HOUSE OF LORDS SESSION 2006–07
[2007] UKHL 5

on appeal from: [2006] EWCA Civ 1639

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

R (on the application of Stellato)
v.
The Secretary of State for the Home Department

Appellate Committee

Lord Bingham of Cornhill
Lord Hoffmann
Lord Hope of Craighead
Lord Carswell
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
David Pannick QC
Parishil Patel
(Instructed by Treasury Solicitor)

Respondents:
Keir Starmer QC
Phillippa Kaufmann
(Instructed by Bhatt Murphy)

Hearing date:
22 February 2007

ON
JUDGMENT: WEDNESDAY 28 FEBRUARY 2007
REASONS: WEDNESDAY 14 MARCH 2007

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

R (on the application of Stellato) (Respondent) *v.* Secretary of State for the Home Department (Appellant)

[2007] UKHL 5

LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood. I am in full agreement with it, and for that reason agree that the Secretary of State's appeal should be dismissed and the respondent discharged.

LORD HOFFMANN

My Lords,

2. I have had the benefit of reading in draft the opinion prepared by my noble and learned friend Lord Brown of Eaton-under-Heywood, and for the reasons which he has given I too would dismiss the appeal. I also agree with the observations of my noble and learned friend Lord Hope of Craighead on the significance of the procedure by which the 2005 Order was made.

LORD HOPE OF CRAIGHEAD

My Lords,

3. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Brown of Eaton-under-Heywood. For the reasons he gives I too agree that the appeal should be dismissed and the respondent discharged.

4. As Lord Brown has explained, the answer to the question raised by this case depends on the proper construction of certain provisions in the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005 (SI 2005/950 (C42)) ("the 2005 Order"). It is a remarkable feature of this case that, if their effect had been that the respondent was entitled only to release on licence despite having reached the three-quarter point of the ten year sentence which he received under the regime that was in force when he committed the offences for which he was sentenced, this would have been achieved by a method of legislating that exposed the measure to the minimum of Parliamentary scrutiny. This raises a point of practice on which I wish to add these brief comments.

5. The preamble to the 2005 Order states that it was made in the exercise of powers conferred on the Secretary of State by sections 330(4)(b) and 336(3) and (4) of the Criminal Justice Act 2003. Section 330(2), read with section 330(1)(a), states that any power which the Act confers on the Secretary of State to make orders and rules is exercisable by statutory instrument. Section 330(4) provides:

> "The power includes power to make –
>
> (a) any supplementary, incidental or consequential provision, and
>
> (b) any transitory, transitional or saving provision,
>
> which the Minister making the instrument considers necessary or expedient."

Section 336 deals with commencement. Subsections (3) and (4) of that section state that the provisions of the Act, other than those mentioned in the two preceding subsections, come into force in accordance with

provision made by the Secretary of State by order, and that different provision may be made for different purposes and different areas. In note (a) to the 2005 Order attention is drawn to the fact that section 333(3) is relevant to the scope of the powers in section 330(4)(b). Section 333 deals with supplementary and consequential provisions. Section 333(3) provides:

> "Nothing in this section limits the power by virtue of section 330(4)(b) to include transitional or saving provision in an order under section 336."

6. The explanatory note to the 2005 Order confirms that the powers which the Secretary of State was exercising were those dealing with commencement and the making of transitional or saving provisions. It states (a) that the Order brings into force the provisions of the 2003 Act set out in Schedule 1 on 4 April 2005, those referred to in article 3 on 18 April 2005 and those referred to in article 2(2) and article 4 on 4 April 2007, and (b) that commencement in the case of provisions falling under article 4 and Schedule 1 is subject to the saving and transitional provisions contained in Schedule 2. Paragraphs 19 and 23 of Schedule 2 are the provisions that are under scrutiny in this appeal.

