



**Neutral Citation Number: [2018] EWCA Civ 2851**

Case No: C1/2016/4712

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE DIVISIONAL COURT**  
**Lord Justice Fulford and Mr Justice Blake**  
**CO/4522/2013**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 20/12/2018

**Before:**

**PRESIDENT OF THE QUEEN'S BENCH DIVISION**  
**(SIR BRIAN LEVESON)**  
**LORD JUSTICE DAVIS**  
and  
**LORD JUSTICE LEWISON**

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**Between:**

<b>THE QUEEN</b>	<b><u>Applicant</u></b>
<b>(on the application of PAUL McATEE)</b>	
<b>- and -</b>	
<b>THE SECRETARY OF STATE FOR JUSTICE</b>	<b><u>Respondent</u></b>

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**Hugh Southey QC and Nick Armstrong (instructed by Stephenson Solicitors) for the Applicant**

**Catherine Callaghan QC (instructed by GLD) for the Respondent**

Hearing date: 28 November 2018  
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**Approved Judgment**

**Sir Brian Leveson P, Lord Justice Davis and Lord Justice Lewison:**

1. It has long been well known that, by reason of the provisions of s. 18(1) of the Senior Courts Act 1981, this court has no jurisdiction to entertain an appeal from a judgment of the High Court “in a criminal cause or matter”. These applications raise such a question and have to be considered in the light of the recent decision of the Supreme Court in *R (Belhaj) v Director of Public Prosecutions (No. 1)* [2018] 3 WLR 435. This is the judgment of the court.

*Background*

2. In addition to the question of jurisdiction, the background to these applications itself gives rise to significant procedural complexity, the starting point being an application for judicial review brought not by this applicant but by Jeffrey Lee.
3. In short, on 13 April 2005, at the home of his former wife and in the presence of his young children, Jeffrey Lee committed an offence of burglary with intent to commit criminal damage. He was said to be in a drunken rage. Having a number of previous convictions for offences of violence, including assault occasioning actual bodily harm and criminal damage, on 2 September 2005, at Bolton Crown Court, he was sentenced to imprisonment for public protection (“IPP”) under s. 225 of the Criminal Justice Act 2003 (which had come into force very shortly before he committed this offence). The minimum term specified was 9 months imprisonment less time spent on remand. The tariff expired on 12 January 2006.
4. Section 225 of the 2003 Act (as it then stood) provided as follows in the relevant respects:

“Life sentence or imprisonment for public protection for serious offences for serious offences

(1) This section applies where—

(a) a person aged 18 or over is convicted of a serious offence committed after the commencement of this section, and

(b) the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.

(2) If —

(a) the offence is one in respect of which the offender would apart from this section be liable to imprisonment for life, and

(b) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life.

the court must impose a sentence of imprisonment for life.

(3) In a case not falling within subsection (2), the court must impose a sentence of imprisonment for public protection.

(4) A sentence of imprisonment for public protection is a sentence of imprisonment for an indeterminate period, subject to the provisions of Chapter 2 of Part 2 of the Crime (Sentences) Act 1997 (c. 43) as to the release of prisoners and duration of licences....”

It was common ground that Mr Lee had committed a serious offence for the purpose of the statutory provisions; and the sentencing judge found that he posed a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences.

5. Although eligible for release on 12 January 2006, it was only over five years later, on 25 July 2011, that the Parole Board concluded that he no longer posed a risk to the public and directed his release on licence. In the meantime, with others, he had engaged in litigation challenging the lawfulness of his continued imprisonment. This was on the basis that he had not been afforded the opportunity of access to courses that might, if successfully undertaken, help persuade the Parole Board of his reduced dangerousness and thus secure his release on licence. The claim failed in the House of Lords but succeeded in the European Court of Human Rights: see *R (James and others) v Secretary of State for Justice* [2010] 1 AC 553 and *James, Lee and Wells v United Kingdom* [2012] ECHR 57877/09.
6. By reason of s. 225(4) of the 2003 Act, a sentence of IPP was an indeterminate sentence. Thus, following his release on licence on 25 July 2011, Mr Lee was subject to the relevant provisions of the Crime (Sentences) Act 1997 and, in particular, s. 31A of that Act which, as originally enacted, provided as follows:

“Imprisonment or detention for public protection: termination of licences

(1) This section applies to a prisoner who –

- (a) is serving one or more preventive sentences, and
- (b) is not serving any other life sentence.

(2) Where –

- (a) the prisoner has been released on licence under this Chapter; and
- (b) the qualifying period has expired,

the Secretary of State shall, if directed to do so by the Parole Board, order that the licence is to cease to have effect.

