HOUSE OF LORDS SESSION 2004–05
[2005] UKHL 1

on appeal from:[2003] EWCA Civ 1269
[2002] EWCA Civ 1641

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Regina *v.* Parole Board (Respondents) *ex parte* Smith (FC) (Appellant)
Regina *v.* Parole Board (Respondents) *ex parte* West (FC) (Appellant)
(Conjoined Appeals)

ON
THURSDAY 27 JANUARY 2005

The Appellate Committee comprised:

Lord Bingham of Cornhill
Lord Slynn of Hadley
Lord Hope of Craighead
Lord Walker of Gestingthorpe
Lord Carswell

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LORD BINGHAM OF CORNHILL

My Lords,

1. These appeals concern the procedure to be followed by the Parole Board when a determinate sentence prisoner, released on licence, seeks to resist subsequent revocation of his licence. The appellants contend that such a prisoner should be offered an oral hearing at which the prisoner can appear and, either on his own behalf or through a legal representative, present his case, unless the prisoner chooses to forgo such a hearing. They base their argument on the common law and on articles 5 and 6 of the European Convention, relying on both the criminal and civil limbs of article 6. The respondent Parole Board accepts that in resolving challenges to revocation of their licences by determinate sentence prisoners it is under a public law duty to act in a procedurally fair manner. It accepts that in some cases, as where there is a disputed issue of fact material to the outcome, procedural fairness may require it to hold an oral hearing at which the issue may be contested. It accepts, through leading counsel, that it may in the past have been too slow to grant oral hearings. But it strongly resists the submission that there should be any rule or presumption in favour of an oral hearing in such cases, contending that neither the common law nor the European Convention requires such a rule or such a presumption.

Justin West: the facts

2. The appellant West was sentenced to 3 years' imprisonment for affray on 27 October 2000. He was thus a short-term prisoner within the meaning of section 33(5) of the Criminal Justice Act 1991, and by virtue of section 33(1) of the Act the Secretary of State was obliged to release him on licence once he had served one-half of his sentence. In the ordinary way, his licence would have remained in force until the date on which he would (but for his release) have served three-quarters of his sentence: section 37(1).

3. The appellant, having spent some time in custody before sentence, was duly released on licence on 6 August 2001. His licence was due to expire on 7 May 2002. His licence included terms that he should place himself under the supervision of any nominated probation officer; should keep in touch with the officer as instructed; should live at an address approved by the officer and notify the officer in advance of any change of address; and should be of good behaviour and not commit any offence or take any action which would jeopardise the objectives of his supervision. He was informed in writing that he must comply with the conditions of the licence and that the objectives of the supervision were to protect the public, to prevent re-offending and to achieve his successful re-integration into the community. He was warned in writing that if he failed to comply with the requirements of his probation supervision or otherwise posed a risk to the public he would be liable to have his licence revoked and be recalled to custody until the date on which his licence would otherwise have expired.

4. On 22 August 2001 the appellant's licence was revoked and he was recalled to prison by the Secretary of State for the Home Department acting on the recommendation of the Parole Board under section 39(1) of the 1991 Act. The Board was prompted to make its recommendation by the appellant's probation officer, who was supported by her superior. The reasons given were that the appellant had breached the conditions of his licence by failing to keep in touch with his probation officer in failing to keep an appointment on 20 August without giving a reasonable explanation; by failing to live regularly at his approved address; and by visiting the hostel address of his former partner, allegedly assaulting her, and being suspected of kicking in a door at her hostel.

5. The appellant's solicitors made brief written representations against his recall to prison under section 39(3)(a) of the 1991 Act. They gave an explanation of the appellant's failure to keep the appointment, stated that he had only spent one night away from his approved address, denied that he had assaulted his ex-partner and explained that he had broken open the door to prevent his ex-partner harming herself, as she had threatened. It was denied that the incident at the hostel had involved the commission of any crime. The solicitors offered to substantiate the appellant's account and suggested that an oral hearing would be appropriate, since there were issues of fact and witnesses would be needed if the Board proposed to resolve them.

6. The Parole Board considered the appellant's representations on 2 October 2002 but rejected them. It noted his admissions concerning the appointment and the ex-partner but said that it did not accept his explanations and noted that he had, on his own admission, spent a night away from his approved address. It also noted that the appellant had been seen drinking at the hostel, a matter not put to him. The Board took the view that his behaviour, taken as a whole, indicated a poor sense of judgment and a propensity for acting in a way which was incompatible with a continuing licence: the appellant served 8½ months in prison during the period of recall.

7. His broadly-based application for judicial review of the Parole Board's decision was dismissed by Turner J on 26 April 2002: [2002] EWHC (Admin) 769. On appeal, his case was advanced on much narrower grounds, but the Court of Appeal by a majority (Simon Brown and Sedley LJJ, Hale LJ dissenting) dismissed his appeal: [2002] EWCA Civ 1641, [2003] 1 WLR 705.

Trevor Smith: the facts

8. On 8 May 1998 the appellant Smith was convicted of rape and of making threats to kill. He was sentenced to 8 years' imprisonment, reduced on appeal to 6½ years'. He was thus a long-term prisoner within the meaning of section 33(5) of the 1991 Act. By virtue of section 35(1) of that Act, he became eligible for release on licence by the Secretary of State after serving one-half of his sentence, if the Parole Board so recommended. By virtue of section 33(2) of the Act, the Secretary of State was obliged to release him on licence after he had served two-thirds of his sentence. This was his "non-parole date", the date on which he was entitled to be released. In the ordinary way, his

licence would have remained in force until the date on which he would (but for his release) have served three-quarters of his sentence: section 37(1). But in this case, because the appellant had been sentenced for a sexual offence, the trial judge made an order under section 44 of the Act, the effect of which was to extend the licence period to the end of the appellant's sentence.

9. On 23 October 2000 the Parole Board refused the appellant's first application for parole. It gave written reasons for its decision, referring to the serious nature of the appellant's offences, his past record of violence, his refusal to undertake courses in prison to address his offending behaviour, his use of class A drugs in prison, his failing of a recent mandatory drugs test and his complete lack of insight.

10. The appellant was released on licence on 7 November 2001, which (taking account of time spent in custody before sentence) was his non-parole date. His licence contained the same conditions as that of the appellant West, save that it named a probation hostel at which he was to live and named a psychiatrist upon whom he was to attend.

11. The appellant lived at the named hostel. Two weeks after his release he was tested for drugs and tested positive for cocaine, benzodiazepine and methadone. He admitted the use of cocaine but denied using the other drugs. He was sent a warning letter on 23 November 2001.

12. On 10 December 2001 the appellant moved at his own request, and with the consent of his probation officer, to a different hostel. On 15 January 2002 he tested positive for cocaine and, three days later, for cocaine and opiates.

13. On 25 January 2002 the appellant's supervising probation officer, with the support of his superior, recommended the revocation of the appellant's licence. He based this recommendation on the appellant's drug use and the risk he thereby presented to the community. It was acknowledged that in every other respect the appellant had complied with his licence conditions, and had kept appointments with the psychiatrist, but the psychiatrist was concerned about the effect of drug abuse, and withdrawal from drugs, on the appellant's personality. The probation officer was worried about the effect of powerful drugs on a man whom he considered to be "volatile, impressionable and potentially

dangerous". He was also concerned about his criminal associations in the drug world.

