HOUSE OF LORDS SESSION 2008–09

[2009] UKHL 1

on appeal from:[2008] EWCA Civ 359

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

R (on the application of Black)(Respondent) *v* Secretary of State for Justice (Appellant)

Appellate Committee

Lord Phillips of Worth Matravers
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood

Counsel

Appellant:
David Pannick QC
Parishil Patel

(Instructed by Treasury Solicitors)

Respondent:
Tim Owen QC
Hugh Southey

(Instructed by Bhatt Murphy)

Hearing dates:

21 and 22 OCTOBER 2008

ON
WEDNESDAY 21 JANUARY 2009

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

R (on the application of Black) (Respondent) *v* Secretary of State for Justice (Appellant)

[2009] UKHL 1

LORD PHILLIPS OF WORTH MATRAVERS

My Lords,

1. My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood and gratefully adopt his summary of the facts and of the relevant legislation. I do not, however, share the conclusion to which he has come. Both established principles of law laid down by the European Court at Strasbourg and recent jurisprudence of your Lordships' House have led me to conclude that the regime for considering the release on licence of prisoners in the position of the respondent is not compatible with the European Convention on Human Rights ("the Convention").

Strasbourg jurisprudence

2. This appeal concerns the interrelationship of article 5.1(a) and article 5.4 of the Convention. They provide:

> "1. 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;
>
> …

> 4. 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."

3. In *De Wilde, Ooms and Versyp v Belgium (No 1)*(1971) 1 EHRR 373, para 76 the ECtHR held that article 5.4 did not entitle a person detained to take proceedings to challenge detention when that detention was pursuant to an order of a court:

> "At first sight, the wording of article 5 (4) might make one think that it guarantees the right of the detainee always to have supervised by a court the lawfulness of a previous decision which has deprived him of his liberty. The two official texts do not however use the same terms, since the English text speaks of 'proceedings' and not of 'appeal', 'recourse' or 'remedy' (compare article 13 and 26). Besides, it is clear that the purpose of article 5 (4) is to assure to persons who are arrested and detained the right to a judicial supervision of the lawfulness of the measure to which they are thereby subjected: the word 'court' ('*tribunal*') is there found in the singular and not in the plural. Where the decision depriving a person of his liberty is one taken by an administrative body, there is no doubt that article 5 (4) obliges the Contracting States to make available to the person detained a right of recourse to a court; but there is nothing to indicate that the same applies when the decision is made by a court at the close of judicial proceedings. In the latter case, the supervision required by article 5 (4) is incorporated in the decision; this is so, for example, where a sentence of imprisonment is pronounced after 'conviction by a competent court' (article 5 (1) (*a*) of the Convention)."

4. Subsequent decisions have made it plain that this principle only applies in relation to the sentence imposed by a competent court where that sentence is conclusive of the lawfulness of the detention of the applicant. In such circumstances no issue as to the lawfulness of the detention can arise and so there is nothing to which article 5.4 can apply. A sentence of imprisonment will not be conclusive of the lawfulness of imprisonment if the law under which it is imposed makes provision for

the release, either unconditionally or subject to the satisfaction of certain criteria, of the person detained before the sentence has been served in full. In such circumstances, when the point is reached where the person detained is entitled to release or where the relevant criteria fall to be considered, there will be a justiciable issue as to whether the continued detention of that person is lawful. Article 5.4 entitles the person detained to the determination of that issue by a court. If that determination concludes that the criteria for release do not apply, the lawfulness of the detention will remain attributable, under article 5.1(a), to the original sentence.

5. The Strasbourg decisions that support this proposition start with *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443. In that case, at para 45, the ECtHR said of the passage from *De Wilde* that I have cited that it

> "speaks only of 'the decision depriving a person of his liberty'; it does not purport to deal with an ensuing period of detention in which new issues affecting the lawfulness of the detention might subsequently arise".

6. The court was in that case dealing with a law that provided for the detention of recidivists at the discretion of the Government and held that article 5 applied to such detention. It observed at para 47 that the system under consideration was fundamentally different from that – on which it did not have to express an opinion – "of the conditional release of prisoners sentenced by a court to a period of imprisonment imposed by the court as being appropriate to the case".

7. In *Weeks v United Kingdom* (1987) 10 EHRR 293 the applicant had been given a discretionary life sentence for armed robbery, described by the sentencing judge as an "indeterminate sentence" that would permit the Secretary of State to release him when it was determined that he was no longer a danger. He was released on licence but subsequently recalled, at which point he claimed that his detention violated article 5.1 and article 5.4. The ECtHR held that there was no violation of article 5.1 but that there had been a violation of article 5.4. The reasoning of the court was as follows. The object of the sentencing judge in imposing a life sentence had not been that the applicant should remain in prison by way of punishment for the whole of his life. Rather it was that he should be detained until he ceased to be a danger. The facts that resulted in his recall had demonstrated that he remained dangerous, so that his original sentence was justification for his renewed

detention under article 5.1(a). In the words of the court there was "a sufficient connection" for the purposes of that sub-paragraph between his conviction and his recall. There had, however, been an issue as to whether his recall had been justified and this he had been entitled to have determined by a court under article 5.4. The court held that article 5.4 had not in that case been satisfied because of deficiencies in the process and the power of the Parole Board that had considered the justification for the applicant's recall.

8. The same distinction between a life sentence imposed by way of punishment and one imposed as an indeterminate sentence because of uncertainty as to when it would be safe to release the prisoner was drawn by the ECtHR in *Thynne, Wilson and Gunnell v United Kingdom* (1990) 13 EHRR 666. The court emphasised that detention pursuant to the latter type of sentence would only be lawful if it satisfied the purpose of the sentence. In this context the court drew at this time a distinction between a discretionary life sentence and a mandatory life sentence. In the former case, once the prisoner had served the punitive element of his sentence the lawfulness of his continued detention depended upon whether he remained a danger, something that was capable of changing over time. It followed that article 5.4 entitled the prisoner to a periodic review by a court of the continued necessity, and thus lawfulness, of his detention. Once again the court held that the Parole Board did not satisfy the requirements of article 5.4.

9. The next step in the development of the ECtHR's jurisprudence in this area was the extension of the reasoning that I have just described to the mandatory detention during Her Majesty's pleasure of a young person convicted of murder – *Hussain v United Kingdom* (1996) 22 EHRR 1. Initially the ECtHR did not extend this reasoning to mandatory life sentences imposed on adults convicted of murder – see *Wynne v United Kingdom* (1994) 19 EHRR 333. In *Stafford v United Kingdom* (2002) 35 EHRR 1121 the court altered its approach and recognised that in the case of such sentences also, once the prisoner had served the tariff that represented the punitive element of the sentence, the justification for his continued detention was the risk that he posed to the public. Whether this justification continued was a question that under article 5.4 the prisoner was entitled to have periodically determined by a court.

10. These decisions show that the ECtHR has not found it easy to identify the true nature of at least that part of the English sentencing regime that covers mandatory life sentences. As I am about to show, the ECtHR has not yet extended the reasoning applied in the case of life

sentences to determinate sentences. It requires no great leap of reasoning to adopt the same approach to that latter part of a life sentence in which, the tariff having been served, the prisoner is entitled to be considered for release under licence and that latter part of a determinate sentence in which, in a case such as that of the respondent, the prisoner is eligible to be released on licence. The question raised by this appeal is whether there is any difference in principle between the two or whether this is another area of this country's confusing sentencing regime that the Strasbourg court has not yet fully understood. That is, I believe, a question that has already been answered by your Lordships' House. Before explaining why this is so, I shall first refer to the Strasbourg cases that deal with determinate sentences.

11. In *Mansell v United Kingdom* (Application No 32072/96) (unreported) 2 July 1997 the Commission ruled the applicant's claim inadmissible. It is not, however, clear from the decision what that complaint was. The applicant had been sentenced for indecent assault to a "longer than normal" sentence to protect the public pursuant to section 2(2)(b) of the Criminal Justice Act 1991. This resulted in his receiving a sentence of five years imprisonment rather than the 2 ½ that the sentencing judge said would have been normal. He was eligible for parole after half of this sentence, namely after 2 ½ years but the Parole Board ruled that his case was not suitable for parole. He had unsuccessfully sought judicial review of the Board's decision on the ground that he should have been afforded an oral hearing, but this was not the only complaint that he sought to raise at Strasbourg. He is also reported as complaining that he should have been considered for parole after 15 months, that is at the stage that he would have been eligible for consideration had he received a normal sentence, and that the Home Secretary should not have enjoyed a right of veto over the decision of the Parole Board.

12. The Commission gave the following reasons for ruling the applicant's complaint inadmissible:

> "In the present case, the Commission must determine whether the applicant was entitled, under article 5 para. 4 (article 5-4) of the Convention, to a further review of the lawfulness of his detention after the expiry of the first two and a half years of his sentence.

> The sentence imposed on the applicant was a fixed term sentence of five years. There is no question of the sentence being imposed because of the presence of factors which 'were susceptible to change with the passage of time, namely mental instability and dangerousness' (above-mentioned Thynne, Wilson and Gunnell judgment, p 29, para 73). Rather, there was an element of 'simple' punishment as well as an element of deterrence. It is true that the latter part of the sentence was imposed pursuant to section 2 of the Criminal Justice Act 1991, which provides for sentences in the case of violent or sexual offences to be longer than 'normal' in order to protect the public from serious harm. Such an 'increased' sentence is, however, no more than the usual exercise by the sentencing court of its ordinary sentencing powers, even if the 'increase' has a statutory basis. In particular, nothing in the sentencing procedure indicates that the fixed term sentence of five years imprisonment was anything other than a sentence which was imposed as punishment for the offences committed.
>
> It follows that the judicial control required by article 5 para 4 (article 5-4) of the Convention was incorporated in the original conviction and sentence, and that article 5 para 4 (article 5-4) of the Convention does not apply to the parole proceedings in which the applicant was denied an oral hearing."

