HOUSE OF LORDS SESSION 2006–07

[2007] UKHL 44

on appeal from:

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Somerville (AP) (Original Appellant and Cross-respondent) *v.* Scottish Ministers (Original Respondents and Cross-appellants) (Scotland)
Blanco (AP) (Original Appellant and Cross-respondent) *v.* Scottish Ministers (Original Respondents and Cross-appellants) (Scotland)
Henderson (AP) (Original Appellant and Cross-respondent) *v.* Scottish Ministers (Original Respondents and Cross-appellants) (Scotland)
Ralston (AP) (Original Appellant and Cross-respondent) *v.* Scottish Ministers (Original Respondents and Cross-appellants) (Scotland)
(Consolidated Appeals)

Appellate Committee

Lord Hope of Craighead
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Mance

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ON

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LORD HOPE OF CRAIGHEAD

My Lords,

1. The petitioners in these four applications for judicial review were all serving sentences of imprisonment. Two of them, Ralston and Somerville, are still in custody. Common to all the applications is a complaint about the lawfulness of their removal from association (referred to colloquially as "segregation") under rule 80 of the Prisons and Young Offenders Institutions (Scotland) Rules 1994 ("the 1994 Rules"). The proceedings are still at the interlocutory stage. No final orders have yet been made. Instead a number of issues of law have been identified which it was thought helpful to have determined before any evidence was led. Some of them were resolved by the First Division of the Court of Session (the Lord President (Hamilton), Lord Macfadyen and Lord Nimmo Smith) after hearing argument on reclaiming motions in each case from decisions on them by the Lord Ordinary (Lady Smith): [2006] CSIH 52; 2007 SC 140. But five issues remain, for the determination of which the Inner House gave leave to the parties to appeal from its decision to your Lordships.

2. These issues, as identified by the Statement of Facts and Issues, are as follows:

1. Whether a claim for damages based on breach of a Convention right by a member of the Scottish Executive is subject to the provisions of section 7(5) of the Human Rights Act 1998.
2. Whether the act of a governor of a prison in making an order under rule 80(1) of the Prisons and Young Offenders (Scotland) Rules 1994 is to be regarded as an act of a member of the Scottish Executive for the purposes of section 57(2) of the Scotland Act 1998.
3. Whether, where a continuing breach of Convention rights over a period of time is alleged, time begins to run, for the purposes of section 7(5) of the Human Rights Act 1998, from the first date on which the breach occurs.
4. Whether want of proportionality is a relevant complaint of unlawfulness at common law.
5. Whether the First Division erred in adhering to the Lord Ordinary's refusal of the petitioners' motions that the Court inspect the less-heavily redacted documents in respect of which public interest immunity was asserted by the Scottish Ministers.

The first, fourth and fifth of these issues were decided by the First Division in favour of the Scottish Ministers. The second and third issues were decided by the First Division in favour of the petitioners.

3. At the heart of the first three issues is a dispute about time bar. Section 7(5) of the Human Rights Act 1998 ("HRA") provides that proceedings by a person who claims that a public authority has acted in a way which is made unlawful by section 6(1) HRA because it has acted in a way which is incompatible with a Convention right must be brought before the end of (a) the period of one year beginning with the date on which the act complained of took place, or (b) such longer period as the court considers equitable having regard to all the circumstances. The Scotland Act 1998 ("SA") does not contain any time limit of its own within which proceedings in which it is alleged that a member of the Scottish Executive has acted outside his devolved competence in terms of that Act must be brought. Your Lordships were informed that a large number of other cases involving the segregation of prisoners are awaiting a decision on this issue. It would however be rendered academic in the case of a complaint against the act of a governor if, as

the Scottish Ministers contend, his act is not to be regarded as an act of the Scottish Executive.

Background

4. It is unnecessary to say much about the facts of these cases. Somerville, Henderson and Blanco complain of events that had been concluded before they brought proceedings. They seek various declarators in respect of past periods of segregation. The only live issue in their cases is their claim for damages as just satisfaction for a breach of their article 8 Convention rights. Ralston was still being held in segregation on 17 April 2003 when the first order in his petition was granted, and he was again segregated during the dependence of his application. Among the remedies he seeks, in addition to various declarators and damages as just satisfaction for a breach of his article 8 Convention rights, is an order ad factum praestandum to end his segregation. In the Court of Session there was a fifth petitioner, William Cairns, but he has not appealed against the orders that were made in his case. None of the petitioners claims damages as a delictual remedy at common law founded either in negligence or on a breach of statutory duty independently of a breach of their Convention rights.

5. The issue as to whether the section 7(5)(a) HRA time bar applies to these applications has not been raised in the cases of Somerville or Ralston. This is because they complain of segregation within one year of the date when they brought proceedings. It has been raised however in the cases of Henderson and Blanco. Four of the ten periods of segregation for which Henderson seeks damages as just satisfaction were concluded more than one year before his proceedings were brought on 9 June 2004. Blanco commenced proceedings on 6 November 2003. Segregation took place in his case, as a result of a series of orders made over time, between 1 August 2002 and 7 January 2003. His case also raises the question which is addressed as issue 3. If, as he maintains, the time bar runs from the end of his segregation, no part of his claim is time barred. If, as the Scottish Ministers maintain, time runs from the beginning of each period of segregation, his claim is restricted to that part of his segregation that is attributable to decisions made on 11 November and 10 December 2002.

6. The question whether the section 7(5)(a) HRA time bar applies also affects the second issue. Each period of segregation of which complaint is made was initiated by an order made by the prison

governor under rule 80(1) of the 1994 Rules. It is not disputed that the governor of a prison is a public authority for the purposes of section 6(1) HRA. It is accepted that it would be unlawful for a governor to make an order under rule 80(1) which was incompatible with a prisoner's Convention rights. The question is whether an act of a governor comes within sections 54(3) or 57(2) SA which limit the competence of members of the Scottish Executive. The practical importance of this question is that the consequences of the time bar on proceedings under section 7(1)(a) HRA will be avoided if proceedings with regard to acts of the governor can be brought under the Scotland Act on the ground that when he is making and giving effect to orders under rule 80 of the 1994 Rules he is a member of the Scottish Executive.