7. The 2003 Act reserved some measure of control over the exercise of these powers to Parliament. The systems which it selected must be seen in the light of those which Parliament itself has put in place for delegated legislation to be subjected to scrutiny. All statutory instruments made in the exercise of powers granted by an Act of Parliament are considered by the Joint Committee on Statutory Instruments. Its role is to assess the technical qualities of each instrument that falls within its remit and to decide whether to draw the special attention of the House to any instruments on any one or more of a number of specified grounds which are of a technical character: House of Commons Standing Order No 151; House of Lords Standing Order No 74. These grounds include that the drafting appears to be defective. Defects of that kind may include simple misprints such as those in paragraph 23 of the 2005 Order which Lord Brown mentions in paragraph 36. Where technical defects are discovered, they are drawn to the attention of the Department which was responsible for the instrument for its comments before the instrument is drawn to the special attention of both Houses. It is not surprising, in view of the huge volume of delegated legislation that has to be scrutinised by this Committee, that the misprints in paragraph 23 were not detected by it so

that arrangements could be made for them to be corrected by the Home Office at the earliest opportunity.

8. Then, so far as the House of Lords is concerned, there is the Merits of Statutory Instruments Committee. Its terms of reference include the consideration of every draft of an instrument laid before each House of Parliament upon which proceedings may be taken in either House under an Act of Parliament. This is with a view to determining whether or not the special attention of the House should be drawn to it on grounds of a more general character. These are (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House, (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act, (c) that it may inappropriately implement European Union legislation and (d) that it may imperfectly achieve its policy objectives. Matters within the orders of reference of the Joint Committee on Statutory Instruments are excluded from those that it may consider.

9. Here again the volume of the material that passes through the committee's hands affects the number of instruments that can be singled out for detailed scrutiny. It is rare for instruments made in the exercise of commencement powers to feature on the list of those which are singled out for detailed scrutiny by the Merits Committee. Exceptionally, this Committee did draw attention to the draft Criminal Justice Act 2003 (Commencement No 12 and Transitory Provisions) Order 2005 on the ground that it gave rise to issues of public policy likely to be of interest to the House and was legally important: (Thirteenth Report, 10 November 2005, Session 2005–2006). But the purpose of this Order, which was made under sections 333(1) and (2)(a) and 336(3) of the 2003 Act, was to commence the provisions of section 43 of that Act which deals with applications by the prosecution for certain serious and complex fraud cases to be conducted without a jury. Section 330(5)(b) provides that an order bringing section 43 into force is subject to the affirmative resolution procedure. The Order was approved in the House of Commons, but it was withdrawn by the government shortly before it was due to be debated in the House of Lords.

10. The opportunity for wider and more detailed debate and scrutiny of delegated legislation in both Houses is determined by the provisions in the enabling Act. Four procedures are available: affirmative resolution procedure; negative resolution procedure; simply laying; and no parliamentary stage at all: Butterworths Legal Research Guide, 2nd

edition (2001), para 4.74. Which of these procedures is prescribed in the enabling legislation will determine whether there are likely to be any debates. It is important in the context of this appeal to see what the 2003 Act laid down.

11. The relevant provisions in the 2003 Act are set out in section 330(5) and (6). Section 330(5) provides that a statutory instrument containing (a) an order made under various provisions which are listed in that paragraph, (b) an order under section 336(3) bringing into force section 43, (c) an order making provision by virtue of section 333(2)(b) which adds to, replaces or omits any part of the text of an Act, or (d) rules made under section 240(4)(a) (which enables the Secretary of State, in certain cases, to make rules to the effect that the number of days for which the offender was remanded in custody in connection with the offence or a related offence are not to count as time served by him as part of the sentence) "may only be made if a draft of the statutory instrument has been laid before, and approved by a resolution of, each House of Parliament." This is a reference to the affirmative resolution procedure. Section 330(6) provides that any other statutory instrument made in the exercise of a power to which the section applies is subject to annulment in pursuance of a resolution of either House of Parliament. This is a reference to the negative resolution procedure.

12. The affirmative resolution procedure requires that a resolution must be passed by both Houses before the order or rules can be made. This provides an opportunity for scrutiny and debate in the Chamber of each House or, in the case of the House of Lords, its detailed consideration in Grand Committee before a resolution is put to the vote in the Chamber. The negative resolution procedure is a less rigorous form of parliamentary control. The instrument is laid before both Houses for a period of 40 days. It takes effect on the expiry of that period unless it has been defeated by a resolution annulling it or praying that it be annulled. It is rare for instruments which are subject to the negative resolution procedure to be challenged in this way, and it is even rarer for such a challenge to be successful. In practice, subjecting the exercise of the power to the affirmative resolution procedure is the only way of ensuring that an opportunity is given for debate on an order or rule that is made under it.

