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IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/03/2016

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE OPENSHAW
and
MR JUSTICE WILLIAM DAVIS

- -

Between:

Regina	**Respondent**
- and -	
(1) Mark Roberts	**Applicants**
(2) Natasha Precado	
(3) David Craig Quaglia	
(4) Paul Anthony Woodward	
(5) Simeon Peter Gittens	
(6) Joseph Steven Powney	
(7) Nigel Darren Garbutt	
(8) Jason William Warwick	
(9) Martin Lee Fay	
(10) Kelly Georgina Diveney	
(11) Darren Paul Byrne	
(12) Sonnie Michael Wakeling	
(13) Sean Dowe	

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- -

J Bennathan QC and E Coverley for the **Applicant (Roberts)**
J Bennathan QC and B Keith for the **Applicant (Precado)**
J Bennathan QC and N Beechey for the **Applicants (Quaglia and Byrne)**
P Rule for the **Applicant (Woodward)**
J Bennathan QC and R Banks for the **Applicant (Gittens)**
J Bennathan QC and C Ashcroft for the **Applicant (Powney)**

J Bennathan QC and K Thorne for the **Applicants (Garbutt and Dowe)**
J Bennathan QC and S Field for the **Applicant (Warwick)**
J Bennathan QC and Miss C Hawley for the **Applicant (Fay)**
J Bennathan QC and Miss C Patrick for the **Applicant (Diveney)**
J Bennathan QC and T Dyke for the **Applicant (Wakeling)**
J McGuinness QC and S Heptonstall for the **Respondent**

Hearing date: 10 December 2015

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Approved Judgment

Lord Thomas of Cwmgiedd, CJ:

INTRODUCTION

1. There are before the Court 13 applications for an extension of time in which to apply for leave to appeal against sentences of imprisonment or detention for public protection imposed between 2005 and 2008 under the Criminal Justice Act 2003 (CJA 2003).

The sentence of Imprisonment for Public Protection: 2005-2012

(a) The original sentence of IPP 2005-2008

2. Sentences of imprisonment for public protection and for offenders under 18, detention for public protection, (IPP) were brought into effect on 4 April 2005 under the dangerous offender provisions contained in Chapter 5 of Part 12 of the CJA 2003. These provisions followed a review of sentencing carried out for the then Home Secretary by John Halliday, set out in a report published in July 2001 entitled *Making Punishments Work - a Review of the Sentencing Framework for England and Wales.*

3. S.225 and s.226 of the CJA 2003 set out the detailed provisions for those convicted of serious specified offences, if the offender was dangerous. An offender was dangerous if the court assessed that there was:

> "a significant risk to members of the public of serious harm occasioned by him of further specified offences"

4. The court was not given the usual freedom in making that assessment. The CJA 2003 required the court to make the assumption of dangerousness for those over 18 if the offender had been convicted on an earlier occasion of a specified offence, unless it was unreasonable to do so. Specified offences were violent and sexual offences listed in Schedule 15 and included wounding or causing grievous bodily harm under s.20 and assault occasioning actual bodily harm under s.47 of the Offences Against the Person Act 1861 which carried a maximum sentence of 5 years imprisonment.

5. Where the offender was found to be dangerous and over 18, the court was required to pass a sentence of IPP or life imprisonment. It is important to emphasise that the CJA 2003 removed all discretion from the court once it was found that the offender was dangerous. The sentence had to be IPP or life imprisonment.

6. The court was required to set a minimum term to be served. This was calculated as half of the notional determinate term that would have been passed if an IPP had not been imposed; this was intended to reflect the culpability and harm caused by the offence and the punishment required. Otherwise the length of the sentence was indeterminate as, before an offender was released, he had to pass a threshold of showing that, under s.28(6) of the Crime (Sentences) Act 1997 it was "no longer necessary for the protection of the public that he should be confined", a test most recently examined in *R (King) v Parole Board* [2016] EWCA Civ 51.

7. 12 of the applications before the court relate to those who were sentenced to IPP in the period before July 2008. In each case the minimum term has long expired; for example the minimum term for one of the appellants, Roberts, was under a year; he was sentenced when 18 in May 2006 (see paragraph 48 below); that of Precado sentenced in January 2007 when aged 23 was 6 months (see paragraphs 59 and 69 below).

(b) The amended sentence of IPP 2008-2012

8. In 2008 Parliament by the Criminal Justice and Immigration Act 2008 modified the sentence of IPP. The amended provisions removed the statutory assumption of dangerousness, removed the mandatory imposition of IPP where the offender was found to be dangerous and removed some offenders from the scope of the sentence by reducing the list of specified offences and by stipulating that the minimum term had to be at least 2 years save where the offender has committed an offence listed in yet another schedule. The amendments did not affect the position of those who had been sentenced between April 2005 and July 2008. One of the applications before the court, Woodward, relates to an offender sentenced after July 2008.

(c) The abolition of the sentence of IPP

9. In 2012 Parliament abolished the sentence of IPP by the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) for all offenders convicted after 3 December 2012. The abolition did not affect those who had been sentenced to IPP in the period between 2005 and 2012, but s.128 enabled the Secretary of State to modify the threshold for release. No modification has so far been made, a point to which we return at paragraph 45.

10. As at 4 March 2016, there are over 4,000 still in custody under a sentence of IPP (about 5% of the total prison population) and a significant further number who are subject to the licence terms of their IPP and therefore still subject to recall to continue to serve their sentence of IPP.

(d) The reason for these applications

11. In each of these applications the applicant seeks to appeal many years out of time against the sentence of IPP. No appeals were brought when they should have been within the 28 day period after sentence specified by s.18(2) of the Criminal Appeal Act 1968 for making applications for leave to appeal. It seems clear that it was perceived at the time there would be no prospect of success in any such application.

12. All the applicants have been either detained in custody long after the expiry of the minimum term or have been recalled for breach of licence as, for example, Gittens (see paragraph 98), Diveney (see paragraph 147) and Wakeling (see paragraph 165). Some were very young when such sentences were imposed - for example Roberts (see paragraph 48), Powney (see paragraphs 109, 111 and 112) and Fay (see paragraph 137).

13. The applicants now seek an extension of time under s.18 (3) of the Criminal Appeal Act 1968 to challenge the correctness of the sentences imposed on them. In contrast to the period of 28 days normally allowed, the applicants seek extensions of between 5 and 9 years either to apply for leave or, in one case, to renew the application after refusal by the Single Judge many years after the expiry of the 14 day period allowed for making an application to renew. They argue that because of the position in which they find themselves, the court should look again at the sentence, even if at the time no-one would have thought they were wrong in principle or manifestly excessive.

14. These cases were heard together so that the court could consider whether time should be extended.

THE GENERAL PRINCIPLES

(a) The central submission of the applicants

15. The central submission of each of the applicants was that the imposition of the IPP was not justified by the statutory criteria as explained by the case law of this court, particularly *R v Lang* [2005] EWCA Crim 2864, [2006] 2 Cr App R(S) 3 to which we refer at paragraph 22.i) below and when considering the individual applications.

16. It was submitted that:

    i) Whatever may have been the position at the time the sentences of IPP were passed, the court had power under s.11 of the Criminal Appeal Act 1968 to pass sentences that, in the light of what had happened over the intervening years, now would be the proper sentence.

    ii) This court should reconsider the assessments made by sentencing judges in the light of *Lang.* The court should examine with particular care cases where proper reasons were not given and cases where young offenders were sentenced.

    iii) A time could and had been reached when the length of the imprisonment was so excessive and disproportionate compared to the index criminal offence that it could amount to inhuman treatment under Article 3 or arbitrary detention under Article 5 of the European Convention on Human Rights. That was because the detention no longer had any meaningful link to the index offence. A much delayed review of a sentencing decision could therefore be a mechanism the court could employ to avoid a breach of these Convention Rights. As the period now served by each of the applicants was so much longer than any conceivable determinate sentence would have required, the continued detention amounted to preventative detention and was therefore arbitrary.

We will consider these in turn.

(b) The role of the Court of Appeal as a court of review

17. It was submitted on behalf of the applicants as their first general submission that s.11 of the Criminal Appeal Act 1968 permitted the court to allow an appeal if the court considered that the appellant should be sentenced differently. This was in contrast to the power under the original Act, the Criminal Appeal Act 1907, where the court's power arose where the court considered a different sentence "should have been" passed. This court was therefore entitled to review the reality of the sentence, as it had turned out to be, even long after the judge had passed sentence. In the cases of these sentences of IPP, they had been manifestly excessive in the result. Sentencing judges could not have foreseen the effect that the sentences would have had. The court was therefore entitled years later to sentence again on a different basis.

18. S.11 provides:

> "On an appeal against sentence the Court of Appeal, if they consider that the appellant should be sentenced differently for an offence for which he was dealt with by the court below may—
>
> (a) quash any sentence or order which is the subject of the appeal; and
>
> (b) in place of it pass such sentence or make such order as they think appropriate for the case and as the court below had power to pass or make when dealing with him for the offence;
>
> but the Court shall so exercise their powers under this subsection that, taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court below."

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.

(c) The case law

22. The second general submission was that this court should carefully review the sentences in each case in the light of the case law developed during the period during which the sentence of IPP was part of the statutory sentencing framework laid down by Parliament. It is necessary briefly to refer to 3 significant cases:

    i) On 3 November 2005, in a judgment of this court given by the then Vice-President, Rose LJ, *R v Lang*, this court gave guidance in relation to certain of the provisions of the Act at paragraphs 15-17.

    ii) On 20 October 2006, in a judgment of this court given by the President of the Queen's Bench Division, Sir Igor Judge (as he then was) in *R v Johnson* [2006] EWCA Crim 2486, [2007] 1 Cr App R (S) 112, this court made clear that the court should not, on well-established principles, interfere with the decision of a judge to impose an IPP if the sentence was one open to him.

    iii) On 26 November 2008 in a judgment of this Court given by Lord Judge CJ in *R v C* [2009] 1 WLR 2158, [2009] 2 Cr App R (S) 22, this court stressed the need to consider the alternatives to IPP as it was a "draconian sentence"

23. We have carefully considered in each of the applications, whether the sentence of IPP imposed by the judge was imposed in accordance with the statutory criteria and the guidance given by this court, particularly in *Lang,* particularly in the applications before us where the guidance was given after the sentencing decision made by the judge. In each case, for the reasons we set out in respect of each application, we are satisfied that each of the sentences was passed in accordance with the statutory criteria as interpreted in the case law of this court.

24. It must be recalled that in many of the 12 applications which relate to the sentence of IPP before the changes made in July 2008, the judge had, by the express terms of the CJA 2003, no discretion as to whether to pass such a sentence if the offender was found to be dangerous. It is also important to stress that the CJA 2003 required the judge to assume that the offender was dangerous if he had committed a previous specified offence, unless the assumption was unreasonable. The case of Quaglia is an illustration of the way in which the assumption operated (see paragraph 79 below). As we explain, each judge faithfully and properly gave effect to the terms of the CJA

2003; they had no discretion under the CJA 2003 until it was amended in 2008, if they could not find the assumption was unreasonable.