(3) Where –

- (a) the prisoner has been released on licence under this Chapter;
- (b) the qualifying period has expired; and

- (c) if he has made a previous application under this subsection, a period of at least twelve months has expired since the disposal of that application.

the prisoner may make an application to the Parole Board under this subsection.

- (4) Where an application is made under subsection (3) above, the Parole Board –

- (a) shall, if it is satisfied that it is no longer necessary for the protection of the public that the licence should remain in force, direct the Secretary of State to make an order that the licence is to cease to have effect;  
(b) shall otherwise dismiss the application.

- (5) In this section –

“preventive sentence” means a sentence of imprisonment for public protection under section 225 of the Criminal Justice Act 2003 or a sentence of detention for public protection under section 226 of that Act  
“the qualifying period”, in relation to a prisoner who has been released on licence, means the period of ten years beginning with the date of his release.”

It thus can be seen that the obligation of the Secretary of State, if so directed by the Parole Board, to order that the licence should cease to have effect could only arise after the expiry of the qualifying period of 10 years.

7. In addition, there was a policy, contained in Prison Service Order 4700, that the supervision element of such a licence could be suspended, following four years' existence in the community without trouble and if certain other conditions were fulfilled. Further, any conditions attached to such licence could be varied on a recommendation of the relevant probation officer and of the Parole Board.
8. Mr Lee was aggrieved that the indeterminate licence period, as laid down by the legislation, entirely precluded the possibility of cancellation of the licence before the expiry of at least 10 years. As a result, on 17 April 2013, he commenced judicial review proceedings.
9. In this regard, it is important to note that, from their inception, sentences of IPP have always been controversial. Substantial amendments were introduced by the Criminal Justice and Immigration Act 2008 (to increase the minimum term that would have to be imposed before the sentence qualified). Ultimately, by s. 123 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 sentences of IPP were abolished. Neither the amendment to nor the abolition of IPP affected the position of Mr Lee.

#### *The Judicial Review proceedings*

10. In the claim form issued on 17 April 2013, in which the defendant was the Secretary of State for Justice, the details of the decision to be judicially reviewed, as set out in Section 3 of the claim form, were described as: “The requirement to be subject to an indeterminate licence for a minimum period of ten years without any right of review”.

The date of the decision was described in Section 4 of the claim form as “Ongoing”. The relief sought (with ancillary orders) was this:

“A Declaration that in preventing the claimant from applying for his IPP licence to be cancelled until after ten years post-release, s. 31A of the Crime (Sentences) Act 1997 is incompatible with the claimant’s Article 8 rights.”

11. Permission to apply having been granted on the papers, the matter came on for decision by a Divisional Court of the High Court comprising Fulford LJ and Blake J, sitting in Manchester. By a full and detailed judgment of the court dated 6 December 2013, [2013] EWHC 4483 (Admin), the claim was dismissed. The court decided that such interference with private and family life as was occasioned by the mandatory ten year licence period was justified and proportionate. It is neither necessary nor appropriate for this court here to engage in any consideration of the merits of that decision.
12. On the same date, the Divisional Court refused an application for permission to appeal to the Court of Appeal. However, on 24 May 2014, Laws LJ granted permission to appeal on the grounds that the points were arguable and merited the attention of this court on appeal. At that stage, no one had adverted to any issue of jurisdiction or to any issue of whether what was involved was a criminal cause or matter.
13. It was at this point that the procedural complexities potentially applicable to this case, over and above the jurisdictional issue, arise. Thus, it was agreed that the appeal of Mr Lee be stayed pending the decision of the Supreme Court in *R (Haney) v Secretary of State for Justice* [2015] AC 1344 which, although believed likely to address this issue, did not do so. There was then delay in securing a hearing date in the Court of Appeal. In the meantime, Mr Lee had found employment and had married. He ceased to be interested in pursuing his appeal. Legal Aid was withdrawn and his solicitors came off the record. The appeal was ultimately dismissed by the Master on 22 August 2016 on the grounds that it had not been progressed.
14. On the face of it, this decision brought the proceedings to an end. However, Mr Michael Pemberton, a partner in Stephenson Solicitors LLP, the firm which throughout had acted for Mr Lee, has explained in a witness statement that he had made efforts to cause the prospective appeal to be effective by identifying another prisoner who also, like Mr Lee, had been made subject to a sentence of IPP prior to the amendments introduced by the 2008 Act. It was proposed that such a person, when located, could be substituted for Mr Lee: and the substantive issue arising on the appeal (which potentially could affect a very significant number of individuals) could thus be decided.
15. Such an individual was Paul McAtee. He had been sentenced to IPP on 2 March 2006, having pleaded guilty to wounding with intent, the facts of which were that, when a heroin addict, he stabbed a police officer with a syringe. The minimum term or tariff set was 2½ years less time spent on remand. It was, however, only on 13 April 2015 that he was ultimately released on licence. Unfortunately, his progress did not match that of Mr Lee: on 25 August 2015, he was recalled having, in the interim, committed a street robbery. We were told that he remains in custody.