13. The Secretary of State is given power by section 333(2)(b)(i) to amend or repeal any Act passed before or in the same Session as the 2003 Act when he is making any transitory, transitional or saving provision which he considers necessary or expedient for the purposes of,

in consequence of, or for giving full effect to any provision of the Act by an order made under section 333(1). As I have already mentioned, an order making provision by virtue of section 333(2)(b) which adds to, replaces or omits any part of the text of an Act is included among the orders that are subjected to the affirmative resolution procedure by section 330(5). But section 333(2)(b) was not among the list of the enabling powers that were mentioned in the preamble to the 2005 Order. The power to make transitory, transitional or saving provision which the Secretary of State was exercising in this case was that which he was given by section 330(4)(b). As the footnote to the 2005 Order points out, the section 330(4)(b) power is not limited by the extent of the power in section 333(2)(b). The effect of making use of the section 330(4)(b) power was to exclude the 2005 Order from the list of orders that are subject to the affirmative resolution procedure. It was subject only to the negative resolution procedure. It was laid before Parliament for the requisite period of 40 days after it was made. But it was not subjected to scrutiny by debate in either House.

14. The provisions in paragraphs 19 and 23 of Schedule 2 to the 2005 Order on which the Secretary of State's argument depends do not purport to amend or repeal the provisions of the Criminal Justice Act 1991 under which long-term prisoners were entitled to be released unconditionally when they reached the three-quarter point of their sentences: see sections 33(3) and 37(1). Nor do they purport to amend the Crime and Disorder Act 1998 by giving retrospective effect to section 104, which provided that, if a pre-30 September 1998 Act prisoner was released on licence and then recalled, his further release was to be on licence until the end of his sentence. Yet the result for which the Secretary of State contends would have the effect of depriving the respondent, and all the other pre-2003 Act offenders who are in the same position as he is, of the entitlement to unconditional release at the three-quarter point which they were afforded by the 1991 Act. The effect would be to amend the regime under which the respondent and others like him were sentenced retrospectively.

15. I respectfully agree with Lord Brown that, if such a surprising result were intended, it ought to have been enacted in the clearest of terms. In my opinion this conclusion is greatly strengthened by the method of legislating that was employed in this case. It could not have been better designed to ensure that, if it was intended, the matter would escape attention when the 2005 Order was being scrutinised under the parliamentary procedures which I have described. We have no means of knowing what instructions the draftsman was given, or whether the Minister of State's attention was expressly drawn to these provisions

before she signed the Order on 24 March 2005. All we have to go on is the wording that is to be found in the Schedule. But one would have expected, in the light of the carefully worded provisions of sections 330 and 333 of the 2003 Act, that the Order would have been made under section 333(2)(b) and the affirmative resolution procedure used if it was the Secretary of State's intention that the respondent and others like him should be deprived of their statutory entitlement. The fact that the order was not made under section 333(2)(b), with the result that the affirmative resolution procedure was not used, is a powerful indication that paragraphs 19 and 23 are to be understood as dealing only with matters of definition and procedure of a transitional nature, not with matters of substance affecting prisoners' rights about which an opportunity ought to have been given for debate in Parliament.

LORD CARSWELL

My Lords,

16. I have had the benefit of reading in draft the opinion prepared by my noble and learned friend Lord Brown of Eaton-under-Heywood, and for the reasons which he has given I too would dismiss the appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

17. The respondent is a prisoner serving a ten year sentence for offences committed in June 1998. On 27 December 2005 he reached the three-quarter point of that sentence and became entitled to his release. Was he, however, entitled to be released unconditionally or was he entitled only to release on licence, subject to recall at any time until the end of his sentence? That is the issue for your Lordships' determination on this appeal and ultimately it depends upon the true construction of certain saving and transitional provisions relating to the new parole scheme introduced with effect from 4 April 2005 by the Criminal Justice Act 2003 (the 2003 Act).

18. First, however, I must indicate something of the prisoner release system and how it has changed over recent years. In particular it is necessary to notice certain core features of three successive statutory regimes, respectively under Part II of the Criminal Justice Act 1991 (the 1991 Act), under the 1991 Act as amended with effect from 30 September 1998 by the Crime and Disorder Act 1998 (the 1998 Act), and, with effect from 4 April 2005, under Chapter 6 of Part 12 of the 2003 Act. Your Lordships are concerned only with the application of these regimes to long-term determinate sentence prisoners (those sentenced to four years or more) like the respondent.