14. The Secretary of State referred the recommendation to the Parole Board to decide whether it should recommend revocation of the appellant's licence under section 39(1) of the 1991 Act. On 4 February 2002 the Parole Board recommended revocation. The Secretary of State accepted this recommendation and recalled the appellant to prison on 6 February 2002. The written reason for revocation given to him was his breach of his licence conditions in testing positive for drugs on two occasions.

15. Solicitors for the appellant submitted lengthy written representations to the Parole Board, asking the Board to recommend the release of the appellant under section 39(5)(b) of the 1991 Act, and the Secretary of State duly referred the appellant's case to the Board under section 39(4)(a). In these submissions the appellant admitted the use of crack cocaine. But he said that, although he had first become addicted to drugs while in prison, he had successfully worked to be drug-free at the time of his release. He denied using other drugs, blamed the drug culture prevalent in both hostels for his reversion to the use of cocaine and drew attention to his own attempts to escape from a cycle of drug addiction. He had himself sought a change of hostel, only to find the second hostel as drug-ridden as the first. He had himself taken steps to obtain advice and counselling. The appellant's solicitors did not ask for an oral hearing by the Parole Board.

16. The Parole Board considered the appellant's representations on 3 April 2002 and decided not to direct the appellant's release. The appellant was not present or represented when this decision was made, and there was no oral hearing. In its written reasons for rejecting the appellant's representations, the Board concluded that the appellant's inability or unwillingness to desist from drugs represented too great a risk to public safety. The appellant remained in prison until the expiry of his sentence on 3 December 2003, having served 22 months during the period of recall.

17. The appellant issued this application for judicial review on 30 December 2002. After a successful interlocutory appeal, the Court of Appeal allowed the appellant to advance all the issues he wished at the substantive hearing, which it reserved to itself. On 31 July 2003, the

Court of Appeal (Kennedy and Brooke LJJ and Holman J) dismissed the application: [2003] EWCA Civ 1269; [2004] 1 WLR 421.

The provisions for early release, licensing and revocation

18. The statutory provisions and subordinate rules governing the release, licensing and recall of prisoners have been the subject of ceaseless change over the past 10-15 years. I shall confine my summary to the provisions directly relevant to these appeals.

19. The Parole Board has the duty under section 32(2) of the 1991 Act of advising the Secretary of State with respect to any matter referred to it by him which is connected with the early release or recall of prisoners. At the time when the Parole Board considered the release of the appellants after revocation of their licences, it was permitted under section 32(3) of the 1991 Act to hold an oral hearing (in the form of an interview by a Board member) if it thought it necessary or desirable to do so, but was not expressly required to do so. By section 32(5) of the Act, the Secretary of State was empowered to make rules with respect to the proceedings of the Board, but had made no rules relevant to these appeals. He was empowered by section 32(6) to give directions to the Board as to the matters to be taken into account by it in discharging its functions:

> "and in giving any such directions the Secretary of State shall in particular have regard to -
>
> (a) the need to protect the public from serious harm from offenders; and
>
> (b) the desirability of preventing the commission by them of further offences and of securing their rehabilitation."

20. At the time when the appellant West's licence was revoked, the applicable directions given by the Secretary of State to the Board were to this effect:

> "1. In deciding whether or not to recommend the recall of a short-term prisoner released on licence ….. or to recommend the immediate release of such a

prisoner who has been recalled, the Parole Board shall consider whether the prisoner's continued liberty or, as the case may be, immediate release, would present an unacceptable risk to the public of further offences being committed.

2. In considering this issue, the Board shall, in particular, take into account

(a) whether the prisoner is likely to commit further offences, and

(b) whether the prisoner has failed to comply with one or more of his licence conditions or might be likely to do so in future."

The directions applicable in the case of the appellant Smith were longer:

"*Recall of Determinate Sentence Prisoners Subject to Licence*

Where an offender is subject to a custodial sentence, the licence period is an integral part of the sentence, and compliance with licence conditions is required. In most cases, the licences are combined with supervision by a probation officer, social worker or member of a youth offending team …..

The objectives of supervision are:

- to protect the public
- to prevent re-offending
- to ensure the prisoner's successful reintegration into the community

Initial Recommendation for a Recall

In determining whether or not to recommend to the Secretary of State (under Section 39(1) of the Criminal Justice Act 1991) the recall of a prisoner who is subject to licence, the Parole Board shall consider whether:

(a) the prisoner's continued liberty would present an unacceptable risk of a further offence being committed. The type of re-offending involved does not need to involve a risk to public safety; *or*

(b) the prisoner has failed to comply with one or more of his or her licence conditions, and that

failure suggests that the objectives of probation supervision have been undermined; *or*

(c) the prisoner has breached the trust placed in him or her by the Secretary of State in releasing him or her on licence, whether through failure to comply with one or more of the licence conditions, or any other means …..

Each individual case shall be considered on its merits, without discrimination on any grounds."

These directions were supplemented by directions on representations against recall: these were to very much the same effect, but also drew attention to the likelihood of compliance with licence conditions in future "taking into account in particular the effect of the further period of imprisonment since recall."

21. Section 37(4) of the 1991 Act required a person subject to a licence to comply with the conditions of the licence. At the relevant time, the recall of short-term and long-term prisoners was governed by section 39 of the 1991 Act which, as amended, provided:

"*Recall of long-term and life prisoners while on licence*

(1) If recommended to do so by the Board in the case of a short-term or long-term ….. prisoner who has been released on licence under this Part, the Secretary of State may revoke his licence and recall him to prison.

(2) The Secretary of State may revoke the licence of any such person and recall him to prison without a recommendation by the Board, where it appears to him that it is expedient in the public interest to recall that person before such a recommendation is practicable.

(3) A person recalled to prison under subsection (1) or (2) above -

(a) may make representations in writing with respect to his recall; and

(b) on his return to prison, shall be informed of the reasons for his recall and of his right to make representations.

(4) The Secretary of State shall refer to the Board –

(a) the case of a person recalled under subsection (1) above who makes representations under subsection (3) above; and

(b) the case of a person recalled under subsection (2) above.

(5) Where on a reference under subsection (4) above the Board –

(a) …..

(b) recommends in the case of any ….. person, his immediate release on licence under this section, the Secretary of State shall give effect to the ….. recommendation …..

(6) On the revocation of the licence of any person under this section, he shall be liable to be detained in pursuance of his sentence and, if at large, shall be deemed to be unlawfully at large."

The House was shown the document given to the appellant Smith pursuant to section 39(3)(b): this informed him of his right to make written representations, but gave no hint that he or his solicitor might in any circumstances make oral representations to the Board. The cases of both the appellants were referred to the Board under section 39(4)(a).