It is to be noted that there is no discussion of the reasons for the grant of parole.

13. In *Ganusauskas v Lithuania* (Application No 47922/99) (unreported) 7 September 1999 the ECtHR dismissed as manifestly ill-founded the applicant's claims that his rights under article 5.1 and 5.4 had been violated. The applicant had been released on licence after serving half a six year prison service under a law which permitted the release of a prisoner on licence after serving half his sentence. There was then a series of court hearings which resulted in the order for his release being quashed. He sought to attack aspects of these court hearings. The court held that there was nothing to suggest that the link between the original conviction and the re-detention was broken, so that there was no basis for asserting a violation of article 5.1. In rejecting the claim in respect of article 5.4 the court said simply this:

> "The court notes that article 5 § 4 only applies to proceedings in which the lawfulness of detention is challenged. The necessary supervision of the lawfulness of detention 'after conviction by a competent court', as in the present case, is incorporated at the outset in the applicant's original trial and the appeal procedures against the conviction and sentence (see, the De Wilde, Ooms and Versyp v Belgium judgment of 18 June 1971, Series A no 12, p 40, § 76). It follows that this part of the application is also to be rejected as being manifestly ill-founded pursuant to article 35 §§ 3 and 4 of the Convention."

14. The final decision of the ECtHR in relation to a determinate sentence that calls for consideration is *Brown v United Kingdom* (Application No 968/04) (unreported) 26 October 2004. The applicant had been sentenced to eight years imprisonment for supplying heroin and released on licence after serving two-thirds of this sentence. He was recalled for breach of the residence conditions of his bail. The Parole Board then considered whether he should be released again and concluded that he should not. He sought to attack this decision by judicial review, but was refused permission. He complained that his recall to detention violated article 5.1 because there was no link between the renewed detention and the original sentence for supplying drugs. He also contended that he was entitled to a court-like review of the justification for his continued detention pursuant to article 5.4. The relevant part of the judgment of the court was as follows:

> "1. . . The court recalls that the applicant was sentenced to a determinate prison sentence of eight years after conviction by a competent criminal court and accordingly, his detention fell within sub-paragraph 1 (a) above. The applicant seeks to argue that after his release on licence he was lawfully at large and his situation was analogous to the situation applicable to the conditional liberty allowed to those on life licence (for example, *Weeks v United Kingdom*, judgment of 2 March 1987, Series A, no 114) and restricted patients on release from hospital (for example, *X v United Kingdom*, judgment of 5 November 1981, Series A, no 46) and therefore that his recall had to be properly linked to the basis of his original conviction and in conformity with the varying requirements of article 5.

The court considers however that there is a crucial distinction between the cases cited by the applicant and the circumstances of his own case. Discretionary and mandatory lifers, after the expiry of the punitive element of their sentence, are detained on the basis of risk – the justification for their continued detention is whether it is safe for the public for them to live in the community once more. Similarly the recall of restricted patients is based on factors arising from their mental health. The applicant however has been sentenced to a fixed prison term by a court as the punishment for his offence. The lawfulness of his detention does not depend, in Convention law terms, on whether or not he ceases to be at risk of re-offending. The fact that the applicant before the end of the sentence may expect to be released on licence does not affect this analysis. When such a prisoner is recalled his detention is again governed by the fixed term imposed by the judge conforming with the objectives of that sentence and thus within the scope of article 5 § 1(a) of the Convention.

Article 5 § 1 does provide that at all times detention must be 'in accordance with the law'. The court notes that the basis for the applicant's recall was considered by the Parole Board, which found that he was in breach of the terms of his licence, and that its decision was in turn subject to judicial review. In the judicial review proceedings the applicant's arguments concerning the lawfulness of his recall and the Parole Board's procedure were rejected by the High Court and the Court of Appeal. On the whole bound to respect domestic courts' interpretation of domestic law (see for example, *Benham v United Kingdom*, judgment of 10 June 1996, Reports 1996-III, § 41), the court detects no arbitrariness or other feature that would justify it departing from their assessment.

It follows that this part of the application is manifestly ill-founded and must be rejected pursuant to article 35 §§ 3 and 4 of the Convention.

2. The applicant complains of lack of a court review of the justification of his continued detention after recall, invoking article 5 § 4 of the Convention which provides: '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'.
>
> The court recalls that where an applicant is convicted and sentenced by a competent court to a determinate term of imprisonment for the purposes of punishment, the review of the lawfulness of detention is incorporated in the trial and appeal procedures (see, *mutatis mutandis, V v United Kingdom*, no 24888/94, ECHR 1999-IX, § 119; *Stafford v the United Kingdom*, § 87). No new issues of lawfulness concerning the basis of the present applicant's detention arose on recall and no right to a fresh review of the lawfulness of his detention arose for the purposes of article 5 § 4 of the Convention.
>
> It follows that this part of the application is manifestly ill-founded and must be rejected pursuant to article 35 §§ 3 and 4 of the Convention."

15. I would make the following observations on this judgment. The court considered whether the applicant's recall had been "in accordance with the law" and referred to the fact that the Parole Board had considered this question, as had the High Court and the Court of Appeal, adding that the court detected "no arbitrariness". This seems to have come close to recognising that there was an issue as to the lawfulness of the applicant's recall. If so, it is hard to see why the court did not accept that article 5.4 applied to that issue, albeit that there would seem no ground for finding that the requirements of article 5.4 would not have been satisfied. There was, however, no consideration of the question of whether, under our sentencing regime, the possibility of release on licence gives rise to rights that are relevant to the lawfulness of detention under a determinate sentence. I now turn to that question.

The sentencing regime

16. It has long been part of the English sentencing regime that when a judge sentences a defendant to a determinate sentence of imprisonment there neither is nor is intended to be any expectation on the part of the sentencing judge or the prisoner that the prisoner will serve in prison the whole of the sentence imposed. It is part of our penal policy that, in normal circumstances, prisoners should be released on licence before

they have served the full term of their sentences. This implication of our sentencing regime is something that the judge is required to explain when he imposes a sentence of imprisonment. Furthermore, when a judge imposes a determinate sentence he does not do so on the basis that the seriousness of the offences requires that the prisoner should be detained for the full period of the sentence. Rather he has regard to the penal effect of the sentence as a whole, having regard to the fact that part of it is likely to be served under release on licence. This has been the position since there was a significant change to the statutory provisions governing the release of prisoners before serving the full term of their sentences as a result of sections 32 to 40 of the Criminal Justice Act 1991. On that occasion Lord Taylor of Gosforth CJ issued *Practice Statement (Crime: Sentencing)* [1992] 1 WLR 948 that included the following guidance:

> "7. It has been an axiomatic principle of sentencing policy until now that the court should decide the appropriate sentence in each case without reference to questions of remission or parole.
>
> 8. I have consulted the Lords Justices presiding in the Court of Appeal (Criminal Division) and we have decided that a new approach is essential.
>
> 9. Accordingly, from 1 October 1992, it will be necessary, when passing a custodial sentence in the Crown Court, to have regard to the actual period likely to be served, and as far as practicable to the risk of offenders serving substantially longer under the new regime than would have been normal under the old.
>
> 10. Existing guideline judgments should be applied with these considerations in mind."

17. The sentencing regime in respect of sentences of more than 12 months was again changed significantly by the Criminal Justice Act 2003. One aspect of the change being that the conditions of licences were made more exacting and that the licence conditions remained in force for the whole length of the sentence. In these circumstances the Sentencing Guidelines Council issued guidance to sentencers that included the following:

> "Since there are so many factors that will vary, it is difficult to calculate precisely how much more demanding a sentence under the new framework will be. The Council's conclusion is that the sentencer should seek to achieve the best match between a sentence under the new framework and its equivalent under the old framework so as to maintain the same level of punishment. As a guide, the Council suggests the sentence length should be reduced by in the region of 15%". (New Sentences: Criminal Justice Act 2003, para 2.1.9)

18. In these circumstances it cannot be suggested that the imposition of a determinate sentence renders the detention of the defendant lawful for the full period of the sentence. It will provide the legal foundation for detention during the term of the sentence provided that other conditions, such as those governing recall of a defendant released on licence, are satisfied. The law provides, however, circumstances in which a person sentenced to a determinate sentence is entitled to be released. Article 5.4 must apply so as to enable him to seek a determination of whether those conditions are satisfied should this be in issue.

19. In support of this point, reference can be made to the decision of the ECtHR in *Gebura v Poland* (Application No 63131/00) (unreported) 6 March 2007. The applicant in that case had, by court proceedings, established that he had under Polish law a right to release on licence after serving three-quarters of a determinate sentence. He complained that he had been unlawfully detained for 48 hours before being released, in violation of article 5.1. This claim succeeded. The court had this to say about the right to conditional release:

> "31. As regards the characteristics of conditional release under Polish law as it stood at the material time, the court notes that the applicant had had a right to apply for conditional release after having served the statutory minimum term of his prison sentence. It is true that the granting of conditional release is left to the court's discretion. However, once conditional release had been granted, the applicant had the right to be released without delay, as provided for in the Ordinance of the Minister of Justice of 27 August 1998 and on completion of the necessary formalities.

