



Residual liberty

Richard Edwards*

University of Exeter

Correspondence email: r.a.edwards@exeter.ac.uk

ABSTRACT

This article presents the argument that detainees do not lose their right to liberty under article 5 of the European Convention on Human Rights as currently thought. Instead, the article argues that they continue to enjoy a residual liberty which may be relied upon by detainees when challenging aspects of their detention.

Keywords: right to liberty; residual liberty; article 5 ECHR; HRA; prisoners' rights.

INTRODUCTION

When a defendant is convicted and sentenced by a trial court to a term of imprisonment it is obvious that they have lost their physical liberty because of the sentence. But have they lost *all* such liberty?¹ The answer to that simple question is not as clear-cut as might be expected. To put it another way, do prisoners retain some residual physical liberty while incarcerated? This article argues that prisoners, indeed all detainees in the custody of the state, do retain an enforceable residual liberty interest while detained. Currently, the disparate threads of authority are somewhat tangled. This means that the concept of residual liberty has not received the proper attention it deserves. This article attempts to untangle the threads of authority and weave a coherent doctrine from it. It proceeds as follows: first, we look at the origins of the problem, and how historically the law addressed the question of prisoner's liberty. Next, we consider how the issue of

* My thanks to Dr Nathan Tamblyn (Law Commission of England and Wales) for his thoughts on an earlier draft of this paper. The comments and suggestions of the anonymous referees were most helpful in improving this paper, and my thanks are also due to them. Finally, I am grateful to Lee Snook and Amelia Coughlan of Exeter's excellent Lasok Law Library for their usual unfailing and prompt assistance. The usual disclaimer, of course, applies.

1 In this article 'liberty' means the physical liberty of the individual and not a broader conception of the right based on personal autonomy as discussed, for example, by Ackermann J in *Ferreira v Levin* NO 1996 (1) SA 984 (CC), [52]–[53]. The focus on the physical liberty of detainees reflects the approach of the European Court of Human Rights under art 5 of the ECHR and the way that this guarantee has been interpreted: *Selahattin Demirtaş v Turkey (No 2)* [2020] ECHR 14305/18, [311].

residual liberty is discussed in the current case law, in three contexts: common law claims in the tort of false imprisonment; claims under the Human Rights Act 1998 (HRA); and claims before the European Court of Human Rights. Then we consider three examples of the deprivation of residual liberty: confinement in secure accommodation in a psychiatric hospital; solitary confinement – the ‘prison within a prison’; and indeterminate sentences. Finally, we look to see what helpful lessons can be taken from the Canadian jurisprudence. The conclusion draws it all together.

THE EVOLVING STATUS OF PRISONERS IN ENGLISH LAW

Whilst at times English prisons have been legal black holes, English law has nonetheless intermittently protected the rights of prisoners albeit with varying degrees of rigour. In the sixteenth century James Morice observed that penal custody was ‘to restrain, not to destroy; safely to guard, not sharply to punish’.² In a similar vein Coke, citing Bracton as authority, noted in his *Institutes* that gaolers should not inflict harm on detainees, by for example shackling them, ‘because a gaol ought to be for containment and not for punishment’.³ But more recently prisons have been an area which the judiciary have been happy to approach in ‘a hands off’ manner.⁴ After the penal reforms of the nineteenth century the position has been that when a defendant was sentenced to imprisonment and thence transferred to prison they entered the custody of the prison governor.⁵ Once convicted a felon forfeited their immediate rights and interests to the Crown, suffering a form of civil death.⁶ At common law a prisoner was unable to bring and

2 Cited in Sir John Baker, *The Reinvention of Magna Carta 1216–1616* (Cambridge University Press 2017) 173.

3 Sir John Baker, ‘Human rights and the rule of law in Renaissance England’ [2004] 2 *Northwestern Journal of International Human Rights* 3, [13]. Sir Edward Coke, *Third Part of the Institutes of the Laws of England* (1797) 34.

4 James E Robertson, ‘Judicial review of prison discipline in the United States and England: a comparative study of due process and natural justice’ (1989) 26 *American Criminal Law Review* 1323, 1323–1324.

5 S 13 Prison Act 1952. Before s 58 Prison Act 1865 was enacted prisoners were at common law in the legal custody of the sheriff. See *May v Cruikshank* (1902) Cox’s CC 210, 216 Wills J. The 1865 Act transferred the legal custody over prisoners to the gaoler. Parliament placed all prisons under the control of the Home Secretary with the Prisons Act 1877.

6 *May v Warden of Ferndale Institution* [2005] 3 SCR 809, [23] Le Bel and Fish JJs. Gordon E Kaiser, ‘The inmate as citizen: imprisonment and the loss of civil rights in Canada’ (1971) 1 *Queen’s Law Journal* 208, 209.

maintain any legal action during their incarceration.⁷ In England, even after the penal reforms of the nineteenth century, actions by prisoners contesting their treatment were unknown, for the Crown could do no wrong. But even if prisoners had been able to access a court it is unlikely that they would have enjoyed a favourable reception for the courts have long feared the ensnaring of prison administration in the 'tentacles of the law'.⁸ Indeed, the courts were long content to adopt what became known as the 'hands-off' approach. Thus, in *Gibson v Young*⁹ Darley CJ barred a personal injury claim by a prisoner against the Government of New South Wales on public policy grounds. Darley's approach subsequently found favour with Goddard LJ, as he then was, in *Arban v Anderson*: 'It would be fatal to all discipline in prisons if governors and warders had to perform their duty always with the fear of an action before their eyes if they in any way deviated from the [prison] rules.'¹⁰ The fear of the chilling effect of litigation on prison administration persisted. Even in *Ex parte Germain*, a case now cited for the judgment of Shaw LJ, the majority held that, while judicial review might lie against decisions of a Board of Visitors, it would not similarly lie against the administrative decisions of prison governors.¹¹ Prison governors were akin to military or naval commanders, for whom disciplinary powers were an essential tool of management.¹² To allow access to the High Court would weaken the authority of prison governors and make the management of prisons very difficult. Indeed, the prospect of prison governors facing judicial review challenges was subsequently described as 'frightening' by Browne-Wilkinson LJ, as he then was.¹³ Prison governors were primarily accountable to the Home Secretary whom Parliament had charged with the supervision of prisons. And in turn the Home Secretary was answerable to Parliament. Thus, as a matter of public policy the courts limited their supervisory jurisdiction when it came to applications by prisoners.¹⁴

7 A V Dicey, *Treatise on the Rule for the Selection of Parties to an Action* (Maxwell 1870) 29–30.

8 *Leech v Deputy Governor of Parkhurst* [1988] 1 AC 533, 566 Lord Bridge of Harwich.

9 (1900) 21 NSWLR 7, 12–13.

10 [1943] KB 252, 255. Lord Denning MR later noted, in a similar vein, that 'if the courts were to entertain actions by disgruntled prisoners, the governor's life would be made intolerable': *Becker v Home Office* [1972] 2 QB 407, 418.

11 *R v Board of Visitors of Hull Prison ex parte St Germain* [1979] QB 425, 447–448 (Megaw LJ) and 462–463 (Waller LJ).

12 *R v Camphill Deputy Governor ex parte King* [1984] 1 QB 735, 753. See also the similar judgments of Lawton LJ (749) and Griffith LJ (751).

13 *Ibid* 749 Lawton LJ.

14 *Ibid* 747 Lawton LJ.

Legal daylight, as Sedley termed it, has been slow to seep into this landscape.¹⁵ Significant change began in the 1970s driven by the appointment of a less deferential judiciary against the backdrop of a more socially liberal society.¹⁶ On the whole, these changes were to have far-reaching consequences for prison regulation. Indeed, there can be little doubt that an important turning point was the judgment of Shaw LJ in *Ex parte Germain*. In his judgment Shaw LJ set out the status of prisoners thus:

Despite the deprivation of his general liberty,¹⁷ *a prisoner remains invested with residuary rights appertaining to the nature and conduct of his incarceration.* Now the rights of a citizen, however circumscribed by a penal sentence or otherwise, must always be the concern of the courts unless their jurisdiction is clearly excluded by some statutory provision. The courts are in general the ultimate custodians of the rights and liberties of the subject whatever his status and however attenuated those rights and liberties may be as the result of some punitive or other process.¹⁸

This was significant, for here it was explicitly recognised that the rights a prisoner enjoys are attenuated or limited, but crucially not extinguished, by his or her imprisonment.¹⁹ In other words, some rights will be unaffected by imprisonment (for example dignity) whereas others (such as liberty) will be limited and thus residual in nature. The approach of Shaw LJ has, of course, much in common with the common law principle of legality subsequently revived by the House of Lords.²⁰ However, unlike the principle of legality the potential of Shaw's LJ *dicta* was not fully realised, at least in English law. Instead, a subtly different approach was adopted in *Raymond v Honey* where

15 Sir Stephen Sedley, *Lions under the Throne – Essays on the History of English Public Law* (Cambridge University Press 2015) 16–18.

16 For an illuminating discussion, see David Feldman, 'Changing boundaries: crime, punishment and public law' in Jason Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart 2020) 281 and 290–291.

17 The liberty of the subject has long been recognised at common law. As Lord Herschell held in *Cox v Hakes* (1890) 15 AC 506, 527: 'this appeal touches closely the liberty of the subject, and the protection afforded by discharge from custody under a writ of habeas corpus. The law of this country has been very jealous of any infringement of personal liberty, and a great safeguard against it has been provided by the manner in which the Courts have exercised their jurisdiction to discharge under a writ of habeas corpus those detained unlawfully in custody.'