22. Before turning to the issues, I think it convenient to summarise certain uncontroversial but fundamental and relevant principles upon which the sentencing, licensing and recall regimes rest. First, the ordinary duty of the court when imposing a determinate sentence of imprisonment is to impose such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the offence or the combination of the offence and one or more offences associated with it: section 2(2)(a) of the 1991 Act. I need not address the small minority of cases in which a longer than commensurate sentence may be called for: section 2(2)(b) of the 1991 Act. In fixing this term, whether it be measured in days, months or years, the court will take account of all matters relevant to the art and science of sentencing and may, depending on the facts of the particular case, have regard to all the well-known objects of a custodial sentence (retribution, personal and general deterrence, incapacitation, reform, rehabilitation). But 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. An appellate court reviewing the sentence will act on the same basis.

23. Secondly, the court which imposes a determinate sentence of imprisonment is of course aware of the statutory provisions governing early release, and should pursuant to *Practice Direction (Custodial Sentences: Explanations)* [1998] 1 WLR 278 outline the effect of these to the defendant when passing sentence. But save in an exceptional case these provisions do not and should not influence the length of the sentence passed. The court does not sentence a defendant to six years' imprisonment because it judges four years' to be the appropriate term, or 3 years' because it judges that the defendant should be incarcerated for 18 months.

24. Thus, thirdly, the sentence passed is not (as it has not within living memory been) a simple statement of the period the defendant must spend in prison. The sentence is in reality a composite package, the legal implications of which are in large measure governed by the sentence passed.

25. While, fourthly, 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.

26. Lastly, it is plain from the statutory provisions already quoted that the resolution of questions of the type indicated is entrusted, and

entrusted solely, to the Parole Board. In exercising this very important function, it is recognised to be an independent and impartial tribunal for purposes of article 6(1) of the European Convention. It is the primary decision-maker, not entitled to defer to the opinion of the Secretary of State or a probation officer: *R v Parole Board, Ex p Watson* [1996] 1 WLR 906, 916. As the materials already cited make clear, the Parole Board is concerned, and concerned only, with the assessment of risk to the public: it must "balance the hardship and injustice of continuing to imprison a man who is unlikely to cause serious injury to the public against the need to protect the public against a man who is not unlikely to cause such injury": *ibid*. The sole concern of the Parole Board is with risk, and it has no role at all in the imposition of punishment: *R v Sharkey* [2000] 1 WLR 160, 162-163, 164.

Common law

27. The Parole Board's acceptance of a public law duty to act in a procedurally fair manner when resolving challenges to licence revocations prompts the inevitable question: what does fairness in this context require? Both sides referred to the answer given by Lord Mustill in *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531, 560. He there made plain that the requirements of fairness change over time, are flexible and are closely conditioned by the legal and administrative context. Mr Pannick QC, for the Board, pointed out that Lord Mustill did not suggest that an oral hearing was called for, and the prisoners in that case raised no such claim. But the procedure in issue in that case – the administrative fixing by the Secretary of State of the punitive terms to be served by mandatory life sentence prisoners – was very different from the present. The procedure has since been superseded. Such terms are now judicially fixed. Where licence revocations are challenged by mandatory and discretionary life sentence prisoners and Her Majesty's Pleasure detainees, the Parole Board now routinely holds oral hearings. So Lord Mustill's guidance must now be followed in a different legal and factual environment.

28. Further guidance was given by Mason J in *Kioa v West* (1985) 60 ALJR 113, 127; sub nom *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 62 ALR 321, 347:

> "In this respect the expression 'procedural fairness' more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the

> circumstances of the particular case. The statutory power must be exercised fairly, that is, in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations ….."

29. Mr Pannick relied on the statutory context. While section 32 of the 1991 Act expressly provided for oral hearings in some classes of case, those classes did not include cases such as the present in which oral hearings were permitted but not required. That, it was submitted, represented a legislative choice. But the maxim expressio unius exclusio alterius can seldom, if ever, be enough to exclude the common law rules of natural justice, as pointed out by McHugh JA in *Baba v Parole Board of New South Wales* (1986) 5 NSWLR 338, 349, and Kirby P in *Johns v Release on Licence Board* (1987) 9 NSWLR 103, 111.

30. In considering what procedural fairness in the present context requires, account must first be taken of the interests at stake. On one side is the safety of the public, with which the Parole Board cannot gamble: *R v Parole Board, Ex p Watson,* above, at 916-917. On the other is the prisoner's freedom. This is a conditional, and to that extent precarious, freedom. In *Weeks v United Kingdom* (1987) 10 EHRR 293, para 40, the European Court recognised the freedom enjoyed by a discretionary life sentence prisoner on licence as "more circumscribed in law and more precarious than the freedom enjoyed by the ordinary citizen" but as, nonetheless, a state of liberty for the purposes of article 5 of the Convention. The value of freedom to the prisoner, even when conditional, was acknowledged by the Supreme Court of the United States in *Morrissey v Brewer* 408 US 471 (1972) para 12, and by Dickson J, dissenting (although not on this point), in the Supreme Court of Canada in *Howarth v National Parole Board* (1974) 50 DLR (3d) 349, 358. It is noteworthy that a short-term prisoner who has served half his sentence and a long-term prisoner who has reached his non-parole date have a statutory right to be free: a conditional right, but nonetheless a right, breach of which gives an enforceable right to redress (see *R v Governor of Brockhill Prison, Ex p Evans (No 2)* [2001] 2 AC 19).

31. While an oral hearing is most obviously necessary to achieve a just decision in a case where facts are in issue which may affect the outcome, there are other cases in which an oral hearing may well contribute to achieving a just decision. The possibility of a detainee being heard either in person or, where necessary, through some form of representation has been recognised by the European Court as, in some instances, a fundamental procedural guarantee in matters of deprivation of liberty: *De Wilde, Ooms and Versyp v Belgium (No 1)* (1971) 1 EHRR 373, para 76; *Winterwerp v The Netherlands* (1979) 2 EHRR 387, para 60; *Sanchez-Reisse v Switzerland* (1986) 9 EHRR 71, para 51; *Waite v United Kingdom* (Appn No 53236/99, 10 December 2002), para 59. Although ruling in a very different legal context, the Supreme Court of the United States, in a judgment delivered by Brennan J in *Goldberg v Kelly* 397 US 254, 269 (1970) helpfully described the value of an oral hearing:

> "Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decisionmaker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The second-hand presentation to the decisionmaker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him. Therefore, a recipient must be allowed to state his position orally. Informal procedures will suffice; in this context, due process does not require a particular order of proof or mode of offering evidence ….."

32. In Canada (Corrections and Conditional Release Act, 1992, section 140(1)(2)) and New Zealand (Parole Act 2002, section 65) statutory provision is made for oral revocation hearings. In the United States, most states had already made such provision when the Supreme Court held such hearings to be necessary: *Morrissey v Brewer*, above, per Burger CJ, 487-488, f.n.15, per Brennan J, 491. In Australia, courts have repeatedly held that there must be an oral hearing: *Baba v Parole Board of New South Wales*, above, 345; *Todd v Parole Board* (1986) 6 NSWLR 71, 81-82; *Johns v Release on Licence Board*, above, 116. In this country, as already noted, revocation hearings are routinely held in the cases of life sentence prisoners and HMP detainees.