16. There was then a significant delay. Legal Aid was eventually obtained on behalf of Mr McAtee. An Appellant's Notice was then lodged on 12 December 2016. The decision sought to be challenged was the decision of the Divisional Court of 6 December 2013 relating to Mr Lee (although we note that Mr McAtee also sought in his written case to pursue an additional argument by reference to Article 14 of the ECHR which was not a point raised before the Divisional Court by Mr Lee). An application for an extension of time for that purpose, and for permission to appeal, was sought. Reliance was placed on the decision in *George Wimpey UK Ltd. v Tewkesbury B.C* [2008] 1 WLR 1649 as authority for the proposition that a party who was not party to first instance proceedings may, in appropriate circumstances, be granted permission to appeal. In the alternative, it was submitted that the decision to dismiss Mr Lee's appeal on 22 August 2016 should be set aside and that Mr McAtee should then be substituted as appellant.
17. The matter eventually came before Irwin LJ who, coincidentally, had delivered the lead judgment in *Belhaj* in the Divisional Court before it proceeded to the Supreme Court. On 28 November 2017, on the papers, he indicated that it seemed to him possible that the case was a criminal cause or matter within the meaning of s. 18 and s. 151 of the Senior Courts Act 1981 and, if so, the Court of Appeal had no jurisdiction to hear the matter. He gave directions for written arguments on the issue of jurisdiction so identified.
18. Those arguments having been filed, Irwin LJ considered the matter further on the papers. He directed that the decision on whether there was jurisdiction to hear the applications was to be referred to the full court. He further indicated that if the full court held that there was jurisdiction to entertain the applications the full court might then remit them for decision on the papers by a single judge of the court. In his written reasons, Irwin LJ among other things said that it was not appropriate to seek to exercise a jurisdiction as to substitution and/or permission before it was clear that such jurisdiction existed.
19. It is in those circumstances that the matter has come before this court. Mr Hugh Southey QC and Mr Nick Armstrong appeared for Mr McAtee. Ms Catherine Callaghan QC appeared for the Secretary of State for Justice.

### *The Legal Framework*

20. The question of jurisdiction of this court has to be decided by reference to the provisions of s. 18 of the Senior Courts Act 1981 as applied to the circumstances of this case. That provides:

“Restrictions on appeals to Court of Appeal.

(1) No appeal shall lie to the Court of Appeal –

(a) except as provided by the Administration of Justice Act 1960, from any judgment of the High Court in any criminal cause or matter...”

By s. 151 (1) “cause” is so defined as to mean “any action or any criminal proceedings”; and “matter” is so defined as to mean “any proceedings in court not in a cause.”

26. It was common ground before us that if this court has no jurisdiction then, provided that a point of law of general public importance was first certified, the only route of appeal from the Divisional Court would have been or would be to the Supreme Court with permission granted either by the Divisional Court or by the Supreme Court itself.
27. In considering the point of jurisdiction that arises, it is necessary to refer to some of the many authorities in this field, culminating in the recent decision of the Supreme Court in *Belhaj*.
28. Thus in *ex parte Woodhall* (1888) 20 QBD 832 a point arose as to whether an application for a writ of habeas corpus to be issued on behalf of a person who had been remanded pending extradition on a charge of forgery was a “criminal cause or matter” for the purposes of s. 47 of the Judicature Act 1873. The Court of Appeal held that it was. In the course of giving his judgment Lord Esher MR said this at p. 855:

“The result of all the decided cases is to show that the words “criminal cause or matter” in s. 47 should receive the widest possible interpretation. The intention was that no appeal should lie in any “criminal matter” in the widest sense of the term, this court being constituted for the hearing of appeals in civil causes and matters”

And a little further on, at p. 836, he said this:

“I think I must try to express my meaning in other words. I think that the clause of s. 47 in question applies to a decision by way of judicial determination of any question raised in or with regard to proceedings, the subject-matter of which is criminal, at whatever stage of the proceedings the question arises.”

