prison governors (ibid). PPCS will only consider the case under the TERS if there are no barriers to removal, a deportation decision has been served and a deportation order has been signed (page 9; twice).

The meaning of a published policy

39. The meaning of a policy is a question of law for the court, but in construing a policy the court must take into account that it is not a contract or a statute, and should be given a sensible, practical meaning (*Tesco Stores Limited v Dundee City Council* [2012] UKSC 13; [2012] PTSR 983, paragraphs 18 and 19).

The legal effect of a published policy

40. In *Lumba v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245, the Supreme Court held, among other things, that a decision-maker who adopts a policy governing the exercise of a statutory discretion must publish it and follow it (unless he articulates good reasons in a particular case for departing from the policy) so that a person affected by the policy could make purposeful representations with a view to influencing the exercise of the discretion.

The Human Rights Act 1998

41. Section 1(1) of the Human Rights Act 1998 ('the HRA') defines 'the Convention rights'. They are set out in Schedule 1 to the HRA (section 1(3)). They include article 5. In interpreting Convention rights, a court must 'take into account' the materials listed in section 2(1) of the HRA. Those include judgments and decisions of the European Court of Human Rights ('the ECtHR') (section 2(1)(a)).

42. Section 6(1) makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. 'Public authority' includes 'any person certain of whose functions are of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament' (section 6(6)).

43. Article 5 of the ECHR provides that no-one shall be deprived of his liberty except on one of the grounds listed in article 5 and in accordance with a procedure prescribed by law. Those exceptions include the lawful detention of a person after conviction by a competent court (article 5(1)(c)) and the lawful detention of a person against whom action is being taken with a view to deportation or extradition (article 5(1)(f)).

44. Detention may be unlawful under the ECHR even if it is lawful domestically, if the detention is nonetheless arbitrary (see, eg, *Haghilo v Cyprus* App. No 479/20/12 26 June 2019 at paragraph 202, which concerned detention for the purposes of deportation, and *James v United Kingdom* [2012] ECHR 1706, which concerned imprisonment for public protection ('IPP')).

The A's grounds of claim

45. The grounds of claim included an argument that the failure of the Secretary of State for the Home Department to deport the A was 'irrational unlawful and/or a breach of article 5 of the European Convention on Human Rights ('the ECHR'). Three grounds are listed in paragraph 40.

    i. The failure of the Secretaries of State to remove the A under the TERS is irrational.

    ii. It is a failure to follow a published policy and is unlawful on that ground.

    iii. The Secretaries of State have failed to act with due diligence to effect the A's removal with the result that the A's continuing detention is arbitrary and/or disproportionate, contrary to article 5 of the ECHR.

Irrationality

46. The A argued that the decision to refuse to deport him until the Parole Board has decided to release him is illogical. If he is to be extradited to Portugal, the risk assessment which the Parole Board is required to undertake is 'not logically relevant to the reality of the A's circumstances', because it is not intended that he should be released from his sentence. Deferring his release 'is highly likely to incur indefinite delay', as he is being given no risk reduction work, and does not admit his guilt.

47. The extradition proceedings are not a statutory bar to the making of a deportation order (see section 33(7) of the 2007 Act). The Secretary of State for the Home Department served notice of a decision to deport the A on the A in October 2017, about 15 years after the start of the extradition proceedings. It may be lawful to deport a person, even if extradition proceedings are on foot, so long as deportation is not effected for an ulterior purpose (see *R v Governor of Brixton Prison ex p Soblen* [1963] 2 QB 242 (CA)).

Failure to follow a published policy

48. The A also argued that he must be presumed to be suitable for removal under the terms of the TERS PSI. The refusal to apply the TERS to him is therefore a breach of a published policy.

Article 5

49. The A argues that the Secretaries of State have failed to act with due diligence in his case. The Secretary of State for the Home Department should have made a deportation order as soon as the A signed the document abandoning his right to make representations against the decision to deport him. If the Secretary of State had made a deportation order promptly, the A could have been removed to Guinea Bissau shortly after his tariff expired. The A 'could therefore have been a free man in Guinea Bissau from that date onwards' (grounds, paragraph 50). In those circumstances, his continued detention after the expiry of his tariff has been arbitrary and/or disproportionate.