33. The argument addressed to the Court of Appeal on behalf of the appellant West did not rely on the common law. Simon Brown LJ did however record (para 2) that in the year ending 31 March 2002 the Board had considered 516 cases in which determinate sentence prisoners had made representations against recall and had during that year held an oral hearing in only one. He observed (para 40) that the Board "should be altogether readier than presently they are to hold oral hearings if in truth their determination is likely to turn upon the resolution of important issues of fact". But it appears that, in the judgment of the Board, very few cases turn on such issues. In the nineteen-month period from 1 April 2003 to 31 October 2004, the House was informed, the Board considered representations against the recall of determinate sentence prisoners in 1945 cases but held oral hearings in only 4.

34. The appellant Smith did rely on the common law in his appeal to the Court of Appeal. Kennedy LJ (para 37) held that no oral hearing was required in his case, accepting that the correct test was that propounded by the Board's witness, Mr McCarthy, in his statement:

> "However, such hearings can be, and are in fact, held where the panel of the Board considering the case takes the view that it is necessary in the interests of fairness, for example where it cannot properly reach a decision on the papers. This might be the case where there is a disputed issue of fact, which is central to the Board's assessment and which cannot be resolved without hearing oral evidence."

Kennedy LJ considered that in Smith's case the primary facts (para 37) were not in dispute. Brooke LJ agreed (para 49). Holman J also agreed (para 55), relying on Lord Mustill's observations in *Doody*. There was, he held (para 56), no objective need for an oral hearing, since there was no dispute on the primary facts, the Board's task was the assessment of risk and the procedure adopted was not "actually unfair".

35. The common law duty of procedural fairness does not, in my opinion, require the Board to hold an oral hearing in every case where a determinate sentence prisoner resists recall, if he does not decline the offer of such a hearing. But I do not think the duty is as constricted as has hitherto been held and assumed. Even if important facts are not in dispute, they may be open to explanation or mitigation, or may lose some of their significance in the light of other new facts. While the

Board's task certainly is to assess risk, it may well be greatly assisted in discharging it (one way or the other) by exposure to the prisoner or the questioning of those who have dealt with him. It may often be very difficult to address effective representations without knowing the points which are troubling the decision-maker. The prisoner should have the benefit of a procedure which fairly reflects, on the facts of his particular case, the importance of what is at stake for him, as for society.

Article 5(1)

36. Article 5(1) of the European Convention, so far as relevant, provides:

> "… 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 ….."

It seems to me plain that in cases such as the appellants' the sentence of the trial court satisfies article 5(1) not only in relation to the initial term served by the prisoner but also in relation to revocation and recall, since conditional release subject to the possibility of recall formed an integral component of the composite sentence passed by the court. This view may have founded the Court's recent admissibility decision in *Brown v United Kingdom* (Appn No 968/04, 26 October 2004), p.6. The same result was reached in *Ganusauskas v Lithuania* (Appn No 47922/99, 7 September 1999), where no break was found in the causal link between the original conviction and the re-detention. But the revocation decision must comply with article 5(4), to which I now turn.

Article 5(4)

37. Article 5(4) 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".

It is accepted that for the purpose of revocation proceedings the Parole Board has the essential features of a court within the meaning of article 5(4), and although, under section 39(5)(b), it can only recommend the release of a recalled discretionary sentence prisoner, its recommendation has the effect of an order since the Secretary of State must give effect to it. 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: *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443, para 49; *Weeks v United Kingdom* (1987) 10 EHRR 293, para 59; *Thynne, Wilson and Gunnell v United Kingdom* (1990) 13 EHRR 666, para 79; *E v Norway* (1990) 17 EHRR 30, para 50. That means, for present purposes, that the Parole Board should be empowered (a) to examine whether circumstances have arisen sufficient in law to justify further detention of a determinate sentence prisoner released on licence and, if so, (b) to decide whether the protection of the public calls for the further detention of the individual detainee. The Parole Board is empowered to discharge those functions. Its review will in my opinion satisfy the requirements of article 5(4) provided it is conducted in a manner that meets the requirement of procedural fairness already discussed.

Article 6 - criminal

38. Article 6 guarantees certain important rights to everyone in the "determination ….. of any criminal charge" against them. The appellants contended that the revocation hearing in effect involved the determination of a criminal charge against them. This argument was advanced by Mr Clayton QC for the appellant West, and was adopted by Mr Fitzgerald QC for the appellant Smith. It was the only argument relied on by Mr Clayton in the Court of Appeal, but he was permitted before the House to adopt the other arguments advanced by Mr Fitzgerald.

39. Mr Clayton referred to the features of a criminal charge identified in *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, para 82, which have been rehearsed and applied in many cases, attaching significance in particular to the third feature, "the degree of severity of the penalty that the person concerned risks incurring". It was necessary, he argued, "to

look beyond the appearances and the language used and concentrate on the realities of the situation": *Ezeh and Connors v United Kingdom* (2003) 39 EHRR 1, para 123. The reality here was that the appellants were threatened with loss of liberty for a substantial period as a result of conduct alleged against them. There could be criminal charges for quite minor delinquencies (as in *Özturk v Germany* (1984) 6 EHRR 409 and *Lauko v Slovakia* (1998) 33 EHRR 994) or where the defendant was subjected only to a fine (as in *AP, MP and TP v Switzerland* (1997) 26 EHRR 541 and *Garyfallou AEBE v Greece* (1997) 28 EHRR 344). In contrast, the liberty of the appellants was at stake. As originally enacted, section 38 of the 1991 Act provided that a short-term prisoner who had been released on licence and had failed to comply with his licence conditions should be liable on conviction in a magistrates' court to a fine and to an order for his recall to prison for up to 6 months. The section had been repealed, and the treatment of short-term prisoners assimilated, in this respect, with that of long-term prisoners. The original section made plain that recall was a penal process and the changed procedure had altered its appearance, not its reality.

40. There are several steps in this argument which I would accept, but I would reject the conclusion for one determinative reason. The distinguishing feature of a criminal charge is that it may lead to punishment. A challenge to revocation of a licence may lead to detention imposed to protect the public but it cannot lead to punishment. It is of course true that the prevention of further offending, for a period, is always an effect and often an object of a determinate sentence of imprisonment, but the primary purpose of that sentence is punitive and that is true of most criminal sentences. The European Court has recognised this. In *Engel*, above, para 82, it observed that deprivations of liberty "liable to be imposed as a punishment" ordinarily belonged to the criminal sphere. It repeated this opinion in *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165, para 72. In *Benham v United Kingdom* (1996) 22 EHRR 293, para 56, it found that proceedings to enforce payment of the community charge had "some punitive elements". In *Lauko v Slovakia*, above, para 58, it described a fine imposed for nuisance as having "a punitive character, which is the customary distinguishing feature of criminal penalties". In *Ezeh and Connors*, above, para 124, the awards of additional days by the governor were rightly held to "constitute fresh deprivations of liberty imposed for punitive reasons after a finding of culpability". The contrast is clear. In *Ganusauskas v Lithuania* (Appn No 47922/99), an admissibility decision, the recall of the applicant to prison was held not to involve the determination of any criminal charge against him. A similar view was taken in *Brown v United Kingdom* (Appn No 968/04, 26 October 2004), pp 6-7. I would reject also the argument based on section 38 of the 1991

Act as originally enacted. A procedure providing for charge, trial and punishment in a criminal court was replaced by one conducted without charge, without trial and without punishment by a body whose sole remit is to protect the public. That is a change of substance, not form. It is not an answer to say that, whatever the reality, the outcome feels to the detainee like punishment.

