HOUSE OF LORDS SESSION 2005–06
[2006] UKHL 17

on appeal from: [2004] EWCA Civ 966

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Watkins (Respondent)
v.
Home Office (Appellants) and others

Appellate Committee

Lord Bingham of Cornhill
Lord Hope of Craighead
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Carswell

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Hearing dates:
13 and 14 February 2006

ON
WEDNESDAY 29 MARCH 2006

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LORD BINGHAM OF CORNHILL

My Lords,

1. Is the tort of misfeasance in public office actionable without proof of financial loss or physical or mental injury and, if so, in what circumstances? Those are the questions which the House must resolve in this appeal by the Home Office, which is the first defendant in these proceedings. There were originally fourteen other defendants in the action, but none is party to this appeal.

2. Mr Watkins was at all material times a convicted prisoner serving a sentence of life imprisonment, first in Wakefield and then in Frankland Prison. He was engaged in a number of legal proceedings, actual and contemplated. This gave rise to correspondence with legal advisers, courts and other bodies.

3. During the relevant period (1 May 1998 to 5 December 2000) the confidentiality of the respondent's legal correspondence was protected, at first by Rule 37A of the Prison Rules 1964 (SI 1964/388) which became (without textual alteration) Rule 39 of the Prison Rules 1999 (SI 1999/728). This rule included the following provisions:

> "*Correspondence with legal advisers and courts*
>
> (1) A prisoner may correspond with his legal adviser and any court and such correspondence may only be opened, read or stopped by the governor in accordance with the provisions of this rule.
>
> (2) Correspondence to which this rule applies may be opened if the governor has reasonable cause to

believe that it contains an illicit enclosure and any such enclosures shall be dealt with in accordance with the other provision of these Rules.

(3) Correspondence to which this rule applies may be opened, read and stopped if the governor has reasonable cause to believe its contents endanger prison security or the safety of others or are otherwise of a criminal nature.

(4) A prisoner shall be given the opportunity to be present when any correspondence to which this rule applies is opened and shall be informed if it or any enclosure is to be read or stopped.

(5) A prisoner shall on request be provided with any writing materials necessary for the purposes of paragraph (1).

(6) In this rule, 'court' includes the European Commission of Human Rights, the European Court of Human Rights and the European Court of Justice; and 'illicit enclosure' includes any article possession of which has not been authorised in accordance with the other provisions of these Rules and any correspondence to or from a person other than the prisoner concerned, his legal adviser or a court."

A Home Office instruction (113/1995, 21 December 1995) to prison governors required them to protect such correspondence against inadvertent or deliberate opening by, in particular, the training of staff handling prisoners' mail. A Standing Order provided for envelopes containing legal correspondence to be marked as such.

4. The respondent complained that staff at both prisons had breached the Prison Rules by opening and reading mail when they were not entitled to do so. He issued these proceedings against the Home Office and fourteen named prison officers claiming damages for misfeasance in public office. His Honour Judge Ibbotson, sitting in the Wakefield County Court, found that a number of officers had wrongly interfered with the respondent's correspondence. But he found that most of them had done so without bad faith, held by the House in *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 to be an essential ingredient of the tort, and so the claim against those officers failed.

5. In the case of three officers, however, the judge found bad faith to be established. One, Mr Ravenscroft at Wakefield, removed and inspected the contents of letters marked as legal correspondence, dismissing the respondent's protest with contempt, indifferent whether he was acting lawfully or not. A second officer, Mr Rosevere, also at Wakefield, denied (in bad faith) that the rule applied to incoming mail. A third officer, Mr Robinson, at Frankland, opened two letters addressed to the respondent marked 'Durham County Court' to see if they related to an action which the respondent had brought against him in that court. Thus in these three instances the bad faith ingredient was established. But the judge dismissed the respondent's claims against these officers also, on the ground that misfeasance in public office was not a tort actionable per se, and the respondent had failed to prove any financial loss or physical or mental injury of any kind. Indeed the judge formed the impression that "in many ways [the respondent] appears to thrive on these conflicts".

6. The respondent appealed against the dismissal of his claims against the three officers, contending that the tort of misfeasance in public office was a tort actionable per se, and so capable of being established without proof of damage, or alternatively capable of being established by proof of anxiety and distress falling short of physical or mental injury. The Court of Appeal (Brooke, Clarke and Laws LJJ) unanimously allowed the respondent's appeal, but on somewhat different grounds of their own devising: [2004] EWCA Civ 966; [2005] QB 883. They held that if there is a right which may be identified as a constitutional right, then there may be a cause of action in misfeasance in public office for infringement of that right without proof of damage. There had here been interference by the three officers with the respondent's constitutional right to have unimpeded access to the courts and to legal advice. Therefore the respondent was entitled to nominal damages of £5 against each of the three officers, and the claims should be remitted to the County Court for consideration whether exemplary damages should be awarded against the three officers and, if so, assessment of the sums to be awarded. The Court of Appeal gave the appellant leave to appeal to the House on condition that it paid the respondent's costs in the House irrespective of the outcome.

Common ground

7. It was common ground that the issue now before the House had not been an issue for decision by the House in *Three Rivers (No 3)*, since it was clear in that case that the Bank of England's conduct, if

tortious at all, was alleged to be causative of financial loss. Thus while no criticism was directed to the definition of the tort given by the House in *Three Rivers (No 3)*, it did not resolve the present appeal. There was no challenge to the judge's findings of bad faith against the three officers, nor to his finding that their conduct had caused the respondent no financial loss or physical or mental injury, which in argument was helpfully described as "material damage", an expression understood to include recognised psychiatric illness but not distress, injured feelings, indignation or annoyance. The respondent wished to be free in any later hearing to contend that he had suffered emotions of the latter kind. It was common ground, in the light of the decision of the House in *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29, [2002] 2 AC 122, that exemplary damages could in principle be awarded where misfeasance in public office was established. But the appellant challenged the proposition, accepted by the Court of Appeal and supported by the respondent, that exemplary damages could be awarded even where no material damage was shown because, as it contended, proof of such damage was a necessary condition of establishing the tort.

Policy considerations

8. There is great force in the respondent's submission that if a public officer knowingly and deliberately acts in breach of his lawful duty he should be amenable to civil action at the suit of anyone who suffers at his hands. There is an obvious public interest in bringing public servants guilty of outrageous conduct to book. Those who act in such a way should not be free to do so with impunity.

9. On the other hand, it is correctly said that the primary role of the law of tort is to provide monetary compensation for those who have suffered material damage rather than to vindicate the rights of those who have not. If public officers behave with outrageous disregard for their legal duties, but without causing material damage, there are other and more appropriate ways of bringing them to book. It is said to be unnecessary and untimely to develop this tort beyond the bounds hitherto recognised. I touch further on some of these considerations below.

10. I am attracted by each of these competing policy approaches. But I note that in October 2004 the Law Commission published a Discussion Paper on "Monetary Remedies in Public Law" in which various important themes bearing on the interrelation of public law and private

law remedies and the impact of the Human Rights Act 1998 were canvassed. At a seminar held in November 2004 it was suggested (as recorded on the Law Commission website) that focus on monetary remedies was often too narrow, that money was often not what the wronged citizen wanted, that other forms of redress might be more appropriate and that new liabilities for public bodies to pay compensation were unlikely to find favour. The continuing work of the Law Commission in this area strengthens the opinion to which I would anyway have inclined, that the House should endeavour to establish whether or not, in this and other jurisdictions where the tort has been recognised, it has or has not been understood as actionable per se, and that the House should apply the law as thus understood.

Misfeasance in public office

11. In *Davis v Bromley Corporation* [1908] 1 KB 170 the Court of Appeal held, in effect, that a cause of action for misfeasance in public office did not exist. It is unsurprising that English lawyers lost sight of this tort, and reference (for example) to the 14th edition of *Clerk & Lindsell on Torts* (1975) reveals no mention of it. But in *Dunlop v Woollahra Municipal Council* [1982] AC 158, 172 the Privy Council described this tort as "well-established", and a little research shows this description to be correct.