18 *Ex parte St Germain* (n 11 above) 455 Shaw LJ (emphasis added).

19 *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115, 120, Lord Steyn observed (emphasis added) that a 'prisoner's liberty, personal autonomy, as well as his freedom of movement and association are limited.'

20 Ibid 120, 125–128, Lord Steyn; 131–132, Lord Hoffmann. *R v Secretary of State for the Home Department ex parte Pierson* [1998] AC 539. The phrase 'principle of legality' appears in Lord Steyn's speech at 587–589.

Lord Wilberforce held in a much cited *dicta* that ‘under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication’.²¹ And this presumption now represents the settled position of English law in relation to the rights of prisoners.²² At first sight the approach of Lord Wilberforce affirms the position of Shaw LJ in offering a new approach to prisoners’ rights. But the *Raymond* doctrine is neither an identical approach nor without its problems. To begin with, as Lord Jauncey of Tullichettle later observed, Lord Wilberforce fails to provide any guidance on what ‘civil rights’ a detained citizen is entitled to.²³ This important element of the normative framework was left undefined and would need to wait for the advent of both common law rights and the HRA to be more fully developed. At the time that *Raymond* was decided rights and freedoms were primarily residual in nature and were enforced via private law. The danger was, as later cases illustrated, that private law claims end up treating the prisoner’s rights as a problem without a context. Similarly, it was unclear what standard of review would apply in determining when rights were limited. Indeed, the idea of what exactly constituted a necessary implication in this context was also unclear. And, as Richardson later noted, ‘residual rights have typically been restricted by a generous interpretation of “necessary implication”’.²⁴ Finally, and perhaps most importantly, the Raymond doctrine does not focus adequately on the ‘*residuary* rights appertaining to the nature and conduct of his incarceration’ which was, in fact, Shaw LJ’s focus.²⁵ Access to court notwithstanding, the context of detention and the rights a detainee should enjoy therein, were largely left undeveloped even as the formalism of the ‘hands-off’ approach to penal litigation began to wane.

21 [1983] AC 1, 10.

22 See, for example, *R v Secretary of State for the Home Department, ex parte Leech* [1994] QB 198; *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532.

23 *R v Deputy Governor of Parkhurst, ex parte Hague* [1992] 1 AC 58, 174. For a very useful discussion of this case, see Margaret Fordham, ‘Falsely imprisoning the legally detained person – can the bounds of lawful detention ever be exceeded’ (1991) *Singapore Journal of Legal Studies* 348.

24 Geneva Richardson, ‘Prisoners and the law: beyond rights’ in Christopher McCrudden and Gerald Chambers (eds), *Individual Rights and the Law in Britain* (Oxford University Press 1994), 187.

25 *Ex parte St Germain* (n 11 above), 455 Shaw LJ (emphasis added).

RESIDUAL LIBERTY AT COMMON LAW

Not surprisingly the question of residual liberty has been further considered since *Ex parte Shaw*. The approach of English law to the concept of residual liberty is exemplified by the decision in *Hague*,²⁶ where the Court of Appeal and House of Lords both addressed the idea. Both appeals concerned treatment within prisons, specifically further imprisonment within the prison. In essence, the appeals decided that lawful imprisonment is not made unlawful by the conditions in which a prisoner is detained within the prison. In *Hague* the applicant prisoner contended that he had been unlawfully transferred and then segregated under rule 43.²⁷ Hague challenged these decisions by way of judicial review and sought damages for false imprisonment caused by his unlawful segregation. Unsuccessful in the Divisional Court, Hague appealed to the Court of Appeal, which dismissed the case in judgments reminiscent of the deferential 'hands-off' approach to prisoners' rights. Before the Court of Appeal Hague successfully argued that the deputy governor had not been entitled to order his segregation in another prison, which in turn raised the question: might the deputy governor rely on the defence of lawful detention? Taylor LJ held that section 12 of the Prison Act 1952 offered a complete defence to any claim for false imprisonment. A breach of the Prison Rules could be met by the defence of lawful detention under the Prison Act.²⁸ Nicholls LJ was even more deferential: 'It is for the prison authorities to decide whereabouts within a prison an inmate shall be confined.'²⁹ Nicholls LJ continued:

I can see no room in principle, in respect of the tort of false imprisonment, for the retention of any residual right against the prison authorities ... a prisoner's loss of freedom to go where he will is total.³⁰

Indeed, it is inherent in his lawful committal to prison that a prisoner loses the ability to bring actions for false imprisonment against the prison authorities for his detention in any prison or 'any particular place within a prison'.³¹ Only if prison conditions were intolerable might a prisoner be able to succeed in an action for false imprisonment.

Equally, in *Weldon* the claimant was a prisoner in Leeds prison who it was contended had been unlawfully removed from the general prison population, beaten and confined to a 'strip cell'. Weldon brought an action for false imprisonment against the Home Office

26 *Hague* (n 23 above).

27 *Ibid* 66.

28 *Ibid* 124.

29 *Ibid* 125.

30 *Ibid*.

31 *Ibid*.

in the County Court. It was contended on behalf of Weldon that the Prison Act 1952 required confinement in humane conditions, and in the absence of these a prisoner's detention would become unlawful. The Home Office sought unsuccessfully to have the case struck out on the grounds that a prisoner could not claim to have been deprived of any liberty by the prison authorities because he was already lawfully imprisoned. Section 12 of the Prison Act 1952, which provided the authority for the detention of prisoners, supplied a complete defence to any action for false imprisonment. An appeal against the decision of the assistant recorder to refuse to strike the claim out came before the Court of Appeal. For Ralph Gibson LJ³² the starting point when determining what 'attenuated rights of liberty' a prisoner might enjoy was to examine the context of imprisonment, particularly the statutory framework under which a convict was imprisoned.³³ Having done this, Ralph Gibson LJ concluded that a prisoner should 'enjoy such liberty – his residual liberty – within prison as is left to him'.³⁴ Thus, there was no reason, His Lordship concluded, why the tort of false imprisonment should not be available to a prisoner to protect his residual liberty notwithstanding his imprisonment.³⁵ However, given the circumstances of the appeal Ralph Gibson LJ was reluctant to make any firm conclusions as to the merits of the claim.³⁶

However, on appeal the House of Lords firmly dismissed the idea that detainees might enjoy an enforceable right to residual liberty. Indeed, the speeches of Lords Bridge and Jauncey remain the authoritative position of English law, even under the HRA. The approach of the House of Lords is unsurprisingly a paradigm of the culture of authority. While in theory prisoners are rightsholders, those rights are undefined in a positive sense and are readily attenuated in order not to frustrate the prison authorities. In keeping with the Diceyan approach to rights these are matters to be determined principally through one of statutory interpretation on the one hand, and private law remedies on the other. Thus, in the House of Lords Lord Bridge confirmed that the Prison Act provided the authority for the lawful restraint of the prisoner.³⁷ And therefore, while imprisoned, the confinement of the prisoner's liberty would be closely controlled by the prison authorities. Indeed, in these circumstances Lord Bridge concluded, 'the concept of the prisoner's "residual liberty" as a species of freedom of movement within the

32 His Lordship presided in the Divisional Court when it heard Hague's application. His judgment makes no reference to residual liberty.

33 *Hague* (n 23 above) 136.

34 *Ibid* 138.

35 *Ibid* 139–140.

36 *Ibid* 144.

37 *Ibid* 162.

prison enjoyed as a legal right which the prison authorities cannot lawfully restrain seems to me quite illusory'.³⁸ Further confinement through segregation was simply the substitution of one restraint for another. The prisoner was lawfully restrained throughout. Or to put it another way, a prisoner's liberty remains indivisible. Turning to the question of whether intolerable conditions would render the imprisonment unlawful, Lord Bridge concluded that the question would raise 'formidable difficulties' of definition. Furthermore, Lord Bridge warned, 'if the proposition be sound, the corollary must be that when the conditions of detention deteriorate to the point of intolerability, the detainee is entitled immediately to go free'.³⁹ As we shall see in due course this fear of inappropriate release also occurs under the HRA. Lord Bridge was joined in dismissing the idea of residual liberty by Lord Jauncey. According to Lord Jauncey placing a prisoner in segregation or a strip cell did not deprive them of any liberty which they have not already lost when initially confined. The proposition that an alteration in conditions infringed the prisoner's liberty and was thus a false imprisonment:

presupposes that a prisoner lawfully confined in prison has, vis-a-vis the Governor, residual liberty which can be protected by private law remedies ... That a prisoner has a right to sue in respect of torts committed against him in prison is beyond doubt ... But does he have such residual liberty, vis-a-vis the governor, as amounts to a right protectable in law? I do not consider that he does.⁴⁰

A prisoner's entire life is regulated by the prison regime stipulated by the Prison Act 1952 and the Prison Rules 1964. The confinement of a prisoner removes their liberty entirely.⁴¹ There was no prison within the prison under English law.

Hague represents the definitive position of English law on residual liberty. However, its reasoning is both flawed and outdated. First, the definition of rights employed by the Law Lords is, of course, the residual one which was long a characteristic of English law. On that basis its conclusions are unsurprising. A prisoner enjoys a general right to liberty in the sense of the freedom left to them after the context of their imprisonment is considered. That is the approach of *Raymond*.