The application for Habeas corpus

50. The application for habeas corpus is made on the same grounds as the application for judicial review.

The decision of Freedman J on the papers

51. Freedman J said that the A was lawfully detained pursuant to the sentence imposed on 14 October 2003. Section 12(3)(a) of the 1989 Act prevented his extradition until the A had been released from that sentence. The A was not eligible for the TERS because he was the subject of an extradition request. In any event, his removal to Guinea Bissau would be contrary to the broader public interest.

52. It was not arguably irrational to prefer an extradition request from a foreign state to the A's desire to be removed to Guinea Bissau. No complaint could be made about the failure to extradite the A as he could not be extradited until he had served his sentence.

53. The PSI does not apply to those who cannot yet be removed. The A could not be removed while he was subject to extradition proceedings, and/or it would undermine confidence in the criminal justice system if the A were removed to Guinea Bissau if there was an outstanding request for his extradition to Portugal.

54. The IDI made clear that any request for extradition took precedence and the deportation must be put on hold while extradition is taken forward.

55. There was no breach of article 5 because the A was detained pursuant to the sentence of the court. The application for habeas corpus added nothing to the application for judicial review.

The decision of Andrew Baker J

56. The Judge said that he was satisfied that 'the applicable statutory regime completely meets the circumstances of this case'. He held that the A could not be extradited until the Parole Board had made a decision to release him. The extant extradition request made the A 'in extradition terms ineligible for removal' and 'therefore' a prisoner to whom the TERS did not apply. The A's 'real difficulty' was that he had not persuaded the Parole Board that it was safe for him to be released on licence. The Parole Board's decision was 'the key that unlocks what would otherwise be the logical puzzle for [the A] and prevents there from being a 'Catch-22', as suggest by Miss Lanigan'.

57. As the Secretaries of State submitted, the A's detention was not arbitrary. He is entitled to have his continuing detention reviewed by the Parole Board. If he were released by the Parole Board, he could be extradited. The extradition request 'perfectly rationally so, given [the 1989 Act]' was 'the impediment' to 'his being

eligible for the TERS'. If there was a difficulty about the A's case, 'it is in and about the Parole Board's decision not to authorise his release as far as the life sentence is concerned'.

58. With one exception (preserving confidence in the criminal justice system, about which he preferred to express no view), the Judge agreed with the views of Freedman J.

The submissions on this appeal

The A

59. There are three grounds of appeal.

    i. The Judge did not grapple with the question whether the A was eligible for the TERS. The IDI did not apply because extradition proceedings were not being 'taken forward'. The mere existence of extradition proceedings did not engage the IDI.

    ii. The J erred in relying on the decision of the Parole Board. The Parole Board's assessment of risk was not a sufficient safeguard for the A in the circumstances. The allegations from Portugal were likely to be a significant factor in the assessment of the Parole Board, making it less likely that he would be extradited to Portugal. The role of the Parole Board meant that there was no way out for the A and meant that his detention was arbitrary.

    iii. The Judge failed to consider the arbitrary nature of the A's current detention. The fact that it complied with national law was not enough to prevent arbitrariness.

60. Miss Lanigan submitted that the Judge did not grapple with the question whether the A was eligible for the TERS, deciding, instead, that the A was not eligible for deportation because of the extant extradition proceedings. The view that extradition proceedings were a bar to deportation is inconsistent with *Soblen* and wrong.

61. Miss Lanigan submitted that the Judge erred in holding that the extradition proceedings meant that the A was not eligible for the TERS. She accepted that the Secretary of State had no duty to deport the A but submitted that the Secretary of State's power to deport co-existed with the extradition proceedings. The A's deportation is, by statute, 'conducive to the public good'. Miss Lanigan referred to *Soblen*. The Court of Appeal emphasised that extradition and deportation are separate processes. She also referred to *Caddoux v Bow Street Magistrates' Court* [2004] EWHC 642 (Admin). In that case, the Secretary of State had decided to deport P to France. Having received a request for P's extradition from the French authorities, the Secretary of State then decided to extradite him instead. In paragraph 11 of his judgment in that case, Kennedy LJ said that it was not necessarily unlawful for the Secretary of State to have deported P when extradition proceedings were pending; whether it would be unlawful would depend on the reason why the Secretary of State decided to deport P. He also observed that once an extradition request was received, 'there were powerful reasons of comity for giving it priority'.