> 32. The Government argued that, despite the Court of Appeal's final decision of 12 April 2000, the applicant's continued detention until his release on 14 April 2000 remained justified under article 5 § 1 (a) as constituting 'the lawful detention of a person after conviction by a competent court'. The court does not accept that proposition. It is true that the Convention does not guarantee a right to have a penalty imposed by a court in criminal proceedings suspended for a probationary period (see *X v Switzerland*, no 7648/76, Commission decision of 6 December 1977, Decisions and Reports 11, p 190). However, in so far as the domestic law provided for such a right and once the conditional release had been granted, the applicant had a right to be released. Consequently, his continued detention following the final decision on his conditional release cannot be considered 'lawful' under article 5 § 1 (a). That finding is not affected by the possibility of a revocation of conditional release in cases where a person has failed to comply with the relevant conditions or committed a new offence, provided that there is a sufficient connection between his conviction and a recall to prison (see *Stafford v United Kingdom* [GC], no 46295/99, § 81, ECHR 2002-IV)."

20. No complaint fell to be made in that case of a violation of article 5.4, nor did the court have to consider whether the applicant had had a justiciable claim to be released. It is hard to avoid the conclusion that he had, however, as he obtained a court order for release by application to the court. If so, I find it hard to see on what principled basis the ECtHR could have avoided finding that article 5.4 entitled him to access to the Polish court to seek release had this been denied him.

21. Whether the respondent and persons in his position have a justiciable right to be released on licence provided that the relevant criteria are satisfied is a question that turns on our domestic law, and to that law I now come.

English jurisprudence

22. The Secretary of State placed considerable reliance on the decision of your Lordship's House in *R (Giles) v Parole Board* [2003]

UKHL 42; [2004] 1 AC 1. The facts were similar to those in *Mansell*. The claimant had been given a longer sentence than commensurate with the seriousness of the offence pursuant to section 2(2)(b) of the Criminal Justice Act 1991 in order to protect the public from the risk of the serious harm that he posed. He was sentenced to consecutive sentences totalling seven years in all. The judge did not, as the judge had in *Mansell*, say what sentence he would have imposed simply by way of punishment and deterrence. Under section 35(1) of the 1991 Act the claimant was eligible for release on the recommendation of the Parole Board after serving half his sentence. He began proceedings for judicial review when he was approaching that half-way point. In accordance with the practice then prevailing the Parole Board would only consider his case on the basis of his dossier. He argued that he was entitled to an oral hearing at this review and invoked article 5.4 as requiring this. His argument was not that article 5.4 applied in the case of any consideration for release by the Parole Board. Rather he sought to draw a distinction between his sentence and a discretionary life sentence. The commensurate part of his sentence fell to be compared with the life sentence tariff. Once each was passed the only issue was whether the prisoner remained a danger and this issue required a periodic review that satisfied article 5.4. Implicit in this argument was the assumption that he had already served the commensurate part of his sentence. This was not necessarily so. Lord Bingham pointed out that there was no reason why the extended part of the sentence should not exceed the commensurate part. In such circumstances the claimant's argument would entitle him to a parole hearing before the domestic regime.

23. Lord Bingham commented, at para 10:

> "That brings one back to consideration of the core rights which article 5(4), read with article 5(1), is framed to protect. Its primary target is deprivation of liberty which is arbitrary, or directed or controlled by the executive. In the present case there was nothing arbitrary about the sentence, which was announced and explained in open court and upheld by the Court of Appeal when refusing leave to appeal against sentence. Since the first offence involved what the sentencing judge described as 'a savage attack' and the appellant had threatened further violence against his first victim, the term imposed does not appear in any way excessive. The sentence left nothing to the executive, since the Parole Board, whose duty it is to consider release at the halfway stage of the sentence, is accepted to be a judicial body."

As Lord Brown points out it might seem implicit in the last sentence that Lord Bingham considered that the parole decision at the half way stage was one that was required to satisfy article 5.4. But as Lord Brown also points out there are other passages in the speeches that suggest that once a determinate sentence has been passed, there is no scope for the application of article 5.4.

24. Lord Hope of Craighead summarised his conclusions as follows, at para 51:

> "It is plain from this summary that the basic rule which the European court laid down in *De Wilde, Ooms and Versyp v Belgium (No 1)* 1 EHRR 373 continues to apply. Where the prisoner has been lawfully detained within the meaning of article 5(1)(a) following the imposition of a determinate sentence after his conviction by a competent court, the review which article 5(4) requires is incorporated in the original sentence passed by the sentencing court. Once the appeal process has been exhausted there is no right to have the lawfulness of the detention under that sentence reviewed by another court. The principle which underlies these propositions is that detention in accordance with a lawful sentence passed after conviction by a competent court cannot be described as arbitrary. The cases where the basic rule has been departed from are cases where decisions as to the length of the detention have passed from the court to the executive and there is a risk that the factors which informed the original decision will change with the passage of time. In those cases the review which article 5(4) requires cannot be said to be incorporated in the original decision by the court. A further review in judicial proceedings is needed at reasonable intervals if the detention is not to be at risk of becoming arbitrary."

Had Lord Hope applied these observations to a case such as the present, where the prisoner's release on parole depends on the decision of the executive in the form of the Secretary of State and depends essentially on whether the prisoner still poses a danger (as to which see further below) it may well be that he would have concluded that article 5.4 was applicable.

25. I now come to two decisions of this House which have a more direct, and in my view determinative, relevance to the issue before your Lordships. In the conjoined appeals of West and Smith in *R* (*West) v Parole Board* [2005] UKHL1; [2005] 1WLR 350 the appellants had been sentenced to determinate sentences, released on licence, recalled and then considered by the Parole Board for re-release. They contended that the Parole Board had failed to satisfy the requirements of article 5.4 in that it had failed to afford them an oral hearing when considering their re-release. The House upheld this submission but ruled that the Parole Board's procedures were capable of satisfying the requirements of article 5.4.

26. Lord Bingham said this about the role of the Parole Board, at para 25:

> "While…it is true that early release provisions have the practical effect of relieving overcrowding in the prisons, that is not their penal justification. But such justification exists. All, or almost all, determinate sentence prisoners are expected to return to the community on release from prison after serving their sentences. It is in the interests of society that they should, after release, live law-abiding, orderly and useful lives. For a host of practical, psychological and social reasons, the process of transition from custody to freedom is often very difficult for the prisoner. It is accordingly very desirable that the process of transition should be professionally supervised, to maximise the chances of the ex-prisoner's successful reintegration into the community and minimise the chances of his relapse into criminal activity. But of course there will be cases in which such professional supervision may not be, or appear to be, effective. If a prisoner is released, subject to conditions, before the expiry date of the sentence imposed by the court, and he does not comply, or appears not to comply, with the conditions to which his release was subject, a question will arise whether, in the interests of society as a whole, he should continue to enjoy the advantages of release."

I observe that this passage would seem to apply equally to the role of the Parole Board when considering release for the first time and when considering whether a prisoner who has been recalled should be released a second time.

27. Lord Slynn of Hadley said:

> "54…my initial view was that there are not two formal orders for detention; it is a combined sentence and, in the subsequent decisions as to licence and revocation and recall, the Parole Board is giving effect to the initial sentencing of the trial judge. If that is right, recall from conditional release was itself empowered by the initial sentence of the court.
>
> 55. I have, however, been persuaded by Mr Fitzgerald that this is too restrictive an approach and that recall, even of someone who has only a conditional right to his freedom under licence 'more circumscribed in law and more precarious than the freedom enjoyed by the ordinary citizen' (*Weeks v United Kingdom* 10 EHRR 293, 307, para 40), is a new deprivation of liberty by detention. The prisoner is therefore entitled to take proceedings by which the lawfulness of that detention can be decided speedily by a court under article 5(4). Review by the Parole Board of the recall decision, however, if conducted in accordance with the fairness which the common law requires, is in my view a compliance with article 5(4) and therefore there is no breach of this article."

This reasoning could equally be applied to the initial decision by the Parole Board whether to grant the prisoner conditional liberty. Lord Hope agreed with what Lord Bingham had said about the application of article 5.4 as did Lord Walker of Gestingthorpe and Lord Carswell.

28. This decision is in direct conflict with the reasoning of the Strasbourg court in *Brown*. Lord Brown considers that its effect should be confined to the decision whether to release a prisoner after recall. I can see no reason for so confining it; the reasoning is applicable to any decision whether to release a prisoner on licence. The passage of Lord Bingham's speech cited by Lord Brown in support of his conclusion does not, I suggest, accurately set out the basis on which the court determines the length of a sentence as I have earlier explained this.

29. Finally I turn to the decision of this House in three conjoined appeals by Clift, Hindawi and Headley; *R(Clift) v Secretary of State for*

the Home Department [2006] UKHL 54; [2007] 1 AC 484. As Lord Brown has explained, the position of Clift was exactly comparable to that of the respondent in the present case. The grant of parole to the others depended on the decision of the Secretary of State rather than the Parole Board because they were the subject of deportation orders. Mr Owen QC, who represented them as he does the respondent before your Lordships, did not advance the argument that article 5.4 applied in such a way as to entitle them to have their parole decisions taken by a body with the attributes of a court, namely the Parole Board. Instead it was argued that their treatment infringed article 14 on the basis that it wrongly discriminated against them in comparison to other long term prisoners. This argument failed in relation to Mr Clift on the narrow ground that, while there was discrimination, the ground for that discrimination was not one of those proscribed by article 14. The claims of the other two succeeded. In the case of all three there was a seminal issue as to whether article 5 applied to the release decision, so as to open the door to the application of article 14. That issue is directly relevant to the issue before your Lordships. The House decided it in favour of the appellants.