38 Ibid 163. Lord Ackner parted company with Lord Bridge's absolutist approach, indicating that while a prisoner would enjoy no residual liberty against the prison governor, he would nevertheless continue to enjoy it vis-à-vis other prisoners and could enforce it via the tort of false imprisonment, 166–167. Lord Ackner in the Court of Appeal gave the leading judgment in the subsequently overruled *Middleweek v Chief Constable of Merseyside* [1992] 1 AC 179.

39 *Hague* (n 23 above) 165. This is, of course, a *non sequitur*. The remedy for intolerable conditions is to require them to be made tolerable.

40 Ibid 176.

41 Ibid.

But it is neither the approach of Shaw LJ in *Ex parte Germain* nor arguably of Convention rights. Second, intolerable prison conditions can now be defined with reference to article 3 European Convention on Human Rights (ECHR).⁴² But this was also true at the time. And it is anomalous that Lord Bridge was able to refer to the ECHR during *Spycatcher* but not in *Hague*.⁴³ And third, the consequentialist argument that an infringement of a prisoner's liberty through unlawful segregation will lead to their immediate release is a *non sequitur*, as Canadian law discussed below, amply demonstrates.

RESIDUAL LIBERTY UNDER THE HRA AND THE ECHR

Perhaps the approach of the courts to residual liberty at common law should not be entirely surprising. While the courts were more receptive to claims by prisoners, as Feldman details, they nevertheless could not entirely escape the formalism of the 'hands-off' approach.⁴⁴ However, the enactment of the HRA ought to have caused the courts to revisit the area viewing it through the lens of enforceable rights as section 6 of the Act requires. This, of course, depends in large part on the jurisprudence of the European Court, which we shall come to shortly. An opportunity to reconsider the approach of *Hague* after the commencement of the HRA arose in *Munjaz*.⁴⁵ *Munjaz* concerned a challenge to the legality of the policy under which patients were secluded within Ashworth Hospital. When subject to seclusion a patient would undergo

supervised confinement and isolation ..., away from other patients, in an area from which the patient is prevented from leaving ... [on the basis that it is immediately necessary] ... for the purpose of the containment of severe behavioural disturbance which is likely to cause harm to others.⁴⁶

In other words, the detainee is held within a secure unit within the secure unit.⁴⁷ *Munjaz* contended that his seclusion was unlawful on the basis that it lacked the mandatory periodic reviews required by the Mental Health Code. The hospital had adopted its own policy which failed to reflect the requirements of Code. The Court of Appeal agreed,

42 See, for example, *Napier v Scottish Ministers* 2005 SC 229 (the practice of 'slopping out' held incompatible with art 3 ECHR).

43 *Attorney General v Guardian Newspapers Ltd (No 1)* [1987] 1 WLR 1248, 1286.

44 Feldman (n 16 above).

45 *R (on the application of Munjaz) v Ashworth Hospital Authority* [2005] UKHL 58; [2006] 2 AC 148.

46 *Mental Health Act 1983: Code of Practice* (The Stationery Office 2015) para 26-103.

47 Brenda Hale, *Mental Health Law* 6th edn (Sweet & Maxwell 2017) para 6-028. The revised Mental Health Code expressly contemplates this form of detention.

holding that the national code ought to be followed unless there was good reason for not doing so. In the absence of such adherence there was a danger, the court concluded, that a hospital might act contrary to articles 3 and 8 ECHR. The House of Lords disagreed and dismissed Munjaz's challenge under articles 3 and 8 ECHR. However, both the Court of Appeal and the House of Lords agreed that article 5 ECHR⁴⁸ did not apply. Before the Court of Appeal, it was argued that a detainee enjoys a residual right to liberty and that as a consequence seclusion within a secure hospital, that is detention within detention, should fall within the scope of the protective ambit of article 5 ECHR. And if it was not justified under article 5(1)(e) release from seclusion should follow under article 5(4) ECHR.⁴⁹ For Hale LJ, as she then was, there was a clear division in the jurisprudence of the ECHR between the treatment of detention on the one hand and its conditions on the other. Provided that a person is detained in an appropriate institution necessary to justify the restriction on their liberty, article 5 has nothing further to say about the conditions of their detention.⁵⁰ Although it was tempting to consider further confinements within a secure institution on the Canadian idea of residual liberty, the jurisprudence of the European Court, Hale LJ concluded, did not require this.⁵¹ Detention under article 5 was all or nothing.⁵² Moreover, article 5 was procedural. Beyond ensuring that a detainee was detained in an appropriate institution, and before that determining that the original decision to detain was lawful, the jurisprudence of the European Court under article 5 was not concerned with the conditions of detention. A majority of the House of Lords agreed.⁵³ Lord Bingham, for instance,

48 Art 5(1) provides:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court; ...

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.'

And art 5(4) further provides that 'everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

49 *R (Munjaz) v Mersey Care National Health Service Trust* [2003] EWCA Civ 1036; [2004] 2 QB 395 [67]–[68], Hale LJ.

50 *Ibid* [69] Hale LJ. *Ashingdane v United Kingdom* [1985] ECHR 8225/78, [44].

51 *Ibid* [67]–[69] Hale LJ.

52 *Ibid* [70] Hale LJ.

53 Lord Bingham provided the most extensive reasons for dismissing the art 5 arguments. The remainder of the majority agreed. *Munjaz (HL)* (n 45 above) [85] Lord Hope; Lord Brown [111]; and Lord Scott agreed with Lords Bingham and Hope.

was not disconcerted that the European Court had failed to develop a concept of residual liberty.⁵⁴ Such a concept, Lord Bingham argued, would lead to not only patients challenging their seclusion but also, in the context of prisons, inmates challenging their status. Moreover, residual liberty would have the unfortunate consequence of enabling detainees to secure their unjustified release through the employment of article 5(4) ECHR.⁵⁵ Finally, while Lord Hope concluded that the conditions of a patient's detention could not be challenged under article 5 ECHR, the patient could nevertheless challenge such matters under articles 3 and 8 instead.⁵⁶

However, the decision in *Munjaz* was not a unanimous one. On the question of whether article 5 ECHR applied Lord Steyn dissented. Invoking *Raymond*, Lord Steyn argued that a detainee continues to enjoy a residual liberty while confined. Indeed, his Lordship argued the concept was 'a logical and useful one' as was the idea of a prison within a prison.⁵⁷ Confining an individual to solitary confinement was capable of constituting 'a material deprivation of residual liberty'. Whilst *Hague* had effectively ruled this out in 1990, the enactment of the HRA now meant that this was open to question. Furthermore, Lord Steyn did not share either the scepticism of Lord Bridge that the idea of residual liberty would be employed by detainees to harass their detainer, or for that matter that private law remedies were sufficient to deal with ill-treatment meted out to detainees. For applicants like *Munjaz*, detained in secure hospitals, any unnecessary use of seclusion that involves a total deprivation of the residual liberty that they enjoy within the hospital would also amount to a further deprivation of liberty under article 5 ECHR.⁵⁸

His domestic remedies exhausted, *Munjaz*, unsurprisingly, petitioned the European Court. How might the court view the idea of residual liberty? In the House of Lords, Lord Steyn had indicated that the European Court did not exclude the possibility 'that measures adopted within a prison may disclose interferences with the right to liberty'.⁵⁹ However, the settled position of the court was that disciplinary measures within prisons would not constitute deprivations of liberty.⁶⁰ As the European Court held in *Ashingdane*, provided that the initial detention had been lawfully imposed and the detaining institution

54 Ibid [30].

55 Such concerns are, of course, unfounded and rest on a confused understanding of the idea.

56 Ibid [84] Lord Hope.

57 Ibid [42] Lord Steyn. Citing the Canadian Supreme Court in *R v Miller* [1985] 2 SCR 613. Discussed below.

58 Ibid [43] Lord Steyn.

59 *Bollan v United Kingdom* [2000] ECHR 421117/98 (dec).

60 *X v Switzerland* [1977] ECHR 7754/77.

was appropriate, article 5 was not concerned with the conditions of detention.⁶¹ Changes to such conditions were authorised by the original order authorising the detention. Indeed, this is the position of English law.⁶² Notwithstanding this consistent line of authority, in *Munjaz v United Kingdom*⁶³ the court nevertheless interpreted article 5 ECHR in a unique manner. Indeed, the court had not interpreted article 5 ECHR in this manner before. And it has not directly done so since. But in considering the applicant's petition under article 5 ECHR the court held that where a detainee contends that has been 'a further deprivation of liberty' under that article the usual approach of the court⁶⁴ in determining whether there has been a deprivation of liberty not only applies to the further restriction but it does so with 'greater force'.⁶⁵ In other words, the court approached the matter as one of secondary (or residual) liberty but without expressly confirming this, or for that matter explaining why consideration of this further deprivation was necessary.⁶⁶ The court then went on to carefully consider whether the applicant had in fact been subject to a further deprivation of liberty when he was subject to seclusion within the secure hospital, before concluding that he had not been.⁶⁷ There was no further deprivation of liberty for four reasons. Firstly, the applicant was already detained in a high-security hospital.⁶⁸ Secondly, the applicant's seclusion was not imposed as a punishment.⁶⁹ The illness he was being treated for made him a danger to others. Thirdly, although his periods of seclusion each lasted several days, and thus tended to indicate that there was a deprivation of liberty, the court considered that factor alone was insufficient. His detention was a matter of clinical judgment by experienced practitioners.⁷⁰ And, finally, the most important factor in determining that there was no further deprivation of liberty was the fact that the seclusion regime at Ashworth was a liberal one, with the confinement balanced with association, the continual presence of staff,

61 *Ashingdane* (n 50 above) [44].