41. These are the reasons which led the Court of Appeal majority to reject Mr Clayton's argument, which I would endorse. Although Hale LJ accepted the argument, she made very plain (paras 48-49) her discomfort in seeking to answer what she regarded as the wrong question.

Article 6(1) - civil

42. Certain rights, less extensive than in the determination of a criminal charge, are guaranteed by article 6(1) to anyone in "the determination of his civil rights and obligations". The appellants contended that, if their challenges to revocation of their licences did not involve the determination of a criminal charge, they involved a determination of their civil rights and obligations within the meaning of article 6(1). The Board said they did not.

43. The strength of the appellants' argument lay in their undoubted enjoyment, after release, of a conditional and revocable right to freedom. This could readily be regarded as a civil right, and in *Aerts v Belgium* (1998) 29 EHRR 50, para 59, the Court observed that "the right to liberty, which was thus at stake, is a civil right". But the Board pointed to decisions capable of supporting a different result. In *Aldrian v Austria* (1990) 65 DR 337, 342 an admissibility decision, the Commission held:

> "The Commission recalls its constant case-law according to which proceedings concerning the execution of a sentence imposed by a competent court, including proceedings on the grant of conditional release, are not covered by Article 6 para 1 of the Convention. They concern neither the determination of 'a criminal charge' nor of 'civil rights and obligations' within the meaning of this provision."

There are some determinations, perhaps involving preventative measures, which do not fall within either limb of article 6(1): *Maaouia v France* (2000) 33 EHRR 1037, paras 35-39; *Ferrazzini v Italy* (2001) 34 EHRR 1068, paras 28-30. A prisoner's challenge to recall was assumed but not held in *Brown v United Kingdom* (Appn No 968/04, 26 October 2004), p 7, to be capable of engaging a civil right, but the applicant's claim under this head was found inadmissible, for reasons which are not immediately compelling.

44. It is not in my opinion necessary to resolve this question in the present cases since, whether or not the civil limb of article 6(1) is engaged, determinate sentence prisoners wishing to challenge the revocation of their licences have the protection of the Board's common law duty of procedural fairness, and I am not persuaded that the civil limb of article 6(1), even if applicable, would afford any greater protection. I would therefore prefer to defer expressing a concluded opinion on this question until a case arises in which a decision will have some practical effect.

Conclusions

45. In his representations against revocation the appellant West offered the Board explanations, which he said he could substantiate, of his failure to keep an appointment with his probation officer and of the incident at his ex-partner's hostel. The Board could not properly reject these explanations on the materials before it without hearing him. He admitted spending one night away from his approved address, staying (he said) with a cousin. While this was a breach of his licence conditions, it is not clear what risk was thereby posed to the public which called for eight months' detention. His challenge could not be fairly resolved without an oral hearing and he was not treated with that degree of fairness which his challenge required.

46. The resort to class A drugs by the appellant Smith clearly raised serious questions, and it may well be that his challenge would have been rejected whatever procedure had been followed. But it may also be that the hostels in which he was required to live were a very bad environment for a man seeking to avoid addiction. It may be that the Board would have been assisted by evidence from his psychiatrist. The Board might have concluded that the community would be better protected by encouraging his self-motivated endeavours to conquer addiction, if satisfied these were genuine, than by returning him to

prison for 2 years with the prospect that, at the end of that time, he would be released without the benefit of any supervision. Whatever the outcome, he was in my opinion entitled to put these points at an oral hearing. Procedural fairness called for more than consideration of his representations, on paper, as one of some 24 such applications routinely considered by a panel at a morning session.

47. I would allow both appeals. I would in each case make a declaration that the Parole Board breached its duty of procedural fairness owed to the appellant by failing to offer him an oral hearing of his representations against revocation of his licence and was accordingly in breach of article 5(4) of the Convention. The Board must pay the costs of the appellant Smith in the House and below. The parties are invited to make written submissions within 14 days on the appropriate costs order in the case of the appellant West.

LORD SLYNN OF HADLEY

My Lords,

48. It is perhaps not surprising that the Parole Board should have felt initially that it was right, or that through available resources they were constrained, to decide as many applications as possible by prisoners whose licence was revoked and who were recalled to prison, without anything approaching a court process, or even an oral hearing. Such a process is time consuming and expensive and some of the applications may on the face of it have appeared without merit. But the facts and the arguments addressed to your Lordships on behalf of the applicants in these two cases have made it plain that in respect of determinate sentence prisoners the decisions taken (where such revocation has been ordered) can have a serious effect on the liberty of the applicant. If the decision is taken on the basis of a misunderstanding of the law or of a failure to appreciate the facts relied on there can be a very serious interference with the prisoner's liberty albeit that liberty is a conditional right. There is a risk that if only written representations are looked at a decision may be taken without a full appreciation of what really matters. When we are told of the number of oral hearings which have been held in practice in respect of the very large number of applicants, it is clear that the risk is serious.

49. To alleviate this risk is well within the competence of the common law. On this aspect of the appeal I am in full agreement with the opinion of my noble and learned friend Lord Bingham of Cornhill which I have had the advantage of reading in draft.

50. There is no absolute rule that there must be an oral hearing automatically in every case. Where, however, there are issues of fact, or where explanations are put forward to justify actions said to be a breach of licence conditions, or where the officer's assessment needs further probing, fairness may well require that there should be an oral hearing. If there is doubt as to whether the matter can fairly be dealt with on paper then in my view the Board should be predisposed in favour of an oral hearing. On any view the applicant should be told that an oral hearing may be possible though it is not automatic; if having been told this the applicant clearly says he does not want an oral hearing then there need not be such a hearing unless the Board itself feels exceptionally that fairness requires one.

51. The greater part of the argument in these appeals has, however, centred on Articles 5 and 6 of the European Convention on Human Rights as incorporated in the Human Rights Act 1998. It seems to me right therefore to express a view on these issues even though in most if not all cases compliance with the common law duty may be all that is required.

52. I gratefully refer to and do not repeat Lord Bingham of Cornhill's analysis of the decisions of the European Court and it is against that background that I can state my conclusions briefly.

53. Article 5 (1) of the Convention as set out in Schedule 1 to the 1998 Act provides that

> ". . . 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 . . ."

54. In the absence of a specific challenge to the conviction, when the prisoner begins his sentence, there is clearly lawful detention by a

competent court. Furthermore that sentence is subject to all the provisions of release on licence and revocation provided for by statute and the rules applicable to determinate sentence prisoners. 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 QC 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), 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.

56. Article 6 is divided into two parts. The second part is that in the determination of "any criminal charge against him" everyone is entitled to the rights set out in Article 6. The allegation against the prisoner released on licence is that he has breached the terms of his licence. The consequence is that he may be recalled under rules made by the Secretary of State if he is likely to commit further offences or if his breach of conditions undermines his supervision which is intended to protect the public, to prevent the prisoner re-offending and to ensure his successful integration into the community. As Lord Bingham of Cornhill has stated, a primary purpose of sentence after trial is to punish. That is an essential element of the sentence. In *Amand v Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] AC 147, where the question was whether the Divisional Court's dismissal of an application was a "judgment in a criminal cause or matter," Lord Wright said,

> "The principle . . . is that if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment such as imprisonment or a fine, it is a 'criminal cause or matter'" (p162).