30. This is what Lord Bingham had to say about the applicability of article 5:

> "16. This argument is in my judgment a mixture of the true and the false. I would agree that the sentences passed on the respective appellants satisfied article 5(1)(a) and provided lawful authority for the detention of the appellants until such time as, under domestic law, their detention became unlawful. *Giles* [2004] 1 AC 1 established that a prisoner sentenced to a determinate term of years cannot seek to be released at any earlier time than that for which domestic law provides. During the currency of a lawful sentence, article 5(4) has no part to play. But the Secretary of State's argument founders, in my opinion, on a failure to recognise both the importance, in our system, of the statutory rules providing for early release and the close relationship between those rules and the core value which article 5 exists to protect.
>
> 17. The Convention does not require member states to establish a scheme for early release of those sentenced to imprisonment. Prisoners may, consistently with the Convention, be required to serve every day of the sentence

> passed by the judge, or be detained until a predetermined period or proportion of the sentence has been served, if that is what domestic law provides. But this is not what the law of England and Wales provided, in respect of long-term determinate prisoners, at the times relevant to these appeals. That law provided for a time at which (subject to additional days of custody imposed for disciplinary breaches) a prisoner must, as a matter of right, be released, and an earlier time at which he might be released if it was judged safe to release him but at which he need not be released if it was not so judged.
>
> 18. A number of grounds (economy and the need to relieve overcrowding in prisons) have doubtless been relied on when introducing pre-release schemes from determinate sentences such as those under consideration here. But one such consideration is recognition that neither the public interest nor the interest of the offender is well served by continuing to detain a prisoner until the end of his publicly pronounced sentence; that in some cases those interests will be best served by releasing the prisoner at the earlier, discretionary, stage; and that in those cases prisoners should regain their freedom (even if subject to restrictions) because there is judged to be no continuing interest in depriving them of it. I accordingly find that the right to seek early release, where domestic law provides for such a right, is clearly within the ambit of article 5…"

31. Applying this reasoning to the case of Clift Lord Bingham said this, at para 33:

> "When, in October 2002, the Secretary of Sate rejected the Parole Board's recommendation that Mr Clift be released on parole, discretionary lifers and HMP detainees had already been brought within the definitive jurisdiction of the Parole Board, and *Stafford v United Kingdom* (2002) 35 EHRR 1121, requiring the same procedure for mandatory lifers, had already been decided. The differential treatment of prisoners serving 15 years or more had, in my opinion, become an anomaly. That would not, in itself, be a ground for holding it to be unjustified. Anomalies are commonplace. But by 2002 it had, in my opinion, become an indefensible anomaly because it had

> by then come to be recognised that assessment of the risk presented by any individual prisoner, in the application of publicly promulgated criteria, was a task with no political content and one to which the Secretary of State could not (and did not claim to) bring any superior expertise. I would accordingly resolve this issue in favour of Mr Clift and against the Secretary of State."

32. Paragraphs 16 to 18 merit careful analysis. The critical question is the point at which the detention of a prisoner becomes, or may have become, unlawful under domestic law. It is at that point that article 5(1)(a) may no longer provide justification for the prisoner's detention and article 5(4) entitles the prisoner to a judicial challenge of the lawfulness of his continued detention. For most determinate prisoners it is the half way point. That is the point at which they are automatically entitled to release. Article 5(4) applies at that point. It is, of course, satisfied by the right to seek judicial review for the issue of whether the prisoner is entitled to release is cut and dried and can readily be ascertained by that process.

33. What of those determinate prisoners whose release depends upon the decision of the Parole Board? I consider that our domestic law entitles them to release provided that the criteria for their release are satisfied. Article 5.4 entitles them to judicial determination of that question and timely consideration by the Parole Board will satisfy the requirements of article 5.4. Thus I consider that *Johnson* and *O'Connell*, to which Lord Brown refers were rightly decided.

34. What then of the dwindling number of long term prisoners, such as Mr Clift and the respondent? I consider that they also have a right to release provided that the relevant criteria are satisfied and that article 5.4 applies to that right. This conclusion and that expressed in relation to *Johnson* and *O'Connell* assume, of course, that these criteria are justiciable.

A justiciable issue

35. Thus far I have not discussed the question of whether the criteria that govern the decision of whether a prisoner should be released on licence are justiciable. It would be surprising were they not, for the decision would then necessarily be arbitrary and Strasbourg would not

countenance that. In general there are no statutory criteria to which the Parole Board is required to have regard, albeit that section 247(3) of the Criminal Justice Act 2003 provides that the Parole Board must not direct the release of a prisoner serving an extended sentence unless "satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined". This reflects the fact that, as Lord Bingham observed in *Clift*, it is now recognised that the task of the Parole Board is to asses risk by the application of publicly promulgated criteria and that the task has no political content. Those criteria include the following extract from Directions issued in May 2004 to the Parole Board by the Secretary of State pursuant to section 32(6) of the Criminal Justice Act 1991:

> "In deciding whether or not to recommend release on license, the Parole Board shall consider primarily the risk to the public of a further offence being committed at a time when the prisoner would otherwise be in prison and whether any such risk is acceptable. This must be balanced against the benefit, both to the public and the offender, of early release back into the community under a degree of supervision which might help rehabilitation and so lessen the risk of re-offending in the future. The Board shall take into account that safeguarding the public may often outweigh the benefits to the offender of early release.
>
> 2. Before recommending release on parole licence, the Parole Board shall consider:
>
> (a) whether the safety of the public would be placed unacceptably at risk…."

36. Accordingly I conclude that there are justiciable criteria that govern whether a prisoner should be granted release on licence once he is eligible to be considered for this. I would hold that that dwindling category of prisoners of which the respondent is one is entitled under section 35(1) of the 1991 Act to release on licence after serving one half of the sentence provided that the criteria are satisfied. It may be that article 5 does not require our domestic law to provide that the initial decision whether or not to release a prisoner on licence must be made by a court. Arguably it could provide for the Secretary of State to make the decision provided that this remained open to review by a court that satisfied the requirements of article 5.4. The Parole Board is the tribunal that is best placed to satisfy those requirements. Inasmuch as section 35(1) of the 1991 Act requires the Parole Board to make its decision first and then permits the Secretary of State to take a different decision it

places the cart before the horse. This is contrary to the requirements of article 5.4. For this reason I would reject this appeal and endorse the declaration of incompatibility that has been made by the Court of Appeal.

LORD RODGER OF EARLSFERRY

My Lords,

37. I have had the advantage of considering a draft of the speech to be delivered by my noble and learned friend, Lord Brown of Eaton-under-Heywood. I agree not only with his conclusion but with his reasoning. Since he deals fully with both the English and Strasbourg cases, it would be pointless for me to go over the same ground. But, as your Lordships are not unanimous, I shall explain shortly how I see the position in the light of those cases.

38. Mr Black is serving five concurrent sentences of 20 years imprisonment and a concurrent sentence of two years, imposed on 26 July 1995. He is also serving a consecutive sentence of four years imprisonment imposed on 8 January 1996, making a total of 24 years. The sentences were imposed by independent judges after due consideration. The appellant's appeal against the four-year sentence was dismissed.

39. When these determinate sentences were passed, section 2 of the Criminal Justice Act 1991 ("the 1991 Act") applied. Subsection (2) provides that the custodial sentence is to be for such term as, in the opinion of the court, is commensurate with the seriousness of the offence, or the combination of the offence and other offences associated with it. The House must accordingly proceed on the basis that the custodial sentences imposed on the appellant were commensurate with the seriousness of the offences which he had committed.

40. Those sentences, imposed by way of punishment, constitute prima facie lawful authority for Mr Black's detention for a total period of 24 years. Providing there is nothing under the domestic law to make his continued detention in terms of the sentences unlawful, his detention is permitted by article 5(1)(a) of the European Convention.

41. Two provisions of the 1991 Act are relevant. First, by section 35(1), once a long-term prisoner such as Mr Black has served half his sentence, "the Secretary of State may, if recommended to do so by the [Parole] Board, release him on licence." Secondly, in terms of section 33(2), as soon as he has served two-thirds of his sentence, it is the duty of the Secretary of State to release him on licence.

42. Under the 1991 Act, the executive, in the shape of the Secretary of State, had, and has, nothing to do with fixing the length of the sentences which Mr Black is serving. That was all done by the courts. Their sentences authorise his detention until he has served two-thirds of the total period - at which point section 33(2) requires the Secretary of State to release him on licence. In the meantime section 35(1) gives the Secretary of State power to administer the courts' determinate sentences by authorising Mr Black's release on licence if the Parole Board recommends it and the Secretary of State thinks fit. That power must, of course, be exercised lawfully.

43. It is common ground that, having served half his sentence, Mr Black became eligible for consideration for release on licence on 30 June 2006. So, when, on 2 May, the Parole Board recommended that he should be released at that stage, the Secretary of State had to consider that recommendation. On 29 August the Secretary of State rejected it and refused to release him.