62 *R(B) v Ashworth Hospital Authority* [2005] UKHL 20; [2005] 2 AC 278, [34] Baroness Hale of Richmond. Lady Hale cited with approval the then approach of the European Court in *Ashingdane* (n 50 above).

63 [2012] ECHR 2913/06.

64 Here the court cited *Austin v United Kingdom* [2012] ECHR 39692/09, [57] which contained the long-standing authorities concerning deprivations of liberty (eg *Guzzardi v Italy* [1980] ECHR 7367/76, [92]–[93]).

65 *Munjaz* (ECHR) (n 63 above) [65]–[67].

66 Unsurprisingly, counsel for the applicant had argued his petition in part on this basis.

67 *Munjaz* (ECHR) (n 63 above) [68].

68 *Ibid* [69].

69 *Ibid* [70].

70 *Ibid* [71].

and meals in the ward. Seclusion at Ashworth did not amount to solitary confinement.⁷¹ On that basis there had been no further deprivation of liberty, and consequently article 5 ECHR was not engaged. This outcome meant that the court had no need to discuss the question of remedies, particularly article 5(4) ECHR and the question of release. The Fourth Section's judgment in *Munjaz* was sadly not repeated, and the case appears not to have laid down what the Strasbourg Court describes as a 'general rule'. This is unfortunate because clearly the court considered that article 5(1) ECHR could apply where 'further deprivations of liberty', as it termed them, occur. Moreover, a divisible concept of liberty would assist the court in dealing with other article 5 ECHR cases.

After *Munjaz* a further opportunity to revisit the question of residual liberty in English law arose in *Bourgass*.⁷² However, the Supreme Court eschewed the opportunity, affirming instead the pre-HRA approach of *Hague*. *Bourgass*, in essence, concerned the legality of keeping prisoners in segregation for substantial periods. Penal segregation is the paradigm 'prison within a prison'. The applicants, both serving prisoners, were segregated by order of the prison governor following episodes of violent disorder. Rule 45(1) of the Prison Rules 1999 allowed the prison governor to segregate prisoners for reasons of good order and discipline. Both prisoners were detained essentially in solitary confinement for several months until they were transferred to other prisons. Before the High Court and the Court of Appeal the applicants' case had been principally that the segregation was inherently risky, leading in some cases to suicide and permanent psychological harm.⁷³ However, in the Supreme Court the case was argued successfully on different grounds. Rule 45(2) allowed the prison governor to authorise the segregation of a prisoner for up to 72 hours. But segregation thereafter required the approval of the Secretary of State. As Lord Reed noted, the rationale for this further approval was simple. The governor would have the flexibility to use segregation quickly thereby effectively ensuring good order and discipline. But given the nature and dangers of segregation the continuance of such detention required the consideration of an individual independent of the day-to-day administration of the prison.⁷⁴ It followed that a segregation decision could not be taken by the governor of a prison as the delegate of the Secretary of State. The purported delegation of the segregation power under PSO 1700 was unlawful, as in turn was the segregation of the appellants. *Bourgass* is significant because the Supreme Court then

71 Ibid [72].

72 *R (Bourgass) v Secretary of State for Justice* [2015] UKSC 54; [2016] AC 384.

73 Ibid [35]–[40].

74 Ibid [86]–[89].

went on to consider whether and how the article 6(1) ECHR right to a fair trial might apply in this context. For article 6(1) ECHR to apply there must be a genuine and serious dispute over a right recognised under domestic law, and that right must be a civil one.⁷⁵ As a matter of English law, segregation was a question which was not covered by private or public law. A prisoner, on the authority of *Hague*, has neither the right to residual liberty nor any private law right to enjoy the company of other prisoners.⁷⁶ In general, the extent of association within prisons is a matter for the prison administration.⁷⁷ However, any decision to authorise the segregation of a prisoner would nevertheless be subject to ordinary judicial review principles, and this in turn would meet the requirements of article 6(1) ECHR.⁷⁸ Whether this really is the case remains open to question. Certainly, the ordinary principles of English administrative law have on occasion been held by Strasbourg to be insufficiently rigorous to protect Convention rights.⁷⁹ Only in the Court of Appeal was there a hint of a different approach. Elias LJ noted that ‘whilst a prison sentence truncates [the right to personal integrity] in a major way ... it does not remove that freedom entirely’.⁸⁰ Elias LJ concluded that while ‘this residual freedom of association did not enjoy any clear support in the case law of the European Court’ many of the Convention rights would be engaged because of an interference with this right.⁸¹

THE EVOLVING JURISPRUDENCE OF THE EUROPEAN COURT

More recently, the authority of *Ashingdane* has come into question in the Strasbourg court, and this development has clear implications for our understanding of article 5 ECHR. In *Ashingdane* the European Court held that article 5 does not touch the conditions of detention. Article 5 ECHR is procedural. The original order depriving an individual of their liberty justifies subsequent deprivations or changes unless they are so remote from the basis of the original order. Detainees must, of course, be held in appropriate institutions, but beyond that article 5 ECHR was, on the authority of *Ashingdane*, silent as to the treatment

75 Ibid [106]. Art 6(1) ECHR guarantees a fair trial in the determination ‘of civil rights and obligations’.

76 Ibid [122].

77 Ibid.

78 Ibid [123]–[126].

79 See, for example, *Daly* (n 22 above) [25]–[28] Lord Steyn and [32] Lord Cooke of Thornton.

80 *R(King) v Secretary of State for Justice* [2012] EWCA 376; [2012] 1 WLR 3602, [86].

81 Ibid [86]–[88].

of detainees within institutions. However, the procedural is now being transformed into the substantive as *Rooman v Belgium* shows.⁸² Originally convicted in 1997 of offences including the indecent assault of a minor aged under 16 and the rape of a minor aged under 10, Rooman was a recidivist child sex offender who on the completion of his prison term in 2004 was transferred by court order to a psychiatric institution for treatment of his underlying mental ill-health. Between 2005 and 2015 the applicant applied for conditional release on three separate occasions. On each occasion the Commission de Défense Sociale declined his application on the grounds that the applicant remained a danger. Ultimately, *Rooman* petitioned the European Court arguing, amongst other things, that the failure to provide psychiatric and psychological care in his first language of German frustrated his ability to regain his liberty and was thus unlawful. The court agreed. *Rooman* is significant because in concluding that there had been a violation of article 5 ECHR the Grand Chamber announced that the time had come to ‘clarify’ the principles that had developed over the years in the context of the obligations of states under paragraph (1)(e) of that article. Unfortunately, the court’s clarification was somewhat opaque. The court began by noting that article 5 ECHR only allows liberty to be deprived in accordance with the express provisions of the first paragraph.⁸³ And that an ‘intrinsic link’ must exist between the purpose of the deprivation and the conditions of its execution.⁸⁴ The assessment of whether conditions are suitable is to be assessed at the point they are challenged and not at the time that the detention was originally authorised.⁸⁵ Moreover, there is a positive obligation to provide treatment for those detained under article 5(1)(e) ECHR which is appropriate to their condition and assists the detainee one day regaining their liberty.⁸⁶ In fact the court could not have been clearer:

There exists an obligation on the authorities to ensure appropriate and individualised therapy, based on the specific features of the compulsory confinement, such as the conditions of the detention regime, the treatment proposed or the duration of the detention.⁸⁷

Crucially, the court then went on to somewhat disingenuously note that its earlier authority, principally *Ashingdane*, had always been subject to a proviso that a case could arise under article 5(1)(e) where the link between purpose of the detention and the conditions of detention

82 *Rooman v Belgium* [2019] ECHR 18052/11, [205].

83 *Ibid* [191].

84 *Ibid* [199].

85 *Ibid*.

86 *Ibid* [203]–[204].

87 *Ibid* [205].

were severed.⁸⁸ However, the interpretation of article 5 ECHR had evolved since *Ashingdane* so that a 'close link' was now required between the lawfulness of the detention and appropriateness of the treatment regime.⁸⁹ In other words, the lawfulness under article 5 ECHR of the detention now turned on the administration of suitable therapy for detainees.⁹⁰ The detention of the mentally ill must have a therapeutic purpose which combines an appropriate environment with real and genuine therapeutic treatment. These conditions are necessary to ensure the ultimate restoration of the detainee's liberty.⁹¹ The court was keen nonetheless to signal that it would continue to defer to medical professionals over the exact nature of the treatment given. However, the assessment of the authorities in ensuring that the conditions of detention with a specific institution which provides appropriate treatment were nevertheless crucial. And while, of course, article 5(1)(e) could be relied upon by states to justify detention necessary for public protection this could not be used as a justification for an absence of therapeutic measures for the detainee. Thus, it would not be lawful to continue to detain an individual on the basis that it was necessary to protect the public where the detainee had been denied access to effective and appropriate treatment which would demonstrate that they were no longer a danger.⁹² Finally, although the court had previously held that conditions must be primarily challenged under articles 3 and 8 ECHR it belatedly recognised that treatment might be compatible with both articles and yet 'insufficiently connected' to the purpose underlying the detention.