Lindley LJ and Bowen LJ were of the same opinion. It is to be noted that the court also affirmed the approach and decision previously taken by the court in *R v Steel* (1876) 2 QBD 37 which held that a subsequent taxation of costs awarded to the defendants in successfully defending a criminal libel information was a “criminal cause or matter” with the result that an appeal from a decision of the Divisional Court with regard to that taxation would not lie to the Court of Appeal.

29. Next, we refer to *Amand v Home Secretary and Minister of Defence of the Royal Netherlands Government* [1943] AC 147, decided by reference to s. 31 (1) of the Supreme Court of Judicature (Consolidation) Act 1925. A Netherlands subject, resident in England, was arrested and remanded with a view to being handed over to the Netherlands military authorities for being absent without leave from the Netherlands army. An application for a writ of habeas corpus was refused by the Divisional Court. The House of Lords affirmed the decision of the Court of Appeal to the effect that it had no jurisdiction to entertain an appeal, on the basis that the judgment under appeal was a “criminal cause or matter”.

30. In the course of his speech Viscount Simon LC said (at p. 156):

“It is the nature and character of the proceedings in which habeas corpus is sought which provides the test.”

Lord Wright further explained (at p. 159-160):

“The words “cause or matter” are, in my opinion, apt to include any form of proceeding. The word “matter” does not refer to the subject-matter of the proceeding, but to the proceeding itself. It is introduced to exclude any limited definition of the word “cause.” In the present case, the immediate proceeding in which the order was made was not the cause or matter to which the section refers. The cause or matter in question was the application to the court to exercise its powers under the Allied Forces Act and the Order, and to deliver the appellant to the Dutch military authorities. It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter. That was the matter of substantive law...”

He then went on to approve Lord Esher’s statements in *ex parte Woodhall*; and, after reviewing certain other authorities, he said (at p. 162):

“The principle which I deduce from the authorities I have cited, and the other relevant authorities which I have considered, is that if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is a “criminal cause or matter.” The person charged is thus put in jeopardy. Every order made in such a criminal cause or matter by an English court is an order in a criminal cause or matter even though the order, taken by itself, is neutral in character and might equally have been made in a cause or matter which is not criminal.”

31. Thereafter, there have been a number of cases which (to put it neutrally) had a criminal context in which the jurisdiction of the Court of Appeal has been either assumed or asserted. It is not necessary to refer to all those cited to us: but we will briefly allude to some of them.
32. Thus it was assumed, without discussion, that the Court of Appeal had jurisdiction to decide an appeal relating to a prisoner’s asserted rights of notification of the judicial decision on the tariff term for a mandatory life sentence before (as was then the procedure) the Secretary of State set the ultimate tariff term: *R v Home Secretary, ex p. Doody* [1993] QB 175. Jurisdiction was also assumed in a case concerning the entitlement (or otherwise) to unconditional release on licence in the light of subsequently introduced legislation: *R (Stellato) Secretary of State for the Home Department* [2007] 1 WLR 608. The same assumption was made in a case (in which a declaration of incompatibility was claimed) involving the absence of review procedures for indefinite notification requirement under the provisions of the Sexual



- Offences Act 2003: *R (F) (A Child) v Secretary of State for the Home Department* [2010] 1 WLR 76; [2011] 1 AC 331. Finally, in *R (Minter) v Chief Constable of Hampshire Constabulary* [2014] 1 WLR 179 it had been held that an issue as to whether the extended licence period in an extended sentence was to be taken into account for the purpose of assessing the period of the notification requirements under the Sexual Offences Act 2003 was not a criminal cause or matter: see per Laws LJ (at [2]).
33. On the other hand, in *R (South West Yorkshire Mental Health NHS Trust) v Crown Court at Bradford* [2004] 1 WLR 1664 the issue related to an erroneous decision of a Crown Court judge as to removal of a defendant to a particular secure hospital following a finding by the jury of insanity on the part of that defendant. More than a year later, that order was purportedly amended by further order so as to correct it. When the Administrative Court quashed both orders and remitted the matter to the Crown Court, the Court of Appeal declined to entertain an appeal on the basis that, although the criminal trial itself had come to an end, the matter was a criminal cause or matter. Pill LJ said (at [33]) that “an overall view of the proceedings is appropriate and not an order by order analysis”. In a striking decision in *R v Secretary of State for the Home Department, ex parte Dannenberg* [1984] QB 55, it was held that a recommendation for deportation made by justices with regard to a defendant convicted of several criminal offences was a criminal cause or matter but, in the circumstances, the subsequent decision of the Home Secretary actually to deport was not.
  34. One point is now clear. Certain aspects of the observations of Lord Wright in *Amand* might suggest that the test of whether a case is a criminal cause or matter is determined by reference to whether the possible outcome is conviction and punishment. Indeed, that is the way Lord Denning MR interpreted things in *R v Southampton Justices, ex parte Green* [1976] QB 11, when rejecting an argument that forfeiting a recognisance provided in support of bail with regard to a defendant accused of drug offences was a criminal cause or matter. But that approach and reasoning has long since been exploded: see *Day v Grant* [1987] 1 QB 972 and *R (Guardian News and Media Ltd.) v City of Westminster Magistrates Court* [2011] 1 WLR 3253. Those particular observations of Lord Wright are, as it has been held, to be treated as illustrative but not definitive.
  35. We should deal with the *Guardian News* case, as Mr Southey placed particular reliance on it. In that case, the Government of the United States of America had sought the extradition of two individuals accused of bribery. So unquestionably the underlying proceedings were criminal. In the course of the lengthy court hearing before a District Judge in the Magistrates Court, held in public, certain documents were produced. The company owning the Guardian newspaper sought disclosure of the documents. The District Judge refused their application. The Divisional Court refused an appeal by way of case stated and an application for judicial review. The question then was whether the Court of Appeal had jurisdiction to entertain an appeal. It was argued that it did not. It was said that, although the decision to refuse access to the documents was not itself a criminal cause or matter, the extradition proceedings undoubtedly were: and thus what was involved was indeed to be regarded as a criminal cause or matter.