44. Mr Black brought the present proceedings for judicial review of the Secretary of State's decision, inter alia, on the ground that it was incompatible with his article 5(4) Convention rights. Kenneth Parker QC, sitting as a deputy High Court judge, dismissed the application. The Court of Appeal allowed Mr Black's appeal [2008] 3 WLR 845 in part, and granted a declaration that section 35 of the 1991 Act is incompatible with article 5(4), as it leaves the decision on release of determinate prisoners, who are serving 15 years imprisonment or more, to the Secretary of State.

45. The House must therefore proceed on the basis that the Secretary of State's decision not to order Mr Black's release was within his powers under section 35. The only question is whether the section itself is incompatible with article 5(4). The section cannot, of course, be incompatible with article 5(4) unless the article applies to the situation which the section covers. So the question comes to be whether article 5(4) gives a long-term prisoner, with a determinate sentence of more

than 15 years, the right to take legal proceedings, at the half-way stage of his sentence, to determine the lawfulness of his continued detention.

46. According to the constant jurisprudence of the European Court conveniently summarised by Lord Hope of Craighead in *R (Giles) v Parole Board* [2004] 1 AC 1, 30, para 40, the answer to that question is No. In 1995 and 1996, judges determined that it would be appropriate, and therefore lawful by virtue of section 2 of the 1991 Act, for Mr Black to be sentenced to be detained for a total of 24 years. In these circumstances, failing any fresh development which might make his detention unlawful, Mr Black's article 5(4) Convention right to have the lawfulness of his detention after conviction decided by a court was satisfied by the original sentencing procedures.

47. Is the mere fact that he has reached the half-way stage in his sentences a fresh development which might make his detention unlawful? Plainly not: his detention would not be unlawful after the half-way point and before the two-thirds point, unless the Secretary of State had ordered his release under section 35 and he remained in custody. In fact, however, the Secretary of State has decided that he should not be released. So he remains detained in terms of the original lawful sentences and has no right to be set free. Other things being equal, he will not have a right to be set free until he has served two-thirds of his sentence and section 33(2) applies to him. At that point, if he were not released on licence, he would indeed have an article 5(4) Convention right to bring proceedings to have the lawfulness of his detention determined. In English law he would bring habeas corpus proceedings to secure his release.

48. But that lies in the future. All that Mr Black had in 2006 was a domestic law right to take proceedings to ensure that the Secretary of State exercised his powers under section 35(1) lawfully. He duly exercised that right by raising these proceedings. The court found that the Secretary of State had acted lawfully; there is no appeal against that decision. But, even supposing the court had decided that the Secretary of State had exercised his power under section 35(1) unlawfully, Mr Black would still not have had a right to be released. His continued detention in terms of the sentences would have remained lawful - but the Secretary of State would have had to reconsider whether to release him on licence, in accordance with the Parole Board's recommendation.

49. Since the lawfulness of Mr Black's detention was determined by the original sentencing courts, article 5(4) had no application at the half-way stage when the Secretary of State was considering whether to release him. There is accordingly no basis for declaring that section 35(1) of the 1991 Act is incompatible with article 5(4). The Secretary of State's appeal must be allowed.

50. The Secretary of State for Justice wins. But, like Lord Brown, I find it hard to understand why he should wish to cling tenaciously to this last vestige of his power to determine when prisoners should be released, since she accepts that there can be no legitimate political input into the decision. The obvious thing would be for the Parole Board to decide when this small group of prisoners, which includes Mr Black, should be released - in the same way as it decides when other long-term prisoners are to be released.

BARONESS HALE OF RICHMOND

My Lords,

51. For the reasons given by my noble and learned friends, Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood, with which I entirely agree, I too would allow this appeal.

LORD CARSWELL

My Lords,

52. My noble and learned friend Lord Brown of Eaton-under-Heywood has set out in his opinion the facts and issues in this appeal and the statutory provisions and articles of the European Convention which require consideration. I gratefully adopt these and do not propose to repeat them.

53. The powers of the Secretary of State to determine when prisoners are to be released have been steadily narrowed over the last few years.

The progressive series of decisions which brought this about in respect of indeterminate sentences has been discussed by Lord Brown in para 66 of his opinion, to which I would refer. The principle which has driven this series is that in order to satisfy the requirements of article 5 of the Convention decisions on the release of prisoners in such cases should be taken by a judicial rather than an administrative body. The issue in the appeal before the House is whether the same principle governs a decision on the release of a prisoner sentenced to a determinate term after he has completed half of the term of the sentence.

54. The application of article 5 was summarised by Lord Hope of Craighead in *R (Giles) v Parole Board* [2003] UKHL 42, [2004] 1 AC 1, 24-25 at paras 25-26:

> "25. The general rule is that detention in accordance with a determinate sentence imposed by a court is justified under article 5(1)(a), without the need for further reviews of detention under article 5(4) … Article 5(1)(a) is concerned with the question whether the detention is permissible. Its object is to ensure that no one should be dispossessed of his liberty in an arbitrary fashion, and its provisions call for a narrow interpretation …
>
> 26. Article 5(4), on the other hand, is concerned with the need for the detention to be reviewed in order that it may be determined whether it is lawful in terms of domestic law and in terms of the Convention. Its purpose is to ensure that a system is in place for the lawfulness of the detention to be decided speedily by a court and for release of the detainee to be ordered if it is not lawful …"

55. The Court of Appeal were influenced by the clear trend in the ECtHR cases, followed in the domestic judgments of the United Kingdom courts, to require all decisions depriving a person of his liberty to be taken by a court and not by an administrative body. Mr Owen QC for the respondent placed some emphasis on the remarks of Lord Bingham of Cornhill and Lord Brown in *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54, [2007] 1 AC 484 that the Secretary of State's power to reject the recommendation of the Parole Board on the release of a prisoner on licence at the half way stage of his term is an indefensible anomaly. As Lord Bingham pointed out at para 33:

> "assessment of the risk presented by any individual prisoner, in the application of publicly promulgated criteria, [is] a task with no political content and one to which the Secretary of State could not (and did not claim to) bring any superior expertise."

56. Mr Pannick QC argued on behalf of the Secretary of State, however, that this anomaly is not material, because of the well-established Strasbourg principle that in the case of a determinate sentence fixed by a court at the close of judicial proceedings, the requirements of article 5(1) are satisfied and the supervision required by article 5(4) is incorporated in the decision itself: see the discussion by Lord Hope of Craighead in *Giles* at para 40. Lord Hope went on to say in that paragraph:

> " … where the responsibility for decisions about the length of the period of detention is passed by the court to the executive, the lawfulness of the detention requires a process which enables the basis for it to be reviewed judicially at reasonable intervals. This is because there is a risk that the link between continued detention and the original justification for it will be lost as conditions change with the passage of time. If this happens there is a risk that decisions which are taken by the executive will be arbitrary. That risk is absent where the length of the period of detention is fixed as part of its original decision by the court."

The issue in the present appeal is therefore whether a decision on the release of a long-term prisoner serving a determinate sentence is incorporated in the original sentencing decision or whether the link with that original sentencing decision has been broken, with the consequence that the question of his release must be considered by a judicial body.

57. None of the decisions of the European Court of Human Rights relates to the situation with which the present appeal is concerned and one has to reason by analogy from a series of judgments on different sets of facts. It is clear that those in *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443 and *E v Norway* (1990) 17 EHRR 30 – both discussed by Lord Brown at paras 68-69 -- lie on one side of the line. In each case the executive authority possessed a discretion over the time when the prisoner would be released, which was not fixed at the outset

by any judicial decision. On the other side are *Ganusauskas v Lithuania* (Application No 47922/99) (unreported) 7 September 1999 and *Brown v United Kingdom* (Application No 968/04) (unreported) 26 October 2004,. Each of these cases concerned the recall of a prison released on licence for breach of the conditions of his licence. The ECtHR held each application inadmissible, on the ground that the lawfulness of the detention was incorporated at the outset in the applicant's original trial and the appeal procedures against the conviction and sentence. In *Brown* the court said:

> "The lawfulness of his detention does not depend, in Convention law terms, on whether or not he ceases to be at risk of re-offending. The fact that the applicant before the end of the sentence may expect to be released on licence does not affect this analysis. When such a prisoner is recalled his detention is again governed by the fixed term imposed by the judge conforming with the objectives of that sentence and thus within the scope of article 5(1)(a) of the Convention."

58. I have referred to the anomaly constituted by the retention by the Secretary of State of the power to reject a recommendation for release made by the Parole Board. There appears to be no good reason for its retention and it may well be that the Secretary of State will now think it right to relinquish it. There is also strength in the argument that it is a fresh issue in the penal process, which is sufficient to break the link with the original sentence of imprisonment pronounced by the court. It does appear, however, from my consideration of the Strasbourg jurisprudence that the current of authority is against the respondent and in favour of the Secretary of State on this question. I do have some reservations, appreciating as I do the force of the considerations which prevailed with the Court of Appeal. On balance, however, I think that our courts should be slow to go beyond what the ECtHR has held and decide that the final decision on release cannot lawfully be left with the Secretary of State. For these reasons I would agree, though not without hesitation, that the appeal should be allowed and the respondent's application for judicial review should be dismissed.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

59. Are determinate sentence prisoners, once their parole eligibility date arrives, entitled by virtue of article 5(4) of the European Convention on Human Rights to a speedy judicial decision upon the lawfulness of any further period of detention? A trilogy of recent decisions of the Divisional Court and the Court of Appeal holds that they are:

> (1) The Court of Appeal in *R (Johnson) v Secretary of State for the Home Department* [2007] 1 WLR 1990, decided that an eight and a half months delay by the Parole Board in its consideration of Mr Johnson's case after he became eligible for parole at the halfway point of his seven year sentence breached article 5(4)'s requirement that the lawfulness of his continuing detention be determined "speedily", so that, provided only he could demonstrate that an earlier consideration of his case would have resulted in his earlier release, he was entitled to compensation under article 5(5).
>
> (2) The Divisional Court in *R (O'Connell) v Parole Board* [2008] 1 WLR 979 held that article 5(4) applies whenever a question arises under the early release provisions relating to determinate sentences, the questions arising there being whether the Parole Board was an independent body and whether its procedures with regard to oral hearings satisfied the requirements of the article.
>
> (3) The Court of Appeal in the present case ([2008] EWCA 359; [2008] 3 WLR 845) declared section 35(1) of the Criminal Justice Act 1991 ("the 1991 Act")—providing as it does for the Secretary of State to have the final say as to the release on licence of prisoners serving determinate sentences of 15 years or longer—to be incompatible with article 5(4)'s requirement that such decisions be taken by "a court".