25. As an alternative to the submission which we have just considered, it was submitted that this Court should not follow *Johnson* in upholding a sentence which was within that area of judgment open to a judge to pass, but should instead, in the light of the observations such as those of Lord Carnwath at paragraph 60 in *Pham v Secretary of State* [2015] 1 WLR 1591, give anxious scrutiny to each decision as human rights were engaged as sentences of custody deprived persons of their liberty. We cannot accept this approach. The Criminal Appeal Act 1968 sets out the approach this court should take. That approach has been carefully developed under the common law and the Human Rights Acts in a manner entirely consistent with its function as a court of review of sentences passed by the sentencing court.

26. We have also carefully considered any case where a judge did not give full reasons as to why the offender was dangerous. As is set out in the paragraphs of this judgment addressing the specific application where this happened, we are satisfied that the sentence was entirely justified – see Gittens at paragraphs 105-108 below. We have applied the same approach to the application where what the judge said on sentence cannot now be found – see Diveney at paragraphs 146 and 152.

27. If we had concluded that the sentences of IPP had been wrongly imposed and a determinate sentence should have been imposed, a question would have arisen as to the determinate sentence that should be substituted given the fact that, in some of the applications, the offender would have been in custody for more than twice the minimum term imposed and there would be obvious difficulties in releasing an offender without any licence conditions that would have provided for supervision in the community As the issue does not arise, we would simply record that we would have considered imposing extended sentences (as was done in the decision in *GJD* to which we refer at paragraph 42 below).

28. We would have also considered the submission made for the first time on behalf of the applicants in the course of the hearing that, as under s.29(4) of the Criminal Appeal Act the court had power to impose a determinate sentence that commenced from the date of this court's decision, that power could be used to ensure that a licence period could be imposed. There would be no infringement of the principles that the sentence imposed could be more onerous, as any such licence would be less onerous than the licence to which the offender was subject under the sentence of IPP. The respondent accepted that there was such a power, but as the only case in which the court had exercised it was in *R v Turner (Bryan James)* (1975) 61 Cr App R 67 at 92, the court would be "breaking new ground" and would have to consider some difficult issues to which that would give rise. Whether it would be right to exercise the power in the way suggested and in the light of the difficulties to which our attention was drawn must await a decision of this court where the issues arise for decision; we express no view.

(d) The European Convention on Human Rights

29. We turn to the third general submission advanced to us as set out at paragraph 16.iii) that reviewing a sentence decision many years after the sentence could be a

mechanism through which the court could prevent detention being in breach of Articles 3 or 5 of the Convention.

30. There is nothing to suggest that a sentence of IPP in itself is a violation of Articles 3 or 5. All that has been suggested is that the way in which a person subject to IPP has been dealt with long after sentence may render the detention arbitrary. This would not make the original decision of the court wrong. In *James v UK* (2013) 56 EHHR 12 the Fourth Section of the Strasbourg Court concluded that the failure to provide those serving IPPs access to courses to enable them to satisfy the conditions for release could render their continued detention arbitrary. In *R (Kaiyam) and R* (*Haney) v Secretary of State for Justice* [2015] AC 1344, the Supreme Court analysed that decision. It held that although the Secretary of State had a duty to provide facilities for rehabilitation, if he failed to do so, the remedy was damages rather than a declaration that the detention was unlawful. As Lord Mance and Lord Hughes said at paragraph 39 in giving the judgment of the court:

> "his detention remains the direct causal consequence of his indefinite sentence until his risk is judged by the independent Parole Board to be such as to permit his release on licence."

31. It is only if the system of review breaks down or ceases to be effective could it possibly be the case that the detention becomes arbitrary: see *R (Walker) v Secretary of State for Justice (Parole Board intervening) [2010] AC 553* as explained at paragraph 11 of *Kaiyam and Haney.* If such a state of affairs was reached, this would not be the consequence of the original sentence providing for arbitrary detention, but of subsequent events. It would not, therefore, be a matter for this court. It would be as a result of a failure by the Secretary of State properly to carry out the sentence of the court or a failure by the Parole Board. Thus it would be a matter for judicial review of the actions of the Secretary of State or the Parole Board by the procedures provided before the Administrative Court with the evidence necessary for such an application.

32. A final submission was made based on Mr Rule's submissions in *R v Docherty* [2014] EWCA Crim 1197, [2014] 2 Cr App R (S) 76. In that case the appellant was convicted of an offence of wounding with intent on 13 November 2012. As the provisions abrogating the sentence of IPP to which we have referred in paragraph 9 did not come into force until 3 December 2012, although enacted by Parliament on 1 May 2012, the judge applied, as he was bound to do, the law as set out in s.225 and following of the CJA 2003. He found that he was dangerous and sentenced him to IPP. Apart from the conventional submission that the sentence of IPP should not have been imposed, it was submitted that the imposition of such a sentence after Parliament had decided to abolish it was a breach of the ECHR (Articles 7, 5 or 14) and of the principle of what is known as the *lex mitior*.

33. As we understand the argument, it was submitted that there was unlawful discrimination against the appellant as he was being subjected to a sentence of IPP when Parliament enacted LASPO 2012 in May 2012 with effect from a date to be appointed, but he was nonetheless subject to that sentence by reason of the date of his conviction being between that date and the date the abolition was brought into force on 3 December 2012. It was also submitted that Article 7, as interpreted by the Strasbourg Court in *Scoppola v Italy (no 2)* (2010) 51 EHHR 12, required a court, in

the event that the legislature had reduced the penalty between the time the crime was committed and the conviction, to impose the reduced penalty. This court did not accept these arguments, but a point of law was certified and permission to appeal was granted in February 2015. The appeal is to be considered by the Supreme Court in May 2016.

34. If the Supreme Court accepts the arguments advanced on behalf of Docherty, it can make no difference whatsoever to the present applications, as all were convicted and sentenced many years before Parliament enacted LASPO 2012 in May 2012 abolishing the sentence of IPP with effect from a date to be appointed. We cannot see how it can be suggested that a sentence lawfully and properly passed many years before Parliament enacted the change in the law can be invalidated by that subsequent change in the law by Parliament.

35. We would add one further point simply to record an argument addressed to us by the respondent to the effect that the position was much more complex than suggested. That further submission was based on the decision in *R v Gintas Burinskas* [2014] EWCA Crim 334, [2014] 1 WLR 4209, [2014] 2 Cr App R (S) 45 where this court considered the circumstances in which a sentencing court could exercise the power under s.224A and s.225 of the CJA 2003 as amended by LASPO 2012 to pass sentences of life imprisonment for those convicted after 3 December 2012. At paragraphs 12-23, the court considered the submission that it would be inappropriate to pass a sentence of life imprisonment under the provisions as amended by LASPO 2012 when an offender might have been sentenced to IPP in respect of an offence committed after 3 December 2012 had IPP continued as an available sentence. The court concluded that it was inevitable that there might be circumstances where a person who would have been sentenced to IPP might be sentenced to life imprisonment under the new provisions.

(e) The principles applicable to an extension of time

36. Rule 36.4(b) of the Criminal Procedure Rules requires the applicant to give reasons for requiring an extension of time. Any application for an extension of time to renew is within the discretion of the court which always requires reasons to be provided by the application as to why the court should grant an extension of time. As this court made clear in *R v Wilson* [2016] EWCA Crim 65, the reasons for the extension must always give an explanation for the delay in making the application.

37. In deciding whether to grant an extension, the court will consider all the material circumstances, including the explanation for the delay and the cogency of the reasons in seeking an extension when determining whether it is in the interests of justice to grant an extension: see, for example, *Hamilton v R* [2012] UKPC 21, [2013] 1 Cr App R 13, at paragraph 17 and *R v Thorsby* [2015] 1 Cr App R (S) 63 at paragraphs 12-18. There is no limit on the court's discretion.

38. As is clear from the detailed reasons given by us in respect of each application before us, we have not based our decision in any of these cases simply on the fact that the application is made years out of time, but on a consideration of all the circumstances, including our review of each of the sentencing decisions. We have taken that course in these applications to enable the court to review the general position of those sentenced to an IPP who are still in custody or subject to licence years after the expiry

of a minimum term. We have done this in the particular circumstances of these applications which were specially conjoined so that the court could consider the general approach this court should take given the nature of the sentences of IPP, the controversy that the outcome which has resulted from this sentencing regime has caused, as reflected in the concern raised in Parliament and elsewhere and the time the applicants have actually spent in custody.

39. However, this is not any indication of any change in the practice of this court summarised in *Thorsby* at paragraph 15. Time limits are set for good reason and in the interests of justice. They must be strictly observed unless there are good and exceptional reasons for their not being so observed. As was made clear by Lord Taylor CJ in *R v Burley* - an unreported decision referred to in *Williams* [2010] EWCA Crim 3289 at paragraph 5 – the interests of justice as a whole require the strict observance of time limits. It is particularly important in the case of a sentence appeal that it is brought within the time frame required so that the offender knows as soon as possible what his position is with finality and so that his rehabilitation can be planned accordingly by those who manage him in HM Prisons.

(f) Obligation to consult the former lawyers.

40. In all of the applications except that of Precado (see paragraph 60), all of the applications are made by those who did not either represent the offender as a solicitor or appear as an advocate at the sentencing hearing. In *R v McCook* [2014] EWCA Crim 734, this court made clear that it was the duty of any new representative to make inquiry of those who represented the offender at the trial so that they are apprised of all relevant information. Although that decision concerned an application for leave to appeal against conviction, the same duty applies in an application for leave to appeal against sentence.

Conclusion on the general principles

(a) The position of this court

41. We have reviewed these 13 cases in detail. In each we are satisfied that the judge correctly applied the law and passed a sentence in accordance with the CJA 2003 as interpreted in the decisions of this court.

42. There may of course be cases where in certain specific circumstances the judge made an error of law (such as imposing such an IPP for an offence committed before the coming into force of the provisions as happened in *R(GJD) v Governor of Her Majesty's Prison Grendon* [2015] EWHC 3501 (Admin), *R v GJD* [2015] EWCA Crim 599). However, we wish to make clear that where the judge has followed the provisions of the CJA 2003 as interpreted by the decisions of this court and passed a sentence of IPP in circumstances where it was properly open to the judge to pass such a sentence, this court will not now revisit sentences of IPP on the bases argued in these applications. Unless clear new points are raised, the court will in all such cases in the future simply refuse an extension of time without more. The remedy, if any, is one that the Executive and Parliament must address.

(b) The issue for Parliament

43. As the principles on which this court exercises its jurisdiction are clear and as the judges were passing sentences faithfully and properly following the clear terms of the CJA 2003, as they were bound to do, it is not permissible for the reasons we have given for this court to set aside sentences that were properly and lawfully passed.

44. We are mindful of the substantial criticism that many years after the expiry of minimum terms, sometimes of a very short period, many sentenced to IPP remain in custody or have been recalled to custody for breach of their licence conditions. It is clear to us from the applications before us that:

    i) The effect of a long term of imprisonment with no certain date of release is that in some cases it may increase the likelihood that an offender will offend again on release.

    ii) The effect of the license provisions will mean that offenders are subject to long periods of licence and, if they offend, are recalled – see for example Roberts (see paragraph 50) and Diveney (see paragraph 147).