7. Each of the petitions contained averments that the respondents' decisions were unreasonable and disproportionate. The Lord Ordinary excluded from probation the averments that the decisions were unreasonable in the *Wednesbury* sense. The petitioners have not appealed against that decision. Their argument that the decisions were not proportionate must be taken to be addressed to a higher level of scrutiny than that which is undertaken in judicial review on the ground of unreasonableness. The Scottish Ministers accept that proportionality is relevant to a consideration of the petitioners' Convention rights arguments. But they maintain that the question whether the common law might afford a broader ground of judicial review on the ground of proportionality does not arise as a practical issue in these cases, as the petitioners do not seek a delictual remedy in damages but confine their claims to a just satisfaction remedy.

8. The issue which has been raised in these proceedings about public interest immunity is an issue of procedure. In each case the Lord Ordinary granted a commission and diligence for the recovery of various documents falling within the terms of an approved specification of documents. A substantial amount of material has been disclosed, subject to the assertion in relation to certain specific information of public interest immunity. The question relates to the procedure that should be followed where public interest immunity is asserted as an objection to disclosure. In particular, it is whether it was necessary for the Lord Ordinary to have inspected the documents herself before coming to a conclusion on production. She decided, having heard argument but without inspecting them, not to order production. The petitioners maintain that she was bound to inspect them. The Scottish Ministers submit that her decision not to inspect the documents unless she was persuaded that there was a good reason for doing so was a

discretionary one, and that she was entitled to have regard to the circumstances of the case when she was exercising her judgment.

9. There is one other matter of background that needs to be mentioned. A proof before answer was allowed on the adjusted pleadings on 10 February 2004. On 30 June 2004 the court assigned 26 October 2004 and the following five weeks as a diet for the proof before answer. On 15 October 2004, in view of a problem that had arisen in obtaining expert evidence, the diet of proof was discharged. It was decided to use the time that had been set aside for it by debating various issues of law that the parties had identified. Some of the issues that were identified are more suited to this procedure than others. No evidence has yet been led, and the elaborate and repetitive pleadings are still capable of further amendment, with the leave of the court, before that stage is reached. This has resulted in a situation which, as my noble and learned friend Lord Walker of Gestingthorpe points out, is far from satisfactory. The function of this House is to decide issues of law that have been clearly focused by the proceedings in the courts below, not to deliver opinions on issues that may turn out to be of academic interest only. The fact that your Lordships have entertained this appeal must not be taken as an endorsement of the way in which the issues have been dealt with in the pleadings.

Issue 1: the relationship between the Scotland Act and the Human Rights Act

10. This issue arises on the pleadings in the cases of Henderson and Blanco as an issue about time bar. But it is an issue of much wider significance. Anybody who wishes to bring any proceedings against a member of the Scottish Executive on the ground that an act or a failure to act is incompatible with the Convention rights, or to rely on any of the Convention rights in any proceedings, needs to know whether he must do this under sections 6 to 8 HRA or whether he must do so, or can do also, on the ground that the act or the failure to act is contrary to the provisions of the Scotland Act. This is so whether the proceedings in question are civil or criminal, as issues about incompatibility with the Convention rights may arise irrespective of the nature of the jurisdiction that the court or tribunal is being called upon to exercise.

11. Reduced to its simplest terms, the question is whether both Acts apply where a remedy is sought on the ground of incompatibility with the Convention rights with regard to an act or a failure to act of a

member of the Scottish Executive that is said to be outside devolved competence; or whether only one or the other Act applies and, if so, which of them. As Mr Moynihan QC for the Scottish Ministers put it, can the Scotland Act be read as conferring a cause of action in damages to afford just satisfaction which is independent of that afforded by the Human Rights Act? It was unlikely, he said, that Parliament intended to confer an alternative remedy against the devolved institutions which was inconsistent with that provided by the Human Rights Act. The way these propositions were expressed underlines the fact that the issue is one of statutory construction. It is idle to speculate as to whether it is likely or unlikely that Parliament intended that a just satisfaction remedy was to be available under the Scotland Act without saying so expressly. The answer is to be found in the words used by the statutes, to which careful attention must be paid in order to discover the intention of Parliament.

12. Section 6(1) HRA makes it unlawful for a public authority, other than in ways that are inextricably connected to primary legislation as described in section 6(2), to act in a way which is incompatible with a Convention right. The expression "public authority" extends to governmental organisations such as members of the Scottish Executive: *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, para 47. An "act" includes a failure to act: section 6(6). Sections 7 and 8 HRA give effect to the principle that acts of a public authority in breach of a Convention right are unlawful. Section 7 provides that a person who claims that a public authority has acted in a way which is made unlawful by section 6(1) may bring proceedings in the appropriate court or tribunal or rely on the Convention right on in any proceedings, and section 8 makes provision for judicial remedies. Sections 7 and 8 contain various limitations on the obtaining of these remedies, one of which is to be found in section 7(5). This subsection provides that proceedings against the authority must be brought before the end of (a) the period of one year beginning with the date on which the act complained of took place, or (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances.

13. Two features of the Human Rights Act are fundamental to a proper understanding of its place in the legislative framework. The first is that it does not disturb the principle of the sovereignty of Parliament. A finding that primary legislation is incompatible with a Convention right does not affect its validity: section 3(6) HRA. Subject to the power that is given to minsters to make remedial orders under section 10, it is left to Parliament to decide, in the light of a declaration of

incompatibility, what should be done about it. An act or failure to act of a public authority is not unlawful if, as a result of primary legislation, the public authority could not have acted differently or it was acting so as to give effect to primary legislation which cannot be read in a way that is compatible with the Convention rights: section 6(2) HRA. The second feature is that the language that it uses to describes acts or failures to act that are incompatible with the Convention rights is that they are "unlawful": sections 6(1), 7(1), 8(1). Unlawfulness in terms of the Human Rights Act has certain consequences with regard to what can be obtained by way of a remedy. This is because the Human Rights Act makes the acts or failures to act unlawful in domestic law.

14. The Scotland Act, on the other hand, is concerned with the consequences of devolving legislative and executive power to institutions which have limited competence. Sections 29 and 30 and Schedules 4 and 5 define the legislative competence of the Scottish Parliament. The executive competence of the Scottish Ministers is limited in exactly the same way as that of the Scottish Parliament. Section 52 enables statutory functions to be conferred on the Scottish Ministers by the Scottish Parliament within its area of devolved competence. Section 29(1) SA provides that an Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament. The effect of this provision is that the Scottish Ministers have no power to exercise functions that may be conferred on them which are outside the legislative competence of the Scottish Parliament. Section 53 provides for the transfer of functions previously exercisable by Minsters of the Crown to the Scottish Ministers, but only in so far as they are exercisable within devolved competence. The expression "devolved competence" is defined by section 54. Subsection (2) of that section restricts the devolved competence of the Scottish Ministers with regard to making, confirming or approving of subordinate legislation to what would be within the legislative competence of the Scottish Parliament. Subsection (3) imposes the same restriction on the devolved competence of the Scottish Ministers in the case of the exercise of any other function that they may exercise under a pre-commencement statute.