12. In *Three Rivers*,above, pp 189-190, Lord Steyn traced the cause of action back to *Turner v Sterling* (1671) 2 Vent 25. In that case the plaintiff complained that his election as one of two custodians of London Bridge, a remunerated office, was thwarted by the malicious and unlawful action of the Lord Mayor. It was an action upon the case. There was a question whether the action would lie. Wylde J (p 26) held that it would: "Where an officer does any thing against the duty of his place and office, and a damage thereby accrues to the party, an action lies". Archer J (p 26) agreed: "for the particular damage an action lies". Tyrrel J (p 27) also agreed: "this action is for damages for being prevented of having the office". He addressed the arguments that "every action upon the case supposes damnum & injuriam", and that since there had been no election it could not be known whether the plaintiff would have been elected, by pointing out that it would be determined whether he would have been elected and "an action of the case lies for a possibility of damage". Vaughan CJ dissented, on the ground that no damage appeared. Thus all the judges held damage to be an essential ingredient of the cause of action, as would normally (not always) be so

of an action on the case; they differed only on whether damage was or could on the facts be sufficiently shown.

13. The Court of Appeal placed great reliance on *Ashby v White* (1703) 1 Sm LC (13th ed, 1929) 253. The plaintiff in that case was a burgess of the borough of Aylesbury who complained that the wrongful conduct of the returning officer had denied him his entitlement to vote. In the Court of King's Bench a majority of the judges rejected his claim on a number of grounds, among them that he had suffered no damage and the matter was one for Parliament, not the courts. But Holt CJ dissented. He described the plaintiff's right as "a personal right" (p 270) but also (p 276) as "a matter of property" and regarded the plaintiff as entitled to the benefit of a franchise vested in the corporation (p 271). The respondent relies in particular on the Chief Justice's acceptance (p 273) of the right to vote as "a thing of the highest importance" and on his ruling (p 273):

> "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal".

14. It is not entirely easy to evaluate this authority, since Holt CJ revised his judgment before the case went to the House of Lords (p 283), where his dissent was upheld by a large majority of lay peers (p 278), on grounds which he is said to have drafted. Professor Sir John Baker QC, in *An Introduction to English Legal History* 4th ed, (2002), pp 431-432, interprets the claim as one for the disturbance of miscellaneous rights which would otherwise go unprotected and observes that the pleadings "show an affinity to more conventional nuisance and disturbance actions", although the right to vote was not strictly a property right. The late Professor Fleming (*The Law of Torts*, 9th ed, (1998), p 22) describes the claim as one in quasi-trespass, for direct infringement of an incorporeal property right, having all the attributes of trespass. The analogy with trespass may perhaps explain why material damage was not held to be a necessary ingredient of the tort, since trespass is of course the paradigm case of a tort actionable per se.

15. *Whitelegg v Richards* (1823) 2 B&C 45 concerned a debtor, imprisoned to coerce him to pay his debt to the plaintiff, whom the defendant, a court clerk, ordered to be released, "wrongfully and

maliciously intending to injure the plaintiff". Abbott CJ (at p 52) recorded:

> "On the argument before us, some authorities were quoted to shew, that an action upon the case may be maintained against an officer of a Court for a falsity or misconduct in his office, whereby a party sustains a special damage; and that, in this case, a damage was plainly shewn by the loss of the means of enforcing payment from the debtor, as in actions against sheriffs or gaolers for an escape. It is not necessary to repeat the authorities quoted. The general principle was not contraverted".

It seems clear that damage was regarded as the gist of the action. In *Henly v Lyme Corporation* (1828) 2 Bing 91 the plaintiff owned property close to the sea which had been swamped by the tide because the corporation, who had been granted land by the Crown subject to a condition that it maintain the sea-defences, had "wrongfully and unjustly intending to injure, prejudice, and aggrieve the plaintiff" permitted these defences to become "ruinous, prostrate, fallen down, washed down, out of repair, and in great decay" for want of necessary maintenance. In his judgment at p 107, Best CJ said:

> "Now I take it to be perfectly clear, that if a public officer abuses his office, either by an act of omission or commission, and the consequence of that, is an injury to an individual, an action may be maintained against such public officer. The instances of this are so numerous, that it would be a waste of time to refer to them".

The Chief Justice went on to give a series of examples all of which plainly involved material damage. One of these examples related to a man to whom a clergyman refused to administer the sacrament, who was described as "thereby prejudiced in his civil rights" because, under the Corporation Act 1661 and the Test Act 1673, receiving the sacrament within a specified period was a condition of eligibility for membership of a town corporation and of holding civil and military offices. The case was one in which (p 108) the corporation had neglected its duty and the plaintiff was clearly entitled to be compensated for the financial loss he had suffered.

16. In *Rogers v Rajendro Dutt* (1860) 13 Moo PC 209 the plaintiff's claim finally failed because, as the Privy Council held, the conduct complained of had not been wrongful. But the exposition of Dr Lushington, giving the judgment of the Board, was clear. At p 236 he said:

> "For if the act which he [the defendant] did was in itself wrongful, as against the Plaintiffs, and produced damage to them, they must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorized, or whether it were done by the order of the superior power".

The plaintiff had, at trial, proved damages of Rs 6624.

17. *Brasyer v Maclean* (1875) LR 6 PC 398 was an appeal to the Privy Council from New South Wales. It arose from a false return made by a sheriff which led to the arrest of the plaintiff and his attachment for 24 hours. The Board differed from the Supreme Court, which had nonsuited the plaintiff because no malice had been shown. But the Board regarded it (p 404) as "impossible to say that no damage was sustained by the Plaintiff in consequence of that arrest", held (p 406) that the sheriff was guilty of a misfeasance and held (p 406) that the damage resulting from the misfeasance was "sufficient damage to enable the Plaintiff to maintain an action against the sheriff for that misfeasance".

18. In *Farrington v Thomson and Bridgland* [1959] VR 286, 293, Smith J, sitting in the Supreme Court of Victoria, ruled:

> ". . . Proof of damage is, of course, necessary in addition. In my view, therefore, the rule should be taken to go this far at least, that if a public officer does an act which, to his knowledge, amounts to an abuse of his office, and he thereby causes damage to another person, then an action in tort for misfeasance in a public office will lie against him at the suit of that person".

This decision was cited with approval, and the need for damage was affirmed, by the Full Court of Victoria in *Tampion v Anderson* [1973]

VR 715, 720. The High Court of Australia had occasion to consider the ingredients of this tort in *Northern Territory v Mengel* (1995) 69 ALJR 527, and plainly considered the suffering of damage by the plaintiff to be one of them: see pp 540, 546, 554.

19. The plaintiff in *Garrett v Attorney-General* [1997] 2 NZLR 332 claimed damages for financial loss and damage to her reputation caused by the alleged failure of the police to investigate her complaint that she had been raped by a police constable in a police station. By the time the case reached the New Zealand Court of Appeal Clarke J had already given his first instance judgment in *Three Rivers* to which I refer in paragraph 21 below, and the court relied on his analysis. Giving the judgment of the court, Blanchard J, at p 349, expressed agreement with Clarke J

> "that it is insufficient to show foreseeability of damage caused by a knowing breach of duty by a public officer. The plaintiff, in our view, must prove that the official had an actual appreciation of the consequences for the plaintiff, or people in the general position of the plaintiff, of the disregard of duty, or that the official was recklessly indifferent to the consequences and can thus be taken to have been content for them to happen as they would".

He went on to observe (p 351) that the common law had long set its face against any general principle that invalid administrative action by itself gives rise to a cause of action in damages by those who have suffered loss as a consequence of that action. A differently constituted Court of Appeal followed this decision in *Rawlinson v Rice* [1997] 2 NZLR 651. In neither case did the decision turn on whether the plaintiff had suffered material damage. But it can scarcely be thought that the court regarded appreciation of the likelihood of damage as a necessary ingredient of the cause of action but did not so regard its occurrence.

20. The Supreme Court of Canada reviewed the ingredients of misfeasance in public office in. *Odhavji Estate v Woodhouse* [2003] 3 SCR 263. Iacobucci J gave the judgment of a unanimous court and in para 32 held:

> "To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose

> distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law."