62. She explained that section 32A of the 1997 Act gave the Secretary of State a discretion to deport the A, because the A is 'liable to removal', as defined; in 2017, he was given notice of the Secretary of State's intention to make a deportation order. He

met the other criteria in section 32A. By statute, his deportation is deemed to be conducive to the public good (see section 33(7) of the 2007 Act). That discretion was not affected by the extradition proceedings.

63. Miss Lanigan accepted in writing that the IDI 'prioritises progress in respect of extradition proceedings over deportation proceedings'. She submitted that the IDI 'supplements' the TERS. She accepted in her oral submissions that it was open to the Secretary of State to adopt a policy governing the exercise of that second discretion, but submitted that it could not be a blanket policy which, without exceptions, prevented deportation if there were extant extradition proceedings.

64. The Judge also erred, she argued, by failing to take into account that A 'does not fall within the policy parameters that justify the exception to automatic deportation'. The IDI refers to extradition being 'taken forward'. The exception to 'automatic deportation' assumes that 'there is in fact a real opportunity for progress to be made in respect of extant extradition proceedings'. She drew attention to the word 'current' and the phrase 'taken forward'. There is no such opportunity in this case because of the effect of section 12(3)(a) of the 1989 Act. The extradition proceedings cannot be taken forward because the A is still serving his sentence and is 'highly unlikely to be released …for the foreseeable future'. The A is not, therefore, caught by the exception to the TERS which is articulated in the IDI. The TERS applies and should be followed. A fact-sensitive analysis was needed and there had been no such analysis. It was not good enough to assert that the A was subject to extradition and therefore should not be deported.

65. Contrary to the view of the Judge, review of the A's detention by the Parole Board was not an answer to the A's 'predicament'. She submitted orally that 'The only real solution is the route via deportation'. The review by the Parole Board contributed to the A's circumstances and prevented any progress. The Parole Board, in assessing the risk posed by the A was bound to take into account, and did take into account, the unproven criminal allegations which were the subject of the extradition request. He was found to pose a high risk of harm to the public because of the allegations of robbery in Portugal. While those allegations were outstanding, even if he did the available courses, it was 'highly unlikely' that he would reduce his risk enough to be released. She did accept that those allegations were relevant to the assessment of the risk posed by the A. Her 'primary point' was that the A had 'no option to reduce his risk' and this meant he could not be released so as to be extradited to contest the allegations in Portugal. The risk was not 'tied to [the A's] real circumstances'.

66. On ground three, she submitted, consistently with the grounds of claim, that the A's detention is 'arbitrary' and, therefore, contrary to article 5 of the ECHR. The Judge did not consider this. Whether detention is arbitrary for the purposes of article 5 will depend on a range of factors, even when a person has been lawfully convicted and sentenced. She referred to *James v United Kingdom*. The ECtHR said that there must be a causal link between the conviction and the deprivation of liberty. That link could be broken if a decision not to release was based on 'grounds that were inconsistent with the objectives of the initial decision of the sentencing court' (judgment, paragraph 189). In paragraph 209, the ECtHR said that there must be a real opportunity for rehabilitation, in relation to that part of the sentence which was justified solely by reference to the protection of the public. The A was not being given 'a viable route to reduce his risk'.

67. In answer to a question from my Lord, Warby LJ, she gracefully conceded that, if this Court assumed that the decision of the Parole Board, which has not been challenged is lawful and rational, that rather tended to undermine grounds two and three. She qualified this by adding, however, that it was not just the decision of the Parole Board, but all the circumstances, which made the A's detention arbitrary.

68. Miss Lanigan accepted that the application for habeas corpus raised the same arguments as the application for judicial review.