60. The Secretary of State submits that all these cases were wrongly

decided. It is his central contention that in all determinate sentence cases the requirements of article 5(4) are satisfied once and for all when the original sentence is imposed following conviction and that there can be no right to any further article 5(4) determination unless and until there arise "new issues affecting the lawfulness of the detention" (*Weeks v United Kingdom* (1987) 10 EHRR 293, 314, para 56; *Thynne, Wilson and Gunnell v United* Kingdom (1990) 13 EHRR 666, 691, para 68). The respondent submits in reply that where the legislation governing release on licence makes a prisoner eligible for parole at a particular point in his nominal determinate sentence, it becomes unlawful to detain him further unless an independent body, satisfying the requirements of "a court", decides that there remains an unacceptable risk of his re-offending so as to justify his continued detention.

61. In the case of all indeterminate sentence prisoners (lifers for short) it is now well established that, once the tariff period of the sentence has been served, the prisoner is entitled to the judgment of a court (for this purpose the Parole Board) as to his suitability for parole, and to immediate release if the Board so decides. There is, submits the respondent, no material distinction between the position of lifers at the end of their tariff period and that of determinate sentence prisoners who have reached their parole eligibility dates. That critically is the issue for your Lordships' determination upon this appeal.

Article 5

62. Article 5 provides so far as material:

> "(1) 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.
>
> . . .
>
> (4) 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.
>
> (5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."

The facts

63. The respondent has a long history of offending, both in this country and in Denmark, Switzerland and Portugal. On 26 July 1995 he was sentenced at the Old Bailey to 20 years imprisonment for offences of false imprisonment, kidnapping, conspiracy to kidnap and robbery (with two years imprisonment concurrent for possessing a firearm with intent to commit an indictable offence). A few months later, on 8 January 1996, he was sentenced to a consecutive term of four years imprisonment for the offences of escaping from custody and assault with intent committed whilst he was being conveyed from the Old Bailey to HMP Belmarsh. Effectively, therefore, he is serving a determinate sentence of 24 years.

64. Having regard to the time spent in custody before trial, the respondent's parole eligibility date (the halfway point of his sentence) was 30 June 2006. Shortly before that, on 2 May 2006, the Parole Board recommended his release on licence. On 29 August 2006, however, the Secretary of State rejected that recommendation and refused to release him. The respondent accordingly remains in custody and, subject to these proceedings or some favourable future decision on release, will do so until he has served two thirds of his sentence, 30 June 2010 (four years after he became eligible for parole).

The legislation

65. The legislation governing release on licence has changed several times down the years. Nowadays the great majority of determinate sentence prisoners are released on licence automatically at the halfway point of their sentences, the Parole Board having ceased to play any part in the process. Mostly the Board are concerned only with lifers and those serving extended sentences. There remain, however, a dwindling number of long-term prisoners, including the respondent, whose release on licence continues to be governed by section 35(1) of the 1991 Act:

> "After a long-term prisoner [a prisoner serving a determinate term of four years or more] has served one-half of his sentence, the Secretary of State may, if recommended to do so by the Board, release him on licence."

I say a dwindling number because subsequent legislation has very substantially reduced the number of those whose release is still subject to the Secretary of State's discretion. In the first place, pursuant to section 50 of the 1991 Act and the Parole Board (Transfer of Functions) Order 1998 (SI 1998/3218), for the word "may" in section 35(1) of the 1991 Act was substituted the word "shall" with regard to all long-term prisoners save those serving terms of 15 years or more. In other words, with regard to those serving between 4 and 15 year terms the Board was given the final say. Secondly, pursuant to Chapter 6 of the Criminal Justice Act 2003, even those serving 15 years or more became entitled to automatic release at the halfway point unless (as in the respondent's case) their offences pre-dated 4 April 2005. Thirdly, by virtue of the Criminal Justice and Immigration Act 2008, even those whose offences pre-dated 4 April 2005 became entitled to release at the halfway point unless their parole eligibility date fell before 9 June 2008 (as in the respondent's case) or their sentence was for certain specified sexual or violent offences (as additionally was so in the respondent's case). There are, we were told, some 440 prisoners serving determinate sentences of 15 years or more whose release still depends upon the Secretary of State agreeing to act on a favourable recommendation from the Parole Board—some 350 excluded from automatic release because their parole eligibility date preceded 9 June 2008 (when the 2008 Act came into force) and who therefore had already been the subject of adverse decisions either by the Parole Board or by the Secretary of State; some 90 excluded because of the sexual or violent nature of their offending.

The Strasbourg case-law

66. All indeterminate sentences include a tariff period fixed to represent the length of time for which the prisoner is to be detained as punishment for his offending and (save in those very few cases which justify a whole-life penal tariff) a post-tariff period during which continued detention depends upon whether the prisoner can safely be released. The Strasbourg Court decided—in relation first to discretionary life prisoners (*Thynne, Wilson and Gunnell* 13 EHRR 666), then to those detained during Her Majesty's pleasure (*Hussain v United Kingdom* (1996) 22 EHRR 1), and finally to mandatory life prisoners (*Stafford v United Kingdom* (2002) 35 EHRR 1121)—that both stages of these life sentences had to be decided judicially rather than by the executive. The fixing of the tariff is part of the sentencing exercise and so engages article 6 of the Convention, requiring determination by "an independent and impartial tribunal established by law" (that critically was the issue arising in *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837). Similarly the

decision on release in the post-tariff period is also one to be taken by "a court" for the purposes of article 5(4). As the court said in *Stafford* (para 87):

> "After the expiry of the tariff, continued detention depends on elements of dangerousness and risk associated with the objectives of the original sentence of murder (sic). These elements may change with the course of time, and thus new issues of lawfulness arise requiring determination by a body satisfying the requirements of article 5(4). It can no longer be maintained that the original trial and appeal proceedings satisfied, once and for all, issues of compatibility of subsequent detention of mandatory life prisoners with the provisions of article 5(1) of the Convention."

67. Throughout its case law, however, the Strasbourg Court has consistently appeared to treat determinate sentences quite differently, time and again contrasting them with the indeterminate cases. This is illustrated by the earlier part of para 87 of the court's judgment in *Stafford* (just cited):

> "The Secretary of State's role in fixing the tariff is a sentencing exercise, not the administrative implementation of the sentence of the court as can be seen in cases of early or conditional release from a determinate term of imprisonment."

As had long ago been said in *De Wilde, Ooms and Versyp v Belgium (No 1)* (1971) 1 EHRR 373, 407, para 76:

> "[W]hen the decision [depriving a person of his liberty] is made by a court at the close of judicial proceedings . . . the supervision required by article 5(4) is incorporated in the decision; this is so, for example, where a sentence of imprisonment is pronounced after 'conviction by a competent court' (article 5(1)(a) of the Convention)."

Thus it was that in *Mansell v United Kingdom* (Application No 32072/96) (unreported) 2 July 1997, the European Commission of Human Rights rejected as inadmissible a complaint by a prisoner, whose long-term determinate sentence had been imposed under section 2(2)(b) of the 1991 Act (providing for longer than commensurate custodial sentences to protect the public), that he was entitled to an oral hearing by the Parole Board of his application for release on licence. The Commission held that:

> "the judicial control required by article 5(4) of the Convention was incorporated in the original conviction and sentence, and that article 5(4) of the Convention does not apply to the parole proceedings in which the applicant was denied an oral hearing."

Similarly in *Ganusauskas v Lithuania* (Application No 47922/99) (unreported) 7 September 1999, the European Court of Human Rights rejected as inadmissible a complaint by a determinate sentence prisoner about an Appeal Court's suspension of a grant of conditional release, the Court again saying that the necessary supervision of the lawfulness of detention was incorporated in the original conviction and sentence.

68. All these decisions (and the Court's later admissibility decision in *Brown v United Kingdom* (Application No 968/04) (unreported) 26 October 2004 to which I shall have to return) are strongly relied upon by Mr Pannick QC for the appellant Secretary of State. Mr Owen QC for the respondent, however, submits that no such invariable principle is to be found in the Strasbourg case law and he prays in aid in particular the Court's decisions in *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443 and *E v Norway* (1990) 17 EHRR 30. Mr Van Droogenbroeck was a recidivist, sentenced to two years imprisonment for theft and subjected to a further order that he be "placed at the government's disposal" for 10 years pursuant to a "Social Protection" Act. The Court found a violation of article 5(4), stating at para 47 of its judgment (p 460):

> "In practice, the court's decision provides the Minister of Justice 'with initial authority for detention for a period . . .whose actual duration'—'from nothing to 10 years'—is striking for its relatively indeterminate character and will vary, in principle, according to the treatment required by

> the offender and the demands for the protection of society. . . . This system is fundamentally different from that—on which the court does not have to express an opinion on this occasion—of the conditional release of prisoners sentenced by a court to a period of imprisonment imposed by the court as being appropriate to the case."