15. Section 57(2) SA reinforces, in the context of provisions about the devolved competence of the Scottish Ministers generally, the restriction that section 29(2)(d) imposes on the legislative competence of the Scottish Parliament. It provides that a member of the Scottish Executive "has no power" to make any subordinate legislation, or to do any other act, so far as the legislation or other act is incompatible with any of the Convention rights or with Community law. Section 57(3)

qualifies that restriction in the case of an act of the Lord Advocate in prosecuting an offence or in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland, so as to align his position with that of the equivalent authorities in England and Wales. It does so by providing that section 57(2) does not apply to an act of the Lord Advocate in that capacity if, because of section 6(2) HRA, it would not be unlawful under section 6(1) HRA. That qualification on the limits of devolved competence does not apply to any other member of the Scottish Executive or to the Lord Advocate acting in any other capacity. It is not open to them to claim that the act or the failure to act was within devolved competence because, as a result of primary legislation, they could not have acted differently or they were acting so as to give effect to primary legislation which cannot be read in a way that is compatible with the Convention rights. The petitioners rely in their pleadings only on section 57(2) SA. But Mr O'Neill QC for the petitioners said in the course of his submissions to your Lordships that, as this case concerns the exercise of functions under a pre-commencement statute, he wished to rely also on section 54(3).

16. Fundamental, therefore, to a proper understanding of the Scotland Act is its concentration on the limits of devolved competence. There are, of course, other limits on devolved competence in addition to those that are imposed with reference to Community law and to the Convention rights. For example, as section 29(2)(a) makes clear, devolved competence is exercisable only within or with regard to Scotland. Schedule 5 contains a list of matters reserved to Parliament at Westminster, which lie outside the devolved competence of the Scottish Parliament and the Scottish Executive. The provisions about Community law and the Convention rights give effect in the devolved system to the consequences for domestic law of the European Communities Act 1972 and of the incorporation of the Convention into domestic law of the United Kingdom by means of the Human Rights Act by placing restrictions on the functions that the devolved institutions can competently exercise. So an act by a member of the Scottish Executive which is incompatible with the Convention rights is not described by the Scotland Act as "unlawful". It is described instead as "outside devolved competence" in section 54(3), and as something that he has "no power" to do in section 57(2). The machinery described in section 98 and Schedule 6 SA is available for the resolution of questions as to whether a failure to act by a member of the Scottish Executive is incompatible with any of the Convention rights or with Community law and any other questions as to whether a function is exercisable within devolved competence.

17. The Scotland Act may reasonably be expected therefore to contain everything that is needed by way of legislation for the proper working out of the system that it lays down. It has not been suggested that it lacks anything that is needed to give effect to the restrictions on devolved competence in any respect other than in regard to the Convention rights. It can be assumed that in every other respect the Act was drafted against the background of the remedies that are available in domestic law to deal with acts that are outside the competence of any body that is exercising powers given to it by statute, informed by decisions of the European Court of Justice as to the need for a domestic remedy in the case of acts that are incompatible with Community law: *Francovich v Italian Republic* (Joined Cases C-6/90 and 9/90) [1995] ICR 722; [1991] ECR I-5357; *R v Secretary of State for Transport, Ex p Factortame Ltd (No 5)* [2000] 1 AC 524; *Sempra Metals Ltd v Commissioners of Inland Revenue* [2007] UKHL 34; [2007] 3 WLR 354 (HL). It did not need to make provision for them because these remedies were already available.

18. Moreover, in the case of acts or failures to act that are incompatible with the Convention rights, the Scotland Act contains its own system for dealing with the incompatibility in a way that gives effect to the Convention. The system is the same as that for any other act or failure to act that is said to be outside devolved competence. A statutory authority has no power to do anything that is outside its competence. Issues as to whether or not an act or a failure to act is outside devolved competence because it is incompatible with the Convention rights are treated as devolution issues for the purposes of section 6, in the just same way as any other act or failure to act. The same remedies were assumed to be available as in the case of any other ultra vires act. These include the remedies of declarator and interdict and for the recovery of money paid in response to a demand made without statutory authority on the ground of unjustified enrichment: *Morgan Guaranty Trust Company of New York v Lothian Regional Council*, 1995 SC 151. They also include the remedy of damages which the Convention provides as just satisfaction for breach of a Convention right.

19. The wording of section 100 SA indicates that it was drafted on the assumption that the court may grant such relief or remedy as it considers appropriate. Section 100(1) provides that the Act "does not enable" a person to seek these remedies unless he would be a victim for the purposes of article 34 of the Convention. As a general rule, the fact that an individual has suffered loss because of an invalid administrative act does not in itself entitle him to be indemnified: *Stair Memorial*

Encyclopaedia, vol 1, *Administrative Law*, para 333; see also *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, 359H, per Lord Wilberforce. But the invalidity that is in point here is incompatibility with a Convention right, and questions as to what remedies are available for the incompatibility depend on what was intended by Parliament. Section 100(3) SA shows what Parliament intended. It assumes that damages for just satisfaction may be claimed in respect of an act which is outside devolved competence because it is incompatible with a Convention right. It provides that the Act "does not enable" a court or tribunal to award any damages which "it could not award" under sections 8(3) and (4) HRA. This makes it clear that a common law claim of damages for breach of statutory duty is excluded. The remedy is limited to what is necessary to afford just satisfaction. There would have been no point in making this provision if the court could not award damages at all as a remedy. The criminal courts in Scotland have no power to award damages, so it was not necessary for the negative provision expressed in section 8(2) HRA to be reproduced in the Scotland Act. Section 100(3) also makes it clear that it is because the act is outside competence within the meaning of the Scotland Act, not because it is unlawful within the meaning of section 6(1) HRA, that the person is assumed to be entitled to seek the just satisfaction remedy.