69. She argued that an application for habeas corpus was available, despite the decisions of this Court in *R v Secretary of State for the Home Department ex p Cheblak* [1991] 1 WLR 890 and *R v Secretary of State for the Home Department ex p Muboyayi* [1992] 1 QB 224. She submitted that they limited the scope of habeas corpus and were inconsistent with the decisions of the House of Lords in *Armah v Government of Ghana* [1968] AC 192 and *Khawaja v Secretary of State for the Home Department* [1984] 1 AC 84. *Cheblak* and *Muboyayi* have been criticised in textbooks and articles. The writ of habeas corpus should be available in a case like the present. She accepted, nevertheless, that unless those decisions were per incuriam, this Court is bound by them.

The Secretaries of State

70. In his written submissions, Mr Watson made four initial points which were said to be a complete answer to both applications.

    i. The A is lawfully detained pursuant to the sentence of life imprisonment.

    ii. Section 12(3)(a) of the 1989 Act prevents his extradition while he is still serving that sentence.

    iii. The A is not eligible for the TERS because he is subject to an extant request for extradition under the 1989 Act, and cannot therefore be 'removed'.

    iv. The broader public interest is served by his extradition because his removal to Guinea Bissau would defeat the request for his extradition to Portugal.

71. Mr Watson added in his skeleton argument that there is nothing arbitrary about the A's detention. As the Judge explained, the power of the Parole Board to release the A is the 'key that unlocks what would otherwise be the logical puzzle for [the A]…' Once released by the Parole Board, he can be extradited to Portugal. The extradition request is 'the impediment, and perfectly rationally so, given [the 1989 Act] to his being eligible for tariff expired removal'.

72. In his written submissions on article 5, Mr Watson contended that the A's detention is justified for the purposes of article 5 on two grounds. He is detained by the order of the court pending his extradition and he is detained pursuant to the sentence of the court. The A's argument that his detention is arbitrary made the A's article 5 rights 'coterminous with his desire for freedom'. But his detention after the expiry of his tariff is justified on the grounds of rehabilitation and risk. It is also justified by the outstanding request for his extradition which can take effect once he is released by the Parole Board.

73. In his oral submissions, Mr Watson argued that the TERS is consistent with the broader context, in which, for good reasons of public policy, extradition takes precedence over deportation, even in cases where deportation and surrender would be to the same jurisdiction. If that priority were not observed in such cases:

    i. extradition could be undermined

    ii. if P were deported, that would result in a breach of the United Kingdom's international obligations to the requesting state and

    iii. deportation might deprive the deportee of the protections conferred by extradition such as the rule about specialty.

74. Those factors had more force where deportation and surrender would be to different jurisdictions. If P were deported rather than extradited, there would be a risk to the international comity which underpins extradition requests, a breach of international obligations owed to the requesting state, and it would defeat the intended criminal proceedings in the requesting state.

75. Those public interests were reflected in the policies of the Secretary of State for the Home Department. The IDI have to be given a sensible contextual interpretation. The alternative posed in paragraph 2.4.5 is 'if extradition fails'. The PSI was clear that the TERS could not be used if P could not be removed. Moreover, it was clear from the associated guidance that the TERS could not be used unless and until a deportation order had been made and signed. All the issues which might stand in the way of removal had to be ironed out before the TERS could be applied. There was no basis in the statutory scheme for an argument that the Secretary of State could not have a policy which gave precedence to extradition.

76. Mr Watson submitted that the Judge was right to see the decision of the Parole Board as the key. That decision, read as a whole, did not show that the outstanding allegations in Portugal were the only factor which led to the decision not to release the A. In any event, it was clear from that decision that there had been evidence about those allegations. The Parole Board refers to fingerprint evidence and photographs. The Parole Board also refers to the A's turbulent relationship with his partner in Portugal and to the fact that the A had refused to do any of the work which, all the witnesses considered, would have helped to reduce his risk. Two relevant courses were available, despite his refusal to admit his guilt. His attitude was that he would not co-operate because he had served his tariff and was unjustly imprisoned. He was also assessed as posing a risk of absconding because of previous breaches of 'immigration rules', and was not recommended for transfer to open conditions. His risk wherever he was released, and not just in the United Kingdom, was considered.

77. There was no 'Catch 22'. The key to unlock the puzzle, that is, to co-operate with work to reduce his risk, was available to the A. That factor distinguished this case from *James v United Kingdom*. In the light of the unchallenged decision of the Parole Board, there was no basis for the submission that the A's detention was arbitrary. That created the causal connection referred to in paragraph 109 of *James*. The A had a proper opportunity for rehabilitation.