69. Mr E was an untreatable psychopath, sentenced to imprisonment for offences of violence and in addition made subject to an order under the Norwegian Penal Code allowing the Ministry of Justice to impose a form of preventive detention for a specified maximum period. At para 51 of its judgment (p 51) the court noted that such measures were "to be terminated when they are no longer regarded as necessary, but may be resumed if there is reason to do so", and at para 52 continued:

> "[T]he Ministry of Justice has a wide discretion in deciding which security measure is to be imposed and for how long. In fact, this system shares a number of features with the Belgian system in regard to recidivists and habitual offenders which was at issue in the *Van Droogenbroeck* case. Under such systems the courts cannot at the time of their decisions do more than assess how the person concerned will develop in the future. The authorities, on the other hand, through and with the assistance of their officers, can monitor that development more closely and at frequent intervals."

It was held, at para 53, that article 5(4) required a court periodically to determine "whether the Ministry of Justice was entitled to hold that detention remained consistent with the object and purpose . . . of the Penal Code".

70. A further Strasbourg decision relied on by Mr Owen, *Gebura v Poland* (Application No 63131/00) (unreported) 6 March 2007, I find unhelpful. It decides no more than that, once a final right to conditional release has been established, the prisoner can no longer be lawfully detained. The position there was as if, under UK law, the Secretary of State had actually granted parole, or the prisoner had reached the two-thirds point in his sentence when he became automatically entitled to parole. Manifestly *habeas corpus* would go to free any prisoner detained beyond such time. Small wonder that the ECtHR said, at para 32, that Mr Gebura's "continued detention following the final decision

on his conditional release cannot be considered 'lawful' under article 5(1)(a)." Article 5(4) simply never came into it.

The English case law

71. Three cases in your Lordships' House call for particular mention although, as I shall explain, none of them to my mind is to be regarded as decisive of the issue now before the House. *R (Giles) v Parole Board* [2004] 1 AC 1 (just as the application to the Commission in *Mansell*—see para 67 above) concerned a longer than commensurate sentence of seven years imprisonment imposed under section 2(2)(b) of the 1991 Act in respect of which it was unsuccessfully argued that the prisoner was entitled to an article 5(4) compliant decision upon his case as soon as he had served the part of his sentence imposed as punishment (ie the commensurate part). Following that, his argument ran, he was entitled to the substantive and procedural rights enjoyed by a post-tariff discretionary life prisoner. In rejecting the argument, Lord Bingham of Cornhill said (para 10) that the "primary target" of article 5(4) "is deprivation of liberty which is arbitrary, or directed or controlled by the executive" but that a section 2(2)(b) sentence "left nothing to the executive, since the Parole Board, whose duty it is to consider release at the halfway stage of the sentence, is accepted to be a judicial body." Arguably implicit in that, submits Mr Owen, is that once the halfway stage *is* arrived at, article 5(4) is engaged (why otherwise would the Board's status as a judicial body have been relevant?) and that the case decides only that it is engaged no earlier in a section 2(2)(b) case. As against that, Mr Pannick points to a number of dicta in the speeches which appear to accept the correctness of the Commission's ~~decision~~ approach in *Mansell* and to suggest, consistently with the repeated statements of the Strasbourg Court, that article 5(4) can have no part to play in a determinate sentence case once sentence is passed. As Lord Hope of Craighead put it at para 26 (p 25):

> "The general rule, as I have said, is that detention in accordance with a determinate sentence imposed by a court is regarded as justified under article 5(1)(a) without the need for any further reviews of the detention to be carried out under article 5(4). The question which [counsel] has raised is whether that rule, which undoubtedly applies to determinate sentences imposed under subsection (2)(a), can be applied also to determinate sentences imposed under subsection (2)(b)."

72. *R (West) v Parole Board* [2005] 1 WLR 350 concerned the application of article 5(4) to the process of recalling to prison two determinate sentence prisoners previously released on licence. It had been held by a majority in the Court of Appeal in *West* that the criminal limb of article 6 had no application to a revocation hearing by the Parole Board (no article 5 argument having been advanced), and subsequently by the Court of Appeal in *R (Smith) v Parole Board (No 2)* (conjoined with West on appeal to the House of Lords) that neither article 5 nor the civil limb of article 6 applied to such a hearing. Following these decisions and before the appeals came before the House, the ECtHR in *Brown v United Kingdom*, 26 October 2004) held inadmissible an application based on article 5 brought by a prisoner released from a determinate sentence and later recalled for breach of his licence conditions precisely as *West* and *Smith* had been. Rejecting the article 5(1) complaint the court said:

> "Discretionary and mandatory lifers, after the expiry of the punitive element of their sentence, are detained on the basis of risk—the justification for their continued detention is whether it is safe for the public for them to live in the community once more. Similarly, the recall of restricted patients is based on factors arising from their mental health. The applicant however has been sentenced to a fixed prison term by a court as the punishment for his offence. The lawfulness of his detention does not depend, in Convention law terms, on whether or not he ceases to be at risk of re-offending. The fact that the applicant before the end of the sentence may expect to be released on licence does not affect this analysis. When such a prisoner is recalled his detention is again governed by the fixed term imposed by the judge conforming with the objectives of that sentence and thus within the scope of article 5(1)(a) of the Convention."

Rejecting also the article 5(4) complaint, the court said:

> "The court recalls that where an applicant is convicted and sentenced by a competent court to a determinate term of imprisonment for the purposes of punishment, the review of the lawfulness of detention is incorporated in the trial and appeal procedures (see, *mutatis mutandis*, *V v United Kingdom*; *Stafford v United Kingdom* [references

> omitted]). No new issues of lawfulness concerning the basis of the present applicant's detention arose on recall and no right to a fresh review of the lawfulness of his detention arose for the purposes of article 5(4) of the Convention."

Brown's application was held to be manifestly ill-founded and was rejected.

73. The central complaint made by *West* and *Smith* was that the Parole Board had failed to allow them an oral hearing when deciding whether or not to recommend them for re-release after their recall (any such recommendation by the Board being binding on the Secretary of State). In seeking to resist their appeals the Board naturally placed considerable reliance upon Strasbourg's rejection of Brown's case. The House nevertheless allowed the appeals, having regard both to the common law duty of procedural fairness and to article 5(4). Lord Bingham referred to *Brown* (and *Ganusauskas*) in that part of his opinion which rejected the appellant's case under article 5(1) but not in his discussion of the article 5(4) argument. Rather in that connection he made no mention of *Brown* but referred instead to the Strasbourg decisions in *Van Droogenbroeck; Weeks; Thynne, Wilson and Gunnell;* and *E v Norway* before concluding (at para 37):

> "Convention jurisprudence establishes that the judicial review of the lawfulness of detention must be wide enough to bear on those conditions which, under the Convention, are essential for the lawful detention of a person in the situation of the particular detainee."

Plainly, however, that decision was reached in the very specific context of the recall to prison of prisoners released on licence for breach of their licence conditions. (In each case the appellant had in fact been released automatically after serving the requisite proportion of his sentence and thus, as Lord Bingham pointed out at para 30, had "a statutory right to be free". Although, however, Lord Bingham described this as "noteworthy", I do not myself understand the opinions as a whole to suggest that article 5(4) would call for any different conclusion in the case of those recalled after discretionary, rather than automatic, release on licence.)

74. Inescapably it follows from *West* that contrary to the view expressed in the Strasbourg Court's admissibility decision in *Brown*, a prisoner's recall for breach of his licence conditions *does* raise, "new issues affecting the lawfulness of the detention" such as to engage article 5(4). And that seems to me clearly correct: it would not be lawful to recall a prisoner unless he *had* breached his licence conditions and there could well be an issue as to this. I wonder, indeed, if the ECtHR would have decided *Brown* as they did had it followed, rather than preceded, the House's decision in *West*. Be that as it may, recall cases certainly so far as domestic law goes, are to be treated as akin both to lifer cases in the post-tariff period and to the *Van Droogenbroeck*-type of case where, upon the expiry of the sentence, a prisoner is subjected to an executive power of preventive detention. And all these cases, submits Mr Owen, weaken the Secretary of State's contention that there exists a core principle of Convention law that article 5(4) cannot be engaged during the term of a determinate sentence. That said, however, there are passages in Lord Bingham's speech in *West* clearly *un*helpful to Mr Owen's argument, emphasising as they do the essentially punitive purpose of a determinate sentence—see in particular para 22 ("the predominant purpose of the sentence will be punitive and the sentence which the court imposes will represent the period which the court considers that the defendant should spend in custody as punishment for the crime or crimes of which he has been convicted") and para 40 ("the primary purpose of [a determinate] sentence is punitive").

75. The third House of Lords decision to which I must refer is *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484 where the appellant, just as Mr Black in the present case, was a prisoner serving a longer than 15 year (there an 18 year) determinate sentence who was refused parole by the Secretary of State notwithstanding a positive recommendation by the Board. When advancing the challenge on behalf of Mr Clift, Mr Owen had submitted, not that article 5(4) is directly engaged with regard to the parole process in such cases, but only that the Secretary of State's part in it violates article 14 of the Convention read with article 5. The argument was that, compared to life sentence prisoners and those serving less than 15 year sentences, those serving 15 years or more are discriminated against under the early release regime.