Whilst the decision of the European Court in *Rooman* is an important addition to our understanding of article 5, recognising that appropriate treatment is instrumental to the effectiveness of the guarantee, it is nevertheless open to criticism.⁹³ To begin with the court reasons primarily under the exception to the right to liberty contained in article 5(1)(e) ECHR. It does not define liberty under article 5(1) ECHR by examining the purpose of the guarantee beyond the usual broad reasons it renders almost mechanically in article 5 cases.⁹⁴ The work of understanding the nature of liberty in this context is subsumed

88 Ibid [206].

89 Ibid [208].

90 Ibid.

91 Ibid [199]–[201] and [207]–[208].

92 Ibid [210].

93 This recognition is analogous in some senses to the recognition of the European Court that the effectiveness of art 6 ECHR, the right to a fair trial, is dependent on the right of access to court. *Airey v Ireland* [1979] ECHR 6289/73, [24]. Rights do not exist in a vacuum.

94 See, for instance, *Bernstein v Bester NO* [1996] ZACC 2; 1996 (2) SA 751, [79] Ackermann J.

into the discussion of the limits to the right under article 5(1)(e). This is perhaps to some degree an understandable consequence of the institutional constitution of the court. By the time cases come before the Chamber or Grand Chamber for determination it is accepted through the admissibility stage that a right is in play. However, this leaves the definitional stage of the interpretation phase underdeveloped. Indeed, the jurisprudence would undoubtedly benefit from greater rigour at this first stage. What does 'liberty' mean? Understanding the nature and purpose of the right to liberty, indeed any right or freedom, is necessary to ensure both its effective application and what limitations on it will be upheld. But as matters stand, the court's jurisprudence currently focuses heavily on the nature of the deprivation. Thus, a richer understanding of the right to liberty eludes us because crucially the definitional aspect of its application is left underdeveloped.⁹⁵ When we turn to remedial matters the error is compounded because the court fails to grapple with the question of definition, its reasoning as to remedies is opaque at best. On one level that is understandable because the court's remedies are limited. But it does not help domestic courts, many of whom are concerned that they might need to release detainees inappropriately. A proper understanding of the nature of the right to liberty, particularly its residual nature, is vital in this context.

INDETERMINATE SENTENCING

The decision of the European Court in *Rooman* was not an entirely unexpected development as the European Court has developed similar reasoning under article 5(1)(a) ECHR with respect to the principle of rehabilitation. But this line of authority, as we shall see, is not without its difficulties and has led to disagreement with the United Kingdom (UK) Supreme Court. Both the inherent difficulties with the jurisprudence, and consequential disagreement, might have been avoided had article 5 ECHR been interpreted differently.

Under article 5(1)(a) ECHR a person may be deprived of their liberty following a conviction. Article 5(1)(a) authorises 'a penalty or other measure involving the deprivation of liberty'.⁹⁶ For this penalty to be lawful under article 5 there must be 'a sufficient causal

95 This deficiency can be seen in other contexts involving the right to liberty, for example, police powers short of a formal arrest. See Richard A Edwards, 'Police powers and article 5 ECHR: time for a new approach to the interpretation of the right to liberty' (2020) *Liverpool Law Review* 331, 335–337. See also the various approaches of the members of the Appellate Committee when determining whether a non-derogating control order made under s 1(2)(a) of the Prevention of Terrorism Act 2005 deprived liberty within the terms of art 5(1): *Secretary of State for the Home Department v JJ* [2007] UKHL 45; [2008] 1 AC 385.

96 *Grosskopf v Germany* [2010] ECHR 24478/03, [43].

connection between the conviction and the deprivation of liberty'.⁹⁷ The sentence of a court which deprives an offender of their liberty by way of punishment has a 'half-life'. As the sentence passes the original penological justification for the sentence, namely punishment, decays. This is particularly true in the case of dangerous offenders sentenced to indeterminate sentences, where the original reason for the detention is by its 'very nature susceptible to change' over time.⁹⁸ The link persists until it is finally broken by a supervening decision, for example a decision not to release a prisoner or to authorise their re-detention on grounds that are inconsistent with the original sentence.⁹⁹ So far, so good. But because the court has failed to reason from first principles it runs into difficulties. European jurisprudence has long held that detentions under article 5 ECHR cannot be arbitrary.¹⁰⁰ And for those detained under article 5(1)(a) ECHR both the sentencing order and its execution must conform with the purpose enshrined in that exception to the right.¹⁰¹ In short, where a prisoner is denied an effective opportunity to work towards their rehabilitation, and thus their eventual release, the continuing detention may become arbitrary, breaking the link with the original sentence which rendered the detention lawful under article 5(1)(a) ECHR.

Over the last 15 years the European Court has firmly established the principle of rehabilitation in its jurisprudence, reflecting the progressive developments in European penal policy and practice that place greater emphasis on that principle.¹⁰² These developments are reflected in both state practice and several of the Council of Europe's own legal instruments.¹⁰³ Rehabilitation was recognised as a tool that both addresses recidivism and fosters resocialisation. These penal goals were re-enforced by the progression principle which recognised that a prison sentence is a journey. Immediately after sentence the emphasis would naturally be on punishment and retribution. But as the sentence progressed towards completion the final stages would be

97 *Weeks v United Kingdom* [1987] ECHR 9787/82, [42]; *Kaffaris v Cyprus* [2008] ECHR 21906/04, [117].

98 *James v United Kingdom* [2012] ECHR 25119/09 57715/09 57877/09, [202]; *Weeks* (n 97 above) [46].

99 *Ibid* [189].

100 *Ibid* [192]–[195]. *Chahal v United Kingdom* [1996] ECHR 22414/93, [118].

101 *Ibid* [193]: Thus, in *Bouamar v Belgium* [1988] ECHR 9106/80, the European Court held that the detention of a minor under art 5(1)(d) necessitated their detention 'in an educational regime in a setting designed and with sufficient resources for that purpose'.

102 *Dickson v United Kingdom* [2007] ECHR 44362/04, [29] and [31]–[36].

103 *Ibid* [28]–[29]. The court also referred to art 10(3) of the International Covenant on Civil and Political Rights [29], the *UN Standard Minimum Rules for the Treatment of Prisoners* (1957) [57]–[59], and the *European Prison Rules* 1987 and 2006 [31]–[36].

on the preparation for release and, on the restoration of the offender's liberty, their reintegration into society. In *Harakchiev v Bulgaria*, for example, the court noted that, while the ECHR did not contain a right to rehabilitation, the principle was nonetheless inherent in the Convention and its guarantees.¹⁰⁴ All prisoners, including those sentenced to life terms, should be provided with a real opportunity to rehabilitate themselves.¹⁰⁵ The applicant's penal regime fell short of these standards. Harakchiev was kept in almost complete isolation, locked in his cell, and isolated from the rest of the prison population, with no social contact, work or education. In such a deleterious regime the applicant was unable to make any effective progress towards rehabilitation and a shortening of his sentence. Indeed, such were the conditions of imprisonment that the court concluded that they infringed article 3 ECHR. Earlier, in *Vinter*, the European Court was unequivocal about the importance of the rehabilitation principle: 'There is now clear support in European and international law for the principle that all prisoners ... be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.'¹⁰⁶ In *Murray* the court further developed the principles that underpin the ECHR in this context. Firstly, every prisoner must have a reducible sentence.¹⁰⁷ Secondly, any detention must have legitimate penological grounds. These grounds might include punishment, deterrence, public protection and, crucially, rehabilitation. And, thirdly, the balance between these justifications is not immutable and will change over time, with different justifications being stronger at different points of the sentence. Thus, when sentenced, the interests represented by the state, such as punishment and deterrence, will be prominent. But as the sentence passes the focus will fall onto the offender, principally their rehabilitation.¹⁰⁸ A state may not, therefore, simply rely on the risk posed by a prisoner to justify their continued detention when they have already been imprisoned for a considerable period. In order that any such detention does not become arbitrary within the terms of article 5 ECHR a state will need to demonstrate that during the continuing detention active steps are being taken to encourage the rehabilitation of the prisoner.¹⁰⁹ Assessing where a prisoner may be on the penal

104 *Harakchiev v Bulgaria* [2014] ECHR 15018/11 and 61199/12, [264].

105 *Ibid* [265]. In the case of life prisoners, prison conditions should be conducive to the effective reform and rehabilitation of prisoners so that one day they might have their sentence reduced and eventually secure their release.

106 *Vinter v United Kingdom* [2013] ECHR 66069/09, [114].

107 *Ibid* [104]–[118]. That of course includes life prisoners. If a life sentence is irreducible it will be incompatible with art 3 ECHR.

108 *Murray v The Netherlands* [2016] ECHR 10511/10, [102].

109 *Ibid* [102].

continuum requires regular reviews and assessment undertaken against objective criteria that have a sufficient degree of clarity and certainty. Fourthly, the review must offer procedural guarantees so that at its conclusion the prisoner knows what steps they must take to secure their liberty. And finally, there must be a guarantee of effective judicial oversight.¹¹⁰

These jurisprudential developments under article 5(1), while welcome, are nonetheless problematic and neatly illustrate the problems created by the current approach to defining the right to liberty. Indeed, because the European Court fails to adequately grapple with the definition of liberty it has turned instead to the principle of legality in the form of arbitrariness to protect article 5 rights. The court recognises that article 5 guarantees a principle of rehabilitation, but not an implied right. This principle is, in effect, a positive obligation which requires states to provide an opportunity for rehabilitation by ensuring prison conditions do not jeopardise a prisoner's prospect of rehabilitation.¹¹¹ Previously, that duty arose under articles 3 and 8. But now it will also arise under article 5. However, the court has left the question of remedies in this context unclear. In the cases discussed above there was no question of release as a remedy. But if liberty has an all or nothing character then, where a court concludes there has been an infringement of article 5, surely release should automatically follow? This is a question which haunts English courts, and one which the European Court cannot adequately answer because of its approach to the definition of article 5.¹¹² Instead, the court resorts to a discussion of arbitrary interferences and general duties that provide little remedial assistance to national courts. On one level this is understandable, for the court enjoys a limited remedial capacity – damages and a declaration. But it remains nevertheless the authoritative body for the interpretation of the Convention. These difficulties can be seen in a series of domestic cases.