Recall of a prisoner on licence is not a punishment It is primarily to protect the public against further offences, though it may also in some cases lead to further training which would enable the prisoner on a subsequent release to integrate more readily into the community. The Parole Board in reaching its decision is as a consequence not determining "a criminal charge" even if (which for present purposes I assume) a recommendation by the supervising officer that the prisoner should be recalled, because in his opinion a licence condition has been breached, is a "charge" within the meaning of Article 6 of the Convention.

57. The first part of Article 6 on the other hand provides that the rights laid down in that Article are enjoyed by everyone in the "determination of his civil rights." The European Court has categorised various rights recognised by the law as not being "civil rights" within the meaning of the Convention, even if they are not rights in respect of criminal proceedings—see inter alia decisions on tax disputes and immigration rulings. The fact that the Parole Board's decision is not the determination of a criminal charge thus does not necessarily mean that it is the determination of his civil rights.

58. The Article clearly distinguishes between civil and criminal but the rights conferred in the latter context are those relative (i.e. limited) to the "determination . . . of any criminal charge against him". What happens in cases like the present is not the determination of a criminal charge. It is a decision as to a procedure laid down for the carrying out of a lawful sentence of a court. The rights in that criminal procedure may attract a need for fairness under the common law. It does not necessarily convert them into "civil rights" for the purpose of the Convention.

59. The European Court has not given a clear decision on this. Maybe *Aerts v Belgium* (1998) 29 EHRR 50 indicates that a "civil right" is involved here though *Aldrian v Austria* (1990) 65 DR 337, a decision of the Commission on admissibility points the other way. Perhaps the best indication of the Court's approach is to be found in *Ganusauskas v Lithuania* (App. 47922/99) decision of 7 September 1999 and *Kerr v United Kingdom* (App. 44071/98) decision of 7 December 1999. In both of those although the Court dealt with whether there was "the determination of a criminal charge" it did not consider whether a decision to revoke a prisoner's early release and to return him to prison was the determination of a "civil right". I do not consider that the recent decision of the Court in *Brown v United Kingdom* (App.

968/04) a decision of 26 October 2004 conclusively determines this matter. The Court said, "Even assuming that the right to liberty is a civil right" (and it referred to *Aerts*) before going on to comment on the rights of the citizen in domestic courts.

60. I of course accept that this is still an open question as far as the European Court of Human Rights is concerned. My opinion on the arguments we have heard in these cases is that the Convention has specifically limited the criminal aspect of the matter to the determination of a "criminal charge" which these are not. Decisions as to recall are not within the meaning of Article 6 concerned with "civil rights." Questions as to the deprivation of liberty by a body like the Parole Board (regarded as a court for this purpose) fall to be dealt with under Article 5 (4) and the common law rules relating to the fairness of proceedings. It is plain from Lord Bingham's recital of the facts that the review in these two cases was not conducted in accordance with the fairness which the common law requires so that detention on recall was not lawful for the purposes of Article 5(4) of the Convention as incorporated in the Human Rights Act 1998.

61. As to the disposal of the two appeals I agree with my noble and learned friend Lord Bingham of Cornhill and would also make the order which he proposes.

LORD HOPE OF CRAIGHEAD

My Lords,

62. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. I would allow these appeals, and I would make the same declaration in each of them as he proposes. My reasons are substantially the same as those that he has given, except that I differ from him about the need to reach a concluded view as to whether there was a breach of the civil limb of article 6(1)of the European Convention on Human Rights.

The common law

63. I can well understand the reluctance of the Parole Board to hold oral hearings in other than a very small proportion of those cases which fall outside the categories of mandatory and discretionary life prisoners, extended sentence prisoners and HMP detainees, for whom it has been decided that continuing judicial supervision of the detention is required to satisfy their article 5(1) and 5(4) Convention rights. But I agree that the absence of an oral hearing in these two determinate sentence cases was a breach of the duty to act fairly at common law. For reasons that I shall explain, I think that this means that the proceedings were not conducted in the way a court would be expected to conduct them and that it must follow that there was a breach of the appellants' article 5(4) Convention rights.

64. It is, of course, more costly and time-consuming to deal with cases by means of oral hearings. Arrangements have to be made to ensure that they are conducted fairly. Notices must be given of the witnesses to be called and the substance of their evidence. They will almost always have to be held at the prison or other institution where the prisoner is held. A simple cost-benefit analysis, looking at the matter from the Board's point of view only, will no doubt show that its resources are better employed by dealing with these applications on paper. That, no doubt, is why the number of oral hearings that are being held in these cases is so tiny, despite Simon Brown LJ's observation in the Court of Appeal in West's case [2003] 1 WLR 705, 717A-B, para 40 that the Board should be altogether readier than presently they are to hold oral hearings if their determination is likely to turn upon the resolution of important issues of fact.

65. Commenting however on the fact that only four oral hearings were held out of the 1945 cases falling outside the categories mentioned above during the period from 1 April 2003 to 31 October 2004, Mr Pannick said that the Board's experience was that decisions in these cases almost never turn on disputed issues of fact. I would make two comments on this explanation.

66. First, the figures that we have been given appear to me to indicate that there is a long-standing institutional reluctance on the part of the Parole Board to deal with these cases orally. It would not be surprising if a consequence of that reluctance was an approach, albeit unconscious and unintended, which undervalued the importance of any issues of fact

that the prisoner wished to dispute. If the system is such that oral hearings are hardly ever held, there is a risk that cases will be dealt with instead by making assumptions. Assumptions based on general knowledge and experience tend to favour the official version as against that which the prisoner wishes to put forward. Denying the prisoner of the opportunity to put forward his own case may lead to a lack of focus on him as an individual. This can result in unfairness to him, however much care panel members may take to avoid this.

67. The second is that the test which Simon Brown LJ had in mind when he made his observation was whether the decision was "likely" to turn upon the resolution of an important factual issue. The question is not whether the case ultimately turns on a disputed issue of fact when the decision is taken. It is whether, when the papers are first looked at, it is likely to do so. This is a more exacting test than that which the Board appears to have been adopting.

68. I agree therefore that the common law test of procedural fairness requires that the Board re-examine its approach. A screening system needs to be put in place which identifies those cases where the prisoner seeks to challenge the truth or accuracy of the allegations that led to his recall, or seeks to provide an explanation for them which was not taken into account or was disputed when his recall was recommended by his supervising probation officer. Consideration then needs to be given to the question whether it is necessary to resolve these issues before a final decision is made as to whether or not the prisoner is suitable for release. If it is, an oral hearing should be the norm rather than the exception.

The Convention rights

69. The fact that the issues which the appellants have raised can be dealt with under the common law does not answer the question whether the decisions that were taken were in breach of their Convention rights. Section 8(1) of the Human Rights Act 1998 provides that, in relation to any act of a public authority which the court finds is unlawful under section 6(1) of that Act, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. The appellants are no longer in custody. But this does not absolve the court of its responsibility, should it find that there was a breach of any of their Convention rights, of considering what order, if any, it should make in recognition of the fact that their rights were breached.