76. Although the appeal in *Clift* failed—because those serving sentences of any particular length cannot be regarded as having the necessary "status" for article 14 purposes—the House made very clear its view that the Secretary of State's continuing discretion in the case of

15 year and longer sentences cannot be objectively justified. Lord Bingham (para 33) described this as "an indefensible anomaly" since "it had by [2002] come to be recognised that assessment of the risk presented by any individual prisoner, in the application of publicly promulgated criteria, was a task with no political content and one to which the Secretary of State could not (and did not claim to) bring any superior expertise." I myself pointed out (para 68) that since 2002 it had become more starkly anomalous still having regard to the 2003 Act (see para 65 above), and added that "it is difficult to see why the Secretary of State would wish to perpetuate it". The subsequent enactment of the 2008 Act to my mind leaves the problem still unresolved albeit in respect of fewer prisoners.

77. It by no means follows, however, that on a true view of the Convention, article 5(4) has always been directly engaged whenever a determinate sentence prisoner reaches his parole eligibility date and that this has simply been overlooked, or the law misunderstood, whilst cases such as *West* and *Clift* were being litigated. (If, of course, Mr Owen is right in his present argument, *Clift's* challenge should have succeeded and *West's* success would have been *a fortiori* rather than have depended upon his recall to prison.) Indeed, so far from the House's criticism in *Clift* of the Secretary of State's continuing discretion supporting Mr Owen's article 5(4) argument, there are again passages in the opinions appearing to undermine it. Consider, for example, this from para 16 of Lord Bingham's speech:

> "I would agree that the sentences passed on the respective appellants satisfied article 5(1)(a) and provided lawful authority for the detention of the appellants until such time as, under domestic law, their detention became unlawful. *Giles* [2004] 1 AC 1 established that a prisoner sentenced to a determinate term of years cannot seek to be released at any earlier time than that for which domestic law provides. During the currency of a lawful sentence, article 5(4) has no part to play."

But immediately thereafter Lord Bingham recognised:

> "both the importance, in our system, of the statutory rules providing for early release and the close relationship

> between those rules and the core value which article 5 exists to protect."

And there is an echo of that at para 66 of my own opinion:

> ". . . the core value protected by article 5 is liberty and, where the penal system includes a parole scheme, liberty is dependent no less upon the non-discriminatory operation of that than on a fair sentencing process in the first place."

Considerations and conclusions

78. As already noted, the focus of Mr Owen's argument in *Clift* was on article 14 discrimination rather than the direct application of article 5(4). Given, however, the critical part played by the parole scheme in determining how long a determinate sentence prisoner will in fact remain in custody, it is not difficult to suggest an equal need to operate that scheme judicially as to have a proper initial sentencing process.

79. Nor is it difficult to recognise the force of the suggested close analogy between the position of lifers and that of long-term determinate sentence prisoners with regard to release on licence. Assume two defendants convicted of an identical crime, one sentenced to a determinate term of 14 years imprisonment, the other (because the judge feels unable to assess his future dangerousness) to a discretionary life sentence with an order pursuant to section 82A of the Powers of Criminal Courts (Sentencing) Act 2000 (as inserted by section 60 of the Criminal Justice and Court Services Act 2000) that the "early release provisions" should apply to him after seven years (half the appropriate notional determinate sentence as routinely now specified under section 82A following *R v Szczerba* [2002] 2 Crim App Rep (S) 387). The latter, all agree, is entitled at the seven year point to an article 5(4) compliant decision by the Parole Board which, if favouring release, binds the Secretary of State. Why should that not be so too in the case of the 14 year prisoner who also becomes eligible for parole at the seven year point? Is there not otherwise, as Waller LJ suggested in *Johnson* [1997] 1 WLR 1990, para 28, an "evident incongruity" between the two cases? Is there not perhaps this further incongruity too: the Secretary of State's directions to the Parole Board regarding the release of lifers

stipulate as the test "the level of risk to life and limb"(Directions to the Parole Board under section 32(6) of the Criminal Justice Act 1991. Issued August 2004); the equivalent directions as to determinate sentence prisoners require the Board to "consider primarily the risk to the public of a further offence [not necessarily of violence] being committed at a time when the prisoner would otherwise be in prison," seemingly a more demanding test for the prisoner to satisfy. (Directions to the Parole Board under section 32(6) of the Criminal Justice Act 1991. Issued May 2004.) Considerations such as these to my mind represent the strength of Mr Owen's case. But as I shall come to explain it has its weaknesses too.

80. The core reasoning in the Court of Appeal's decision in the present case [2008] 3 WLR 845 appears at para 17 of Latham LJ's leading judgment:

> "[Section 35] leaves the decision as to release in the hands of the executive, and is therefore capable of being applied arbitrarily which is the mischief at which article 5(4) of the Convention is directed."

That mirrored the views earlier and more fully expressed by the learned Lord Justice in *O'Connell* [2008] 1 WLR 979, at para 14:

> "It seems to me . . . that the question as to whether or not article 5(4) is engaged is not answered by any formal analysis of the original order of the court in cases such as the present. The question is whether, bearing in mind its purpose, namely to prevent arbitrariness, it has a function to perform in the particular circumstances of the case in question. In the present case, the decision as to whether or not to direct release is critical to the claimant's entitlement to release after he has served one half of the custodial period. That decision is capable of being an arbitrary decision unless controlled by a mechanism which is article 5(4) compliant. In other words there is a clear purpose to be served by the article in this context, in exactly the same way as it has a function to perform in the case of indeterminate sentences."

That in turn reflected Waller LJ's approach in *Johnson* [2007] 1 WLR 1990, para 29 that article 5(4) applies in these cases "because there is a risk, unless the sentence is kept under review, of [the] sentence becoming arbitrary".

81. Cogently though these judgments are reasoned, and broadly sympathetic though I am to the conclusions they arrive at, I have finally come to regard them as mistaken. In the end they seem to me to involve widening the reach of article 5(4) beyond its proper limits, certainly beyond its hitherto recognised scope. Article 5(4) cannot be held to apply merely because it would be useful if it did—because "it has a function to perform", "a clear purpose to be served" (*O'Connell* [2008] 1 WLR 979, para 14). There is suggested to be a risk of arbitrariness in the operation of the parole system if the Secretary of State can overrule the Parole Board on the question of risk. But the Secretary of State's decision is, of course, judicially reviewable and, if found arbitrary or irrational, it will be struck down. There was, indeed, an irrationality challenge in this very case but it failed before the judge and permission to appeal was refused in respect of it. There is nothing intrinsically objectionable (certainly in Convention terms) in allowing the executive, subject to judicial review, to take the parole decision, notwithstanding that it involves rejecting another body's recommendation. In one sense it may be said to be putting the cart before the horse. And, as we said in *Clift*, it is indefensibly anomalous. But it is not contrary to article 5(4).

82. There was no need for the Parole Board to have been involved in the process at all: a state could perfectly lawfully, and consistently with the Convention, leave the entire question of release, whether absolutely or on licence, and whether throughout the sentence or only after a given period, solely to the executive. Does then the fact that the UK has chosen to give the Parole Board a role in the process and statutory directions as to how to approach that role, and has chosen to fix precisely the period within a determinate sentence during which the prisoner is to be considered for parole (the period before which he cannot be released and after which he must be released), mean that article 5(4) is necessarily thereby engaged so that the Board's decision must be final?

83. In my judgment not. The essential contrast struck by the ECtHR is between on the one hand "the administrative implementation of the sentence of the court", for example decisions regarding "early or conditional release from a determinate term of imprisonment" (para 87 of the court's judgment in *Stafford* 35 EHRR 1121 set out at para 67

above), and on the other hand "fixing the tariff" and later determining the length of post-tariff detention in life sentence cases. The administrative implementation of determinate sentences does not engage article 5(4); the decision when to release a prisoner subject to an indeterminate sentence does.

84. Cases such as *Van Droogenbroeck* 4 EHRR 443 and *E v Norway* 17 EHRR 30 to my mind ultimately weaken, not strengthen, the respondent's argument. As the court observed in *Van Droogenbroeck* (see para 68 above), the detention provided for there was "striking for its relatively indeterminate character"—analogous therefore to a life sentence case and "fundamentally different from" a determinate sentence case when considering the impact of article 5 on decisions whether or not to release. In the final analysis, it seems to me one thing to say that "new issues affecting the lawfulness of the detention" (Strasbourg's core and oft repeated touchstone for determining when article 5(4) is engaged) arise when assessing dangerousness in the post-tariff period of a life sentence (there being otherwise no finite end to a term which, everyone agrees, in the great majority of cases was never meant to last for life); quite another to apply the same approach to the release of determinate sentence prisoners.

85. Certainly nothing in the Strasbourg jurisprudence affords any support for Mr Owen's contention that the two categories should be assimilated and, even were I to conclude that the ECtHR might now be prepared, notwithstanding its earlier dicta and admissibility decisions on the point, to extend the reach of article 5(4) to encompass also determinate sentence prisoners once they become eligible for parole, I would feel bound, consistently with the approach dictated by *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, 350, para 20 (and the many subsequent endorsements of that approach), to leave any such development to the ECtHR itself.

Result

86. In the result I would allow the Secretary of State's appeal, set aside the Court of Appeal's declaration of incompatibility, and restore the order of Kenneth Parker QC, sitting as a deputy High Court judge in the Administrative Court, dismissing the respondent's judicial review application.