In the *Secretary of State for Justice v James*¹¹³ the applicants were a number of prisoners sentenced to indeterminate sentences for public protection (IPPs). An IPP sentence had two parts. The first part was imprisonment for the purposes of punishment; a penal tariff. And the second part was an open-ended period of detention for public protection which followed immediately after the first part has expired. In fact, so important was the second element that Lords Brown and Judge both considered that the second element of IPP had displaced

110 Whether judicial review in England and Wales is effective for these purposes is open to question: *Vinter* (n 106 above) [109].

111 *Murray* (n 108 above) [104].

112 See, for example, *James* (ECHR) (n 98 above) [217].

113 [2009] UKHL 22; [2010] 1 AC 553.

the normal sentencing objective of rehabilitation.¹¹⁴ Be that as it may, all the applicants in *James* had received short penal tariffs but had continued to be detained thereafter on public protection grounds. Implicit in the scheme was a necessity to provide IPP prisoners with rehabilitative courses so that they might be able to demonstrate to the Parole Board that they no longer posed a danger to public safety and could therefore be released. The Government failed to do so. The House of Lords decided the case on public law grounds, holding that the prisoners were entitled to rehabilitative courses. However, so far as the ECHR is concerned their Lordships decided that there could be no infringement of article 5(1) ECHR because throughout the sentence a causal link continued between the sentence of the court and the detention.¹¹⁵ Although the Secretary of State was responsible for the failure to provide courses and assistance, this did not break the causal penal link. That link would only ever be broken in exceptional circumstances which were not present in this case.¹¹⁶ However, James then petitioned the European Court which in turn decided that article 5(1) ECHR had been infringed.

Article 5, the European Court affirmed, was intended to prevent arbitrary deprivations of liberty. And, in general, under article 5(1)(a) ECHR the link between detention and sentence must remain unbroken. This principle applies to both the sentence and its application. Thus, although an indeterminate sentence for public protection is justified under article 5(1)(a) ECHR, it must not be applied in such a way as to amount to an arbitrary detention. Notwithstanding the state's intention to employ IPPs to protect the public, that intention could not displace the principle of rehabilitation imminent in article 5 ECHR.¹¹⁷ Consequently, once the penal tariff expired and the applicant was detained on the grounds of public protection the absence of rehabilitative courses made his detention arbitrary. In effect the applicant was left unable to work effectively towards securing his liberty.¹¹⁸

James, and its difficulties, were subsequently considered by the UK Supreme Court in *Re Corey*.¹¹⁹ Corey had been convicted of murder in 1973 and sentenced to life imprisonment. In 1992 he was released on licence. However, in 2010 he was recalled to prison largely because of intelligence reports that showed he had become involved

114 Ibid [48]–[49] and [100]–[101].

115 Ibid [50] and [103].

116 Ibid [51] Lord Brown; [128] Lord Judge CJ.

117 Ibid [218].

118 The court dismissed claims that the continuing detention involved interferences with arts 5(4) and 5(5) ECHR, awarding damages and a declaration.

119 *Re Corey's Application for Judicial Review* [2013] UKSC 76; [2014] 1 AC 516.

in dissident republican activity and as such posed a significant risk of harm to the public. In accordance with Northern Irish law Corey's recall was considered by a panel of parole commissioners. Before the commissioners Corey was represented by a special advocate who had access to the closed material. The commissioners decided to continue Corey's detention to protect the public from harm. Corey's subsequent challenge under article 5(4) ECHR contended that inadequate details had been provided to him in the gist, and that the decision to continue his detention was based exclusively or almost exclusively on the closed material. Lord Kerr, adopting the reasoning of the European Court in *James*, held that 'the essential question [was] whether [Corey] had an opportunity to demonstrate that the reasons that he was considered to present a threat no longer applied'.¹²⁰ The law had provided Corey with that opportunity, and for this reason his appeal was dismissed. But in doing so Lord Kerr touched upon a problem which the decision in *James* has created: where a prisoner has managed to demonstrate that their detention is no longer necessary, and thus unlawful within the terms of article 5, would their release automatically follow?¹²¹ It was unclear, Lord Kerr observed, whether release in such circumstances was 'inevitable'.¹²² Lord Mance, in a separate opinion, also canvassed the same question concluding that the European Court's decision that the applicants were denied their right to liberty was problematic. 'Logically', Lord Mance reasoned, such a finding 'implies that the prisoner should have been at once released.'¹²³ The European Court had failed to follow the logic of its reasoning to its natural conclusion. Furthermore, it was improbable that a prisoner denied a rehabilitative course would succeed in securing their release on that basis.¹²⁴ In reaching its conclusion that there had been a violation of article 5 the European Court made express reference to the periods where the applicant was left with access to any effective rehabilitative courses. In such circumstances, Lord Mance thought it improbable that article 5 ECHR would require prisoners to be released until the rehabilitative courses were provided, whereupon they would be recalled to prison. Moreover, the European Court had granted an award of just satisfaction for distress and frustration in *James*. This was an understandable outcome if the award was for a breach of an ancillary duty within article 5 ECHR to progress prisoners through the prison system.¹²⁵ These were not damages awarded for false imprisonment. While the

120 Ibid [48].

121 Ibid [49]–[52].

122 Ibid [52] citing *James (ECHR)* (n 98 above) [127].

123 Ibid [62].

124 Ibid [63]–[67] Lord Mance.

125 Ibid [69] Lord Mance.

idea of an ancillary duty is an attractive one, it is not one supported by authority. Moreover, it has not been taken up by the European Court in subsequent cases.

The UK Supreme Court once more returned to this question in *Kaiyam*.¹²⁶ In *Kaiyam* the applicants had all received IPP sentences, and the tariff element had expired or was about to. The applicants sought to challenge their continuing detention on Convention grounds. The principal head of challenge was a failure to provide rehabilitative courses, which it was contended had left the applicants unable to convince the Parole Board that they were no longer dangerous. In a joint judgment for the court Lord Mance and Lord Hughes declined to follow the authority and reasoning of *James*, fashioning instead an alternative approach to the application of article 5 ECHR. The UK Supreme Court was concerned, as it had been in *Corey*, that where a prisoner's detention is held to be unlawful under article 5 ECHR their release would automatically follow.¹²⁷ The approach of the European Court in *James*, Lord Mance and Lord Hughes reasoned, was supported by little if any authority.¹²⁸ *James*, their Lordships concluded, was not part of a clear and constant line of authority, and, as such, the European Court's decision did not need to be followed.¹²⁹ Instead, the court interpreted article 5 ECHR as containing an ancillary duty, which was implicit in the scheme of the article.¹³⁰ The duty was clearly not to be found in the express wording of article 5(1) ECHR. Moreover, the court concluded, it was not appropriate to derive the duty from article 5(1)(a) ECHR. Relying on article 5(1)(a) ECHR would involve employing the reasoning that the European Court had developed with respect to 'arbitrariness' and this would have 'unacceptable and implausible' consequences.¹³¹ Consequentially, it was better to imply a duty into the overall scheme of the article. The remedy for a breach of this duty would not be release from custody, but rather an award of damages.¹³² This duty, the Supreme Court concluded, would avoid the problems that they had identified as inherent in the decision in *James*: there would be no duty to release a prisoner, no fluctuation in the status of the detainees between legitimate and illegitimate detention and there was no risk to the public through the inappropriate release of dangerous offenders.¹³³ *Kaiyam* subsequently petitioned the European

126 *R (Kaiyam) v Secretary of State for Justice* [2014] UKSC 66; [2015] AC 1344.

127 *Ibid* [31] citing *Re Corey* (n 119 above) [63]–[69].

128 *Ibid* [32].

129 *Ibid* [18]–[20].

130 *Ibid* [36].

131 *Ibid*.

132 *Ibid* [39].

133 *Ibid* [40].

Court, arguing that the UK Supreme Court had wrongly applied *James*.¹³⁴ The European Court dismissed the petition as manifestly ill founded. In doing so, the court noted that the UK Supreme Court had declined to follow the reasoning in *James* on the basis that it would require the court to release dangerous prisoners.¹³⁵ The European Court sidestepped this disagreement, observing that how states choose to implement judgments of the court within their legal order is a matter for them.¹³⁶ The court then went on to apply the reasoning that it had developed in *James* and subsequent cases.

The issue then returned to the UK Supreme Court in the case of *Brown v The Parole Board for Scotland*,¹³⁷ where, following the decisions in *Kaiyam* and other similar cases representing a clear and consistent line of authority, the court decided that it could no longer avoid following the reasoning of *James*.¹³⁸ Lord Reed decided that this was necessary for two reasons. Firstly, he concluded that, in practice, the principle in *James* had been less demanding than the one fashioned by the Supreme Court in *Kaiyam*. Secondly, and perhaps more fundamentally, the understanding of the Supreme Court in *Kaiyam* that *James* required prisoners to be released where their lack of rehabilitative courses caused their detention within the terms of article 5 ECHR to become unlawful was wrong. The Supreme Court had overlooked the European court's part of the judgment, where the court had indicated that the availability of a remedy in the form of the Parole Board, with its discretion to release offenders who were no longer dangerous, was sufficient to comply with article 5(4) ECHR. The award of just satisfaction for a failure to provide rehabilitative courses did not necessarily entail an obligation to release the prisoner.¹³⁹ Thus, in this 'unsatisfactory situation' the UK Supreme Court had to abandon its own ancillary obligation and follow *James*.¹⁴⁰

134 *Kaiyam v United Kingdom* [2016] ECHR 28160/15 (dec).