19. Under the 1991 Act long-term prisoners became eligible for release on licence (parole as I shall call it) at the Home Secretary's discretion on the Parole Board's recommendation at the halfway point of their sentence (section 35(1)). At the two thirds point, if not already released, the prisoner became entitled to parole (section 33(2)). At the three quarter point, the prisoner was entitled to his freedom; if he had before then been recalled to prison and was still in custody he was entitled to be released unconditionally (section 33(3)); if he was then on parole his licence at that point expired (section 37(1)). The prisoner could not, in short, be required to serve more than three quarters of his sentence. Section 39 (under the heading "Recall of … prisoners while on licence") provided for recall in either of two ways:

> "39(1) If recommended to do so by the Board in the case of a … 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."

20. The 1991 Act, as amended by the 1998 Act, provided that where a prisoner was released on licence and then recalled, his further release at the three quarter point was to be on licence for the rest of his sentence. This was effected by section 104 of the 1998 Act which amended section 33(3) so as to preserve the prisoner's absolute right to release at the three quarter point but to make that release subject to licence rather than unconditional. Section 37 (under the heading "Duration … of licences") was correspondingly amended to provide that

in such a case the licence was to remain in force for the whole of the sentence.

21. That new regime, however, was not to operate retrospectively. It was to apply only to those whose offending post-dated its coming into effect. It accordingly did not apply to this respondent whose offences were committed *before* 30 September 1998.

22. The 2003 Act introduced a very different regime. Long-term prisoners (indeed most prisoners) must now be released at the halfway point (section 244) but never unconditionally, always on licence until the end of their sentences. Section 249 (the counterpart to section 37 of the 1991 Act), under the heading "Duration of licence", provides that "the licence shall, subject to any revocation under section 254 … , remain in force for the remainder of [the] sentence." Section 254 (the counterpart to section 39 of the 1991 Act), under the heading "Recall of prisoners while on licence", provides by subsection (1) that "the Secretary of State may, in the case of any prisoner who has been released on licence under this Chapter, revoke his licence and recall him to prison" and then makes provision for the Parole Board to become involved at that stage. Section 256 makes provision for a prisoner's "Further release after recall."

23. The new regime under the 2003 Act came into effect, as stated, on 4 April 2005. Pursuant to the Act there was made on 24 March 2005 The Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005 (SI 2005/950(C 42)) ("the 2005 Order") which, by paragraph 19 of Schedule 1, brought into force the relevant provisions of the 2003 Act and, by Schedule 2, made certain saving and transitional provisions relating to them.

24. It is necessary to set out in full paragraphs 19 and 23 of Schedule 2, the provisions at the heart of this appeal:

> "*Savings for prisoners convicted of offences committed before 4th April 2005*
>
> 19. The coming into force of—
>
> (a) sections 244 (duty to release prisoners), 246 (power to release prisoners before required to do so), 248 (power to release on

compassionate grounds), 249 (duration of licence) and 250 (licence conditions);

(b) paragraph 8(2)(b) of Schedule 32 (Criminal Appeal Act 1968);

(c) the repeal of sections 33, 33A to 38A, 40A to 44, and 46 to 47 and 51 of the 1991 Act; and

(d) the repeal of sections 59 and 60, 99 and 100, 101, 103 to 105 and 121 of the Crime and Disorder Act 1998,

is of no effect in relation to a prisoner serving a sentence of imprisonment imposed in respect of an offence committed before 4th April 2005.

Transitional arrangements for recall after release

23.—(1) Subject to sub-paragraphs (2) and (3), in relation to a prisoner who falls to be released under the provisions of Part 2 of the 1991 Act after 4th April 2005—

(a) the reference to release on licence in section 254(1) of the 2003 Act (recall of prisoners while on licence) shall be taken to include release on licence under those provisions; and

(b) the reference in sections 37(1) and 44(3) and (4) of the 1991 Act to revocation under section 39 of that Act shall be treated as a reference to revocation under section 254 of the 2003 Act.

(2) Paragraph 12(1) and (2) of Schedule 9 to the Crime and Disorder Act 1988 [sic] shall continue to apply to the recall of prisoners whose sentence [sic] was committed before the commencement of section 103 of that Act.