36. The Court of Appeal rejected this argument. Lord Neuberger MR (with whom Jackson LJ and Aikens LJ agreed) reviewed various authorities. He referred to the case law as “confusing” ([29]) and “rather tangled” ([43]). His conclusion, however, was that the Guardian’s application for production of the documents was “wholly collateral to the extradition proceedings themselves”. It was observed, first, that this proposition was highlighted by the application having been made by someone who was not a party to the criminal proceedings at all. Second, the order made did not involve the Magistrates Court invoking its criminal jurisdiction; and, third, such an order did not have a bearing on the extradition proceedings ([36]).

*R (Belhaj)*

37. That then leads to the decision in *Belhaj* in which the background was one of alleged unlawful rendition following an investigation into which the Director of Public Prosecution announced a decision not to bring any prosecutions. The applicants sought, by judicial review proceedings, to challenge that decision. The Director of Public Prosecutions, defending the claim for judicial review, wished to rely on certain classified documents and applied under s. 6 of the Justice and Security Act 2013 by way of the closed material procedure for that purpose. This could only be ordered if, among other things, the proceedings were “relevant civil proceedings”. “Proceedings in a criminal cause or matter” were excluded from such definition. It was held in the Supreme Court (by a majority), reversing the Divisional Court, that the proceedings were a “criminal cause or matter” for the purposes of s. 6 of the 2013 Act and so could not be “relevant civil proceedings” for the purposes of that Act.
39. In the course of his judgment (with which Lady Hale and, in essentials, Lord Mance agreed), Lord Sumption reviewed a number of the authorities, including *ex parte Woodhall* and *Amand*. He observed (at [15]:

“... in its ordinary and natural meaning “proceedings in a criminal cause or matter” include proceedings by way of judicial review of a decision made in a criminal cause...”

Having cited certain authorities, he went on (at [16]):

“It follows that judicial review as such cannot be regarded as an inherently civil proceeding. It may or may not be, depending on the subject matter. What is clear is that it is an integral part of the criminal justice system, whose availability is in many cases essential to the fairness of the process and its compliance with article 6 of the Human Rights Convention. It is against this background that one must construe the phrase “proceedings in a criminal cause or matter” as it appears in section 6 (11) of the Justice and Security Act 2013.”

Thereafter, having referred (among other cases) to *Amand* he went on (at [17]):

“In other words, Lord Wright was treating the proceedings in the Divisional Court as an integral part of the “matter” before the magistrate. Since the latter was criminal in nature, so too was the former. Clearly, the principle thus stated has its limits.

A decision on an application collateral to the exercise of criminal jurisdiction, such as an application for the release of documents referred to in court, will not necessarily itself be a decision in a “criminal cause or matter”. On that ground, the Court of Appeal held in *R (Guardian News and Media Ltd) v City of Westminster Magistrates’ Court* [2011] 1 WLR 3253 that an application for judicial review of a court’s refusal to provide the press with copies of documents referred to at a hearing of a criminal cause or matter was not a criminal cause or matter.”