20. The question then is what indications there are in either Act that it was the intention of Parliament that proceedings in which it was alleged that an act or a failure to act was outwith the devolved competence of the Scottish Ministers because it was incompatible with the Convention rights must be brought, and brought only, under the Human Rights Act subject to the limitations which that Act lays down, including the time bar, for the obtaining of judicial remedies. The Human Rights Act does not mention the Scotland Act, although it refers in its definition of "subordinate legislation" in section 21(1) to Acts of the Scottish Parliament. So the answer must be found in what the Scotland Act itself provides.

(a) Section 129(2) SA

21. I start with section 129(2). It provides:

> "If any of the following provisions come into force before the Human Rights Act 1998 has come into force (or come fully into force), the provision shall have effect until the

> time when that Act is fully in force as it will have effect after that time: sections 29(2)(d), 57(2) and (3), 100 and 126(1) and Schedule 6."

This subsection took account of the fact that, although the Human Rights Act was expected to receive the Royal Assent at about the same time as the Scotland Act, it was the intention to defer bringing most of the Human Rights Act into force until after the Scotland Act was fully in force. The Human Rights Act received the Royal Assent on 9 November 1998. The Scotland Act received the Royal Assent on 19 November 1998. Sections 18, 20, 21(5) and 22(1) HRA came into force on Royal Assent, and section 19 was brought into force on 24 November 1998. The bringing into force of the remainder of that Act was deferred until 2 October 2000: SI 2000/1851. The provisions of the Scotland Act were brought into force by stages also. The provisions dealing with devolved competence were brought into force in May 1999 and the Act was fully in force by 1 July 1999: SI 1998/3178.

22. One of the drafting techniques that was employed for the purposes of the Scotland Act was to refer to the Human Rights Act as a dictionary for use when dealing with issues about Convention rights. Sections 29(2)(d), 57(2) and 100(1) and Schedule 6 SA use the expression "the Convention rights". It is defined in section 126(1) SA as having the same meaning as in the Human Rights Act 1998. Section 57(3) refers to acts which are not unlawful because of section 6(2) HRA. Section 100(3) refers to damages which a court or tribunal could not award if section 8(3) and (4) HRA applied. Section 129(2) enabled these provisions to be given effect during the period prior to the coming into force of the relevant provisions of the Human Rights Act in just the same way as they would when they were brought into force.

23. The First Division said that the effect of section 129(2) SA was that the Human Rights Act was to be treated as in force for the purposes of the Scotland Act as from the date when the Scotland Act came into force: para 54. But this is not what section 129(2) says. It refers, and refers only, to the provisions in the Scotland Act which are designed to protect Convention rights. It enables them to receive effect as from the date when they are brought into force on the assumption that the provisions of the Human Rights Act on which they depend were already in force by that date. The First Division said later in the same paragraph that the subsection points to an intention of Parliament that as from the coming into force of the Scotland Act it should be read and construed consistently with the Human Rights Act, and that this was wholly

inconsistent with the notion that the Scotland Act was a self-contained, self-standing and self-understood instrument. In my opinion this proposition overstates the effect of section 129(2). It is true, as I have said, that the Scotland Act uses the Human Rights Act as dictionary to explain what it provides for the protection of Convention rights. To that extent, and for that purpose only, the subsection enables reference to be made to the Human Rights Act, although not yet in force. But it does not justify reading into the Scotland Act any of the provisions of the Human Rights Act, such as section 7(5) HRA, that the Scotland Act itself does not refer to.

24. A careful and accurate reading of section 129(2) is important because it reveals something else about the intention of Parliament. It tells us that it was the intention of Parliament that the system which the Scotland Act provides, by which an act or a failure to act which is incompatible with the Convention rights is outside devolved competence, was to be capable of receiving effect in just the same way before the Human Rights Act was fully in force as it was to be afterwards. There could, of course, be no question of such an act or failure to act being made unlawful until the coming into force of section 6(1) HRA. But this was of no consequence for the purposes of the Scotland Act, because it provides that an act or failure of that kind is outside devolved competence. Although the dictionary is needed to understand what is meant by its references to the Convention rights and to the references to the Human Rights Act in section 57(3) and section 100, the system of devolved competence as a whole, with all its consequences, was intended to be fully operational as from the coming into force of the Scotland Act.

25. Mr Moynihan QC recognised that, on his argument, the system of devolved competence was lacking one of its essential features until the coming into force of the Human Rights Act. This was because it was not until that stage was reached that an act or a failure to act that was incompatible with the Convention rights could be said to be made unlawful by section 6(1) HRA and the remedies for which that Act provides became available. He said that this was just something that had to be lived with. The delay was not, after all, expected to be for very long. I do not think that such an odd situation can be what Parliament intended. The system of devolution which the Scotland Act lays down was carefully worked out in every other respect. If there was to be such a transitional loophole, it could easily have been dealt with in section 129. The absence of such a provision indicates that Parliament saw no need for it because the Scotland Act was to have its own system

for protecting Convention rights, including a just satisfaction remedy, by means of the limits that were to be placed on devolved competence.

(b) Section 100 SA

26. I turn next to section 100. It contains two subsections that contain indications about what Parliament intended to be the relationship between the two Acts. Section 100(1) provides:

> "This Act does not enable a person –
>
> (a) to bring any proceedings in a court or tribunal on the ground that an act is incompatible with the Convention rights, or
>
> (b) to rely on any of the Convention rights in any such proceedings,
>
> unless he would be a victim for the purposes of article 34 of the Convention (within the meaning of the Human Rights Act 1998) if proceedings in respect of the act were brought in the European Court of Human Rights.

Section 100(3) provides:

> "This Act does not enable a court or tribunal to award any damages in respect of an act which is incompatible with any of the Convention rights which it could not award if section 8(3) and (4) of the Human Rights Act applied."

27. Careful attention needs to be paid to the language of these two subsections. The purpose of section 100(1) is, of course, to ensure that there is no inconsistency between the Scotland Act and the use for the purposes of section 7(1) HRA of the victim test referred to in section 7(7) HRA. The purpose of section 100(3) is to ensure consistency between the Scotland Act and sections 8(3) and (4) HRA in regard to the awarding of damages. What matters for present purposes is the language that is used to achieve this. The formula that is used in each subsection is the same. The words "This Act does not enable" are followed by a reference to what the position "would be" if proceedings were brought in the European Court of Human Rights (section 100(1)) or to what a court or tribunal "could not award" if section 8(3) and (4)

applied (section 100(3)). In both cases the limitation that is imposed for the purposes of the Scotland Act is defined by comparing what the Act "does not enable" with what cannot be done in proceedings brought otherwise than under reference to the Scotland Act.