The court went on to hold (para 41) that while grief or emotional distress were insufficient injury to support a claim, visible and provable illness or recognisable physical or psychopathological harm were not.

21. I come finally to *Three Rivers (No 3).* There was, as already observed, no debate in that case whether, if the other ingredients of misfeasance in public office were established, the plaintiffs had suffered loss. In his judgment at first instance, Clarke J nonetheless reviewed the ingredients of the tort in a comprehensive manner, summarising his conclusions: [1996] 3 All ER 558, 632-633. His final conclusion was:

> "(6) Where a plaintiff establishes (i) that the defendant intended to injure the plaintiff or a person in a class of which the plaintiff is a member (limb one) or that the defendant knew that he had no power to do what he did and that the plaintiff or a person in a class of which the plaintiff is a member would probably suffer loss or damage (limb two) and (ii) that the plaintiff has suffered loss as a result, the plaintiff has a sufficient right or interest to maintain an action for misfeasance in public office at common law. The plaintiff must of course also show that the defendant was a public officer or entity and that his loss was caused by the wrongful act."

I do not understand the Court of Appeal to have taken a different view on this question: see [2003] 2 AC 1, 57-59, 157-166. Both Hirst and Robert Walker LJJ in their joint opinion and Auld LJ in his dissent considered with care the causation of the plaintiffs' loss: see pp 59-61, 166-169.

22. In the House, Lord Steyn (at p 191) defined the two different forms of liability for misfeasance in public office. The first is targeted malice by a public officer, conduct specifically intended to injure a person or persons. The second is where a public officer acts, knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. In Lord Millett's opinion (p 235) these are merely different ways in which the necessary element of intention is established. The state of mind to be proved against the defendant differs somewhat in the two cases. Common to both forms, however, is the requirement of proving that the misfeasance in question has caused damage and that the public officer was at least reckless whether such damage would be caused or not: pp 194-196, 221-222, 225-227, 231, 236-237.

23. These authorities present a remarkably consistent body of law on the point now at issue. The proving of special damage has either been expressly recognised as an essential ingredient, or it has been assumed. None of these cases (and no authority, judicial or academic, cited to the House) lends support to the proposition that the tort of misfeasance in public office is actionable per se. *Ashby v White,* as I have suggested, is not reliable authority for that proposition. I would be very reluctant to disturb a rule which has been understood to represent the law for over 300 years, and which has been adopted elsewhere, unless there were compelling grounds for doing so.

24. The feature on which the Court of Appeal fastened was the breach in this case of the respondent's constitutional right to protection of the confidentiality of his legal correspondence. That was seen as providing an analogy with the breach of the plaintiff's constitutional right to vote in *Ashby v White.* The respondent relied on the authority of the Court of Appeal (per Steyn LJ) that the right of access to a court, closely linked with the right to obtain confidential legal advice, is a constitutional right (*R v Secretary of State for the Home Department, Ex p Leech* [1994] QB 198, 210). In a number of cases rights of this kind have been described as "constitutional", "basic" or "fundamental": see, for instance, *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539, 575; *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 130-131; *R(Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, para 12; *R v Lord Chancellor, Ex p Witham* [1998] QB 575, 581, 585, 586. In all these cases the importance of the right was directly relevant to the lawfulness of what had been done to interfere with its enjoyment.

25. In the present context the unlawfulness of what was done to interfere with the respondent's enjoyment of his right to confidential legal correspondence is clear. I see scant warrant for importing this jurisprudence into the definition of the tort of misfeasance in public office. We would now, of course, regard the right to vote as basic, fundamental or constitutional. None of these expressions was used by Holt CJ in *Ashby v White*, and scarcely could have been given the very small number of adult citizens by whom the right was enjoyed at the time. There is thus an element of anachronism in relying on *Ashby v White* (itself a highly politicised decision) to support a proposition it would scarcely (despite the right to vote being "a thing of the highest importance, and so great a privilege") have been thought to support at the time. It is, I think, entirely novel to treat the character of the right invaded as determinative, in the present context, of whether material damage need be proved.

26. Novelty is not in itself a fatal objection, and the respondent contends that the importance of the right in question requires or justifies the modification of a rule, if there be such, that material damage must be proved to establish a cause of action. I do not, however, think that the House should take or endorse this novel step, for a number of reasons. The first is that it would open the door to argument whether other rights less obviously fundamental, basic or constitutional than the right to vote and the right to preserve the confidentiality of legal correspondence, were sufficiently close to or analogous with those rights to be treated, for damage purposes, in the same way. Since, in the absence of a codified constitution, these terms are incapable of precise definition, the outcome of such argument in other than clear cases would necessarily be uncertain. My second reason, already touched on, is the undesirability of introducing by judicial decision, without consultation, a solution which the consultation and research conducted by the Law Commission may show to be an unsatisfactory solution to what is in truth a small part of a wider problem. Thirdly, the lack of a remedy in tort for someone in the position of the respondent, who has suffered a legal wrong but no material damage, does not leave him without a legal remedy. Prison officers who breach the rules (even in the absence of bad faith), and the governors of both prisons, would be amenable to judicial review. Errant officers would be susceptible to disciplinary sanctions, and failure to initiate such proceedings could also, on appropriate evidence, be challenged by judicial review. The officers might well be indictable for the common law offence of misconduct in public office: see *Attorney General's Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73. Breach of a fundamental human or constitutional right would also, in all probability, found a claim under section 7 of the Human Rights Act 1998, as it would in this case where the violation occurred

after the Act came into force. I have myself questioned, albeit in a lone dissent, whether development of the law of tort should be stunted, leaving very important problems to be swept up by the European Convention (*D v East Berkshire Community Health NHS Trust*, [2005] UKHL 23, [2005] 2 AC 373, para 50), but the observation was made in a case where, in my opinion, the application of familiar principles supported recognition of a remedy in tort, not a case like the present where the application of settled principle points strongly against one. A fourth reason for not adopting the rule for which the respondent contends is to be found in enactment of the 1998 Act: it may reasonably be inferred that Parliament intended infringements of the core human (and constitutional) rights protected by the Act to be remedied under it and not by development of parallel remedies. It is true, as the respondent pointed out, that section 11 of the 1998 Act contains a safeguard for existing rights, and monetary compensation awarded at Strasbourg tends, in comparison with domestic levels of award, to be ungenerous. But there is, as I have concluded, no existing right to damages where misfeasance in public office has caused no material damage to the victim, and if the evidence showed an egregious and deliberate abuse of power by a public officer one would expect the Strasbourg court to award compensation for non-pecuniary loss even though its practice is not to award exemplary damages: *BB v United Kingdom* (2004) 39 EHRR 635, para 36. It is, however, a fifth reason for resisting the respondent's argument that what he seeks, for himself and others in a like position in similar actions, is not an award of damages to compensate the claimant but an award to punish the defendant. Such, after all, is the function of exemplary damages. That exemplary damages may be awarded where a compensatory award is insufficient to mark the court's disapproval of proven misfeasance in public office, and deter repetition, is, as already noted, accepted. But the policy of the law is not in general to encourage the award of exemplary damages, and I would not for my part develop the law of tort to make it an instrument of punishment in cases where there is no material damage for which to compensate.

27. For these reasons, and those given by my noble and learned friends Lord Hope of Craighead, Lord Rodger of Earlsferry and Lord Carswell, I would accordingly rule that the tort of misfeasance in public office is never actionable without proof of material damage as I have defined it. I would accordingly allow the appeal, set aside the Court of Appeal's order save as to costs and restore the order of the judge. The appellant must, conformably with the condition imposed below, pay the respondent's costs of this appeal to the House.

LORD HOPE OF CRAIGHEAD

My Lords,

28. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill, Lord Rodger of Earlsferry and Lord Carswell. I agree with them, and I too would allow the appeal and make the order which Lord Bingham proposes.