He continued (at [20]):

“I nevertheless reach the same conclusion about the meaning of “proceedings in a criminal cause or matter” in the Justice and Security Act as Lord Esher and Lord Wright (among others) did when construing the statutory restrictions on the right of appeal. I do so because I think that their reasoning reflected the natural meaning of the words... But the real basis of the decisions on appeals was that the phrase “criminal cause or matter”, read as a whole, spoke for itself. A “cause” is a proceeding, civil or criminal, actual or prospective, before a court. A “matter” is something wider, namely a particular legal subject matter, although arising in different proceedings...”

40. It may be noted that, in dissenting, Lord Lloyd-Jones (with whom Lord Wilson agreed) did not disagree with the breadth to be accorded to the phrase “criminal cause or matter” as used in s.18 of the Senior Courts Act 1981 (and predecessor statutes). He in terms accepted that, for the purposes of s. 18, there were “strong reasons for giving the phrase a particularly broad meaning” in that context: see [50]. His dissent was based on the context and wording of s. 6 of the 2013 Act. As with other cases, it is also to be noted that, in *Belhaj*, the underlying matter involved a decision of the executive (the decision by the DPP not to prosecute) and not a “judicial determination” as such.
41. As it seems to us, the following points, some overlapping, can be extracted from the decision of the Supreme Court in *Belhaj*:
  - (1) For the purposes of s. 18 of the Senior Courts Act 1981 a broad meaning is to be given to the phrase “criminal cause or matter”.
  - (2) The phrase applies with regard to any question raised in or with regard to proceedings, the subject matter of which is criminal, at whatever stage of the proceedings the question arises.
  - (3) A decision on a matter which is collateral to the exercise of criminal jurisdiction will not necessarily be a decision in a “criminal cause or matter.”
  - (4) A “matter” is wider than a “cause.”

(5) It is necessary to focus on the nature and character of the underlying litigation in which the matter arises.

(6) Judicial review is not to be regarded as inherently a civil proceeding. It depends on the subject matter whether or not it is so in any given case.

### *Submissions*

42. In submitting that this court did have jurisdiction, Mr Southey drew attention to the fact that what was claimed in this case was a declaration of incompatibility. Thus, success in the litigation would not of itself have any direct impact on Mr McAtee's sentence: it simply might or might not prompt a change in the law which, in any case, might or might not be retrospective. That of itself, he said, is conclusive, or alternatively at least indicative, of this claim not being a criminal cause or matter.
43. He went on to submit that the mandatory requirement of a licence for at least ten years was no part of the judicial sentencing exercise in the Crown Court. Rather, it arose because of the statutory stipulation in s. 31A of the 1997 Act. His core submission was that licence provisions of such a kind were simply to be regarded as part of the subsequent administration of the sentence. In that way they were wholly collateral to the underlying criminal proceedings themselves (by parity of approach with that taken in the *Guardian News* case) and so were not a criminal cause or matter. He submitted that such an approach was also consistent with the assumption of jurisdiction by the Court of Appeal in cases such as *Stellato*, *F* and *Minter* as well as other cases. He further said that the original rationale for decisions exemplified in cases such as *ex parte Woodhall* was that the civil Court of Appeal simply should not be involved in criminal appeals: but the issue raised in the present claim form could never have generated an appeal to the Court of Appeal (Criminal Division).
44. For the Secretary of State, Ms Callaghan emphasised the decision of the Supreme Court in *Belhaj* and its approbation of the broad approach to the meaning of the words "criminal cause or matter" as set out in *ex parte Woodhall* and *Amand*. Nevertheless, whilst emphasising the broad meaning of those words she made clear that it was not her argument that jurisdiction had wrongly been assumed in cases such as *Stellato*, *F* and *Minter* (although she did submit that Mr Southey's argument itself did not accord with the approach taken in, and the outcome of, cases such as *Squire* or *South West Yorkshire*).
45. Her fundamental point, however, was that these present proceedings are, in truth, a challenge to the sentencing regime itself. A sentence of IPP is, she said, plainly part of the criminal process and is a criminal cause or matter; and the applicable licence regime is a fundamental part of such a sentence. She said that it was quite wrong to view the licence as, in some way, collateral to the sentence or as merely part of the administration of the sentence. She also drew attention to the statement of Lord Esher in *ex parte Woodhall* (which was endorsed in *Belhaj*) that the assessment of whether there is a criminal cause or matter falls to be applied "at whatever stage of the proceedings the question arises".