45. Criticism has also been made of the imbalance between the threshold test that brought an offender within the scope of an IPP, namely a significant risk to members of the public of serious harm occasioned by him of further specified offences and the threshold test for release, namely it was no longer necessary for the protection of the public that he should be detained. An analysis of the difference is set out in *Sturnham v Secretary of State for Justice and the Parole Board* [2013] 2 AC 254 at paragraphs 40-48. As we have set out at paragraph 9, Parliament has given to the Secretary of State power to alter the threshold test for release. As we have observed, there is some evidence that the effect of long periods of imprisonment or the recall to prison of those sentenced to IPP under their licence requirements may be either impeding their rehabilitation or increasing the risk they pose. It is not for this court to examine that evidence or to suggest a new test which might be premised on the basis that the Parole Board should take into account, as a balancing factor, the risks posed by continued detention or long periods of licence. That must be a matter for Parliament and the Secretary of State.

46. It will not be easy to find a ready solution, for simply to release those who have completed their tariff periods would have the consequence that many would be put into the community without any supervision and they might well pose a risk of danger. It would appear that there is no likely solution other than (1) significant resources be provided to enable those detained to meet the current test for release which the Parole Board must apply or (2) for Parliament to use the power contained in s.128 of LASPO 2012 to alter the test for release which the Parole Board must apply or (3) for those in custody to be re-sentenced on defined principles specially enacted by Parliament.

47. This is not a case where the common law took a wrong turning as it did in the case of joint enterprise as recently set out in the judgment of the Supreme Court in *Jogee* [2016] UKSC 8 in which the courts corrected the common law. It was Parliament which legislated to establish a regime of sentences of IPP in terms which the courts have faithfully and properly applied. It must, in our democracy and in accordance with the rule of law, be for Parliament to provide a correction for the outcome if it so wishes. Such a correction will in the circumstances not in any way interfere with the

fundamental constitutional principle that the independent decision of the court must be respected, because the sentences were premised on the condition that it would be for the Parole Board to determine the terms of release.

OUR DECISIONS ON THE 13 APPLICATIONS

(1) Mark Roberts

48. On 17 May 2006, following his earlier plea of guilty to an offence of attempted robbery, as charged in count 1, Mark Roberts, then aged 18, was sentenced by HH Judge Milford QC at the Crown Court in Newcastle to IPP under s.225 of the CJA 2003, with a minimum term specified of 359 days. No separate penalty was passed following his plea of guilty to breaching an antisocial behaviour order, as alleged in count 3. A charge of theft as alleged in count 2 was ordered to lie upon the file.

49. Roberts was advised by counsel originally representing him that there were no arguable grounds of appeal, but Roberts himself applied for leave to appeal against sentence on the grounds that the sentence was harsh. That application was refused by the single judge in October 2006 and was not pursued. Technically, therefore, this is an application for an extension of time (of fully eight years), in which to renew his application following refusal by the single judge.

50. This further application followed his appearance before the Crown Court at Sheffield in September 2014, when a different sentencing judge expressed disquiet that Roberts was still in prison pursuant to the sentence of IPP, having been recalled after his earlier release. This further application was then made on 29 September 2014 by those who represented him at that hearing; the extension of time required is 8 years. Roberts has since been released again and is out on licence.

51. The facts were as follows.

    i) On the evening of 7 February 2006, a young man, Jonathan Davidson, drove to his girlfriend's house in Sunderland in his new Peugeot car. As he stopped outside the house, Roberts, who was a stranger to him, approached the car and lent through the window so as to engage him in conversation. This was a ruse to enable him to reach inside the car and to snatch the car keys from the ignition, which he did. He then ordered the complainant out of the car, and when he refused to do so, Roberts opened the car door and dragged him out. The complainant attempted to take back his car keys and a struggle between them developed during which Roberts punched the complainant several times in the face.

    ii) Roberts was then joined by two others; the complainant was overpowered until others joined in on his side and Roberts made off.

    iii) The complainant was left with a swollen left cheek, soreness to his jaw, cuts to the top of his head, abrasions and soreness to his face.

    iv) Roberts was arrested the next day; in interview he denied responsibility but he was later picked out at an identification parade, and in due course pleaded guilty, as we have already said.

52. Roberts was aged only 18 at that time but he had a very bad criminal record including two convictions for robbery when he was aged 14, for the second of which he received a sentence of four months detention and a training order. He had made 13 previous court appearances for a total of 48 offences, mainly offences of dishonesty, but also for racially aggravated common assault and racially aggravated criminal damage and for public order offences. He had been released from his last sentence of six months custody in a Young Offender Institution on the very day that he committed the instant offence. He was, incidentally, also in breach of his antisocial behaviour order.

53. As was set out in the pre-sentence report, following his release from custody in February 2006, the offence was committed after he had drunk a great deal of lager and cider to prove to his younger associates that he was 'still one of the gang'. The probation officer identified a pattern of offending linked to his continuing association with other offenders and to his drinking, which he was presently unable or unwilling to address. Consequently he was of the opinion that Roberts was extremely impulsive, and then rarely considered the consequences of his actions; he concluded that Roberts presented a high risk of reoffending.

54. The sentencing judge pointed out that because he had a previous conviction for a specified offence, namely robbery, the statutory assumption that he was dangerous within the meaning of the CJA 2003 applied to his case. The judge then considered the circumstances relevant to the risks that he presented; having done so, he was satisfied that it would be unreasonable not to make the assumption that he was dangerous. Indeed, he pointed out that his counsel had not attempted to persuade him to do otherwise.

55. The judge had particularly in mind: the facts of the instant case; that this offence was committed on the very day that he was released from his earlier custodial sentence; his poor criminal record (including the previous conviction for robbery, admittedly committed when he was only 14); that he was in breach of his antisocial behaviour order and that he appeared to be unwilling to address the underlying causes of his offending.

56. Accordingly, he came to the conclusion that he was indeed dangerous, within the meaning of the CJA 2003 and passed a sentence of IPP. Plainly there were cases where the judge would consider the possibility that a young offender might improve, but there was no reason at all to think in 2006 that Roberts might do so. We can see no fault or flaw in the judge's approach or in his reasoning; indeed the decision seems to us to have been inevitable on the terms of the CJA 2003 as it then stood.

57. There was no complaint about the minimum term, which was fixed on the basis that the appropriate sentence after a timely plea was 32 months, which the judge then halved and gave him credit for the day that he had spent in custody.

58. In accordance with the principles which we have already set out, this application for an extension of time is refused.

(2) Natasha Precado

59. On the first indictment, Precado, then aged 23, pleaded guilty to an offence of arson, intending to damage property or being reckless as to whether property would be damaged, contrary to section 1 (1) and (3) of the Criminal Damage Act 1971. On the second indictment, she was convicted after a trial of five further counts of simple arson, two counts of common assault and one count of criminal damage.

60. On 17 January 2007, for the offences of arson she was sentenced by HH Judge Richardson, at Snaresbrook Crown Court, to IPP under s.225 of the CJA 2003, with a specified minimum term of 6 months. No separate penalty was imposed in relation to the assaults or criminal damage. She was advised by counsel at the time not to appeal, but her instructing solicitor has kept her case under review and has recently instructed new counsel.

61. Precado seeks an extension of time of over 7½ years for leave to appeal against sentence. She currently remains in custody. A report prepared for this court set out a bleak history of her period in prison and the significant difficulties in rehabilitating her into the community; there is a risk of her becoming institutionalised. During her time in custody, she has spent one short period in hospital receiving psychological treatment.

62. The facts are as follows.

    i) Precado committed the offences on three separate days while in custody at HMP Holloway.

    ii) On 8 October 2005 she started a fire in her cell in the segregation unit. Prison officers described her as "playing up" and being verbally abusive earlier that day. That evening officers saw smoke in the corridor and flames coming from the hatch in the cell door. Officers managed to enter the cell, put the fire out and dragged her out. She had set fire to paper and clothing. That arson caused £600 worth of damage.

    iii) On 21 January 2006, once again she was described as being hostile to staff and as a result she was moved to cell 31. Shortly afterwards she started a fire with a lighter she had concealed. Officers extinguished the flames through the hatch, entered the cell and removed her. She was then moved to cell 23. A short time later, officers discovered that she had started a fire in cell 23. Again they put the fire out. When officers went to remove her she punched one of them in the face causing his nose to bleed.

    iv) In the early hours of 23 January 2006 she damaged a television, a chair and a table in cell 25. She was verbally abusive and as her behaviour deteriorated she was removed from the cell. As she was being taken to another cell she kicked out twice, hitting one of the officers in the leg. She was put in cell 31. A short time later the officers saw smoke coming from under the door of cell 31. Again, officers put the fire out and removed her again, this time to cell 27. She then started another fire in that cell. Once again, officers had to enter the cell to extinguish the fire. She was removed and placed back in cell 25. Again, she started another fire by burning paper and tissues. Officers described her as being aggressive throughout.

63. She was aged 23 at the time of conviction but already had a substantial criminal record. Between 1999 and 2005 she had 36 previous court appearances for 62 offences. She had numerous convictions for common assault, criminal damage and disorderly behaviour but only one conviction for a specified offence, that being an assault with intent to resist arrest, contrary to s.38 of the Offences against the Person Act 1861. She had been in custody on several occasions albeit for short periods of time.

64. The pre-sentence report described her as being aggressive, chaotic and unpredictable; further, she reacted badly to uniformed officers and lawful restraint.

65. The sentencing judge, sensibly as it seems to us, ordered a psychiatric report. This was provided by Dr Power in October 2006. The report stated that Precado had no discernible psychiatric illness but she did have an emotionally unstable personality disorder, consistent with the description of her being aggressive, chaotic and unpredictable. She had a dissocial personality disorder of the type not amenable to medical treatment.

66. The sentencing judge considered that her motivation for committing the offences was unclear but she had said that the first arson was an attempt on her own life; his impression was that she was out of control and self-absorbed, not caring how much trouble and difficulty she caused for others and who had developed a taste for starting fires in prison. He noted that both the pre-sentence report and the psychiatric report found that she posed a high risk of causing serious harm to others.

67. The judge found that despite her seemingly positive response to counselling in prison, he could not ignore the taste which she had developed for starting fires. He had no hesitation in finding that she posed a significant risk of causing serious harm to members of the public. The judge considered there to be a real possibility that she might start a fire in a hostel, house or block of flats and in doing so would likely cause great injury to others or loss of life.

68. In reaching that conclusion, the judge stated that this had not been through any application of a statutory assumption but his own view of the danger that she presented having regard to her offending in the cases for which he was sentencing her. We might add that his assessment of the risk that she presented was shared by the writer of the pre-sentence report and the psychiatrist, as we have already observed.

69. He considered that the appropriate determinate sentence would have been three years; one half of that is 18 months; from that he deducted the 12 months that she had already spent in prison to give a minimum specified term of just 6 months.