78. The short and complete answer to the application for habeas corpus was that the A is detained pursuant to his criminal conviction and sentence. In any event, the

submissions on that application were exactly the same as the submissions in support of the application for judicial review and similarly flawed.

79. The highwater mark of the criticisms of *Cheblak* and *Muboyayi* was an article by the late Professor Sir William Wade. Even he had accepted, nevertheless, that 'The proposition that habeas corpus should always be available to a prisoner who can show a legal flaw in his detention is admittedly subject to an ill-defined but important exception in the case of convictions by courts of competent jurisdiction'.

80. Mr Watson referred us to paragraph 5 of the speech of Lord Hope in *R (James) v Secretary of State for Justice* [2009] UKHL 22; [2010] 1 AC 553 (the precursor to the application to the ECtHR in *James v United Kingdom*). Referring to the judgment of Simon Brown LJ (as he then was) in *R v Oldham Justices ex P Cawley* [1997] QB 1, 13-14, Lord Hope said that 'where there has been a criminal conviction the courts have firmly excluded collateral attack by habeas corpus, holding that the only proper remedy lies by way of appeal'. He described the statutory framework for imprisonment for public protection and said '… it is not open to the courts to set that system aside by directing release contrary to the provisions of the statute'.

81. Lord Brown, with whom Lord Hope and Lord Carswell agreed said, at paragraph 36, that the Secretary of State's breach of his public law duty (his failure to make the courses available which would have enabled IPP prisoners to reduce the risk they were seen to pose) did not make the detention of those IPP prisoners unlawful at common law. Lord Judge, at paragraph 123, held that a breach by the Secretary of State of his public law duties 'cannot be converted into a re-enactment or amendment of the statutory provisions…'. The power to direct the release of prisoner was vested in the Parole Board. Declaratory relief was appropriate, but release from custody was not. Lord Mance agreed with all four speeches.

82. At page 18F of his judgment in *Cawley*, Brown LJ acknowledged the criticisms of *Cheblak* and *Muboyayi.* He said that the latter case 'was certainly not decided per incuriam', as both *Armah* and *Khawaja* were cited to the Court of Appeal.

83. The application for habeas corpus added nothing to the application for judicial review and was flawed on the same grounds.

Discussion

84. My consideration of the decision-making process in this case is limited by the failure of the A's representatives to include any of the relevant documents in the bundle. There are no decision letters, only the summaries, in the A's grounds of claim and in the acknowledgement of service of the Secretaries of State, of the exchanges of correspondence between the A's solicitors and the Secretaries of State. Mr Watson handed us the response to the pre-action protocol letter during the hearing, but that by no means fills this gap.

85. What is clear from the summaries of the correspondence, however, is that no official has accepted that the TERS should be applied to the A. The early letter in which an official acting for the Secretary of State for Justice suggested that the A was eligible for the TERS was qualified by the statement that this was subject to there being no barriers to the A's removal. After that, the consistent line taken in the correspondence was that the extradition proceedings took precedence over any deportation proceedings.

86. The first broad question raised by this application for judicial review is whether that stance is arguably unlawful. I have described the legal framework and the arguments at some length. I can answer that question shortly, therefore. The answer depends on the answers to two further questions:

    i. what relevant statutory powers the Secretaries of State have, and

    ii. how they may lawfully be exercised.

87. On these facts, the Secretary of State for the Home Department had both a power to order the A's extradition under the 1989 Act, and a power to make a deportation order pursuant to section 32A(1) of the 1997 Act. The A meets the statutory criteria for the exercise of that second discretion, and, by statute, his deportation is conducive to the public good.

88. The second question is whether it is lawful for the Secretary of State, on these facts, to decline, as she has done, to make a deportation order in the A's case, in the exercise of the discretion conferred by section 32A. The Secretaries of State have two relevant published policies: the IDI and the PSI (which is supplemented by the guidance issued by the Secretary of State for the Home Department). The answer to this question depends on the meaning of those policies.