135 Ibid [71].

136 Ibid [72].

137 [2017] UKSC 69; [2018] AC 1.

138 Ibid [30].

139 Ibid [43].

140 Ibid [44].

RESIDUAL LIBERTY – THE CANADIAN DEVELOPMENT OF *EX PARTE GERMAIN*

In the common law world, the most sophisticated understanding of liberty in the context of prisons and secure units can be found in Canada. Analytically, many systems wrestle with this area.¹⁴¹ The idea of residual liberty is not a creation of the Canadian Charter of Rights and Freedoms, although its development has been strengthened by it. In fact, the taproot of the idea of residual liberty lies in English law. In the leading case of *Raymond v Honey*,¹⁴² Lord Wilberforce cited in support of his conclusion on prisoners' rights the judgment of Dickson J, as he then was, in *Solosky v The Queen*.¹⁴³ However, Dickson J was familiar with the earlier judgment of Shaw LJ having cited *Ex parte Germain* in an earlier appeal to the Supreme Court of Canada.¹⁴⁴ In fact, in *Martineau v Matsqui Disciplinary Board*, decided almost immediately before *Solosky*, the residual rights of prisoners had been fashioned in a way that gave proper effect to their residual right to liberty. Indeed, this case marked the beginning of a divergence between Canadian and English law based on the proper application of the reasoning in *Ex parte Germain*. In short, Canadian law has recognised that the right to liberty is divisible. This division enables Canadian law to protect both the rights of prisoners and the rule of law effectively and coherently.

In *Martineau* the Canadian Supreme Court was asked to consider whether decisions of a prison disciplinary board were subject to judicial review. Martineau had been accused of a disciplinary offence, but he contended that he had been subject to procedural irregularities that prevented him making an effective defence. The board found Martineau guilty and consequently he was sentenced to 15 days in the Special Corrections Unit (solitary confinement) on a restricted diet with a loss of privileges.¹⁴⁵ In finding that the board was subject to judicial review, Dickson J noted that the challenged decision:

141 For an interesting and useful discussion of German law, see Liora Lazarus, 'Conceptions of liberty deprivation' (2006) 69 *Modern Law Review* 738.

142 *Raymond* (n 21 above). The approach of Lord Wilberforce in *Raymond* is not quite the same as saying that a prisoner is invested with residual rights related to the nature and conduct of imprisonment as Canadian law shows.

143 [1980] 1 SCR 821, 839: 'A person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law.' Lord Wilberforce also cited *Ex parte Germain* (n 11 above).

144 *Martineau v Matsqui Disciplinary Board* [1980] 1 SCR 602, 625.

145 The full facts are set out in the judgment of Jetté CJ in the Federal Court of Canada (Appeal Division): *Martineau v Matsqui Institution* [1976] 2 FC 198, [1]–[5].

had the effect of depriving an individual of his liberty by committing him to a 'prison within a prison'.¹⁴⁶ In these circumstances, elementary justice requires some procedural protection. The rule of law must run within penitentiary walls.¹⁴⁷

Martineau heralded the Canadian retreat from the deferential 'hands-off' approach towards prison administration, cementing the approach of Canadian courts in their review of correctional decision making.¹⁴⁸ Indeed, the *Martineau* approach was soon developed in a series of cases which became known as the *Miller* trilogy.

The *Miller* trilogy, in essence, concerned the confinement of inmates to special handling units and the consequences which that might have for their residual liberty. In *Miller*, the Canadian Supreme Court recognised for the first time the idea of a 'prison within a prison'.¹⁴⁹ Following a disturbance at the prison where he was held, Miller was transferred to another and placed in administrative segregation in the 'Special Handling Unit'. Miller was not able to challenge the decision, or indeed to see what evidence was used to reach it. The special handling unit was reserved for dangerous offenders, who were kept segregated from the general population. Solitary confinement exemplifies the idea of 'a prison within a prison'. Such places of confinement within prisons have long existed,¹⁵⁰ with for example 'Little Ease' within the Tower of London being perhaps the most notorious.¹⁵¹ In the companion case to *Miller*, *Cardinal*, Le Dain J noted that close confinement within a prison is 'a significantly more restrictive and severe form of detention than that experienced by the general inmate population'.¹⁵² Confinement to the prison within a prison is a distinct and separate form of confinement that involves a significant reduction of the residual liberty of the prisoner.¹⁵³ Indeed, solitary confinement is, of itself, a

146 The term 'prison within a prison' originates from R J Sharpe, *The Law of Habeas Corpus* (Oxford University Press 1976) 149.

147 *Martineau* (n 144 above) 622.

148 *May* (n 6 above) [25] Le Bel and Fish JJs.

149 *Miller* (n 57 above).

150 *R v Shubley* [1990] 1 SCR 3, 9 Cory J.

151 R D Melville 'The use and forms of judicial torture in England and Scotland' (1905) 2 *Scottish Historical Review* 225, 232–233 noting that a few days in the cell 'were sufficient to break all but the stoutest spirits'.

152 *Cardinal v Director of the Kent Institution* [1985] 2 SCR 643, 653 Le Dain J. See also *R v Morin* [1985] 2 SCR 662, 671.

153 *May* (n 6 above) [28] Le Bel and Fish JJs.

severe form of punishment which can have serious consequences for the mental and physical health of the prisoner.¹⁵⁴

Crucially, decisions which affect the residual liberty of a detainee, through for example extensions to the deprivation of liberty within prison, must be seen as distinct from decisions to free a prisoner from the prison system.¹⁵⁵ As Lamer J noted in *Dumas*:

in the context of correctional law, there are three different deprivations of liberty: the initial deprivation of liberty, a substantial change in the nature of detention amounting to a further deprivation of liberty, and a continuation of the deprivation of liberty.¹⁵⁶

Moreover, the jurisprudence has evolved to make a further distinction between primary and secondary liberty.¹⁵⁷ Primary liberty is restricted by a prison sentence, in other words the initial deprivation of liberty. Whereas secondary liberty is the residual liberty that remains when the primary liberty of the detainee is controlled and limited by a prison sentence. And it is this residual or secondary liberty that remains during the detention of a prisoner, preventing the state treating a detainee in an arbitrary fashion by ensuring further interferences with the prisoner's right to liberty are lawful. Confinement in a special handling unit is, as Le Dain J observed:

a form of detention that is distinct and separate from that imposed on the general inmate population. It involves a significant reduction in the residual liberty of the inmate. It is in fact a new detention of the inmate, purporting to rest on its own foundation of legal authority.¹⁵⁸

Moreover, once the applicant has demonstrated that there has been a deprivation of their residual or secondary liberty the burden of proof shifts to the defendant to justify the detention.¹⁵⁹ To show that the secondary deprivation of a detainee is lawful and thus consistent with their residual liberty the decision-maker would need to demonstrate that the decision was reached in a manner which was procedurally fair, evidenced and within the powers granted to the decision-maker.¹⁶⁰

154 *Shubley* (n 150 above) 9 Cory J. Solitary confinement can border on torture. See, for example, *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, UN General Assembly A/66/268 11-44570 2 (United Nations 2011).

155 *Miller* (n 57 above) 641 Le Dain J. *Mission Institution v Khela* [2014] 1 SCR 502, [34] Le Bel J.

156 *Dumas v Leclerc Institute* [1986] 2 SCR 469, 464 Lamer J.

157 *Idziak v Canada* [1992] 3 SCR 631, 646–647 Le Cory J.

158 *Miller* (n 57 above) 641 Le Dain J.

159 *May* (n 6 above) [71] Le Bel and Fish JJs; *Khela* (n 155 above) [40] Le Bel J. Judith Farbey, Robert Sharpe and Simon Atrill, *The Law of Habeas Corpus* 3rd edn (Oxford University Press 2011) 88.

160 *Khela* (n 155 above) [67].

But what would be an appropriate and just remedy for a prisoner whose secondary right to liberty had been infringed? The answer the Canadian Supreme Court concluded was *habeas corpus*. Thus, in *Miller*, Le Dain J held that *habeas corpus* would lie in these circumstances:

A prisoner has the right not to be deprived unlawfully of the relative or residual liberty permitted to the general inmate population of an institution ... Any significant deprivation of that liberty, such as that effected by confinement in a special handling unit meets the first of the traditional requirements for *habeas corpus*, that it must be directed against a deprivation of liberty.¹⁶¹

In the context of a prison the writ of *habeas corpus* plays a critical role in ensuring that both the rule of law and the rights of detainees are respected.¹⁶² *Habeas corpus* issues as of right to release a detainee from the unlawful constraint, and thus is a more powerful remedy than the discretionary ones which judicial review affords.¹⁶³ Le Dain J then went on to consider whether *habeas corpus* would only lie where it was sought to secure the unqualified liberty of the individual. Having reviewed Canadian and American authority, Le Dain J concluded that:

in all of these cases the effect of *habeas corpus* is to release a person from an unlawful detention, which is the object of the remedy ... The use of *habeas corpus* to release a prisoner from an unlawful form of detention within a penitentiary into normal association with the general inmate population of the penitentiary is consistent with these applications of the remedy.¹⁶⁴

Furthermore, it was important for *habeas corpus* to be developed and adapted to serve as an effective remedy in the context of modern incarceration.¹⁶⁵ Consequently, the writ was to be applied in a way that avoided a narrow and formalistic approach.¹⁶⁶ Of course, the writ would only lie where there was a deprivation of liberty and not a mere loss of privileges.¹⁶⁷ The end of the 'hands-off' doctrine did not mean that the courts would become 'hands-on'. That said, it was nevertheless crucial that *habeas corpus* be employed rather than the internal grievance procedures of institutions. Internal procedures can be protracted and are also not an appropriate forum for testing the

161 *Miller* (n 57 above) 637.