(3) The repeal of section 39 of the 1991 Act is of no effect in a case in which the Secretary of State has received a request for the recall of an offender from an officer of a local Probation Board before 4th April 2005."

Before turning in some detail to these provisions it is convenient to note both the central difference between the parties as to their true construction and effect, and how the point arises on the facts of the case.

25. The critical question raised is as to the effect on a prisoner whose offence was committed before 4 April 2005 (a pre-Act offender as I shall call him) of a recall after 4 April 2005 (a post-Act recall as I shall call it) from release on licence (a recall which in the case of those like the respondent must by definition occur before the three quarter point of the sentence). It is the Secretary of State's contention that such a recall operates without more to extend the duration of the prisoner's licence and his period at risk from the three quarters point (at which he would otherwise have been entitled under the 1991 Act to unconditional release) to the end of his sentence. The respondent submits to the contrary that, whilst clearly any post-Act recall would now be effected in the way provided for by section 254 of the 2003 Act (under the transitional arrangements for recall set out in paragraph 23 of the second Schedule), that cannot affect the duration of his licence which remains as provided for by section 37 of the 1991 Act.

26. The point here arises on the facts because, having initially been released on licence on 17 February 2005 at the two thirds point of his sentence (under section 33(2) of the 1991 Act), (and then been released again on 16 June 2005 following his recall in February 2005 under section 39 of the 1991 Act for failing to reside at a designated hostel), the respondent was again recalled to custody on 11 August 2005 (this time, the parties agree, under section 254 of the 2003 Act), following the revocation of his licence by the Secretary of State on 1 August 2005 for failing to comply with the hostel's curfew arrangements.

27. Although those are the only facts strictly material to the determination of this appeal, the subsequent course of events may be shortly recorded. On 4 October 2005 the Parole Board upheld the recall to custody and (under section 256(1)(b) of the 2003 Act) directed a further review in April 2006. On 24 October 2005 the Parole Board issued a further decision (in substitution for the previous one) directing that the respondent be released at the three quarter point of his sentence on licence until the end of his sentence (under section 256(1)(a)). On 31 October 2005 the respondent commenced judicial review proceedings claiming that he was entitled to be released from custody unconditionally at the three quarter point of his sentence, 27 December 2005. On 23 December 2005 (the last working day before the three quarter point) the respondent was released on licence under section 256. On 28 December 2005 the Secretary of State again revoked the respondent's licence under section 254, this time for refusing to comply with the conditions of a licence to which, on his case, he should not have been made subject. On 6 January 2006 he was arrested and returned to prison where he has since remained.

28. On 31 March 2006 the Divisional Court (Hallett LJ and Jack J) [2006] EWHC 608 (Admin) dismissed the respondent's judicial review application, holding that his release on 23 December 2005 was properly subject to a licence which would continue until the final expiry of his sentence on 26 June 2008.

29. On 1 December 2006 the Court of Appeal (Longmore, Scott Baker and Hughes LJJ) allowed the respondent's appeal and held that his release became unconditional at the three quarter point of his sentence on 27 December 2005 so that there was no power to recall him to prison thereafter: see [2006] EWCA Civ 1639; [2007] 1 WLR 608.

30. The respondent has nevertheless since remained in custody pursuant to a stay granted initially by the Court of Appeal and thereafter continued by your Lordships to enable the Secretary of State to pursue his appeal to the House.

31. At the conclusion of the argument before the House on 22 February 2007 your Lordships indicated that the Secretary of State's appeal was to fail and would be formally dismissed on 28 February for reasons to be given thereafter.

32. It is time finally to return in detail to the two critical provisions, paragraphs 19 and 23 of Schedule 2 to the 2005 Order. Paragraph 19, as its heading states, is expressly aimed at saving the position of pre-Act offenders. These offenders are not, it should be noted, the beneficiaries of various advantages conferred on prisoners by the 2003 Act, most obviously perhaps an entitlement (as opposed to mere eligibility) to release at the halfway point. It is hardly surprising that they should therefore be safeguarded against newly introduced disadvantages, quite apart from the fact that such disadvantages are not generally introduced retrospectively. Paragraph 19 achieves this in their cases by disapplying certain provisions of the 2003 Act and by preserving (disapplying the repeal of) certain provisions of the 1991 Act.