29. I would add just a few words to the references that have been made by Lord Rodger and Lord Carswell to the way equivalent proceedings would be treated in Scotland. Although the point is by no means determinative of the issue in this appeal, it is nevertheless of some interest. It is the normal practice for rules regulating the conduct of public officers in Scotland to be the same, or at least substantially the same, as those by which the conduct of comparable public officers in England and Wales are regulated. Prison Rules are no exception. The Prisons and Young Offenders Institutions (Scotland) Rules (SI 1994/1931) contain rules protecting the confidentiality of a prisoner's correspondence with his legal adviser which are closely modelled on the Prison Rules 1964, as amended by the Prison Rules (Amendment) (No 2) Rules. It would be a matter for regret if the remedies for a breach of these and other rules regulating the conduct of public officers were not the same on either side of the border.

30. The question whether a breach of duty is actionable without proof of material damage has long been settled in Scotland. In *Black v North British Railway Co*, 1908 SC 444, the widow and children of man who had been killed while travelling as a passenger on one of their trains claimed damages against the railway company. A court of seven judges was asked to lay down the principles on which on which damages should be assessed under the head of solatium. For the pursuers it was contended that they should be found entitled to enhanced damages if they were able to show that the accident was caused by gross negligence. This argument was rejected. Lord President Dunedin said at pp 453-454 that he found no authority for any distinction between damages and exemplary damages in the law of Scotland.

31. The Lord President might have added that an award of exemplary damages was also contrary to principle. The function of the law of delict in Scotland is to ensure that if loss is caused by another person's

wrongful act the loss will be compensated. The wrongful act of a public officer gives rise to an obligation in delict. The obligation arising from his wrongful act is to make reparation for loss, injury or damage suffered. Reparation is achieved either by restoring to the other party what he has lost or, where that cannot be done, by giving the like value, or that which is nearest, to make up the damage: Stair, *Institutions of the Law of Scotland* (1693), 1, 9, 4. The loss suffered is the basis for the assessment of damages. It is not the function of the law of delict to exact anything more, and certainly not anything by way of punishment. If no loss has been suffered, the wrongful act will not give rise to any liability.

32. The present state of the authorities in England and Wales, as Lord Bingham has so clearly demonstrated, is that the tort of misfeasance in public office is actionable only where the claimant has suffered loss or damage which was caused by the tortuous conduct of the public officer. Its function is to compensate the claimant, not to punish the public officer. Section 8(4) of the Human Rights Act 1998 provides that in determining the amount of an award of damages for a breach a Convention right the court must take into account the principles which the Strasbourg Court applies under article 41 of the Convention. Those principles do not extend to awarding exemplary damages. This is as good an indication as any as to what the policy of the law should now be. I agree that we should refrain from developing the tort so that exemplary damages may be exacted in cases where a compensatory award cannot be made because the claimant has not suffered any material damage as a result of the tortuous act of the public officer.

LORD RODGER OF EARLSFERRY

My Lords,

33. Although convicted of crimes and deprived of their liberty, prisoners have the right to send and receive letters and to make and receive telephone calls. Many of the communications to relatives and friends are social or deal with purely personal matters, but prisoners may also wish to contact the courts or their legal advisers in relation to legal problems, real or perceived. Whatever the nature of the communications, there is a risk that some prisoners may abuse the system to breach the security of their prison. The prison authorities can therefore take measures to counteract that risk by opening, reading and,

if necessary, censoring or blocking correspondence. The Secretary of State's authority for taking these measures is to be found in the Prison Rules made under section 47(1) of the Prison Act 1952. Obviously, the rights of prisoners to communicate with the courts and to consult their legal advisers in confidence are particularly important. Devising a system which respects those rights while maintaining the security of the prisons has not proved altogether easy, as can be seen from the cases that have come before the courts over the last twenty-five years.

34. In *Raymond v Honey* [1983] 1 AC 1, in the purported exercise of his powers under the Prison Rules, a prison governor intercepted a letter containing documents which a prisoner had addressed to the Crown Office for the purpose of raising proceedings to have the governor committed for an alleged contempt of court. This House decided that the governor was in contempt of court in stopping the documents. Lord Wilberforce held that there was nothing in the Prison Act 1952 which conferred power to make regulations which would deny, or interfere with, the right of a prisoner to have unimpeded access to a court. The rule-making provision in section 42(1) was, he said, "quite insufficient to authorise hindrance or interference with so basic a right." That basic right was also given effect in the context of articles 6 and 8 of the European Convention on Human Rights. Long before the Human Rights Act 1998, the scope of a prisoner's right to correspond with his lawyer and the permissible restrictions on that right were progressively clarified by the European Court in cases involving the United Kingdom: *Silver v United Kingdom* (1983) 5 EHRR 347 and *Campbell v United Kingdom* (1992) 15 EHRR 137. At about the same time Mr Mark Leech was active in getting the courts to clarify the position in both Scotland (*Leech v Secretary of State for Scotland* 1992 SC 89) and England (*R v Secretary of State for the Home Department, Ex p Leech* [1994] QB 198).

35. Most of the cases went in favour of the prisoners. The Home Office and the Scottish Office responded by amending the rules to meet the various decisions of the courts. This appeal concerns rule 37A of the Prison Rules 1968, as amended to take account of the decision of the Court of Appeal in *R v Secretary of State for the Home Department, Ex p Leech*, and rule 39 of the Prison Rules 1999, which is in identical terms. Taken as a whole, the cases revolutionised the way that prisoners' correspondence with solicitors and courts had to be handled. The changes in rule 37A reflected this, but the message seems to have taken some time to filter down to the frontline prison officers. In a careful judgment in these proceedings brought by the respondent, Mr Watkins, HHJ Ibbetson found that there had been many breaches of the

rules for handling his correspondence with solicitors. But, for the most part, the judge concluded that the breaches had occurred because the officers concerned simply did not understand the system which they were supposed to be operating. The position was different in the three cases which form the subject-matter of the Home Secretary's appeal.

36. Mr Watkins was a prisoner in Wakefield Prison in 1998. In September one of the prisoner officers, a Mr Ravenscroft, opened two letters to him from his solicitors, even though the officer had no good reason to do so in terms of Rule 37A. He did not care whether he was breaking the rule or not. When the respondent protested, Mr Ravenscroft replied "So report me to John Major." A notice was then issued to staff, reminding them about the terms of rule 37A. About two weeks later, the respondent received another letter from a solicitor. The officer on duty refused to hand the letter over to him unless he was willing to open it in his presence. Later that day, another prison officer, Mr Rosevere, ripped open the letter and, when challenged, said that the notice only applied to outgoing mail. In fact, Mr Rosevere either knew that he was acting unlawfully or was reckless whether his conduct was unlawful.

37. By December 2000 rule 39 had replaced rule 37A and Mr Watkins was in Frankland Prison. He had raised legal proceedings against one of the officers, a Mr Robinson. On 5 December, without Mr Watkins' knowledge or consent and without any sufficient reason to do so, Mr Robinson opened two letters addressed to Mr Watkins from Durham County Court in order to see whether they related to the proceedings against him. He then handed the letters which he had opened to Mr Watkins.

38. The judge found that Mr Watkins was not particularly embarrassed or humiliated by any of these incidents. Rather, in the judge's view, it could be said that in many ways he appeared to thrive on the conflicts.

39. The three officers – and indeed a considerable number of other officers besides – opened the respondent's correspondence with his lawyers in breach of rule 37A or rule 39 of the relevant Prison Rules. It is settled, however, that the Rules are not intended to create private rights in favour of prisoners and that their breach does not of itself give a prisoner a right to claim damages in private law: *R v Deputy Governor of Parkhurst Prison Ex p Hague* [1992] 1 AC 58. The proceedings

which Mr Watkins raised against the Home Office and the individual officers therefore took the form of an action for misfeasance in public office. But in order to establish liability for misfeasance, the claimant must show that the officer was at least recklessly indifferent to the illegality of his act: *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1, 193C-D per Lord Steyn. Here the judge held that, except in the case of the three officers just mentioned, Mr Watkins had failed to establish this ingredient of his claims. The judge therefore dismissed the claims against all the other officers.

40. In his particulars of claim the respondent specified a number of ways in which he said that he had suffered injury as a result of the officers' acts, among them a claim that his sense of pride and dignity was severely injured. The judge did not find that he had established any of these heads of injury. Therefore, despite concluding that the three officers had acted in a malicious or reckless way, the judge dismissed the respondent's claims on the ground that the tort of misfeasance was not actionable per se and the respondent had not suffered any loss or damage as a result of what the officers had done. Mr Watkins appealed against this aspect of the judge's decision.