28. In my opinion the inference that is to be drawn from the way these subsections are expressed is that it was assumed by Parliament that all that needed to be done to protect the Convention rights in the case of pre-commencement enactments in the devolved system was to provide that the exercise of functions in a way that was incompatible with the Convention rights was outside devolved competence: section 54(3) SA. The limitations that are expressed in sections 100(1) and 100(3) SA are consistent with that assumption. There was no need to say anything about the remedies that might be obtained in respect of an act or failure to act of a member of the Scottish Executive that was outside competence except where this was because of an incompatibility with Convention rights. Inconsistency between the Scotland Act and the Human Rights Act in regard to an incompatibility with Convention rights could have been dealt with by making such an act or failure to act unlawful within the meaning of section 6(1) HRA and applying sections 7 and 8 HRA. But that is not what section 100(1) does. It assumes that the same proceedings may be brought under the Scotland Act on the ground of this kind of devolved incompetence as in the case of any other. On the assumption that damages may also be awarded as just satisfaction where an act is outside competence because it is incompatible with a Convention right, section 100(3) enacts special rules to ensure consistency with sections 7 and 8 HRA in the respects, and in the respects only, that it expressly refers to. Like section 8(3) HRA, it does not concern itself with anything other than just satisfaction damages.

29. The First Division discuss the effect of section 100 in para 80. They point out that a Convention incompatible act is not only outside the competence of the Scottish Ministers. It is also made unlawful by section 6(1) HRA. They say that, given that a remedy is available under sections 7 and 8 HRA, there is no need to look for a basis for a claim of damages to the Scotland Act. They then say that section 100 can be given what they describe as its natural meaning, rather than be distorted into an implied positive assertion of a right to claim damages. Having referred to the two ways in which sections 100(1) and 100(3) ensure consistency between the Scotland Act and the Human Rights Act, they conclude that the proper basis for a claim for damages is that the act or failure to act is unlawful, for which a claim is made available under

section 8 HRA. It follows, they say, that such a claim is properly subject to the time bar imposed by section 7(5)(a) HRA.

30. In my opinion this approach fails to address the precise wording of sections 100(1) and 100(3). It is true that an act or a failure to act which is incompatible with the Convention rights can be said to both outside competence for the purposes of the Scotland Act and unlawful for the purposes of the Human Rights Act – now that the Human Rights Act is fully in force. It is also right to say that section 100 SA does not positively assert a right to claim damages for an act or a failure to act which is incompatible. And section 8 HRA does indeed contain provisions which expressly enable a court to grant relief in relation to any act which it finds unlawful, including the award of damages to afford just satisfaction after taking account of any other relief or remedy. But the First Division's analysis breaks down at this point. There is no warrant in the words that section 100 uses for the conclusion that the time bar applies to proceedings that are brought under the Scotland Act on the ground that the act or failure to act is outside competence because it is incompatible with the Convention rights. The absence of any reference in section 100 to the section 7(5) HRA time bar is a plain indication to the contrary.

31. Acts or failures to act which are incompatible with the Convention rights are, in the language of the Scotland Act, outside competence. The fact that they are also unlawful for the purposes of the Human Rights Act (now that it is in force) does not weaken or undermine this point in any way. There are therefore two equally valid ways of addressing the incompatibility. It is open to the litigant to choose which of two alternative remedies he should pursue, even if the effect of doing so is to enable him to avoid a time bar that excludes one of them: *Deutsche Morgan Grenfell Group plc v Commissioners of Inland Revenue* [2007] 1 AC 558 (HL), para 51. A person who wishes to assert that an act or failure by a Scottish Minister is made unlawful by section 6(1) HRA must, of course, accept the system which that Act lays down for dealing with acts which that section makes unlawful, including the provisions in section 7(5) about time bar. A person who wishes to assert that the act or failure to act is outside competence in terms of the Scotland Act because it is incompatible with Convention rights must accept the limitations that are imposed by section 100 SA. But these limitations do not mention the section 7(5) time bar. The absence of a reference to that subsection indicates that it was the intention of Parliament to confine the limitations to those that were mentioned expressly.

(c) Section 57(3) SA

32. A further indication of what was intended by Parliament is to be found in section 57(3) SA. It extends to acts of the Lord Advocate in prosecuting any offence, and in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland, the protection that is afforded to a UK public authority which acts in ways that are inextricably connected to primary legislation that are described in section 6(2) HRA. But it does not extend this protection to any other member of the Scottish Executive. A requirement that a person who complained that an act of the Scottish Ministers which gave effect to primary legislation which could not be read otherwise was outside competence because it was incompatible with the Convention rights must seek his remedy under the Human Rights Act on the ground that it was made unlawful by section 6(1) HRA would be contrary to the system that is indicated by this subsection read together with section 57(2). It would provide the Scottish Ministers with a defence under section 6(2), albeit in this admittedly highly unusual situation, which the devolution system that the Scotland Act lays down denies to them. To achieve consistency with that system a remedy must be available against the Scottish Ministers under the Scotland Act.

(d) Why no section 7(5) HRA time bar?

33. The question may then be asked, why did the Scotland Act omit any reference to the section 7(5)(a) HRA time bar in section 100(3)? The answer to this question is to be found in the fact that section 100(3) is concerned only with awards of damages. Section 7(5) on the other hand applies generally to all proceedings under section 7(1)(a) HRA, irrespective of the choice of remedy or remedies. To achieve consistency with the Human Rights Act on this point therefore the Scotland Act would have had to extend the time bar to all proceedings mentioned in section 100(1)(a) SA, irrespective of the choice of remedy or remedies. It was not suggested however by Mr Moynihan in the course of his argument that the Scotland Act should be read in this way. He accepted that the section 7(5)(a) HRA time bar did not apply where the remedy sought was the repetition of sums paid in response to a demand by the Scottish Ministers which was outside competence.

34. It is not difficult to see that to include in section 100(3) SA a time bar on the lines of section 7(5) HRA that applied only where a remedy was sought in damages would distort rather than ensure consistency between the two systems. It would also have introduced a significant

difference between the treatment of acts or failures which were incompatible with the Convention rights and those which were outside competence for other reasons. No compelling reasons can be imagined for taking that step.