70. The articles of the Convention which the appellants say were breached by the Board's failure to hold an oral hearing in their cases are articles 5(1) and 5(4), together with article 6 in its criminal or alternatively its civil aspects. In my opinion it is necessary for a decision to be taken as to whether the appellants' rights were breached under each of these articles. As the Convention has its own self-contained structure, the question whether the requirements of the common law have been breached or satisfied raises issues which must be dealt with separately from issues about breaches of the Convention rights. As for article 6, it is invoked on the alternative ground that there was here a determination of civil rights and obligations. So it is necessary to decide whether their rights under that aspect of the article were engaged as well as their rights under the criminal aspect.

71. There is one other factor that indicates the need for a decision on the civil aspect of article 6(1). The right to a fair hearing under this article carries with it some ancillary rights that are not usually regarded as part of the general right to procedural fairness in common law. The right to a hearing within a reasonable time and the right to legal assistance of one's own choosing, for example, are expressly guaranteed by article 6. A consideration of the appellants' arguments is incomplete if the question whether they are entitled to invoke these ancillary rights is left undecided.

72. I agree with what Lord Bingham has said about the application of article 5(1) and (4) to these cases. But I should like to say a bit more to explain why I too consider that, if its review is to satisfy the requirements of article 5(4), the Parole Board must conduct the proceedings in a manner that meets the requirement of procedural fairness at common law and why I would hold that, as the proceedings were not procedurally fair in these cases, the appellants' article 5(4) Convention rights were violated.

73. At first sight the proposition that the review by the Parole Board will satisfy the requirements of article 5(4) only if it is conducted in a manner that meets the requirements of procedural fairness at common law risks confusing two things that, out of respect for the structure of the law, ought to be kept separate. The common law is antecedent law: Clayton and Tomlinson, *The Law of Human Rights* (2000), para 1.33. The introduction of the Convention rights into our law by the Human Rights Act 1998 is a creature of statute. The Act protects Convention rights in a way that differs from the way that common law rights are protected.

74. It is unlawful for a public authority to act in a way which is incompatible with a Convention right: Human Rights Act 1998, section 6(1). And a member of the Scottish Executive has no power to act in a way that is incompatible with any of the Convention rights: Scotland Act 1998, section 57(2). The protection which the Human Rights Act 1998 provides in the case of a person's Convention rights is designed to provide a minimum standard of human rights protection. But it does not restrict any other right or freedom which the law confers: section 11(1)(a). This is where the common law steps in. The requirement of procedural fairness is part of the common law. It is a requirement that applies to bodies in this jurisdiction which have the characteristics of a court within the meaning of article 5(4) because domestic law says so. Common law procedural fairness as such is not a Convention requirement. But the Convention can and does inform the common law, and the common law informs the Convention.

75. It is not enough to satisfy the requirement of article 5(4) that the lawfulness of the detention must be decided by a court to point simply to the Board's independence and to its impartiality. It is, of course, possible to say that the Parole Board is an appropriate body to conduct the review because it is impartial and independent of the executive. But article 5(4) requires that the proceedings themselves must be conducted in the way a court would be expected to conduct them. From this it follows that, to satisfy article 5(4), the Board's procedure for conducting reviews must embody the procedural fairness that the common law requires of a court. Procedural fairness is a requirement of the common law. It is not in itself a Convention requirement. But it is built into the Convention requirement because article 5(4) requires that the continuing detention must be judicially supervised and because our own domestic law requires that bodies acting judicially, as a court would act, must conduct their proceedings in a way that is procedurally fair. As Lord Bingham has explained, the common law duty of procedural fairness required that the appellants be offered an oral hearing into their representations against revocation of their licences. As this was not done, the review of their detention was not conducted as a court would be expected to conduct it, so there was, in my opinion, a violation of their article 5(4) Convention rights.

Article 6 - civil rights and obligations

76. For all the reasons that Lord Bingham has given, I agree that the appellants' rights under article 6(1) in its criminal aspect were not engaged by the decisions that the Board took in these cases. I wish

however to examine more fully the question whether their rights were engaged under article 6 in its civil aspect.

77. The appellants submit that the decisions which followed upon their representations against their recall to prison involved a determination of their civil rights and obligations within the meaning of article 6(1) of the Convention. In *Aerts v Belgium* (1998) 29 EHRR 50 the applicant had been detained, following his arrest for assault, in the psychiatric wing of a prison prior to his transfer to a social protection centre. He complained of an infringement of his right of access to a court for determination of the lawfulness of his detention because he had been refused legal aid for an appeal from the decision of the court of first instance on points of law to the Court of Cassation. At p 88, para 59 the European Court said that the question which was at issue was the lawfulness of the deprivation of liberty and that the right to liberty "which was thus at stake" was a civil right.

78. Mr Fitzgerald QC submitted that it was clear, and established by this decision, that the right to liberty was a civil right within the meaning of article 6(1). He said that the appellants' civil right to liberty was engaged because they were in a state of actual liberty before they were recalled, and because they would have been entitled to sue for false imprisonment if they had not been released after they had completed the relevant proportion of their sentences: *R v Governor of Brockhill Prison, Ex p Evans (No 2)* [2001] 2 AC 19.

79. In my opinion it does not follow from the fact that the right to liberty can be described generally as a civil right that the appellants' civil rights within the meaning of article 6(1) were engaged in this case. The question whether this Convention right is engaged, if at all, has to be decided in the light of the proceedings that are in issue and the nature of the dispute. As I said in *R (McCann and Others) v Crown Court at Manchester* [2003] 1 AC 787, 818, para 59, it is possible that the proceedings that are in issue will fit neither of the two descriptions of rights in article 6(1) – criminal or civil. Various examples of cases falling outside the reach of article 6 are given in Clayton and Tomlinson, *The Law of Human Rights* (2000), para 11.172. Furthermore, as the decision of the European Court in *Pabla Ky v Finland*, application no 47221/99, 22 June 2004, reminds us, the question whether Convention rights are infringed is a practical one, not one to be decided in the abstract. In para 29 of that decision the court emphasised that the question is always whether, in a given case, the requirements of the Convention are met. The context is all-important.

80. This approach is further demonstrated by *Brown v United Kingdom*, application no 968/04, 26 October 2004. In that case the applicant complained that his recall to prison was a breach of his rights under articles 5 and 6 of the Convention. The court said:

> "Even assuming that the right to liberty is a civil right (for example, *Aerts v Belgium* Judgment of 30 July 1998, reports 1998-V, para 59), the Court notes that this applicant may bring proceedings in the domestic courts to assert the unlawfulness of his detention and claim damages at any time. The fact that the domestic courts might reject such claims, as happened in this case, does not affect the availability of access to court for the purposes of article 6."