70. That this term has long since been served is no reason to conclude that the sentence as originally passed was wrong. Indeed for the reasons we have given the judge was plainly entitled to conclude that she was dangerous and that the risk that she presented could be contained only by a sentence of IPP. Indeed faithfully and properly applying the law as laid down by Parliament, he could hardly come to any other conclusion.

71. Accordingly, this application for leave to appeal her sentence out of time is doomed to fail and we refuse to extend time.

(3) David Craig Quaglia

72. On 22 February 2007, in the Crown Court at Stoke-on-Trent, following his earlier plea of guilty to an offence of arson being reckless as to whether life was endangered, contrary to section 1 of the Criminal Damage Act 1971, Quaglia, then aged 26, was sentenced by Mr Recorder Bowers QC to IPP, with a minimum term specified of 21 months.

73. The advocate appearing for him at the original hearing advised against an appeal; that is not perhaps surprising since he had accepted that Quaglia was dangerous within the meaning of the CJA 2003.

74. The single judge has referred his application for an extension of time (of fully 7½ years) in which to apply for leave to appeal against sentence to the Full Court. He has now served a sentence well beyond his tariff but remains in custody. It is said on his behalf that it is in the interests of justice for the case to be heard out of time.

75. The facts are as follows.

i) Quaglia was at the time aged 26. He was being taunted and bullied by a couple of brothers, who lived nearby; he was not alone in this since other neighbours had often complained that the brothers were causing trouble and nuisance on the estate.

ii) On 23 July 2006, one of the brothers had called him a "grass", had punched Quaglia in the face and knocked him off his bike, he had then threatened to burgle his house and smash up his mother's car, he had then taken Quaglia's bike and ridden off on it. Quaglia did not want to report the matter to the police, since he was afraid of reprisals; he decided to take his own revenge.

iii) He went home and emptied a bottle of turpentine into an empty coffee jar; he then put some tissue paper in the top of the jar, so as to create a primitive petrol bomb. He went round to the brothers' house, which was in a terrace, and knocked on the front door, to see if anyone was home; there was no answer so he assumed – wrongly as it turned out – that no-one was at home. He went to the back of the house, lit the tissue paper and flung the bomb at the house and ran off.

iv) The bomb landed on a flat roof and burst into flames. Neighbours saw what had happened and managed to put the fire out with buckets of water. It could have been very different: a senior officer of the Fire Service pointed out that a fire originating in the guttering and soffit area of a traditional terraced property could develop rapidly and spread into the roof void.

v) Meanwhile, Quaglia had himself rung the emergency services. When the police called, he said that he had petrol bombed the brothers' house; he explained that he had had enough from them.

vi) In interview, he explained that he was trying to scare the brothers because he was worried about his mother. He said he would not have done it if he thought

anyone had been home. He accepted that it was a really stupid thing to have done. He apologised for scaring his neighbours.

76. He had many previous convictions mainly for low level assaults and public order offences. He did however have a previous conviction for possessing a knife and a conviction for affray, which was a specified offence; the notice of appeal stated that this was a domestic offence, as if to suggest that it was a matter of no consequence. In fact he returned home one night very much under the influence of drink, to find his partner with another man, he suspected her of being unfaithful, he fetched an air pistol and hit both his partner and her friend with the airgun, the resulting disturbance spread into the street, hence the charge of affray, for which he was sentenced to 4 months imprisonment. His longest previous sentence was six months' imprisonment for theft in 2003.

77. The pre-sentence report identified a pattern of aggressive behaviour, use of drugs, alcohol and poor emotional management. The writer considered that he had a worrying attitude to weapons. Considering the facts of the instant offence, she thought that Quaglia posed a high and significant risk of harm to the public. It is, quite rightly, pointed out in the notice of appeal that this does not precisely address the statutory criteria, which required the offender to present a significant risk of causing serious harm.

78. There was also a psychiatric report from Dr Vaggers, which although not focused on the risk that Quaglia presented, did make clear that Quaglia did not have any mental illness or psychiatric condition which predisposed him to arson; indeed, the report stated, in terms (at paragraph 108) that Quaglia did not have a dangerous fascination with fire setting.

79. The sentencing judge considered that the arson was extremely serious. He correctly pointed out that arson was a specified offence and that Quaglia had a previous conviction for affray, which was another specified offence, which required the court to assume that he was dangerous unless it was unreasonable to apply the assumption; he did not find it unreasonable to come to that conclusion and accordingly he passed, as he was then bound to do, a sentence of IPP.

80. It was argued before us that the sentence of IPP was wrong in principle. It is said that the assumption in section 229(3) of the CJA 2003 only bit because Quaglia had a previous conviction for affray in a domestic context. It was suggested that his previous convictions for low level violence had not caused any serious harm and did not, at least in themselves, indicate a significant risk of serious harm. The judge should not therefore have applied the statutory assumption.

81. It was also said that that there were significant mitigating features in the arson; that it took place in daytime when there was less chance of anyone being home, but in fact somebody was at home; that he took steps to find out if anyone was home, but in fact the steps were ineffective; that the fire was not set at an entry or exit point, that it was started outside, not inside and that the damage was minimal, but it could have been very different had the fire taken hold, as it easily could have done. Furthermore it is said that Quaglia ran home and called the emergency services and then made full admissions and pleaded guilty at the first opportunity. But this was a case where he threw a lighted 'turps' bomb at an occupied house in revenge; had the fire taken hold,

the occupier could easily have been harmed, or even killed, by fire or by smoke inhalation.

82. We do not accept that there were substantial mitigating circumstances in the instant offence. It was a very serious offence, which created a gross and obvious risk to the occupier and indeed to the neighbours. He did have significant previous convictions, including for a specified offence. In our judgment, by passing a sentence of IPP, the Recorder was faithfully and properly applying the law as laid down by the CJA 2003. We see no fault in his reasoning or indeed in his conclusion.

83. Accordingly, we refuse leave to extend time for appealing.

(4) Paul Anthony Woodward

NOTE: The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence, so that no publication of these proceedings should include any detail by which any of the complainants might be identified

84. In the Crown Court at Maidstone, Woodward, then aged 48, was convicted after a trial on counts 1, 3, 4, 5, 6 and 8 – 11 of inciting a child to engage in sexual activity, contrary to section 10(1) of the Sexual Offences Act 2003. He was also convicted on count 2 of inciting a child under the age of 13 to engage in sexual activity, contrary to section 8(1). He was convicted on count 7 of sexual activity with a child, contrary to section 9(1). He was convicted on count 12 of possessing indecent photographs of children, contrary to section 160(1) of the Criminal Justice Act 1988.

85. On 10 November 2008 he was sentenced by the trial judge, HH Judge O'Mahony, as follows: on count 4 to a sentence of IPP, under s.225 of the CJA 2003 (as amended), with a minimum term specified of 2½ years (predicated on a notional determinate term of 5 years) with a direction that the time spent on remand should count towards sentence. No separate penalty was passed on the other counts.

86. A Sexual Offences Prevention Order was made which was recorded as indefinite in duration. We observe, in passing, that at some time the terms of this Order will need re-drafting in the light of the decision of this court in *Smith* [2012] 1 Cr App R (S) 82 when and if Woodward is eventually to be considered for release. A draft has been provided by counsel. He is presently still in custody.

87. It is not certain what advice he was given after his conviction, but it is to be inferred that he was advised against an appeal. His application for an extension of time (of nearly 6 years) for leave to appeal against sentence has been referred to the full Court by the Registrar.

88. The facts of each offence fell into very clear pattern.

i) Woodward who was then aged 48, held open house for adolescent boys, whom he enticed with offers of cannabis and payments for sexual favours. He arranged to pick them up in his car and take them back to his house; realising that his neighbours might suspect that something untoward was going on if they saw boys constantly arriving at his house, he would ask them to duck down below the level of the car windows so as to avoid detection.

ii) The charges related to seven different boys; all told a similar tale. In the circumstances it is unnecessary to detail the particular circumstances of each count. Having lured them back to the house, he would invite them to masturbate in his presence, in return for money: typically £10 or £20. He sometimes asked if he could touch them but they always refused and he never forced himself upon them. He further humiliated some of the boys giving them money in return for watching them urinate, or even defecate. Some of the boys became frequent visitors. One of the boys was as young as 11. The course of offending covered a number of months.

iii) Count 4, to which the sentence of IPP attached, was typical of the other offences; a 14 year old boy, who visited on four separate occasions, masturbated in Woodward's presence and was paid to do so.

iv) When he was arrested, the police found that he had kept a written record describing in salacious detail what he had done and to whom.

v) His computer was seized but only one indecent image was found, and that was at level one.

vi) He was released on bail but his offending continued, except that he met the boys upon the street and did not bring them back to his house.

vii) Despite the overwhelming evidence of these seven separate boys, Woodward contested the trial, which lasted a couple of weeks.

89. The pre-sentence report made clear that, even after conviction, Woodward did not accept his guilt. He remained focussed on the impact such behaviour had had on him and did not demonstrate any awareness of victim empathy or consequential thinking. In view of his continued denials, he was unsuitable for any of the sexual offender treatment programmes. He had limited insight into the effects of sexual abuse on victims both in the short and long term. He was assessed as being a medium risk of re-offending.

90. The judge heard the trial and was therefore in an excellent position to come to a conclusion as to the risks presented by Woodward who was 48 years old. He had been a teacher for many years but these offences were not committed within that context, as many testimonials confirmed. He had no previous convictions. He was in poor health. The judge said correctly, in our judgement, that he had persistently and over a significant period of time carried out organised recruitment of under aged boys for the purposes of his sexual gratification and interest. The judge recognised that the provisions of the CJA 2003, as amended in 2008, were not designed to be implemented for low level offending, but there were many aggravating factors: he gave the boys money, he offered them drink and cannabis, the offending continued after his arrest and release on bail. Furthermore, it did have a serious effect on some of the boys, who became understandably upset and confused. Furthermore, he continued to deny that he had a sexual interest in adolescent boys. The judge concluded that there was a significant risk of serious harm from future specified offences committed by him and thus there must – a word that the judge did indeed use - be an indeterminate sentence of IPP. He therefore passed such a sentence on one count, count 4 and imposed no separate penalty on all the other counts.

91. He fixed the notional determinate sentence at 5 years imprisonment; thus the minimum term was 2½ years imprisonment.

92. It was said in the grounds of appeal that the judge failed to properly consider lesser alternatives to a sentence of IPP; that the sentence was disproportionate or manifestly excessive because other combined lesser restrictions existed that would adequately protect the public. It was also argued that the effect of the sentence has been to fall foul of various Articles of the European Convention of Human Rights Articles, a point which we considered at paragraphs 29 to 32 above.

93. It is important to note that Mr Rule does not contend that the finding of dangerousness was wrong when made at the time; indeed before us he specifically confirmed that Woodward was dangerous at the time of sentence. That being so, under the CJA, as amended, the judge was not required to pass a sentence of IPP, but Mr Rule contended, quite rightly, that the judge should have considered whether any alternative was available. The judge did not do so but that, no doubt, was because he was sentencing before the guidance given by this court in *R v C* to which we have referred at paragraph 22.iii) above.