41. The Court of Appeal identified the question at the heart of the appeal as being whether proof of damage is a necessary ingredient of the tort of misfeasance in public office. The court proceeded to answer that question by saying that a claimant's right of action was complete even without proof of special damage where a defendant infringed a right which could be identified as a constitutional right of the claimant. Holding that the officers had infringed the respondent's constitutional right of access to the courts, the Court of Appeal allowed his appeal, awarded him £5 by way of general damages and remitted the case to the judge to determine whether an award of exemplary damages should be made and, if so, for what amount.

42. The issue in the appeal to this House by the Home Office is whether the Court of Appeal was correct to hold that a claimant could succeed without proof of special damage where the defendant's misfeasance in public office interfered with a "constitutional right" of the claimant.

43. The somewhat disjointed history of the tort which is now known as misfeasance in public office has been traced in the literature and in

several judgments. It would serve no useful purpose for me to add to what my noble and learned friend, Lord Bingham of Cornhill, has said about it in his speech. But his survey shows that the plaintiff has always had to prove that he suffered material damage as a result of the defendant's misfeasance. Take, for instance, *Henly v Lyme Corporation* (1828) 2 Bing 91. The defendants held the famous cob at Lyme under letters patent from Charles I, which obliged them to maintain the sea walls. The plaintiff sued them for failing to perform their duty. He obtained a verdict on two counts. One was to the effect that, with the intention of injuring, prejudicing and aggrieving the plaintiff, and in order to deprive him of the use and benefit of certain lands and cottages, the defendants had allowed the sea defences to fall into a ruinous state with the result that his lands and cottages were flooded and he was "greatly injured and damnified." The defendants sought to have the judgment on the two counts arrested, chiefly on the ground that, since the defendants' obligation to repair the walls had been imposed by the letters patent from Charles I, the Crown alone could take advantage of a breach of the conditions of the grant. That argument might well have had some force if the plaintiff had not suffered any damage as a result of the defendants' failure, but Best CJ held, at p 107, that it was "perfectly clear, that if a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer." He went on to hold, at p 108, that, if by any act of negligence or any act of abuse in his office by a public officer, "any individual sustains an injury, that individual is entitled to redress in a civil action." It is the fact that he suffers injury from the abuse which gives the particular individual a right, which others would not have, to seek redress.

44. The decision of this House in *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 shows that the position remains the same today. In that case the issue was whether recklessness on the part of a defendant would be sufficient to establish liability for misfeasance in public office. The House held that it was. Counsel for the respondent in the present case emphasised that in *Three Rivers* the House had not been concerned with whether the plaintiffs needed to allege that they had suffered loss as a result of the defendant's misfeasance – there were allegations in plenty to that effect. That is, of course, true but it does not take him very far if the claimant's alleged loss forms a material element in the tort as formulated by the House.

45. I find it impossible to read the speeches in *Three Rivers* as proceeding on any other basis than that material injury to the claimant is

an essential element in a claim for misfeasance in public office. The majority of the Court of Appeal had held that the notion of proximity should have a significant part to play in the tort of misfeasance, just as in negligence. The House rejected that approach. Lord Steyn commented, at p 193H: "The state of mind required to establish the tort … as well as the special rule of remoteness … keeps the tort within reasonable bounds." He went on to hold, at p 196A-B, that the plaintiff must establish that the defendant acted not only in the knowledge that the act was beyond his powers "but also in the knowledge that his act would probably injure the plaintiff or person of a class of which the plaintiff was a member." If Lord Steyn had thought that a claim could lie without proof of loss, he could scarcely have failed to mention it in this context. In fact, he considered, at p 196C, that, by limiting the recoverable losses in this way, the test which he favoured

> "represents a satisfactory balance between the two competing policy considerations, namely enlisting tort law to combat executive and administrative abuse of power and not allowing public officers, who must always act for the public good, to be assailed by unmeritorious actions."

For Lord Steyn, therefore, the need to prove loss of the requisite kind was of the very essence of the tort and played a crucial part in defining its scope.

46. Similarly, Lord Hobhouse commented, at p 231D-E, that the tort is historically an action on the case and is not generally actionable by any member of the public. He continued:

> "The plaintiff must have suffered special damage in the sense of loss or injury which is specific to him and which is not being suffered in common with the public in general. … The plaintiff has to be complaining of some loss or damage to him which completes the special connection between him and the official's act."

Lord Hobhouse distinguishes the plaintiff with a right of action from others within the range of the official's act precisely by the fact that it has caused him loss or damage.

47. I do not understand the Court of Appeal, or indeed counsel for the respondent, to have questioned the general position as stated in these authorities. Brooke LJ held, however, that the requirement of proof of loss or damage does not apply where the defendant has infringed "a right which may be identified as a constitutional right": [2005] QB 883, 898, para 48. Since in the present case the respondent's right which the three officers had infringed was to be regarded as a right of this level of importance, "his cause of action in misfeasance in public office was complete even without proof of special damage": [2005] QB 883, 899, para 52. Similarly, Laws LJ held, at pp 902 – 903, para 67:

> "The wrongful act may have interfered with a right of a kind which the law protects without proof of any loss. In that case, the public officer's interference with the right will complete the tort and no actual damage needs to be shown. This is the second class of case. Its paradigm is the instance where the public officer's unlawful conduct has interfered with a constitutional right."

I need not consider whether, as counsel for the Home Secretary suggested, by describing interference with a constitutional right as the paradigm, Laws LJ was indicating that the same approach could be applied in a wider class of cases.

48. Brooke LJ, [2005] QB 883, 898, para 48, sought authority for this significant departure from the law laid down in *Three Rivers DC v Bank of England (No 3)* in "*Ashby v White* and the other election cases" which

> "show that if there is a right which may be identified as a constitutional right, then there may be a cause of action for an infringement of that right without proof of special damage, provided that there is something more than mere infringement."

He did not consider that one could safely explain *Ashby v White* as a case involving the infringement of a franchise (being a property right). He added, at para 49:

> "If this is the correct analysis of *Ashby v White*, then there are some rights recognised by English law which in

> constitutional significance are every much as important in our liberal democracy as the right to vote."

On this basis he held that the three officers should be held liable because they had maliciously or recklessly infringed Mr Watkins' right of unimpeded access to his solicitor which formed an inseparable part of his "constitutional right" of unimpeded access to the courts themselves. See [2005] QB 883, 886–887, para 3.

49. In my view, the dissenting judgment of Holt CJ, which was upheld by your Lordships' House in *Ashby v White* (1703) 1 Sm LC (13th ed) 253, will not bear the weight that Brooke LJ places upon it.

50. The plaintiff was a burgess of Aylesbury and, as a member of the corporation, claimed a right to vote for two members of Parliament in an election in January 1701. He alleged that White and his fellow constables, fraudulently and maliciously intending to indemnify him, hindered him from giving his vote and absolutely refused to permit him to give his vote "to the enervation of the aforesaid privilege of him". He claimed to have been injured thereby and to have suffered damage to the value of £200. The jury returned a verdict in favour of the plaintiff and the defendants applied for arrest of judgment.

51. That is to put the dispute in purely legal terms, but there was much more to it. It was really a set-piece battle in a war between the two Houses of Parliament and between the Whigs and the Tories, with Ashby, a poor cobbler, being backed by the most prominent Whig and the constables by the Tory lord of the manor. See E Cruickshanks, "The case of the men of Aylesbury, 1701-4" in C Jones (ed), *Party and Management in Parliament, 1660 – 1784* (1984) 87.

52. The case came before the Queen's Bench in the autumn of 1703. Holt CJ's views on the question appear in at least three places: in the reported judgment, in a report which he apparently drafted for the House of Lords when their decision in the case brought them into conflict with the House of Commons and in a version published from his manuscript in 1837. Only his judicial opinion can provide authority, however, and it seems to be agreed that the report reproduced in Smith's Leading Cases is the most reliable and complete.