35. It is worth noting too the provisions of Section 102 SA. This section contemplates that a court or tribunal may be asked to decide whether an Act of the Scottish Parliament was within the legislative competence of the Scottish Parliament or the making, confirming or approval of subordinate legislation was within the devolved competence of the Scottish Ministers. It also contemplates that decisions on these issues may have retrospective effect. Yet it does not impose any special time limit on the bringing of proceedings that may produce that result. I find here a further indication that it was thought that the existing law provided sufficient means of preventing unreasonable delay in the bringing of proceedings in respective of both legislative and executive acts that were alleged to be outside devolved competence, and that a special time bar of the kind provided for by section 7(5)(a) HRA was unnecessary.

(e) *R v HM Advocate*

36. I have refrained so far from mentioning what I said in *R v HM Advocate*, 2003 SC (PC) 21 about the relationship between the two Acts. In para 43 I said that the precise relationship between them was still in the course of being worked out. I then dealt with the argument that had been advanced on behalf of the Lord Advocate that the machinery provided by the Scotland Act was not available for dealing with complaints about acts of the Lord Advocate in prosecuting offences and that such complaints could only be dealt with under the Human Rights Act. In para 51 I referred to section 100. I said that there would have been no point in enacting that provision if the only way in which an accused person could make such a complaint was by invoking the provisions of the Human Rights Act. It pointed to the opposite conclusion which was that it was under the provisions of the Scotland Act that he must seek his remedy. In para 60 I said that a power to award damages was clearly implied by section 100(3) SA, and I referred to the description in Clayton and Tomlinson, *The Law of Human Rights*, p 1416, para 21.13 of an award of damages in these circumstances as a public law remedy.

37. The complaint in *R v HM Advocate* was of unreasonable delay in the prosecution of certain charges on indictment by the Lord Advocate. The appellant sought the deletion of those charges from the indictment on the ground that the effect of section 57(2) SA was that Lord Advocate had no power to proceed with them because of his delay. The Lord Advocate's position was that, having regard to what he submitted was the meaning of the word "act" in section 57(2) SA, the appellant's complaint did not raise a devolution issue within the meaning of para 1 of Schedule 6 SA. He maintained that, for this reason, the Judicial Committee of the Privy Council did not have jurisdiction to deal with it. My observation that the accused's challenge in these proceedings had to be brought under the Scotland Act needs to be understood in that context.

38. The First Division said in its opinion in this case that I was mistaken in my construction of section 100 SA: paras 72, 76. But I see no reason to depart from what I said about section 100(1)(b) in *R v HM Advocate*. On the contrary, I am unable to accept their interpretation of that subsection or of section 100(3). Nor am I able to accept their interpretation of section 129(2). In my opinion, a careful and accurate reading of these two sections, taken together, provides ample support for the conclusion that Parliament intended that a person whose complaint was that an act or a failure to act of a Scottish Minister was outside competence because it was incompatible with the Convention rights should be able to seek a remedy on the ground that this was ultra vires in terms of the Scotland Act. They do not justify the contrary conclusion that he must do so, and can do so only, under the Human Rights Act. The limitations that the Human Rights Act imposes on the obtaining of such a remedy are only relevant to the extent that section 100 makes express reference to them. As section 100 does not mention the section 7(5) HRA time bar, that limitation does not apply to these proceedings as the petitioners' case is that the acts or failures to act were outside devolved competence within the meaning of section 54(3) SA.

39. I ought to mention, in fairness to their Lordships of the First Division, that the analysis that I have set out in the preceding paragraphs is not based on points made by Mr O'Neill in the course of his argument. He took his stand, without much further elaboration, on his understanding of what was said by myself and my noble and learned friend Lord Rodger of Earlsferry in *R v HM Advocate*. The First Division were right to treat what was said on this issue in that case as *obiter*. They had a great deal else to consider in the course of a hearing in their court which lasted for 12 days. And the state of the pleadings tends to obscure rather than reveal the strength of the petitioners'

argument. Nevertheless I am in no doubt, after giving much further thought to the issue, that they were wrong not to follow the guidance that was offered in *R v HM Advocate*. I would hold that the petitioners' case that the acts and failures to act of the Scottish Ministers were outside competence is not subject to the section 7(5) HRA time bar.

40. Mr O'Neill submitted that, even if these proceedings were to be regarded as having been brought with reference to the Human Rights Act, section 7(5) did not apply because they were not proceedings "under this Act" for the purposes of section 7(1)(a) HRA. He advanced an argument, of which no prior notice had been given, to the effect that the petitioners' claim of damages should be regarded as having been brought under reference to section 7(1)(b) HRA, to which the time limit under section 7(5) does not apply. I do not need to deal with it in view of the opinion which I have formed on the main issue. If it had been necessary to do so, I would have favoured the answer to it which my noble and learned friend Lord Mance has indicated. As it is, I wish to reserve my opinion as to the precise relationship between these two paragraphs in the context of an argument about the scope of the section 7(5) HRA time limit.

Issue 2: whether section 54(3) SA applies to acts of the governor

41. Part 9 of the 1994 Rules deals with the security and control of prisoners. Among its provisions is rule 80 which deals with removal from association. The system which this rule lays down involves the making of orders by the governor and, in the case of removal from association for periods in excess of 72 hours, the granting of authority for its continuation by the Scottish Ministers.

42. Rule 80(1) provides that the governor may order in writing that a prisoner shall be removed from association with other prisoners either generally or during any period he is engaged or taking part in a prescribed activity. Rule 80(5) provides that a prisoner who has been removed from association by virtue of an order made by the governor shall not be subject to such removal for a period in excess of 72 hours from the time of the order except where the Scottish Ministers have granted written authority on the application of the governor. Rule 80(6) provides that an authority granted by the Scottish Ministers under rule 80(5) shall have effect for a period of one month from the expiry of the period of 72 hours but that they may, on any subsequent application by

the governor, renew the authority for further periods of one month commencing from the expiry of the previous authority.

43. The periods of segregation that are in issue in each of these cases extended over periods in excess of 72 hours. In each case decisions were made by a governor that the petitioner should be removed from association. In each case the governor made application to the Scottish Ministers for authority to continue to hold the petitioner under rule 80 conditions for further periods, and written authority to do so was granted by the Scottish Ministers.