94. We must therefore consider whether there was any viable alternative. In the face of Woodward's continued denials, an extended sentence would not provide any protection to teenage boys, since he would not have been eligible for any of the sex offending treatment programmes and he would be released presenting precisely the same risk as he did before. Nor could one say with confidence that the making of a SOPO would suffice, since he had already offended when on bail. So, in our judgement, the judge was really driven to conclude that Woodward posed a risk that could not be safely addressed other than by an indeterminate sentence.

95. The simple fact is that he presented too great a risk of committing similar crimes against teenage boys to be safely released into the community and the commission of further offences might cause serious harm. As with the other applicants, arguments as to the danger he now presents should be directed to the Parole Board; in its decision of 6 October 2014, the Parole Board declined to order release or a move to open conditions.

96. In all the circumstances, any appeal was bound to fail and the proper course is to refuse to extend time for appealing.

(5) Simeon Peter Gittens

97. On 13 December 2006 in the Crown Court at Worcester, following his conviction after a trial for an offence of robbery, Gittens, then aged 30, was sentenced by HH Judge Cavell to IPP, with a minimum term specified of 931 days, calculated as half of the 7 years considered to be an appropriate determinate sentence, less the time already served.

98. He sought leave to appeal against conviction which was refused on 29 February 2008 by the Full Court. He did not then apply for leave to appeal against sentence, almost certainly on the basis that counsel then representing him did not consider an appeal against sentence to be arguable. Unfortunately the advice by trial counsel in respect of sentence cannot be found. Some 7 years later, Gittens seeks leave to appeal against

sentence, asking for an extension of very nearly 8 years. He has been recalled to custody as, after release in July 2015 on licence, he committed a burglary in August 2015 and was sentenced to a term of imprisonment of 4½ years.

99. The facts are as follows:

i) On the evening of 13 September 2005 the complainant, a female customer at Tesco in Redditch, went to the cash machine, intending to withdraw £20. As she stood at the machine, Gittens approached her from behind and put one arm around her neck and the other around her waist.

ii) He told her to get her money out; he said she should take out all her money, he mentioned £200 or £250. He said, 'No one's going to fucking help you', so she did as she was told and withdrew another £200, which he snatched and ran off.

iii) He was later arrested after the CCTV footage had been studied and an image of the robber had been publicised locally. He was later identified by the complainant but he denied his guilt and, as we have said, he was only convicted after a trial.

100. He was at the time aged 30. He had two convictions for robbery as a juvenile, neither of which is relevant for present purposes. More importantly, in 2002, he was sentenced to five years' imprisonment for robbery. He had entered a general store, armed with a screwdriver and a crowbar with which to threaten staff and demanded that they open the safe. He made off with a number of bottles of spirits. He had many convictions for offences of dishonesty but no other offence for violence, although he had three convictions for possessing an offensive weapon. There was no pre-sentence report.

101. The court log indicates that counsel then representing Gittens accepted that he fulfilled the criteria of dangerousness. That is hardly surprising given the then statutory assumption and the circumstances of the offence. Counsel's submissions at the time were focussed on persuading the judge to pass a sentence of IPP rather than a sentence of life imprisonment, as those were the only two sentences then open to the judge where an offender was dangerous. Mr Banks, on behalf of Gittens, attempted to ascertain the circumstances from counsel who then represented Gittens in accordance with the principles set out in *McCook*. He had no independent recollection of the circumstances and, as we have said, the advice he gave at the time cannot be found.

102. The judge had heard the trial and was well placed to assess Gittens' criminality. He found that he had deliberately targeted a woman at a cash point, having been on a reconnaissance the day before. He was armed with a knife and threatened to use it. When his victim gave evidence she was, as he put it, 'a gibbering wreck', so it was clear that the offence had had a serious impact upon her.

103. The judge recited his previous convictions for robbery and, no doubt having in mind that there were no submissions to the contrary, concluded that he met the criteria of dangerousness under the CJA 2003, and therefore he said that his public duty required him to pass a sentence of IPP and he did so.

104. It was submitted to us on Gittens' behalf that the judge should have ordered a pre-sentence report. But the court is entitled to waive the requirement for a pre-sentence report if it is unnecessary to have one. The practice of the time was frequently to sentence without a pre-sentence report after a trial. In any event, a failure to obtain a pre-sentence report is not a free-standing ground of appeal against sentence and on the facts of this case could have made no difference.

105. Complaint was also made that the judge's sentencing remarks did not fully explain how he had concluded that the criteria of dangerousness were met and indeed why it was that a sentence of IPP should be passed. Modern sentencing practice would be to examine such issues in rather more detail, but the judge no doubt very much had in mind the concession by counsel that the appropriate statutory criteria were fulfilled and that a sentence of IPP was inevitable.

106. We have nonetheless considered the matter fully. This was a case to which the statutory assumption applied because Gittens had a previous conviction for a specified offence, namely robbery, and it was a serious robbery, as we have already set out. So not long after his release from serving the sentence for that robbery, which was committed when armed with a screwdriver and a crowbar, he approached the woman in the offence before the court and robbed her at knifepoint. Maybe no injury was in fact caused, because the victim complied with the request made to her but it may have been very different if the victim had not complied with his request.

107. Mr Banks on behalf of Gittens pointed out that the judge was not directed to paragraph 36 in *R v Lang,* where the then Vice-President, Rose LJ, made clear that not all robbers necessarily presented a substantial risk of causing serious harm. Mr Banks stressed that Gittens had not in fact caused any serious injury, but that, no doubt, was because the victims had complied with his demands. In our judgement, at the time of sentence, as trial counsel then conceded, Gittens plainly presented a substantial risk of committing a further specified offence and of causing serious harm to the public; accordingly, we conclude that the judge was quite right in imposing a sentence of IPP.

108. In our judgement, the sentence as passed was entirely in accordance with the law as it was prior to the amendments made in 2008. There are no arguable grounds of appeal against the sentence passed in this case and the application to extend the time is refused.

(6) Joseph Steven Powney

Note: The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. No reports of these proceedings should include any particulars likely to lead to the identification of the victim.

109. On 29 June 2007 in the Crown Court at Oxford, following his earlier plea of guilty to an offence of rape, Powney, then aged 16, was sentenced by HH Judge Hall to IPP, with a minimum term of specified of three years, less the time already served, predicated upon an appropriate determinate term of six years.

110. He renews his application for an extension of time for leave to appeal against sentence (of nearly 7½ years) following refusal by the single judge of this application. Powney did not seek leave to appeal at the time; it is not clear why this was so, because those

representing him in the application to us could not obtain any information, despite enquiries. He remains in custody.

111. The facts are as follows:

i) On 17 March 2007, at about 10:30 at night, the complainant, a slightly built 34-year-old woman, took her dog for a walk in a public park in Bicester; it was a dimly lit area with paths passing through dense undergrowth. She heard footsteps behind her. Powney, who was only 16 at the time, approached; he asked her for the time. He then grabbed her anorak and pulled her towards him, saying that he had a knife. At first, she fought back; she hit him with her dog lead. She shouted for help. People living nearby heard the commotion. He screamed at her to shut up, saying again that he had a knife and he was going to stab her. She tried to break free but he was taller and stronger than she was and he overpowered her. He dragged her into the undergrowth. He told her not to run, or he would cut her from ear to ear, and even that he would cut her throat. During the struggle she grabbed his knife and she cut her hand.

ii) She decided it would be foolish to resist him further and she submitted. He forced her to kiss him. He made her touch his penis. He sat on the floor with his trousers around his thighs. He made her masturbate him. He made her perform oral sex on him. He made her straddle him. He then had full penetrative sexual intercourse with her. He did not wear a condom and he ejaculated. He then demanded her money and phone but she had neither and he ran off.

iii) She made her way to the nearby road, and sought refuge from a passing taxi driver.

iv) The police were called. Powney was arrested because the police had earlier received reports that he was drunk and acting strangely.

v) Whilst he was being taken to the police station, he dropped a penknife on the floor of the police car; presumably this was the knife he used in the commission of the offence.

vi) The victim was medically examined. She had sustained bruising and soreness to her knees and left ankle, scratch marks to the side of her body, a small cut to her left hand and three small cuts to her right hand where she had grabbed the knife.

vii) Although the Powney's DNA was found in semen swabs taken from the complainant, he made no comment and certainly no admission during interview.

viii) There was a moving Victim Personal Statement which spells out the anguish and distress that the complainant suffered following this attack upon her.

112. Although Powney was 16 at the time, he had many previous convictions for general anti-social offending such as criminal damage, theft and vehicle taking and minor violence including assaults on constables, common assaults and batteries and for

breaches of an Anti Social Behaviour Order. He had no convictions for sexual offences.

113. The pre-sentence report attributed his extensive offending to a lack of boundaries set at home, to bad peer influence, to substance misuse and his lack of maturity. The writer considered that the nature of the offence, and its unpredictable nature, indicated a high risk of harm to the public.

114. There was also a psychiatric report which suggested that without intervention Powney would pose a high risk of re-offending. The writer noted that he had been exposed to high levels of domestic violence and as a result was highly impulsive, lacking personal boundaries, immature, angry and oppositional. He was a damaged young person and would require intensive intervention to avoid a life of incarceration and a fully developed Anti-Social Personality Disorder. He was currently amenable to treatment. The writer thought that opportunity might be lost if he was given an indeterminate or extended sentence.

115. The judge said that what Powney had done was, as he put it, a perfectly dreadful offence. A woman walking her dog at night was dragged into a bush, threatened at knifepoint and raped, leaving her life shattered. He said that although he was only 16, Powney had been raised in a household of domestic violence and was damaged as a result. He observed that he had been in and out of the criminal justice system since the age of 12, admittedly for relatively minor offences usually involving violence. He identified the serious elements of the instant offence: this was a stranger rape, at night, he ejaculated in his victim, he used a knife and there was more than one type of sexual activity. We might add the very serious adverse effect upon the victim. The judge therefore concluded that Powney posed a significant risk to members of the public of serious harm.

116. The judge said that had he been over 21, the sentence would have been 11 years' imprisonment. He reduced that to nine years, on account of his youth. He reduced the nine years to six years, to take account of the plea of guilty. He halved that and deducted the days spent in custody to reach the minimum term.

117. It was submitted to us that the sentence was manifestly excessive in that: the judge erred in finding Powney dangerous within the meaning set out in s.226 of the CJA 2003; that he failed to give any consideration to the factors set out in *R v Lang*, most particularly (but not confined to) those in respect of young offenders as set out in paragraph 17 of the judgment Further and alternatively, the judge failed to address the consideration set out in section 226 (3) of the CJA 2003 in respect of young offenders: whether an extended sentence of detention would be sufficient to protect the public from serious harm as, in contradistinction to adults, the judge had this option.