162 *May* (n 6 above) 823 Le Bel and Fish JJs.

163 *Khela* (n 155 above) [69]–[70] commenting on the necessity of avoiding a bifurcated jurisdiction that could lead to a duplication of proceedings. *Habeas corpus* was to be preferred.

164 *Miller* (n 57 above) 638.

165 *Ibid* 641.

166 *Khela* (n 155 above) [54].

167 *Morin* (n 152 above) 671 Le Dain J.

deprivation liberty.¹⁶⁸ As the court would later note, prisoners do not have the resources or the ability to discover the reasons for the change in their detention regime: ‘Habeas corpus is in fact the strongest tool a prisoner has to ensure that the deprivation of his or her liberty is not unlawful.’¹⁶⁹

CONCLUSION

The aim of this article has been to show that the law in this area is muddled and that greater lucidity can be afforded through the adoption of the idea of residual liberty. The disparate threads are there ready to be woven into a coherent fabric. Canadian law, using some of those English threads of authority, has already woven the idea into an elegant and principled doctrine. But in the UK, and indeed before the European Court, some limited interweaving has also begun. Thus, for example, the most obvious outcome of the dialogue between the UK Supreme Court and the European Court is that prisoners continue to enjoy the right to liberty while detained. Without addressing this point explicitly, the law has developed as a consequence of *James* to the point where a prisoner has an enforceable liberty interest which will sound in damages in appropriate cases. But quite what the extent of this article 5 ECHR liberty interest is, remains unclear. The European Court has arrived at this position via the circuitous route of arbitrary deprivations without addressing how the liberty guarantee applies in the first place. To put it another way the court has failed to reason from first principles, looking at the nature and purpose of the guarantee of the right to liberty in this context and then proceeding to see how it might apply. The *James* approach might deliver practical justice, but it does it in an incoherent manner. Indeed, the criticism of the UK Supreme Court is certainly not wide of the mark. And yet in *Munjaz* the court flirted with the idea of ‘further deprivations of liberty’, seemingly recognising that in detention greater scrutiny is at times required where the state wishes to further confine a detainee. This, of course, accords with the core purpose of article 5 ECHR. In *Kurt v Turkey* the European Court observed that:

what is at stake [for detainees] is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule

168 *Khela* (n 155 above) [58]. Holding that the writ of *habeas corpus* ought not be declined simply because there was an alternative remedy available in the circumstances.

169 *Ibid* [29].

of law and place detainees beyond the reach of the most rudimentary forms of legal protection.¹⁷⁰

It is for this very reason, for example, that article 5 ECHR contains a positive obligation to ensure that, where an individual is detained, proper records are maintained.¹⁷¹ The protection of articles 2, 3, and 8 ECHR are crucially dependent on this. This is, of course, equally true of detention in a prison within a prison. Placing an individual there carries with it a real and inherent risk of treatment that will engage articles 2, 3 and 8 ECHR. Perhaps more so.

However, when we turn to domestic law it offers little assistance because English law views liberty as indivisible. Had the idea of residual liberty been more fully embraced, as it has been in Canada, then arguably matters would be different. Crucially, the Canadian notion of residual liberty offers a richer understanding of liberty in the context of confinement. If we accept, as European law does, that the protection of liberty afforded by article 5 is intended to safeguard physical liberty, then, using the idea of primary and secondary liberty interests within it, we can more effectively apply that guarantee. In other words, detainees should enjoy both primary and secondary interests of liberty under the umbrella of article 5 ECHR. Detention in either a prison or secure hospital limits the primary liberty right of the individual. But the right to liberty is not extinguished by such detention. There is no negation of the essential content of the right. The right also applies to further deprivations of liberty, as the European Court suggested in *Munjaz*. A detainee continues to enjoy a secondary or residual liberty right. Where the state wishes to limit that residual liberty right, then it must proceed on the same basis that it would if the primary liberty right was at issue. That would accord with the court's view in *Munjaz*. To commit a person to solitary confinement is to imprison a prisoner within a further prison. A prisoner in such circumstances is hardly Hamlet complaining that Denmark is his prison.¹⁷² There is a significant change in the qualitative nature of his detention. This further detention is an interference with the secondary right to liberty, but one which could be justified for disciplinary reasons. Of course, where it is not justified then article 5(4) ECHR would provide a remedy: release from solitary confinement and a transfer back into the general population of the prison. All of this would happen without touching the prisoner's primary liberty right, which throughout would remain limited by the sentence of the trial court. Similarly, a failure to provide rehabilitative courses to an IPP prisoner frustrates their ability to

170 *Kurt v Turkey* [1998] ECHR 15/1997/799/1002, [123].

171 *Anguelova v Bulgaria* [2002] ECHR 38361/97, [157].

172 William Shakespeare, *Hamlet* (Penguin 1980) act 2, scene 2 239–250, 110–111.

regain their primary liberty right. Without such courses IPP prisoners cannot demonstrate to the Parole Board that they have made sufficient progress to address their dangerousness. Where an IPP prisoner is denied access to rehabilitative courses, their secondary liberty right is engaged. Here the liberty interest is a secondary one in rehabilitation, which enables the prisoner to work towards the restoration of their primary liberty.

Naturally, a division of liberty would therefore require greater remedial flexibility. The Canadian courts have shown this is possible through the constitutional development of *habeas corpus*.¹⁷³ For example, in *Gamble*, the Canadian Supreme Court applied the writ of *habeas corpus* to protect the residual liberty interests of the appellant.¹⁷⁴ It was argued that *habeas corpus* would only be available to secure the complete liberty of the individual.¹⁷⁵ The Canadian Supreme Court disagreed. A purposive and expansive approach to the remedy of *habeas corpus* would enable the court to review the deprivation of liberty inherent in the operation of the parole ineligibility scheme without touching the sentence itself.¹⁷⁶ In fact, the European Court has recognised that article 5(4) may apply where it is not sought to secure the primary liberty of a prisoner, merely a change of custodial regime. Thus, in *Kuttner*¹⁷⁷ the applicant challenged the length of domestic proceedings where he requested a transfer from a secure hospital to an ordinary prison. In 2005 Kuttner had been sentenced to six years' imprisonment for a violent assault on his 80-year-old mother. Kuttner had a record of violent offending. Following medical evidence, Kuttner was imprisoned not in an ordinary prison but in a secure institution where his underlying mental illness could be treated. His detention was, as the European Court observed, justified under both article 5(1)(a) and (e). Between 2007 and 2009 Kuttner made a series of applications to the domestic courts seeking a transfer to the ordinary prison system before he was finally released. He subsequently complained to the European Court that these various applications had not been considered speedily as required by article 5(4). As a

173 The law has shown remedial flexibility in other contexts, eschewing the one remedy fits all violations, for example in the apply the trial within a reasonable time guarantee: *Attorney General's Reference No 2 of 2001* [2003] UKHL 68; [2004] 2 AC 72. This is another context which demands further such imaginative flexibility. Here the *lex specialis* of release contained in art 5(4) ECHR may not always be appropriate, but in those circumstances a court could grant a remedy under the *lex generalis* of art 13 ECHR. In the UK under the HRA, s 8, this would be a remedy which is 'just and appropriate'.

174 *R v Gamble* [1988] 2 SCR 595.

175 Ibid 636 Wilson J.

176 Ibid 644–646 Wilson J.

177 *Kuttner v Austria* [2015] ECHR 7997/08.

preliminary matter it was necessary for the European Court to decide if article 5(4) applied in such cases of ‘parallel detention’. That is even when successful an applicant would not be released from detention, but merely transferred from one custodial regime to another. The European Court held that article 5(4) applied.¹⁷⁸ To decide otherwise, the court concluded, would risk rendering the applicant’s detention in a secure institution immune from challenge, something which would be contrary to the object and purpose of article 5 itself. Changes to the ‘category of confinement’ must be open to judicial scrutiny under article 5(4) even if they did not lead to release.¹⁷⁹ In fact, there is no reason why a similar approach could be adopted in contexts discussed above. Just as in *Kuttner*, such remedial flexibility would avoid the spectre of releasing dangerous people while vindicating both the Convention rights of detainees and the rule of law. But, for this flexibility to be enjoyed more widely would require, as we have seen, a new approach to the right to liberty itself. The case for adoption of the idea of residual liberty has, as we have seen above, considerable force. The evolution of both English and European law in this respect is clearly a matter that requires full consideration.

178 Ibid [33].

179 [31]. *Kuttner* sits uneasily with the European Court’s earlier authority such as *Ashingdane* (n 50 above), where the applicant unsuccessfully argued that art 5(4) applied in a case challenging the conditions of his detention [45], [49], and [52].