44. The Scottish Ministers submit that the powers that are given to the governor by rule 80 are given to him as governor in his own right and not to him in the exercise of functions by the Scottish Ministers. The practical significance of this issue is that complaints that the governor has acted in a way which is incompatible with the Convention rights cannot, if this submission is well founded, be brought under reference to the Scotland Act. They would have to be brought under section 7(1)(a) HRA, with the result that they would be subject to the section 7(5)(a) HRA time bar irrespective of the decision which your Lordships reach on issue 1. The First Division held however that the cumulative effect of the provisions of the Scotland Act regarding the functions relating to prisons that were transferred to the Scottish Ministers was that a governor, as an appointee of the Scottish Ministers, is circumscribed by the same limits of competence as his appointer: para 25.

45. At first sight there is force in the proposition that a governor who is exercising powers given to him by the 1994 Rules is acting in his own capacity as governor and is not subject to the direction or control of the Scottish Ministers. On this view the Scottish Ministers would not be answerable for his decisions on the principle that was explained in *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560. The application of that conclusion to the facts of this case seems to me less clear, however. There are two reasons for taking this view.

46. The first arises out of the way the petitioners' case is put in their pleadings. Their case is a cumulative one. It is directed both to the orders made by the governors and to the grants and renewals of authority by the Scottish Ministers. The argument that proceedings cannot be taken with reference to section 54(3) with respect to orders made by the governors does not affect the case made with respect to the

grants and renewals of authority by the Scottish Ministers. It is unclear at this stage, prior to an analysis of the facts established by the evidence, whether and if so to what extent the remedies that the petitioners seek are dependent upon acts of the governors as distinct from acts of the Scottish Ministers.

47. The second arises out of the definition that is contained in rule 3 of the 1994 Rules of the word "governor". For the purposes of rule 80, among other rules, it extends not only to the governor in charge and the deputy governor but also to any authorised unit manager and, when none of these other officers is present, to the most senior officer who is present in the prison at that time. The extent of this definition lends support to the view which the First Division took on this issue, that it falls to be determined by examining the functions regarding prisons and their organisation and management that were transferred to the Scottish Ministers by the Scotland Act and not by looking exclusively to the functions that the 1994 Rules provide are to be exercisable by governors.

48. On balance however I agree with Lord Rodger that the fundamental point is that whoever is acting as governor for the purposes of rule 80 at the relevant time is exercising a different function from that exercised by the Scottish Ministers, who are not responsible for any order he makes under that rule. It follows that the First Division's conclusions that the governor, in making his order, was subject to the same vires control as the Scottish Ministers and that no distinction fell to be made between him and the Scottish Ministers on the issue of time bar were unsound.

Issue 3: when time begins to run under section 7(5)(a) HRA

49. Section 7(5)HRA applies only to proceedings that are brought against a public authority under section 7(1) by a person who claims that it has acted, or proposes to act in a way which is made unlawful by section 6(1). It provides:

> "Proceedings under subsection (1)(a) must be brought before the end of –
>
> (a) the period of one year beginning with the date on which the act complained of took place; or

(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,

but that is subject to any rule imposing a stricter time limit in relation to the proceedings in question."

The wording of section 7(5)(a) contemplates that an "act" is a single event which occurred on a particular date. No express provision is made for an act which extends over a period of time, such as is said to have occurred in these cases as a result of the decisions taken under Rule 80 of the 1994 Rules.

50. The Scottish Ministers contended that time began to run against the petitioners under section 7(5)(a) HRA from the commencement of any period of segregation and that it was interrupted only by the service of the petition in which the segregation was complained of. The Advocate General supports this approach, on the view that the relevant acts were the decisions of the governor to order segregation. These were, he submits, one-off acts with continuing consequences. The First Division agreed that the proceedings were interrupted only by service of the petition. But they held that these were continuing acts and that time began to run only on the expiry of the relevant period of segregation. This was on the view that the relevant consideration was not only the decision to subject the petitioner to this regime but also the practical effect of the decision on the petitioner: para 86. They sustained the Scottish Ministers' plea of time bar in so far as it was directed towards Henderson's first four periods of segregation. *Quoad ultra* they allowed his petition to proceed and those at the instance of Cairns and Blanco. There was no plea of time bar in Somerville's case or that of Ralston.

51. This issue will be rendered academic if, as I would hold, the time bar in section 7(5)(a) HRA does not apply to these proceedings as presently drafted because the petitioners' case is that the acts of the Scottish Ministers were outside the limits of their devolved competence in terms of the Scotland Act. If it is necessary to express an opinion on it, however, I would hold that the phrase "the date on which the act complained of took place" in section 7(5)(a) means, in the case of what may properly be regarded as a continuing act of alleged incompatibility, that time runs from the date when the continuing act ceased, not when it began. Otherwise it would not be open to a person who was subjected to a continuing act or failure to act which was made unlawful by section 6(1) HRA to take proceedings to bring it to an end without relying on section 7(5)(b) while it was still continuing after the expiry of one year after its commencement. I would also hold that, so long as the

proceedings are brought within the time permitted by section 7(5)(a) and any longer period allowed under section 7(5)(b), damages may be awarded as just satisfaction for the whole of the period over which the continuing act extends, including any part of it that commenced before the period of one year prior to the date when the proceedings are brought.

52. The position would be different, for the reasons given by Lord Mance, if the orders and authorisations complained of were to be seen as a series of acts with continuing consequences. But the question whether the acts complained of in these cases are continuing acts or one-off acts with continuing consequences is not easy to determine on the petitioners' pleadings. Decisions of the Strasbourg court indicate that it tends to analyse situations such as these as one-off acts with continuing consequences, rather than as continuing breaches of the Convention: see eg *Camberrow MM5 AD v Bulgaria* (App. no. 50357/99, 1 April 2004), p 17; *Blecic v Croatia* (App. No. 59532/00, 8 March 2006), paras 85, 86. This is not a rule of law, however. Each case must be viewed on its own facts. The question how the petitioners' cases ought to be viewed in the light of this jurisprudence would require more careful examination if the section 7(5) HRA time limit applied to them. I would prefer to reserve my opinion upon it in view of the answer which I would give to the first issue.