53. The majority of the court were in favour of arresting judgment, inter alia, on the ground that the plaintiff's privilege of voting was not a matter of property or profit, so that the hindrance of it was merely *damnum sine injuria*. They also held that the issue of his right to vote was a matter for Parliament rather than for the judges and that great inconvenience would follow if the judges determined the point one way and Parliament the other. At least in retrospect, the importance of the case in the history of the constitution lies in Holt CJ's defence of the jurisdiction of the Queen's Bench against the privilege asserted by the House of Commons. But Ashby actually lost in the Queen's Bench and so he applied for, and was granted, a writ of error. On 14 January 1704, ten judges being in attendance, the majority of the Whig House of Lords reversed the decision of the Queen's Bench. At the time, this decision, upholding the jurisdiction of the courts against the Commons, was seen as an attack by the Lords on the right of the Commons to decide all matters concerning elections to the House. See 14 Howell's State Trials 695, 696-778. The resulting conflict between the Houses was to continue until the Whigs regained control of the House of Commons after the general election of 1705.

54. In meeting the objection that Ashby's complaint lay within the jurisdiction of the Commons, Holt CJ exclaimed, 1 Sm LC 253, 276, "O! by all means, be very tender of that," and went on to argue that, if a matter came within the jurisdiction of the court, the judges were bound by their oaths to judge of it: "This is a matter of property determinable before us." Later, at p 278, he acknowledged the right of the House of Commons to determine the matter in the course of inquiring into an election, "but we must not be frighted when a matter of property comes before us, by saying it belongs to the parliament; we must exert the queen's jurisdiction."

55. The idea that the plaintiff's privilege or right to vote "as one of the persons qualified to represent all the Commons of England" could be regarded as a matter of property was therefore fundamental to Holt CJ's judgment and to his defence of the jurisdiction of the court. Earlier, at p 270, he had described the right as "a personal right" as opposed to "a real privilege". Of course, he may have been wrong to classify the right to vote in this way and to say that a dispute about it was a dispute about a matter of property. But what matters for present purposes is how he chose to describe Ashby's right to vote, not whether his description was technically sound. Indeed, even if his classification of the right were to seem forced, that would only emphasise its importance: despite any difficulties, he formulated the claim in this way because he thought he needed to. If, instead, he had classified the right to vote as, say, a

constitutional right relating to the selection of members of the House of Commons, he would have run slap up against the objection that the dispute was all a matter for the House of Commons, not for the judges. It was precisely by characterising the right to vote as a property right that Holt CJ avoided that objection and affirmed the jurisdiction of the court in the face of the assertion of the privilege of the House of Commons. And once the plaintiff's right had been characterised in this way, it was relatively easy to conclude that he was entitled to damages for interference with the right even though he could not prove actual loss.

56. In the present case, the respondent has never sought to frame his case as one of interference with a right of property in the letters from his legal advisers. So he cannot rely on Holt CJ's actual decision. But Brooke LJ looks to it for support for the view that a plaintiff is entitled to damages for interference with a constitutional right. This respectfully seems to me to involve the Court of Appeal ignoring the actual terms of his decision and remodelling it in twenty-first century terms which would not only have been unrecognisable to its author but which he would actually have been at pains to avoid.

57. Moreover, although this House did not characterise the dispute as one relating to property, their reasoning proceeded on the basis that "The plaintiff, in this case, hath a privilege and a franchise, and the defendants have disturbed him in the enjoyment thereof, in the most essential part, which is his right of voting": 14 Howell's State Trials 695, 786. So, even on that version, there is no basis for saying that *Ashby v White* cannot safely be explained "as a case involving the infringement of a franchise (being a property right)".

58. Leaving on one side the proper interpretation of *Ashby v White*, the Court of Appeal's decision is noteworthy for the novel use which it makes of the concept of a "constitutional right" or "a right of this level of importance" to create a type of misfeasance in public office which is actionable per se. For such an innovation to be workable, it would have to be possible to identify fairly readily what were to count as "constitutional rights" for this purpose in a country without a written constitution. As it happened, in the present case the Court of Appeal was able to refer to *R v Home Secretary, Ex p Leech* [1994] QB 198, 210A-B where Steyn LJ had commented that, "even in our unwritten constitution," the basic right of access to the court "must rank as a constitutional right." There is, however, no magic in the term "constitutional right". So, for instance, Lord McCluskey must have

been making much the same point in *Leech v Secretary of State for Scotland* 1992 SC 89, 98 when he spoke of "a basic civil right of access to the courts." Moreover, as Laws J remarked in *R v Lord Chancellor Ex p Witham* [1998] QB 575, 585G, although the right of access to the courts has been described as a constitutional right, "the cases do not explain what that means."

59. Laws J sought to provide the necessary explanation, at p 581D-F:

> "In the unwritten legal order of the British state, at a time when the common law continues to accord a legislative supremacy to Parliament, the notion of a constitutional right can in my judgment inhere only in this proposition, that the right in question cannot be abrogated by the state save by specific provision in an Act of Parliament, or by regulations whose vires in main legislation specifically confers the power to abrogate. General words will not suffice. And any such rights will be creatures of the common law, since their existence would not be the consequence of the democratic political process but would be logically prior to it."

He considered a right to be "constitutional" because it can be abrogated only by express enactment. But, if the adjective has any particular force, surely such rights can be abrogated only by express enactment because they are "constitutional", in the sense that they are seen as part of the British constitution which Parliament would not change except on due deliberation leading to express enactment.

60. That is certainly how this House approached the converse case of a common law constitutional impediment in *Nairn v University of St Andrews* [1909] AC 147. A number of women graduates of St Andrews and Edinburgh, who, as graduates, were members of the general council of their university, sought a declarator that they were entitled to vote under section 27 of the Representation of the People (Scotland) Act 1868. The section provided that "every person" whose name was on the register of the general council, if of full age "and not subject to any legal incapacity", was to be entitled to vote for the member of Parliament for the university. This House held that the section did not confer a right to vote on women graduates. Lord Loreburn LC commented, at p 161, "It would require a convincing demonstration to satisfy me that Parliament intended to effect a constitutional change so momentous and far-

reaching by so furtive a process." Similarly, Lord Ashbourne said, at p 163, "If it was intended to make a vast constitutional change in favour of women graduates, one would expect to find plain language and express statement."

61. Although embodied in a statute, in a system of universal suffrage today the right to vote would fall within everyone's notion of a "constitutional right". And, doubtless, the principle of legality would apply in construing any statutory provision which was said to have abrogated that right. Indeed, it is in the sphere of interpretation of statutes that the expression "constitutional right" has tended to be used, more or less interchangeably with other expressions. In *R v Home Secretary, Ex p Simms* [2000] 2 AC 115, 130D-E, in the general context of the power of the Home Secretary to make rules about prisoners' contacts with journalists who might investigate the safety of their convictions, Lord Steyn said that there was a "fundamental or basic right" at stake and that, in interpreting the rule-making power in the Prison Act, the principle of legality operated as a "constitutional principle". In the well-known passage in his speech in the same case, [2000] 2 AC 115, 131E-G, Lord Hoffmann spoke of legislation "contrary to fundamental principles of human rights" and of "the basic rights of the individual". Fluctuations in terminology are only to be expected, since the operation of the canon of construction does not depend on attaching a particular label, "constitutional" or "fundamental" or "basic", to the legal rule in question. Rather, the courts interpret the particular provision in this way because the substance of the rule is perceived to be so important that Parliament must squarely confront what it is doing when it interferes with it and must accept the political cost. That approach to interpretation is not confined, of course, to legislation affecting fundamental or basic rights. For instance, in *Mortensen v Peters* (1906) 8 F (J) 93 the Danish master of a Norwegian steam-trawler was prosecuted for using a particular method of fishing in the Moray Firth. He argued that, although the statute banning the method would have caught a British fisherman, it should be construed as impliedly excepting all foreigners fishing from foreign vessels outside the territorial jurisdiction of the British Crown. The defence failed for a variety of reasons. Lord Salvesen commented, at p 108, that it could scarcely be supposed that the British Parliament should pass legislation placing British fishermen under a disability which did not extend to foreigners. "I think," he added, "it was a just observation of the Solicitor General that, if legislation of this nature had been proposed, and the words inserted which the Dean of Faculty maintained were implied, it would never have been submitted by a responsible minister or have received the approval of Parliament."