118. We reject those grounds entirely. This was indeed a dreadful offence, Powney plainly presented a substantial risk of committing a further specified offence which might cause serious harm to the public. That he was 16 did not lessen the risk since no one could say when the risk would have passed. Accordingly, the judge was quite right to pass a sentence of IPP; he would have been failing in his duty to apply the law as set out in the CJA 2003 if he did not do so.

119. Accordingly, the application is bound to fail and we refuse to extend time for appealing.

(7) Nigel Darren Garbutt

120. On 11 July 2006, after Garbutt, then aged 27, had changed his plea to guilty to an offence of robbery, as charged in Count 1, he was sentenced by Mr Recorder Jackson QC at the Crown Court at Sheffield to IPP under s.225 of the CJA 2003; the following day, the Recorder specified the minimum term as 3 years, less the 26 days spent on remand.

121. Garbutt seeks an extension of time of nearly 8½ years in which to apply for leave to appeal against sentence. Advice was given at the time as to an appeal against sentence. No application was made. Those representing him at the time of his sentence cannot assist further. He remains in custody; the Parole Board refused his release on 29 June 2015.

122. The facts are as follows:

i) In the early hours of 7 January 2006 Garbutt, assuming a false name, called for a taxi from a public telephone box at Queen's Corner in Maltby, Rotherham, Shortly afterwards, the complainant, Mr Ahmed, responding to the call, collected Garbutt, who gave that false name. Mr Ahmed took him to Eastwood, as he requested.

ii) When they reached the destination, Garbutt would not pay the fare; instead he pulled a long bladed kitchen knife and demanded Mr Ahmed's takings, which amounted to £115 odd. At first Mr Ahmed refused to hand over the money but Garbutt then prodded him twice with the point of the knife and Mr Ahmed then handed the money over. Garbutt ran off.

iii) He was traced after police examined the CCTV footage from the call box. He was arrested on 24 January 2006. In interview he admitted that he was in Maltby that night but denied any knowledge of the offence. Later however, he pleaded guilty, as we have said.

123. Garbutt had a bad record for violence (and indeed for dishonesty). As a juvenile, he had been convicted of robbery. In 2002 he had been sentenced to 4½ years for a robbery, in which he had attacked a man with a pointed stick in an attempt to rob him; that same day he had 'glassed' another man, causing the victim deep cuts and wounds to his head. In 2005, he was sentenced to 16 months for an assault on a woman, causing her to sustain a broken nose and a black eye; he had been released from this sentence only a few days before committing the instant offence and was therefore on licence. As the judge pointed out, he had previously committed no less than ten specified offences (being robbery, attempted robbery, affray, unlawful wounding, assault with intent to resist arrest, and five assaults occasioning actual bodily harm).

124. The judge considered the facts of the offence. It had been committed while Garbutt was on licence; furthermore, it was a planned offence for which Garbutt had armed himself with a knife before luring the taxi driver to pick him up with the intention of robbing him. He observed, quite rightly, that taxi drivers are to be protected by the

courts because they are providing a public service, often during the night, and as such are vulnerable to attack by criminals such as Garbutt, although that feature goes to the length of the notional determinate term rather then to the risk he presents.

125. The judge concluded, from all these offences and from the facts of the instant case, that he had a propensity to use violence and to cause serious harm, accordingly he was satisfied that Garbutt fulfilled the criteria of dangerousness as defined by the CJA 2003; accordingly, he passed a sentence of IPP.

126. He fixed the notional determinate term at 7 years. He gave a year's discount for the late plea; one half of that resulted in a minimum term of 3 years, less the time served.

127. It was argued before us, many years later, on his behalf that it was unreasonable to conclude that Garbutt was dangerous. That, as we have pointed out, was not the relevant test; because Garbutt had previously committed a serious specified offence, in fact, many serious specified offences; the judge was therefore required to assume that he was dangerous, unless it was unreasonable to make this assumption. There were, in our judgement, a number of relevant factors, which justified - indeed, they required - the assumption to be applied. We refer to: the nature of the instant offence; the large number of previous specified offences which he had committed, including a robbery for which he had received a sentence of 4½ years, and an offence of glassing, and another unpleasant assault in which he had broken someone's nose, from which sentence he had been released only a few days beforehand. In our judgement, he plainly presented a substantial risk of causing serious harm by reason of the commission of a further specified offence; the sentence of IPP was inevitable. Accordingly the application for leave to appeal against sentence out of time is refused.

(8) Jason William Warwick

128. In October 2006 Warwick, then aged 37, pleaded guilty at the Crown Court at Cambridge to an offence of manslaughter committed in February 2006. On 7 February 2007 he was sentenced by HH Judge Worsley QC to IPP with a minimum term to be served of 18 months less time spent on remand. He was represented by leading counsel who advised that there were no grounds for appeal against the sentence.

129. He applies for an extension of time of over 7 years in which to apply for leave to appeal against the sentence. His applications have been referred to the Full Court by the Registrar. He is in custody; he was moved to open conditions, but in April 2013 absconded. He was returned to custody, sentenced to 8 months imprisonment for unlawful escape and held in a closed prison. A prison report prepared for us recorded the following:

> "Warwick's poor attitude and behaviour reflects his frustration at his continued incarceration and in many respects is his own worst enemy. Intellectually he may have completed offending behaviour work but apparently chooses when and when not to put learning skills into practice. It is also reasonable to conclude that Warwick lacks the necessary cognitive abilities. Consequently his behaviour is unpredictable and those working with him are unable to accurately assess his risk at any given

> time. Warwick is desperate to be released but his attitude and behaviour towards staff is worrying and impacts professionals assessing risk and suitability for release."

130. The facts of the offence were as follows:

i) In the early hours of 21 February 2006 Warwick attacked a man named Nleya in an area of open parkland in Cambridge. Warwick punched Nleya very hard to the face causing damage to the teeth. The force of the blow was sufficient to fell Nleya who suffered a severe brain injury as a result.

ii) Warwick left Nleya lying on the ground which is where a passer-by on his way to work found him the next morning. Nleya was still alive but he was suffering from hypothermia as well as the effects of the brain injury. He died in hospital later the same day.

iii) The attack on Nleya was planned and premeditated in that Warwick was angry with Nleya for telling Warwick's then girlfriend that Warwick had been seeing another woman. As a consequence the girlfriend had broken off her relationship with Warwick.

iv) During the evening prior to the attack Warwick had sent a series of abusive and threatening text messages to Nleya. He then had gone out into Cambridge intending to find Nleya. He later told a friend that he in fact had encountered Nleya by chance at the scene of the attack. He told that friend that he had given Nleya "a good hiding".

131. Warwick had an offending history. He had convictions for specified violent offences - assault occasioning actual bodily harm in 1989 and 1992 and for affray in 1995 - together with convictions for lesser and non-specified offences of violence in 1997, 1998 and 2001. In 1995, 1998 and 2001 the disposal had been by way of a hospital order. The 2001 order was made subject to a restriction order.

132. The sentencing judge had reports from three separate consultant psychiatrists, each of whom concluded that Warwick suffered periodically from mental illness. There was some dispute as to the nature of the illness but not a dispute of any significance to the sentencing process. Dr Tim McInerny concluded that there was a future risk to the public of harm due to violent behaviour in the event of Warwick suffering a relapse in his mental state and/or in the event of his using illicit substances and/or alcohol. Professor Coid, instructed on behalf of Warwick, took a similar view. He stated that Warwick's risk of future offending was closely linked to his mental state and to his consumption of alcohol and/or drugs. Dr Shetty aligned the risk to the public with non-compliance by Warwick with his medication regime.

133. The judge in detailed and careful sentencing remarks concluded that Warwick's mental condition would deteriorate were he to abuse drink or drugs or to fail to take his medication. Those features were commonplace throughout his history. In the event of deterioration the judge concluded that Warwick would present a real and significant risk of harm to the public. The judge set out the test of dangerousness as defined by the CJA 2003 and found that it had been satisfied. He concluded that an indeterminate sentence was required for the protection of the public. The judge did

not purport to rely on the assumption in Section 229(3) of the CJA 2003 which in the light of his offending was applicable.

134. Warwick seeks in this application to rely on the evidence of another psychiatrist, Dr Shapero. There is no application to rely on fresh evidence. We have considered the evidence *de bene esse*. In essence Dr Shapero concluded that Warwick was not suffering from a mental illness at the time that he committed the offence. He argued that the offence was not due to a relapse in his mental state whether by reason of a failure to take his medication or otherwise. Rather, his conclusion was that the offence in 2006 was caused by the consumption of alcohol and drugs. Dr Shapero stated that in consequence the judge should not have taken into account the issues of mental illness and failure to take medication when deciding whether Warwick was dangerous.

135. Leaving aside whether Dr Shapero's evidence is admissible and relevant, his opinion fails to deal with the point with which the judge had to grapple, namely the future risk presented by Warwick. The detailed rehearsal by the judge of his psychiatric history demonstrated that his mental state was plainly of relevance to the issue of future risk, irrespective of whether he was mentally ill at the time of the offence. In any event the judge identified the use of alcohol and/or drugs as relevant to the future risk. It is not necessary to lengthen this judgment with a detailed consideration of the evidence of Dr Shapero and the extent to which he engaged in criticism of the judge's assessment of dangerousness. Insofar as he did so, Dr Shapero's evidence falls into the category of expert evidence criticised in a different context in *Cleobury* [2012] EWCA 17 at paragraphs 15 to 22. *Cleobury* was concerned with scientific evidence in relation to DNA but the principles enunciated in that case are equally applicable in the context of psychiatric evidence relating to the sentencing process.

136. It follows that there is no merit in this application for leave to appeal. The judge was wholly justified in reaching the conclusion that Warwick posed a significant risk of serious harm to members of the public from the commission of further specified offences. There can be no complaint about the minimum sentence specified which by current standards was low. In the circumstances the application to extend time is refused.

(9) Martin Lee Fay

137. On 8 November 2007, Martin Fay, then aged 18, pleaded guilty at the Crown court at Manchester to an offence of causing grievous bodily harm with intent. Sentence was adjourned for the preparation of a pre-sentence report. Fay did not co-operate with the Probation Service in that process. In due course on 8 April 2008 he was sentenced without any report being available. HH Judge Hammond passed a sentence of IPP with a minimum term to be served of 2 years 8 months less time spent on remand (229 days). It is not known for certain whether Fay sought advice on the merits of any appeal against the sentence (as the papers have been destroyed), but it appears he was advised against an appeal at the time. We were told that it was not anticipated he would remain for so long in custody.

138. He applies for an extension of time of nearly 7 years in which to apply for leave to appeal against the sentence. The applications have been referred to the Full Court by the Registrar. He remains in custody.

139. The facts were as follows:

i) At about 5 a.m. on 30 June 2007 a man named Naz was walking along a street in Manchester. He was passed by a car in which there were three young men, one of whom was Fay. The men in the car agreed to stop and rob Mr Naz. The car was turned around and went back towards Mr Naz. Two of the men in the car but not Fay got out and began to attack Mr Naz.

ii) Fay then got out of the car and joined in with the attack. Mr Naz was knocked to the ground. He was kicked repeatedly. He was stabbed. One of the attackers took his mobile telephone at which all three men returned to the car and drove away.

iii) Mr Naz was left with three fractures to his skull, a fractured nose, bleeding to the brain and three significant stab wounds to the abdominal area. His injuries were life threatening.