33. Most notably for present purposes, paragraph 19(a) disapplies section 249 of the 2003 Act and correspondingly paragraph 19(c) preserves section 37 of the 1991 Act. These, as already explained, are the sections which directly concern the duration of licences under the respective parole regimes. Section 37 states in terms that the licence remains in force "until the date on which [the prisoner] would (but for

his release) have served three quarters of his sentence." Section 249 by contrast states that the licence shall remain in force "for the remainder of his sentence". On the face of it nothing could be clearer than that paragraph 19 was intended to preserve for pre-Act offenders the shorter licence period applicable under the 1991 Act.

34. The Secretary of State's argument is that such indeed is the position with regard to pre-Act offenders who are *not* recalled after the coming into force of the 2003 Act. But, he argues, if they *are* recalled, then any further release is on licence up to the end of their sentence. Such further release takes place pursuant to section 254 or section 256 of the 2003 Act (which are not disapplied by paragraph 19(a)). These two sections provide for "release on licence under this Chapter". Chapter 6 includes section 249 and thus, runs the argument, notwithstanding its express and apparently unqualified disapplication in the case of all pre-Act offenders, section 249 operates to extend their licenses on re-release to the full length of their sentence if recalled after Chapter 6 came into force. The argument is not an easy one. I hope I have done it justice. As Scott Baker LJ pointed out in the leading judgment in the court below, its effect is to qualify the apparently plain effect of paragraph 19 and require it to be read as if it ended with the words "except where he is recalled on or after that date under section 254 of the 2003 Act."

35. Before turning to paragraph 23 it should be noticed that paragraph 19(c) does *not* preserve section 39 of the 1991 Act (the recall provision) (although paragraph 23(3) in terms provides that the repeal of section 39 is to be of no effect in cases where the recall process has already been started by the Parole Board).

36. On any view the drafting of paragraph 23 leaves much to be desired. Paragraph 23(2) (not otherwise of any interest on this appeal) remarkably contains two obvious mistakes: the date of the Crime and Disorder Act is 1998, not 1988, and the reference to a "sentence" being committed should instead be to an "offence". The opening clause of paragraph 23(1) has likewise caused problems: it was decided by the Court of Appeal in *Buddington v Secretary of State for the Home Department* [2006] EWCA Civ 280 (27 March 2006) that the words "falls to be released" mean "is entitled to be released" or "is released". Meantime, and consistently, the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005 (Supplementary Provisions) Order 2005 [SI 2005/2122], made on 29 July 2005, stated "for the avoidance of doubt" that the reference in

the 2005 Order to a prisoner who falls to be released "is to be read as including a prisoner who was released before 4 April 2005 and the words 'after 4 April 2005' are to be read only as indicating the date from which sub-paragraphs (a) and (b) of that paragraph take effect."

37. In short, sub-paragraphs (a) and (b) of paragraph 23(1) apply after 4 April 2005 to the recall of pre-Act offenders whether or not released before that date.

38. Section 254(1) of the 2003 Act on its face empowers the Secretary of State to revoke the licence of, and recall to prison, only "any prisoner who has been released on licence under this Chapter." Paragraph 23(1)(a) operates to extend that reference to include also those prisoners released on licence under the 1991 Act. Clearly this was necessary given that, as already explained, section 254 was to govern the recall process in all cases after 4 April 2005.

39. Section 37(1) provides that the licence of a prisoner released under the 1991 Act remains in force until the three quarter point "subject to … any revocation under section 39". Because section 254 was to apply in all cases, it was likewise necessary for paragraph 23(1)(b) to provide that that reference to revocation in section 37(1) should be treated as a reference to revocation under section 254. Similarly with regard to the references to revocation in sections 44(3) and (4) (provisions dealing with extended sentences and accordingly of no present relevance).

40. This brings me to the Secretary of State's final argument on the construction of these paragraphs, an argument based on what Mr Pannick QC submits is the conspicuous omission from paragraph 23(1)(b) of any mention of section 33(3) of the 1991 Act. Section 33(3), it will be remembered, required a prisoner released on licence and then "recalled to prison under section 39" to be released at the three quarter point of his sentence (unconditionally in the case of pre-1998 Act offenders like the respondent). But, submits the Secretary of State, section 33(3) is concerned only with the re-release of prisoners recalled under section 39 of the 1991 Act. Once, as provided for by paragraph 23, recall after 4 April 2005 and any further release thereafter came to be governed by sections 254 and 256, then any re-release was to be effected under the new regime—in every case, therefore, subject to licence until the end of the sentence. The reference to section 33(3), it is suggested, was deliberately omitted from paragraph 23(1)(b) because it

was not intended to apply in post-Act recall cases. The argument, of course, reflects that already outlined in paragraph 34 above. Once again I hope to have done it justice.