### *Analysis*

46. We have reached the conclusion – and ultimately, we have to say, the clear conclusion – that this is a criminal cause or matter. Consequently, this court has no jurisdiction to entertain the applications.
47. While the Supreme Court in *Belhaj* has affirmed the approach taken nearly 130 years ago in *ex parte Woodhall* and has endorsed a broad meaning for the words “criminal cause or matter”, we make clear that, where this particular jurisdictional issue arises, a careful individual appraisal remains necessary by reference to the circumstances of each case. It certainly is not the law that just because the underlying proceedings are criminal in nature then any decision or step thereafter taken which has some sort of connection with those criminal proceedings is necessarily of itself a criminal cause or matter. That is made clear by Lord Sumption in *Belhaj* (at [20]) and in his approval of the approach and decision taken in *Guardian News*.
49. It is, in our view, accordingly salutary that there should not be an over-expansive interpretation of the phrase “criminal cause or matter” and neither should there be an over-expansive approach to addressing the jurisdictional issue. After all, while some cases in the Divisional Court or Administrative Court are at a second level of judicial decision making – for example, appeals by way of case stated – many are not (the present case is an example). If a case is a criminal cause or matter then the only route of appeal is to the Supreme Court. Not only is that complex and expensive for litigants but also (and importantly) such an appeal is only possible if the court has first certified that a point of law of general public importance arises. That is a high bar to cross; many, indeed most, cases are not likely to be able to cross it. Moreover, for those relatively few cases which do raise an important point of law, the Supreme Court will then be required to deal with them without what one would hope would be considered the benefit of the decision and reasoning of a three judge constitution of the Court of Appeal.
50. That said, it is clear enough on which side of the line this particular case falls. We agree with Ms Callaghan that the fact that Mr McAtee seeks a declaration of incompatibility cannot of itself mean that this case is not a criminal cause or matter. That would be a triumph of form over substance. The reality is that he is seeking such a declaration just because the aim is that, if the claim succeeds, it may thereafter result in an alteration to the licence provisions to which he is currently subject as part of his sentence. To focus solely on the relief sought in these proceedings also would involve a departure from the requirement, established by the authorities, to focus on the underlying subject matter in which such issue is raised. On one view, in fact, this judicial review claim could indeed be said itself to be a criminal “cause”. But in any event, as Lord Sumption has explained, a “matter” is something wider: a particular legal subject matter, although arising in a different proceeding. That assuredly can be said of the present case.
51. It is simply not possible, in our judgment, to accept the argument that what is involved here is simply the administration of the sentence in the aftermath of the judicial decision in the Crown Court. It is not. The licence regime is a fundamental part of the sentence. It is just because a judge, by judicial decision taken in criminal proceedings in the Crown Court, has imposed a sentence of IPP that the licensing regime stipulated in s. 31 A of the 1997 Act comes into play on an offender’s release from custody. That is one aspect of the public protection and risk management which is inherent in such sentences. That licence continues to reflect a restriction on a

defendant's liberty (albeit, of course, of a much more limited nature than custody). It is part of his sentence. It involves no decision by the executive or anyone else.

52. In fact, that is equally so for a prisoner who is sentenced to a determinate term and who then is released on licence from custody at the half-way point of his sentence. He may be no longer in custody; but he remains subject to the sentence until the expiry of the full determinate term: see s. 244 and s. 249 of the 2003 Act. (We appreciate that the Supreme Court have concluded that there may potentially be differences in appraising determinate sentences as compared to indeterminate sentences in terms of punishment on the one hand and risk management on the other: see *R (Stott) v Secretary of State for Justice* [2018] UKSC 59; that does not affect the present point.) The very fact that an offender is liable to be recalled to prison if he re-offends during the period of the licence – as in fact happened in the case of Mr McAtee – simply reinforces the point that the licence is part of the sentence.
53. The reality is that Mr Lee and Mr McAtee have sought to challenge the legality of an aspect of their sentences. Indeed, the very reason why persons such as Mr Lee and Mr McAtee have standing to advance such claims as these in judicial review proceedings is just because they are subject to this licence regime as part of their sentence. Thus, overall, the subject matter of the underlying proceedings, indeed the subject matter of the judicial review claim itself, is assuredly criminal.
54. Mr Southey accepted, inevitably, that a sentence is part of criminal proceedings. But it is not possible to accept his bold and bald assertion in argument that the licencing provisions of s. 31A of the 1997 Act are “nothing to do” with the sentence of the judge. On the contrary, they are everything to do with the sentence of the judge. For, as we have said, it is that sentence which has inevitably caused those provisions to come into play.
55. Mr Southey also accepted that if a judge in the Crown Court imposes an extended sentence, comprising a custodial term of appropriate length and an extended licence period (statutorily capped, in cases of violence, at five years) then a challenge to that sentence would be a criminal cause or matter. But he argued that this was so because it was part of the judicial decision making in the Crown Court, not only in imposing the extended sentence where a finding of dangerousness has been made but also in fixing the term of the extended licence; and in fact, he said, an appeal against such a sentence would lie to the Court of Appeal (Criminal Division). It is true that there is such a distinction. But in our view it is, for present purposes of considering jurisdiction, a distinction without a real difference. A judge is not called upon to set a licence period in cases of IPP just because Parliament has, by statute, done the job, as it were, for the judge by the terms of s. 31A of the 1997 Act. This further confirms that the statutory licencing regime is part and parcel of the sentence, and hence a challenge to it is a criminal cause or matter.
56. In his argument Mr Southey also suggested that, in considering the question of whether or not there is a “criminal cause or matter”, the answer is to be found not in the subject-matter but in an assessment of whether there are, or may be, actual or prospective criminal proceedings which may result in punishment. From that, he went on to say that here the criminal proceedings in the Crown Court are concluded; and this present judicial review claim cannot have such an outcome. He went so far as to say that the present proceedings are “quintessentially civil in nature”.