In *Kerr v United Kingdom,* application no 44071/98, 7 December 1999, the applicant complained among other things that he was denied a fair hearing of the revocation and continuance of his licence under article 6(1). The part of that article that was treated by the court as relevant to his case was the criminal part only. No mention was made of the civil part. In *Ganusauskas v Lithuania,* application no 47922/99, 7 September 1999, the applicant alleged that the proceedings whereby he was recalled to prison violated article 6. The court observed that that provision was not applicable in his case "for the proceedings did not involve the determination of 'any criminal charge against him' within the meaning of article 6 of the Convention." Here too no mention was made of the civil part of that article.

81. The conclusion which I would draw from the observations which the court made in *Brown's* case, and from the fact that in neither *Kerr* nor in *Ganusauskas* was a breach of the article 6 civil right even contemplated, is that the article 6 civil right is not infringed by proceedings of the kind that are in issue in this case, so long as the individual has access to the domestic courts to assert his right to liberty. The proceedings of the Parole Board did not deprive the appellants of that right of access. What the Board was doing was giving effect, in the performance of functions given to it by statute, to the sentences which had previously been imposed by the judge when the appellants were convicted. The sentencing procedure which he conducted satisfied the requirements of article 5(1)(a). When the appellants were recalled to custody the requirements of article 5(4) would have been satisfied by the review of their recall by the Parole Board which, due to its independence from the executive and its impartiality, has the

characteristics of a court for the purposes of that article if an oral hearing had been offered to them. None of the elements that were inherent in the sentence from the beginning were being enlarged or altered. I think that it is clear that the appellants were not entitled to invoke the additional protection of the article 6(1) civil right in relation to the proceedings before the Board in these circumstances.

Headings and Side notes: the Parole Board Rules 2004

82. One of the issues that arose in *R v Montila* [2004] 1 WLR 3141 was whether the headings to each group of sections and the side notes, or marginal notes, to each section were a legitimate aid to the construction of the sections to which they relate: see para 31 of the Appellate Committee's report in that case. The conclusion which the Committee reached was that the headings and side notes, which are unamendable, are as much part of the contextual scene of the statute as the Explanatory Notes, which do not form part of the Bill and are not endorsed by Parliament, and ought to be open to consideration as part of the enactment when it reaches the statute book: para 34.

83. The observation in para 34 in *Montila's* case that these materials are unamendable was an important qualification. It is highlighted by an error in the Parole Board Rules 2004 which was identified in the course of the hearing of the appeal. I wish to add these words of explanation as to what that error was and how it appears to have arisen, in the hope that the pitfall into which the draftsman of these Rules fell may be avoided in future cases.

84. The 2004 Rules deal with cases before the Board which fall into the categories identified by Rule 2(1), which provides:

> "Subject to rule 24, these Rules apply where a prisoner's case is referred to the Board by the Secretary of State under section 28(6)(a), 28(7) or 32(4) of the [Crime (Sentences) Act 1997], or under section 39(4) or 44A(2) of the [Criminal Justice Act 1991], at any time after the coming into force of these Rules."

Part IV, which is headed "Proceedings with a hearing" applies to the cases identified by Rule 14(1), which provides:

> "This part of the Rules applies in any case where a decision pursuant to rule 11(2)(a) or 13(2)(a) has been made, or where a notice under rule 12(2) or 13(5) has been served, or in any case referred to the board under section 32(4) of the 1997 Act or under section 39(4) or 44A(2) of the 1991 Act."

85. Mr Pannick said that the 2004 Rules were not intended to confer a right to an oral hearing on determinate sentence prisoners. The Parole Board Rules 1992 had given the right to an oral hearing to discretionary life prisoners, following the decision of the European Court in *Thynne, Wilson and Gunnell v United Kingdom* (1990) 13 EHRR 666. This right was extended to HMP detainees by the Parole Board Rules 1997, following the decision of the European Court in *Hussain v United Kingdom* (1996) 22 EHRR 1. The 2004 Rules were intended to extend the right to mandatory life prisoners and to prisoners sentenced to extended sentences: *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837; *R (Sim) v Parole Board* [2004] QB 1288. It had not been suggested that it was necessary for short-term and long-term prisoners to be given that right, and it was not the intention to do this when the 2004 Rules were brought into effect on 1 August 2004.

86. The side note to section 32 of the 1997 Act is "Recall of life prisoners while on licence". The words "any life prisoner" appeared in each of the subsections of that section when it was originally enacted. It dealt exclusively with life prisoners as defined in section 34(1) of that Act. A new subsection (5) was substituted by the Criminal Justice Act 2003. It requires the Secretary of State to give effect to a direction by the Parole Board under that section for the immediate release on licence of the life prisoner whose case has been referred to the board under section 32(4). The section still deals with life prisoners only, so the side note remains an accurate description of its contents. The reference in Rule 14(1) to section 32(4) is in keeping with Mr Pannick's explanation of the purpose of the 2004 Rules.

87. The side note to section 39 of the 1991 Act is: "Recall of long-term and life prisoners while on licence". This was an accurate description of the contents of the 1991 Act when it was enacted. However, as a result of a complex series of repeals and associated savings by the 1997 Act and the Crime and Disorder Act 1998, section 39 no longer deals with life prisoners. It deals with short-term or long-term prisoners who have been released on licence under Part II of the 1991 Act, as amended. The effect of these amendments has been to

change the subject matter of section 39 of the 1991 Act from that which was identified by the side note. The reference to section 39(4) in Rule 14(1) has the effect of extending the benefit of oral hearings to prisoners who are serving determinate sentences. This is contrary to what Mr Pannick said was the intended effect of the 2004 Rules.

88. The explanation for this error is not hard to find. Section 39 of the 1991 Act appears in its amended form in *Halsbury's Statutes* and in the version of it which is available online. But the side note to the section is unchanged. This is because of the rule that side notes are not capable of being amended by Parliament. The editors of *Halsbury's Statutes* have been careful to point in a footnote that, in view of the amendments, the side note is no longer accurate. But the misleading impression that its preservation creates remains. It is enhanced by the fact that in 2001 side notes were moved from the side of each section in the Bill when it was introduced and in the Queen's Printers' copy of the enactment. They now appear, with greater emphasis as to their importance, as headings in bold type on the same line as the clause or section number. That is how they also appear in all the unofficial versions of the statutes that are now available.

89. The 2004 Rules may need to be amended to correct the error that has arisen, bearing in mind the effect of your Lordships' decision in this case that the common law right to procedural fairness does not require that determinate sentence prisoners be given the same absolute right to an oral hearing which has been given to prisoners in the other categories. But I suggest that similar misunderstandings could be avoided in the future if a section whose substance has been so changed as to make the side note an unreliable guide to its contents were to be repealed and replaced by an entirely new section – which would, of course, be provided, after consultation with Parliamentary Counsel, with its own appropriate side note. Consolidation would, no doubt, be the ideal. But, just as modern methods of updating make this less necessary, so there is a greater need to adapt Parliamentary practice and procedures to what these modern methods require if the updated legislation is to be presented in that way with sufficient clarity.

LORD WALKER OF GESTINGTHORPE

My Lords,

90. I have had the privilege of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill. I am in full agreement with it, and for the reasons given by Lord Bingham I would allow both appeals and make the orders which he proposes.

LORD CARSWELL

My Lords,

91. I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead, and for the reasons which they have given I would allow the appeals.