62. The term "constitutional right" works well enough, alongside equivalent terms, in the field of statutory interpretation. But, even if it were otherwise suitable, it is not sufficiently precise to define a class of rights whose abuse should give rise to a right of action in tort without proof of damage. Moreover, any expansion to cover abuse of rights under "constitutional statutes", as defined by Laws LJ in *Thoburn v Sutherland City Council* [2003] QB 151, 186 E–G, would carry with it similar problems of deciding which statutes fell within the definition. Even supposing that these could be resolved, it is by no means clear that the abuse of "constitutional rights" or rights under "constitutional statutes" should necessarily attract a remedy which would be denied for the abuse of other important rights. Is the prisoner who suffers no material harm from abuse of his right to correspond with his solicitor necessarily more deserving of a remedy than the patient who is actually perfectly healthy but whose general practitioner maliciously refuses to see him? Or than the applicant who is not actually entitled to a social security benefit but who is maliciously denied the appropriate hearing by the relevant official? At least within the realm of tort law, questions about the availability of a remedy are best answered by looking at the substance of the supposed wrong rather than by reference to a somewhat imprecise label which lawyers might attach to it in another connexion.

63. The desirability of looking at the substance of the matter is relevant to the present appeal. The Court of Appeal was prepared to grant the respondent damages on the basis that the officers abused his constitutional right of access to the courts. But, as counsel for the Home Secretary pointed out, this is to put a somewhat artificial overlay on the facts. Rules 37A and 39 of the Prison Rules were made in order to give practical expression to the "constitutional right" of prisoners to have access to the courts and to a solicitor. But, for that very reason, the officers were almost certainly not aware that they were interfering with any constitutional right as such. What they were doing was maliciously or recklessly failing to apply rule 37A or 39. On the approach favoured by the Court of Appeal, the officers would therefore be made liable not so much for their actual malicious or reckless disregard for the rules, but for unconsciously abusing a right which the rules embody. Again, there is a risk that the result would depend on potentially difficult legal distinctions rather than on the nature and impact of the defendants' abuse.

64. My Lords, despite the encircling difficulties, it might be worth trying to deploy the concept of constitutional rights in the law of tort if it represented a way forward which best fitted the present state of the law. But it does not. Most of the references to "constitutional rights" are to

be found in cases dealing with situations before the Human Rights Act brought Convention rights into our law. In using the language of "constitutional rights", the judges were, more or less explicitly, looking for a means of incorporation *avant la lettre*, of having the common law supply the benefits of incorporation without incorporation. Now that the Human Rights Act is in place, such heroic efforts are unnecessary: the Convention rights form part of our law and provide a rough equivalent of a written code of constitutional rights, albeit not one tailor-made for this country. In general, at least, where the matter is not already covered by the common law but falls within the scope of a Convention right, a claimant can be expected to invoke his remedy under the Human Rights Act rather than to seek to fashion a new common law right: *Wainwright v Home Office* [2004] 2 AC 406, 423, para 33 per Lord Hoffmann. It may be – as counsel for the Home Secretary was inclined to concede, even though the point was not fully argued – that someone in the respondent's position could now bring proceedings under section 8 of the Human Rights Act for damages for breach of certain of the guarantees in articles 6 and 8 of the Convention. But, if so, in considering whether to award damages, the courts would apply the principles developed by the European Court of Human Rights: *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673. Exemplary damages form no part of the existing jurisprudence of that court. Therefore, in my view, it would be wrong in principle for the House now to develop the common law so as to create a situation where exemplary damages could be awarded when they would not be available in equivalent proceedings for breach of the relevant Convention right. No award of exemplary damages would be competent, either, it may be noted, in equivalent proceedings under Scots law.

65. The availability or non-availability of other remedies for the three officers' misfeasance cannot be a decisive factor in deciding whether the respondent has a claim for damages without proof of material damage. Nevertheless, it is worth noting that, as Lord Bingham suggests, the law and the disciplinary system should not in fact be powerless to deal with officers who may, in future, abuse what is an important position of trust.

66. For these reasons, as well as those given by Lord Bingham, I too would allow the appeal and make the order which he proposes.

LORD WALKER OF GESTINGTHORPE

My Lords,

67. I have found this a difficult and troubling appeal. The unchallenged findings of His Honour Judge Ibbotson are that on three separate occasions (on 17 September 1998 and 5 October 1998 at Wakefield Prison, and on 5 December 2000 at Frankland Prison) three different prison officers, deliberately and in bad faith, broke the Prison Rules by opening or reading correspondence addressed to the respondent, Mr Watkins, (on the first two occasions) by his solicitors and (on the third occasion) by the Durham County Court. In the first incident the officer took out and inspected the contents of one package which had already been opened, and opened and inspected the other in front of the respondent. His protest was met by the comment "so report me to John Major" (the prison officer cannot have taken much interest in current affairs). In the second incident the officer "proceeded to rip open" a letter in front of him. In the third incident the officer read documents likely to relate to proceedings in which he (the officer) was a defendant (the officer's evidence of his ignorance of the proceedings was disbelieved, as he had signed a statement of truth on his defence).

68. Each of these incidents was an immediate and intentional breach of the respondent's right to unimpeded access to the court, either directly or through his solicitors. In its impact on the respondent each incident was likely to be much the same as an actual assault which occasioned no lasting harm, such as a slap in the face. Whether or not the respondent suffered distress or depression as a result (and the judge commented that he appeared "to thrive on these conflicts") it was an affront, and a deliberate affront, at which he was entitled to feel real indignation. But whereas even the most trifling and transient physical assault would undoubtedly have given the respondent a cause of action in private law for trespass to the person, sounding in damages (and if appropriate aggravated or exemplary damages), if the appellant Home Office is right the affronts which the respondent suffered give him no private law remedy. He would be left with the possibility of obtaining vindication of his rights by proceedings for judicial review (with no prospect of damages), by enforcement of the disciplinary code to which prison officers are subject, or by a criminal prosecution for misfeasance in public office. He cannot obtain relief by proceedings for the tort of misfeasance in public office, it is said, because he has suffered no damage which the law will recognise. This is a far cry from the stirring

language of Holt CJ in *Ashby v White* (1703) 1 Sm LC (13th ed) 253, 273,

> "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."

69. Mr Sales (on behalf of the Home Office) has submitted that these avenues provided by public law give the respondent adequate protection. I have to say that I am rather sceptical about that. Judicial review (with the preliminary filter of the need for leave, and little prospect of obtaining an order for cross-examination of witnesses) is hardly a satisfactory substitute for an action in the county court. No disciplinary action was (as the Treasury Solicitor has informed the respondent's solicitors) taken against any of the officers. Nor has there been any prosecution, in which a different burden of proof would apply.

70. Two of the incidents on which the respondent succeeded (and another twenty-two allegations on which he failed) occurred before the coming into force of the Human Rights Act 1998. Only the last incident at Frankland Prison occurred after the Act came into force. Unsurprisingly, therefore, the respondent's proceedings did not seek to rely on sections 6, 7 and 8 of the Act. Before the House each side was, for different reasons, a little wary about the significance of the Act. The position of the Home Office was that a claim would now be possible in comparable circumstances, but that a claimant would certainly not obtain exemplary damages and would probably be told that a declaration, or at best nominal damages, amounted to just satisfaction: see *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673. The respondent's position was that it was not clear that substantial damages might not be awarded, but that in any case the coming into force of the Act should not deter the House from developing the tort of misfeasance in public office as justice and principle required, since the Act's reach (and the requirements for liability under sections 6, 7 and 8) are very different from those of the tort.