140. Fay had a criminal history of considerable length. Predominantly his offending involved burglary and like offences. However, in 2003 he was sentenced for offences of robbery and assault occasioning actual bodily harm, both specified offences, and in 2004 and 2006 he was sentenced for breaches of an anti-social behaviour order.

141. Since Fay had refused to co-operate with the Probation Service, the judge had little material with which to make any assessment of the nature and extent of the risk of future specified offences beyond the facts of the instant offence and Fay's criminal history. Although the judge referred to the previous convictions, he did not indicate in terms that he proceeded on the basis of the assumption in s.229(3) of the CJA 2003. He said that he had "regard to the facts of the offence and your record". He included in Fay's criminal record the breaches of the anti-social behaviour order. The judge concluded by reference to the matters to which he had regard that Fay was a dangerous offender. It is accepted on his behalf in those circumstances that the judge was bound to impose an IPP.

142. It was submitted in the amended grounds of appeal that it was not clear from the judge's sentencing remarks that he had addressed his mind to the relevant issue i.e. did Fay pose a significant risk of serious harm to the public from the commission of further specified offences? In those circumstances it was argued that the judge's conclusion on dangerousness was wrong.

143. We remind ourselves of the guidance in *Johnson*. The question for this court is not whether the sentencing judge used particular or precise language in considering the issue of future risk. Rather, we must ask whether the sentence imposed was manifestly excessive or wrong in principle. The judge identified the only matters on which he possibly could reach his conclusion as to future risk, namely Fay's past behaviour and the nature of the offence for which he fell to be sentenced. His reasoning which led to the conclusion that Fay was a dangerous offender was set out in clear terms.

144. We are quite satisfied that the gravity of the offence coupled with Fay's previous behaviour amply justified the conclusion reached by the judge. The offence for which the judge was sentencing Fay was exceptionally serious. It demonstrated a

willingness to be involved in an offence which came near to killing an innocent member of the public. That was sufficient to justify the judge's conclusion.

145. Insofar as the general principles discussed earlier in this judgment have any application, we apply them to this case. The application for leave to appeal is without merit. The extension of time is not granted.

(10) Kelly Georgina Diveney

146. On 15 November 2005 Diveney, then aged 30, pleaded guilty to a single offence of wounding with intent at the Crown Court at Manchester. In February 2006 she was sentenced to IPP by HH Judge Thomas. Initially the minimum term to be served was set at 4 years less time spent on remand. Later in the same month the minimum term was reduced to 2 years less time spent on remand. These events occurred so long ago that there is no extant record of why there was such a reduction or how it was effected. In any event there is no issue about the length of the minimum term. The passage of time also means that there is no transcript of the sentencing remarks and no information as to what advice was given to Diveney after the sentence was imposed, despite attempts made by those now instructed to act.

147. She applies for an extension of time just in excess of 9 years in which to apply for leave to appeal against the sentence. Her applications have been referred to the Full Court by the Registrar. She has been released on licence twice (August 2012 and November 2013) and recalled twice (March 2013 and April 2014 after her arrest for burglary). At the time her applications were lodged she was serving a sentence of 18 months imprisonment imposed in October 2014 for the burglary. The solicitors representing her on that occasion advised her to appeal against the imposition of the sentence of IPP. A detailed prison report before the court recorded Diveney's own view of the effect of the IPP licence on her. It did not allow her to progress; she felt as if she was on a "piece of string" and anyone could take her life from her. She remains in custody under the sentence of IPP.

148. The facts were as follows:

i) On the afternoon of 11 May 2005 Diveney went to the home of her cousin, a woman named Nicola Butler. Diveney believed that Butler was engaged in some kind of relationship with Diveney's boyfriend. The two women argued on the front doorstep of Nicola Butler's home for a few minutes before Diveney pulled out a knife with a 6 inch blade which she had brought with her and stabbed Nicola Butler in the stomach and the upper left arm and neck. When Nicola Butler said "you've stabbed me", Diveney responded "so fucking what, die".

ii) Diveney made off on foot leaving Nicola Butler lying on her doorstep with stab wounds. The wound to the stomach caused internal damage to the stomach and the liver which required surgical repair. Fortunately Nicola Butler suffered no lasting physical injury but she did have significant psychological effects when she made a victim personal statement in November 2005.

iii) Diveney was not arrested until August 2005. In interview she claimed that, although she had gone to the home of Nicola Butler, she had been walking away when Nicola Butler came at her with a knife. A scuffle had followed in which she had been injured. Any stab wound suffered by Nicola Butler was in the course of that scuffle and must have been caused by her own knife. This exculpatory account was subsequently abandoned by her. She pleaded guilty and the account she gave to the author of the pre-sentence report was consistent with that plea.

149. Diveney was just 30 when she was sentenced. She had a long criminal history, albeit one that involved no convictions in the three years before the offence in 2005. In 1992 she was convicted of assault occasioning actual bodily harm and robbery. Although she was only 16 at the time they attracted a term of detention of 12 months. There was a further offence of robbery in 1994 and an offence of wounding in October 2001. Her last conviction before 2005 involved the unlawful possession of a lock knife.

150. The pre-sentence report was detailed and drew on a number of different sources of information. It considered the issue of future risk at some length. The author of the report identified factors in Diveney's life which tended to indicate a tendency to violent and uncontrolled behaviour. He concluded that she posed a high risk of harm to the public from such behaviour. It was implicit in the report's conclusions that any such harm would be serious. The report reflected on the past convictions so as to indicate that the author was concerned with the commission of further specified offences in the future.

151. The sentencing judge had a psychiatric report from a Dr Deo obtained on behalf of Diveney. Dr Deo had only limited information with which to work. His main report said nothing about future risk though it suggested that Diveney would benefit from anger management. In a very brief addendum Dr Deo offered the opinion that she did not "pose a significant risk to public safety" but he did not provide any rationale for this view.

152. Given the lack of any sentencing remarks it is not possible to say precisely how the sentencing judge approached his task. We can say that the judge was faced with a defendant who had committed specified offences on three separate occasions over a period of 9 years and who was assessed as dangerous by the author of the pre-sentence report. Moreover, the instant offence was very serious involving the repeated use of a knife taken to the scene to inflict significant stab wounds. It was the kind of behaviour which could very easily have resulted in the death of the victim. Whilst the psychiatric evidence was that there was no current risk presented by Diveney, this evidence did not address future risk and was not substantiated by reference to other material. On the face of it this case was a paradigm for the imposition of an IPP under the law as it then stood.

153. The grounds of appeal pointed to the fact that Diveney has been at liberty for a total of only 12 months since the imposition of the IPP and argue that this demonstrates that the sentence was manifestly excessive bearing in mind the minimum term imposed. The limited time Diveney has spent at liberty is substantially due to the fact that she has committed further offences or otherwise breached the terms of her licence. Her subsequent behaviour cannot be relevant to the appropriateness of the

sentence imposed in 2006. The fact that the minimum term calculated by reference to the appropriate determinate sentence was relatively short is of no consequence to the issue of future risk which was the reason for the imposition of an IPP under the law as laid down under the CJA 2003. Diveney in fact was very fortunate in the length of the minimum period to be served. Even by the standards applicable in 2006 a determinate sentence of 4 years for a deliberate stabbing with a weapon taken to the scene by someone with a significant criminal history would have been lenient.

154. The application for leave to appeal is without merit. Although we cannot know how the judge came to the view that Diveney was a dangerous offender, we are in no doubt that there was the ample basis which we have set out as to the basis on which judge was entitled to have come to the same conclusion. The extension of time is refused.

(11) Darren Paul Byrne

155. On 30 March 2007 Darren Byrne, then aged 27, pleaded guilty at the Crown Court at Woolwich to causing death by dangerous driving and associated driving offences including driving whilst disqualified. On 5 May 2007 he was sentenced by HH Judge Tain to IPP with a minimum term of 3½ years less time spent on remand. The grounds of appeal assert that no advice on appeal was given at the time.

156. We do not know whether the assertion in the grounds, which must have been made purely on the basis of Byrne's instructions, is true. Counsel then representing him could not recollect this matter. Whilst the assertion is not relevant to the substantive merits of the appeal, it is relevant to the issue of extension of time.

157. Byrne applied in April 2015 when still in custody for an extension of time of nearly 8 years in which to apply for leave to appeal against his sentence. His applications have been referred to the Full Court by the Registrar. Since the imposition of the IPP Byrne was sentenced in 2010 to a long determinate sentence of imprisonment for his part in a conspiracy to distribute Class A drugs within a prison. He was released on licence in July 2015, but, although wanted by the police for assault and a drugs offence, is still at large.

158. The facts were as follows:

i) In the early hours of 29 December 2006 Byrne was driving in a residential part of South London from a party to a nearby garage in order to buy some cigarettes. He was giving a lift for that purpose to a 16 year old girl. He was disqualified from driving and he was uninsured. The car he was driving had been stolen a week earlier. Although Byrne was not charged with any offence relating to the taking of the car, it was the fact that it was stolen which led police officers to try and stop the car whilst Byrne was driving it. His reaction was to drive away at speed.

ii) There was a police pursuit which was interrupted when the pursuing police car lost sight of Byrne such was the speed at which he was driving. When another police car encountered Byrne and took up the chase, Byrne drove too fast round a bend, collided with another vehicle and struck a tree. As a result the 16 year old girl was thrown from the car and killed. At the time of the incident

Byrne was on licence in respect of a sentence of 18 months' imprisonment imposed in November 2005 for an offence of handling stolen goods.

159. Byrne has a long criminal history. Until 2000 his offences involved dishonesty and/or motor cars. In 2001 he was convicted of an offence of wounding in which he had used a bottle as a weapon and had kicked his victim. In 2004 he was convicted of robbery committed after he had been involved in a road accident, the robbery involving the taking of another car by the threat of force. These were both specified offences.

160. The pre-sentence report addressed the issue of future risk. The author concluded that the risk of causing harm to others was high but in the context of harm caused "unintentionally" in the course of driving. In respect of what the report referred to as "directed violence" the conclusion was that Byrne posed a medium risk of harm at the higher end. The report stated that the author had "not assessed [Byrne] as presenting a high risk of directed harm nor that serious harm is an inevitable outcome of further offences." We note that these conclusions are not inconsistent with a finding that Byrne presented a significant risk of serious harm to the public from further specified offences. A "significant" risk is not the same as "a high risk". The CJA 2003 does not require serious harm to be "inevitable". It is the future risk against which the relevant provisions of the CJA 2003 are directed.

161. The judge's sentencing remarks were careful and detailed. Having rehearsed all of the matters relevant to the offences in question he noted the assumption set out in s.229(3). He concluded that it would not be unreasonable to determine that there was a significant risk of serious harm due to further specified offending taking into account the circumstances of the offences for which sentence was to be passed, the facts and circumstances of the previous offending, the pattern of behaviour displayed by Byrne and the information available about Byrne himself. The judge did not refer in terms to the judgment in *Lang*. This is not determinative. The judge applied the principles in *Lang* which is what matters.