41. I understand the respondent to accept that paragraph 23(1)(b) ought properly to have included reference to section 33(3)—his argument being that its "omission was entirely accidental and … merely a further reflection of the poor drafting" in the 2005 Order.

42. To my mind the likeliest explanation for section 33(3)'s omission from paragraph 23(1)(b) is that it contains no "reference … to *revocation* under section 39": the reference is rather to the prisoner having been *"recalled* under section 39" (in each case my emphasis). Nevertheless it would have been better for the draftsman to provide (perhaps in an additional sub-paragraph) that section 33(3)'s reference to recall under section 39 should be treated as a reference to recall under section 254 (which uses the omnibus expression "revoke his licence and recall him to prison").

43. Whatever be the explanation, however, the omission cannot begin to bear the weight the Secretary of State seeks to put upon it. In the first place, section 33 is expressly preserved in the case of pre-Act offenders by paragraph 19(c) of the Schedule. Secondly, and most importantly, section 37 (the section expressly governing the duration of the licence) is similarly preserved by paragraph 19(c) and this section *is* mentioned in paragraph 23(1)(b). Thirdly, the longer one considers the scheme of this part of Schedule 2, the plainer it becomes that paragraph 23 is concerned only with the process of recalling and re-releasing prisoners on licence and not in any way with the duration of their licences and the point at which they become entitled to unconditional release. Of course under these "transitional arrangements" sections 254 and 256 will be operated in the case of pre-Act offenders in the same way as for every other recalled prisoner and the Secretary of State and Parole Board will discharge their respective duties and exercise their respective powers as the Act provides. But their powers extend only to the point where the prisoner is entitled to an unconditional release and, as paragraph 19 makes abundantly plain, the rights of pre-Act offenders are in that critical respect saved.

44. Although these provisions are, indeed, somewhat opaque and ill-drafted, their intended effect is in the last analysis quite clear. The new scheme for recalling and re-releasing prisoners was to come into

immediate effect for everyone: no longer was the Parole Board to be primarily responsible for initiating a prisoner's recall by making a recommendation under section 39(1), the Secretary of State's power being limited by section 39(2) to urgent cases where it was impracticable to await a recommendation. Henceforth recall was to be solely for the Secretary of State. Pre-Act offenders were not, however, to be disadvantaged by the new parole regime, in particular with regard to the effective length of their sentences and the period for which they were to be at risk of recall after release on licence. Nor is any of this in the least surprising. The more stringent regime introduced by the 1998 Act was, as already explained, to apply only to those offending after September 1998. And this, as Scott Baker LJ pointed out at paragraph 15 of his judgment, "is consistent with the longstanding principle that existing prisoners should not be adversely affected by changes in the sentencing regime *after* their conviction." The learned Lord Justice also drew attention to the practice direction issued by Lord Bingham of Cornhill CJ on 22 January 1998 (*Practice Direction (Custodial Sentences: Explanations)* [1998] 1 WLR 278) directing that defendants be told the effect of the sentence passed upon them. In the respondent's case this would have required that he be told: "After your release you will also be subject to supervision on licence until the end of three-quarters of the total sentence."

45. The result for which the Secretary of State contends would, in short, be a surprising one, unlikely to have been intended by the legislation. And if it were intended, one would expect it to have been enacted in the clearest of terms. So far from that being the case here, all the indications are, as I have sought to explain, strongly to the contrary.

46. Mr Pannick told your Lordships that 16 pre-Act offenders are in the same position as the respondent, in prison for breaches of licence conditions beyond the three quarter point of their sentences; and that 60 more, albeit at liberty, are wrongly still subject to licence conditions despite having served three quarters of their sentences. This judgment will affect them too and, indeed, all those who have been and continue to be sentenced for offences committed before 4 April 2005.

47. For these reasons, which are substantially the same as those given in the admirable judgments of the court below, the appeal had to fail.