71. Mr Rabinder Singh QC (for the respondent) also made some powerful general submissions in response to the argument that if the respondent's right was a public law right, the most appropriate remedy

must be a public law remedy. He cited the well-known observations of Lord Wilberforce in *Davy v Spelthorne Borough Council* [1984] AC 262, 276, as to the need for caution in importing the expressions "private law" and "public law" into English law, which typically fastens, not on principles, but on remedies (I would also respectfully note the valuable observations of my noble and learned friends Lord Hope of Craighead and Lord Rodger of Earlsferry in *Davidson v Scottish Ministers* [2005] UKHL 74, paras 41-42 and 73-77). As Mr Rabinder Singh points out, there is something strange about giving the label "private law tort" to misfeasance in public office, a tort which (by definition) can be committed only by a public official acting as such.

72. That is one of the special features of the tort. Another is that it is an intentional tort, and moreover one which can be established only by proof of bad faith. As a matter of principle an intentional tort, and especially one necessarily involving bad faith, may differ from other torts in the need for proof of actual damage (see the observations of Lord Hoffmann in *Wainwright v Home Office* [2004] 2 AC 406, 425-426, paras 42-46, not resiling from what he said in *Hunter v Canary Wharf Ltd* [1997] AC 655, 707) as it does in relation to causation (see *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 279-280).

73. There are nevertheless formidable objections (set out more fully in your Lordships' speeches) to the proposition that the tort of misfeasance in public office should be actionable without proof of special damage, whether the proposition is put in that wide form, or is limited to cases where the misfeasance takes the form of targeted malice which breaches the claimant's constitutional rights. I will list very briefly the main objections to the narrow proposition.

(1) Although the point at issue seems never to have risen for decision either in England or elsewhere in common law jurisdictions, the great weight of authority treats damage as an element of the tort, and (apart from the decision now under appeal) there is no definite authority the other way.

(2) Some cases of "targeted" malice are very clear, such as the early Canadian case of *Roncarelli v Duplessis* [1959] SCR 121 (discussed by the Supreme Court of Canada in *Odhavji Estate v Woodhouse* [2003] SCC 69, para 19). But the weight of authority is against treating targeted malice as being in a special category, rather than as being at the brightest end of a spectrum (see *Odhavji*

at para 22 and the decision of this House in *Three Rivers District Council v Governor and Company of the Bank of England* [2003] 2 AC 1 at pp191-192 (Lord Steyn), 219-223 (Lord Hutton), 230-231 (Lord Hobhouse) and 235 (Lord Millett, who expressed most strongly the view that there is a single tort of intention). A rule that the targeted malice limb (only) of the tort is actionable without proof of special damage would therefore be unprincipled and difficult to apply.

(3) The same objection applies to the notion that the scope of the tort could be kept within sensible boundaries by making it actionable *per se* only if there is a breach of a constitutional right enjoyed by the claimant. In *R v Secretary of State for the Home Department Ex p Leech* [1994] QB 198, 210, Steyn LJ said of a prisoner's right to confidentiality for correspondence with his solicitors,

> "Even in our unwritten constitution it must rank as a constitutional right."

But so long as we have no written constitution, any syllabus of the citizen's constitutional rights (or, equally, of the citizen's "core" constitutional rights) is bound to be controversial. Mr Sales suggested that the notion of core constitutional rights has a part to play in the development of the law, but only in the field of the interpretation of primary legislation (as in *R v Secretary of State for the Home Department Ex p Simms* [2002] 2 AC 115, 130 (Lord Steyn), 131 (Lord Hoffmann) or in the review of secondary legislation (as in *Leech*); in that area he said, the Court can take a nuanced approach. I see a lot of force in that.

(4) The Human Rights Act 1998 is now in force and (if the facts of the case occurred again) a prisoner would have a clear claim under sections 6, 7 and 8 of the Act by reference to both Article 6 and Article 8 of the Convention (the Article 8 claim appears to me to be the stronger). Despite *Greenfield*, the developing domestic jurisprudence under the Act may lead to modest (but more than nominal) awards of damages in cases of deliberate official wrongdoing, even if it does not occasion monetary loss.

74. I do not include among what I see as powerful objections either the historical origins of the tort, or fear of a flood of what Mr Sales called gold-digging claims. Historically the tort of libel developed, as misfeasance in public office did, from the action on the case. But both

have come a long way since then. If (as is still the case after *Rantzen v Mirror Group Newspapers (1968) Ltd* [1994] QB 670) a claimant can recover general damages of over £100,000 for a single libel without proof of any monetary loss whatsoever, ancient legal history cannot be a good reason why misfeasance in public office should not develop in the same direction.

75. Nor am I impressed by predictions of a flood of unmeritorious claims. It is not easy to bring a claim of this sort. Experienced judges (and the civil juries whom they sometimes have to direct in such cases) know that the police and prison officers have a difficult job to do, often in the face of provocation, and that they are not infallible. Awards of general or aggravated damages take these matters into account, and are rarely extravagant. Extravagant awards can be and are reduced on appeal. But deliberate abuse of public office directed at an individual citizen calls for an effective sanction enforceable as of right by that citizen. Exemplary damages, even if anomalous, have a part to play in discouraging abuses of power in a democratic society: *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122.

76. Nevertheless the four main difficulties outlined above, which are much more fully developed in the speeches of your Lordships, lead me, with some reluctance, to the conclusion that this appeal must be allowed.

LORD CARSWELL

My Lords,

77. I have had the advantage of reading in draft the opinions prepared by my noble and learned friends, Lord Bingham of Cornhill and Lord Rodger of Earlsferry. I am in full agreement with their reasons and conclusions and wish to add only a few observations.

78. The distinction between actions in tort in which it is not necessary to prove special or material damage in order to succeed (torts actionable *per se*) and those in which such proof is an essential ingredient of the claimant's case stems from the ancient dichotomy between actions in trespass and actions on the case. The discussion of

the development of the two forms of action contained in Maitland, *The Forms of Action at Common Law*, Lecture VI shows how that development may be regarded as no more than accidental and the distinction is described in *Clerk & Lindsell on Torts*, 19th ed (2006), para 1.46 as being of limited relevance; for a useful synopsis see also *Prosser & Keeton on Torts*, 5th ed (1984), pp 28-31.

79. In actions on the case, the category into which the tort of misfeasance in public office falls, "damage is the gist of the action" (*Salmond & Heuston on Torts*, 21st ed, (1996) p 6) and the claimant will fail if he cannot prove it. For the reasons set out by Lord Bingham, I agree that the authorities establish that that tort is properly classed among those in which proof of material damage is required. I also agree with his opinion that the conclusion reached by the Court of Appeal, that where the tortious act amounts to a breach of the claimant's constitutional rights it is actionable *per se*, cannot be supported. In my opinion it would not be a readily workable expedient and it has insufficient authority to support it.

80. One might question, more generally, whether the law should continue to support a distinction between those actions in which proof of material damage is needed and those in which there is no such requirement. It might not unreasonably be said that any civil wrong should carry damages and that those who deliberately flout the law and deprive others of their rights by abusing their position should be liable to the victims of such acts. The common law is capable of accommodating changes necessary to allow it to adapt to modern needs, as your Lordships recognised in the recent torture case *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71; [2005] 3 WLR 1249. It might therefore be theoretically possible to abolish the distinction and hold that all torts are actionable without proof of material damage.

81. I am not satisfied, however, that it would be advisable for the House to take such a course, were it minded to do so. The underlying dichotomy between trespass and case would still remain, even if it became of even less relevance than now. It would be a departure from the prevailing trend in other common law jurisdictions and would be out of harmony with the Scots law governing damages in actions for delict. There are other avenues for a claimant in a case of the present type who cannot establish any material damage, even if they may not afford a perfect remedy in all cases. Finally, it would be likely to open the door to claims for exemplary damages in a broader class of cases than those in which they may now be awarded. Notwithstanding the fact that the

House has ruled in *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29; [2002] 2 AC 122 that exemplary damages may in principle be awarded in cases of misfeasance in public office, I should myself prefer to confine the award of such damages very closely indeed.

82. Although the possibility of rationalising the law in this way may have some attraction at first sight, I think that for these reasons it should be resisted. If at some time it is thought advisable to give the idea further consideration, I think that it should be done by the Law Commission, which would be well placed to consider in depth the issues and possible consequences of such a change in the law. In the present state of the law, however, I agree with your Lordships that the judge was correct to rule as he did, and I would allow the appeal and make the order proposed.