162. In the grounds of appeal it was argued that the terms of the pre-sentence report were such that an indeterminate sentence was not considered by the author to be appropriate. As we have already identified that is not the proper conclusion to be drawn from the substance of the report. The fact that the author of the report did not suggest a particular form of custodial sentence is to be commended. It does not follow that as a consequence the judge was precluded from imposing an IPP.

163. The judge's assessment is not open to legitimate criticism. He applied the requirements of the CJA 2003 to the facts of the case as he found them to be. The application for leave to appeal has no merit. The extension of time is refused.

(12) Sonnie Michael Wakeling

164. On 23 June 2006 Wakeling, then aged 21, was sentenced at the Crown Court at Oxford by Mr Recorder Blackford in respect of two offences of robbery and one offence of theft. Concurrent sentences of IPP were imposed in relation to the offences of robbery. The minimum term in each instance was specified as 18 months less time spent on remand. It is not clear from the available records whether any separate

sentence was imposed in relation to the theft. In his sentencing remarks the judge reflected that offence in the overall indeterminate sentence, as he was entitled to do.

165. Wakeling applies for an extension of time of nearly 9 years in which to apply for leave to appeal against his sentence. His applications have been referred to the Full Court by the Registrar. No explanation at all is given for the delay, as we were told that those representing Wakeling have been unable to find those instructed at the time sentence was passed, but it appears that he was advised against an appeal. Wakeling has thrice been released on licence (in April 2012, June 2013 and April 2015) only for the licence to be revoked within a short time (November 2012, June 2013 and May 2015). We were told that this was because of his chaotic lifestyle and the use of drugs. He remains in custody.

166. The proceedings in the Crown Court occurred so long ago that the only account of the facts comes from the grounds of appeal settled almost 9 years after the event coupled with the offence analysis in the pre-sentence report.

i) The first robbery occurred on an afternoon in November 2005 in a street in the centre of Oxford. Wakeling went up to a man whom he knew, pinned him to a wall, demanded money and took £50 in cash and a mobile telephone. He threatened the man that there would be more violence should the man report the matter to the police.

ii) The second robbery in January 2006 was of an off licence in Oxford. Wakeling threatened the proprietor by saying that he had a dirty needle is his pocket which he would use if he were not allowed to take some bottles of drink. On the basis of that threat Wakeling was permitted to leave with some bottles of alcohol. The theft involved stealing bottles of champagne from a shop.

167. Wakeling has a substantial criminal history going back to 2001 when he was aged 16. Much of his offending involved stealing from shops and minor violence. Some of the disposals indicate that drugs were a feature of his life. In 2002 he was convicted of an offence of robbery for which he was sentenced to 2 years' imprisonment. This was a serious specified offence.

168. The pre-sentence report confirmed what could be inferred from his criminal history, namely that he has a history of drug and alcohol abuse. The author of the report by reference to an OASys assessment considered that Wakeling presented a medium risk of harm to the public. It was considered that abstinence from drugs and control of alcohol intake would reduce the risk.

169. Four grounds of appeal were identified before the court. Three of the grounds are of academic interest only: (i) the judge failed properly to identify which counts on the indictment attracted an IPP; (ii) the judge did not specify the extent of the credit (if any) given for the pleas of guilty; (iii) the notional determinate sentences were excessive. The fact is that a sentence of IPP was imposed and there were two counts on the indictment in respect of which such a sentence was a potential outcome. Whether more credit should have been given for the pleas and whether the notional determinate sentences were too long is of no consequence at all now.

170. Wakeling remains in custody because it is not considered safe to release him, not because the minimum term was of a particular length. For what it is worth the submission in relation to the notional determinate sentences by reference to the Sentencing Guidelines Council guideline fails to take account of the fact that the starting point relates to an offender of good character who has committed one offence. Wakeling was not of good character and he had committed two robberies.

171. This application stands or falls on the submission relating to the judge's finding that there was a significant risk of serious harm from the commission of further specified offences. The judge stated expressly that he had considered everything that had been placed before him. He found that Wakeling had committed two serious specified offences which plainly he had. He found that he had previously been convicted of a serious specified offence. That also was correct though the judge did mistakenly refer to the previous conviction as an offence which in fact fell to be sentenced by him. That can only have been a slip of the tongue given the reference later to Wakeling's previous offences. The judge properly identified that he was required to make the assumption in s.229(3) but that he had to consider whether it would be unreasonable to find that there was the relevant risk. The judge set out all of the matters which were relevant to that consideration, both those in favour of such a finding and those which tended to militate against the finding. His judgement was that, having considered all of the relevant matters, there was a risk which required the imposition of a sentence of IPP. The judge's consideration of the position was very different to that adopted by the judge who sentenced a Mr Ryan at the same court a few months before and who did not apply s.229(3) by reference to the words of the section or in line with the guidance in *Lang* (supra). In that instance this Court did interfere with the sentence: see *Ryan* [2014] EWCA Crim 2147. That was a fact specific decision. The circumstances in this instance were different as was the approach taken by the judge.

172. We refer again to *Johnson* in which at paragraph 11(i) this Court said that "in cases to which Section 229(3) applies, where the sentencer has applied the statutory assumption, to succeed the appellant should demonstrate that it was unreasonable not to disapply it." Wakeling has no prospect of demonstrating that in this case. The judge reached a conclusion which was open to him on the findings he made. It follows that the application is bound to fail. An extension of time is refused.

(13) Sean Dowe

173. In November 2005 Sean Dowe, then aged 25, was convicted after a trial at the Crown Court at Birmingham of offences of false imprisonment, robbery, assault occasioning actual bodily harm and theft. In December 2005 the very experienced trial judge, HH Judge Stanley, imposed concurrent sentences of IPP in respect of the offences of false imprisonment and robbery, the minimum term to be served being 5 years less time spent on remand. Concurrent determinate terms were imposed in relation to the other offences.

174. He applies for an extension of time of over 9 years in which to apply for leave to appeal against the sentence. It appears that no application for leave to appeal was made at the time as he was advised it was unlikely to be successful. The applications have been referred to the Full Court by the Registrar. He remains in custody.

175. The facts were as follows:

i) On the evening of 1 June 2005 a man called Danks was walking along a street close to the centre of Birmingham when he met a man called Wilson whom he knew. Wilson asked him to get into a car parked nearby. Danks did so not realising that there was anything amiss.

ii) Dowe was the front seat passenger in the car. As they drove off Danks was in the back of the car with Wilson and another man. Those two men began to search through Danks's pockets. When he tried to stop them he was punched in the face. Danks had little money on him. Dowe and the other men in the car demanded more. Danks said that he had some at the flat. The car was driven to Danks' address with Wilson and one of the others continuing to punch him as they drove along.

iii) Dowe and Wilson went up to the flat which was occupied by Danks's sister. Dowe assaulted her with a broom which he picked up at the flat. He took a mobile telephone and some cash from the flat. Dowe and Wilson then returned to the car in which Danks was being held against his will. The car drove away and the attack on Danks resumed. He was punched and the other man in the rear of the car used Danks's belt as a type of ligature around his neck. Eventually the car stopped and Danks was dragged from the car onto a piece of wasteland. Dowe and the others (though not Wilson who was no longer there) put Danks to the ground and subjected him to a kicking. Before they left they removed some of Danks's clothing. Danks was left unconscious. He eventually made his way to a garage from where help was summoned. Danks sustained black eyes and multiple cuts and bruises all over his body. There were footprint impressions on his back. He was in hospital for a time because blood was observed in his urine. The sentencing judge found that he had been scarred for life psychologically.

176. Dowe had had a varied criminal career prior to 2005 with appearances for offences involving violence and threats of violence. In particular in September 2003 he had been sentenced to a total of 18 months' imprisonment for two offences of assault occasioning actual bodily harm, the assaults being on prison officers who had challenged him about potential possession of controlled drugs. These were specified offences.

177. Wilson was also sentenced to IPP albeit with a shorter minimum term to be served. He had pleaded guilty to the counts on the indictment which related to him. He applied for leave to appeal against his sentence. The Full Court granted leave and allowed the appeal. A determinate sentence of the appropriate length was substituted for the indeterminate sentence imposed by the Crown Court judge. The decision of this Court is reported at [2006] EWCA Crim 1825.

178. In Dowe's grounds of appeal it was argued that the judgment of this Court in Wilson's case amounted to a finding that the offences committed by Dowe were not so serious in themselves to warrant a finding of dangerousness. That argument cannot be right. Dowe was involved in the assault on Danks's sister which Wilson was not, an assault which was relevant to the overall assessment of the offending even if it was not an assault which itself could attract an indeterminate sentence. Further, Wilson

was not party to the later part of the attack on Danks which arguably was the most serious part of the incident. The true relevance of Wilson's case is that it signposted to Dowe in 2006 that there might be some basis for him to apply for leave to appeal. He did not make any such application for a further eight years. No explanation is given as to why, if the sentence was plainly wrong and engendered some sense of injustice in Dowe, he did not take any steps until 2015. These matters are relevant to the question of extension of time.

179. In assessing the issue of whether Dowe was a dangerous offender the judge took account of his previous convictions, in particular the convictions in 2003 in respect of which the licence period had not long expired prior to the events in June 2005. The judge noted that Dowe had chosen a lifestyle which involved regular crime and the commission of offences in relation to drugs and offences of violence. He observed that there were other less significant offences which appeared on his record that further indicated a violent temperament. As a result the judge concluded that there was a significant risk that Dowe would commit further specified offences which are likely to involve serious harm to members of the public.

180. In this appeal it was argued that the judge was unreasonable when he concluded that Dowe was a dangerous offender. The basis for this submission was that Dowe's previous offending and the instant offending did not involve any serious harm. In those circumstances it was argued that the judge was wrong when he concluded that there was a significant risk of serious harm. This submission ignores the fact that a judge when imposing a sentence under s.225 of the CJA 2003 is engaged in an assessment of future risk. That assessment may be helped if there have been previous episodes where someone has been seriously injured by the defendant. The fact that there have not been any such episodes does not mean that the judge cannot conclude that there is a future risk. In this instance it was a matter of luck rather than judgment that Danks was not injured more seriously than he was. In any event the judge had tried the case and presumably had seen Danks give evidence. We have already referred to the judge's finding as to the effect of the incident on him.

181. There were ample grounds for the determination by the very experienced judge in this case that Dowe presented a significant risk of the kind identified within the dangerousness provisions. We refer again to the decision of this court in *Johnson* where it was said that "….this Court will not normally interfere with the conclusions reached by a sentencer who has accurately identified the relevant principles and applied his mind to the relevant facts." The judge in this case did both. He did not refer in terms to the assumption in s.229(3), though this was applicable. Thus, any general argument on the effect of that section is of no relevance in this case.

182. We are satisfied that there is no merit at all in this application. The extension of time is refused.