57. This cannot be right, either. It seems to involve an entire departure from the approach taken by the Supreme Court in *Belhaj*. In fact, such an argument comes close to resurrecting the now discredited approach taken, wrongly, in *ex parte Green*. Besides, while it is right that the Crown Court judge has long been functus, the sentence itself – part of the criminal process – is, as we have said, extant and ongoing.
58. We do not consider that previous decisions or assumptions in the Court of Appeal (which in any event now have to be read in the light of the subsequent decision of the Supreme Court in *Belhaj*) are necessarily inconsistent with this conclusion. In many of them, in fact, the point of jurisdiction was not argued. Moreover, the context of such cases was very different from the present. By way of example, cases such as *F* and *Minter* related to the notification provisions of the Sexual Offenders Act 2003 – which, as is well understood, are not strictly part of the actual sentence but are only consequential upon a sentence. Cases such as *Stellato* are, we can accept, perhaps rather closer to the line but it would serve no purpose to discuss them further: not the least reason is that the statutory context and statutory provisions in those cases are different from those in the present case. Besides, as Lord Neuberger observed in *Guardian News* (decided, of course, before *Belhaj*), the state of the jurisprudence as it then stood was “rather tangled”.
59. We should also mention the unreported decision of the Divisional Court in *Gilbert v Secretary of State for the Home Department* [2005] EWHC 1991 (Admin) to which we were referred. That was a judicial review case involving no challenge to an actual sentence but a challenge to a decision of the prison authorities in calculating the date on which the claimant was to be released and the date on which his licence expired. It therefore was a case very different from the present case, which involves a challenge to the sentencing regime incorporated in s. 31 A of the 1997 Act. In fact, that case corresponds altogether more closely with Mr Southey’s examples of the administration by the executive of a sentence. In refusing permission to appeal Smith LJ, following a brief oral argument, shortly stated that the matter before the Divisional Court was a criminal cause or matter. Whilst expressing no final view, we would indicate reservations about this conclusion. At all events, it certainly would seem surprising that, for example, a decision on a consequential claim by any person for damages for wrongful detention (on the footing that the release date had been miscalculated) which is a claim of a kind not infrequently ultimately assigned to a Queen’s Bench Master or to the County Court, could only attract an appeal, on certification, to the Supreme Court.

### *Conclusion*

60. Reverting to the circumstances of the present case, we conclude, for the reasons given above, that these applications are in a criminal cause or matter. Consequently, this court has no jurisdiction to entertain them.
61. Mr Southey requested that if the court were to reach that conclusion, we nevertheless should grant permission to appeal, albeit then dismissing the appeal thereby providing Mr McAtee with the opportunity of seeking permission to appeal to the Supreme Court on the issue of jurisdiction. He cited to us the case of *LO (Jordan) v Secretary of State for the Home Department* [2011] EWCA Civ 164 where, in circumstances where jurisdiction had been declined, a constitution of this court was prepared to take such a step.

62. We decline to do so. *LO (Jordan)* was very different from the present case and also lacked the additional procedural complexities of the present case to which we have alluded above. Further, Mr McAtee is not left without remedy. He would be free hereafter to institute his own judicial review proceedings, if he sees fit to do so, in the Administrative Court. If he were to do so, then it would be entirely a matter for the Administrative Court as to how it then deals with such a claim.
63. In the light of the important issues that have been argued and considered, we give permission for this judgment on these applications to be cited.