89. Applying the approach which I described in paragraph 39, above, I consider that it is clear that the TERS, unsurprisingly, tracks the statutory provisions. Moreover, the associated guidance is clear that a person cannot be deported under the TERS if the Secretary of State has not made a deportation order in his case. This is not surprising, because although the TERS is 'mandatory' in the sense that potentially eligible prisoners must be considered for removal under it, it is not 'mandatory' in the sense that the Secretary of State has fettered the discretion conferred by section 32A(1) of the 1997 Act so as to require him or her to remove every potentially eligible prisoner, regardless of any countervailing considerations. Whether the prisoner can (or should) be removed is one such consideration, as the PSI makes clear.

90. Moreover, and in any event, the IDI makes clear that the Secretary of State's policy is to give precedence to extradition over deportation. I accept Mr Watson's submissions about the powerful reasons of public policy which support that preference. That preference is not arguably irrational.

91. I do not consider that it is arguably sensible or practical to read paragraph 2.4.5 of the IDI as only entitling the Secretary of State to give precedence to extradition if it is possible to make progress with extradition. One reason is that there is a wide range of reasons why it might not be possible to make progress with extradition, and some may lie in the hands of the extraditee. I say more about this in paragraph 95, below. A further reason is that this interpretation would make life difficult for decision makers, by requiring them to consider what counts as 'progress' in each case. It is more sensible, and practical, to read this paragraph as being intended to create a straightforward order of priority between extradition and the exercise of the power conferred by section 32A(1) of the 1997 Act. Mr Watson's reference to the last part of paragraph 2.4.5 is, in this regard, persuasive.

92. The second broad question is whether the A's detention is unlawful, either domestically, or under the ECHR.

93. I consider that the reasoning of the House of Lords in *James* provides a powerful analogy. There are broad schematic similarities between the IPP sentence and life imprisonment subject to a minimum term. In both cases, there is a tariff, and a period after the tariff during which the prisoner is detained for the protection of the public. Each statutory scheme provides that only the Parole Board may direct the prisoner's release after the expiry of the tariff. The House of Lords was clear in *James* that public law failings could not re-write the statute, and permit the court to order the release of the prisoner. In the absence of any challenge to the recent decision of the Parole Board not to direct his release, the A's detention is not arguably unlawful in domestic terms.

94. I now consider whether it is arguable that the A's detention is a breach of article 5. The lawfulness of his detention is my starting point. That, I accept, is not necessarily enough. I do not, however, consider it arguable that the necessary causal link between the purpose of the sentence and the A's continuing detention has been broken. He is being detained for the protection of the public because the Parole Board has recently considered his case, and, rationally and lawfully, as I must assume, in the absence of a timely (or any) challenge to its decision, decided that it is not safe to release him.

95. I reject Miss Lanigan's submission that the A is trapped in a Catch 22. The key lies in his own hands. He has refused to co-operate with any work which might reduce his risk. In those circumstances it is not open to him to complain that he will never be released, still less to complain that he would not be released even if he were to do that work. It is impossible, and it would be wrong, to speculate about the weight which a future panel of the Parole Board would give to the Portuguese allegations, were he to do that work.

Conclusions

96. For those reasons I consider that it is not arguable that the Secretary of State's refusal to deport the A pursuant to section 32A of the 1997 Act was irrational, or a breach of any published policy, or that his detention is unlawful, whether pursuant to article 5 of the ECHR or otherwise.

97. Miss Lanigan accepted that the grounds for the applications for judicial review and for habeas corpus are the same. That makes it unnecessary for me to express a concluded view whether habeas corpus is an appropriate remedy in a case like this. I would say two things only, therefore.

    i. The reasoning of the House of Lords in *James*, which is powerfully persuasive, indicates clearly that it would not be.

    ii. So does the decision of this Court in *Muboyayi*, which, in *Cawley*, Simon Brown LJ (sitting in the Divisional Court), considered was not decided per incuriam; thus (although I have not considered this in any detail), *Muboyayi* is likely to bind this Court.

98. I would therefore dismiss this appeal against the renewed applications for permission to apply for judicial review and for the writ of habeas corpus.

Lord Justice Birss

99. I agree.

Lord Justice Warby

100. I also agree.