Issue 4: proportionality

53. The remedies which the petitioners seek are set out in statement 3 of their petitions. Included as statement 3(a) in each case is a prayer for a declarator that the orders and grants and renewals of authority authorising the general segregation of the petitioners under rule 80 of the 1994 Rules were "disproportionate *et separatim* unreasonable and therefore unlawful." In statement 11 in Somerville's case it is averred that the decision on the part of the Scottish Ministers to make provision for the effective imposition of a punishment regime in segregation as the only means of management, control and containment of prisoners involved a disproportionate interference with his rights under article 8 of the Convention to respect for his psychological integrity, personal development and autonomy and self-determination and to his physical and moral security. In statement 12 of his petition it is averred that the decisions of the governors and the purported decisions of the Scottish Ministers to segregate and continue to segregate him were in all the circumstances disproportionate *et separatim* unreasonable and unlawful.

His plea in law is to the same effect. Similar averments and pleas in law are contained in the petitions of the other petitioners.

54. The Lord Ordinary held that the law did not recognise proportionality as an independent ground for judicial review of administrative action and she excluded the averments which raised this issue from probation. Before the First Division counsel for the Scottish Ministers indicated that the issue was unlikely to be of any practical importance as the proportionality of the Scottish Ministers' actings might require to be addressed in the context of the petitioners' cases under article 8 of the Convention. They were content to have the whole averments and pleas about proportionality remitted to proof before answer. The First Division decided nevertheless to hear argument on this issue. Having done so, they rejected the petitioners' submission that the law recognised proportionality as a criterion by which to test the validity of administrative action generally: para 124. They also rejected the petitioners' subsidiary argument that it had been recognised as a criterion for dealing with alleged infringement of common law fundamental rights including the right to liberty. They excluded from probation the words "disproportionate *et separatim*" where they appear in statement 3(a) and repelled the petitioners' first pleas in law so far as relating to proportionality. The word "unreasonable" had already been excluded from probation by the Lord Ordinary.

55. In the discussion before your Lordships Mr Moynihan again submitted for the Scottish Ministers that the issue whether proportionality was an independent ground for judicial review was academic at this stage and in the events that had happened, and that it was unnecessary to reach a decision on it. But he also submitted that, were it necessary to deal with the issue, your Lordships should hold that the proposition that it was an independent ground of judicial review was not supported by authority. There was a material difference between the grounds of review described in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 and *R v Ministry of Defence, ex p Smith* [1996] QB 517 and the approach of proportionality in respect of review with regard to Convention rights: *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, para 26, per Lord Steyn. Such authority as there was indicated that a decision that proportionality was a ground for judicial review in addition to *Wednesbury* unreasonableness would give rise to much uncertainty. He referred to Lord Walker of Gestingthorpe's observation in *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185, para 144, that the *Wednesbury* test, for all its defects, has the advantage of simplicity.

56. In my opinion it would not be appropriate for your Lordships to seek to reach a decision on this issue in the circumstances of this case. The issue of proportionality will have to be considered in the context of the petitioner's complaint of an infringement of their article 8 Convention rights. It is unclear what need, if any, there will be for an examination of this issue independently of that complaint. As Mr Moynihan pointed out and their pleas in law make clear, the petitioners' claim for damages is confined to what would be necessary to afford just satisfaction within the meaning of section 8(3) HRA: see *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673, para 19, per Lord Bingham of Cornhill. I have in mind too that, subject to the question of time bar, these petitions have already been sent to proof before answer on other issues and that the pleadings may be subject to further amendment, with the leave of the court, before the proof takes place. All these factors indicate that this is not the occasion to embark on an examination of this issue, which is plainly one of considerable importance and difficulty. I would allow the averments directed to the question of proportionality to go to proof before answer.

Issue 5: inspection by the judge of redacted documents

57. In each case the Lord Ordinary granted a commission and diligence for the recovery of documents in the hands of the Scottish Ministers called for in various specifications of documents lodged by the petitioners. The Scottish Ministers produced several hundred documents in response to these calls. But in many cases parts of these documents were blacked out, or redacted, so as to delete various details and in some cases entire documents were blanked out. This was done because the Minister for Justice in the Scottish Executive was of the opinion that the disclosure of these parts would be contrary to the public interest because it would cause real harm to the work of the Scottish Prison Service. Public interest immunity certificates were lodged in each case which gave reasons for the view which she had formed with the assistance of Mr Michael Duffy, the Director of Prisons in the Scottish Prison Service, whose affidavit giving his reasons was also lodged, and of other officials in the SPS.

58. The petitioners insisted nevertheless on seeking to recover these documents in an unredacted form, except in so far as the redacted parts disclosed the identities of persons referred to in the PII certificates. By agreement between the parties, counsel for the petitioners were permitted to consider the redacted parts of the documents so that they could be informed of their contents. This was done in accordance with a

protocol which provided that they would not disclose their contents to any other person except to the extent to which the court should decide that the document should be disclosed notwithstanding the assertion of PII.

59. The question as to the extent to which the documents should be recovered in an unredacted form then came before the Lord Ordinary for a hearing *in camera*. On 8 February 2005 the Lord Ordinary, having heard submissions from the parties, refused to order that the documentary material covered by the PII certificates be produced for inspection by the court or to the petitioners. In the reasons that she gave for this decision she explained that counsel for the petitioners, despite having seen the material sought, did not specifically identify any document or part of a document as being required for the furtherance of any specific issue in any one of the individual cases. She said that it was not obvious that evaluation of intelligence material would have any bearing on the cases that were pled. She concluded that the petitioners had not made out a case that the material sought was likely to give substantial support to any specific issue identified in their cases.

60. The First Division agreed with the Lord Ordinary and adhered to her interlocutor. They did not accept that counsel for the petitioners was inhibited by the protocol from pointing to specific averments of either party which disclosure of the redacted passages would serve to prove or disprove and without which the petitioner would be deprived of the means of proper presentation of his case. Yet no attempt had been made to direct the Lord Ordinary's attention to any averment the proof of which depended on or would be advanced by disclosure of any redacted passage. They said that there was good reason for a procedural requirement that the court should be satisfied at the outset that there was sufficient justification for considering unredacted material: para 20.

61. I would be reluctant to interfere with a decision of the Court of Session on a mere matter of procedure: see *Girvan v Inverness Farmers Dairy*, 1998 SC (HL) 1, 21. But the issue raises an important matter of principle on which it is proper that your Lordships should give guidance. I also think that the decision of the Court of Session on this issue was based on a misconception of the context in which the Lord Ordinary was being asked to examine the redacted material in the light of the reasons that had been given for the PII certificates.

62. Dealing first with the context, the issue as to whether or not the redacted material ought to have examined by the Lord Ordinary should have been determined in the light of the fact that all the documents in respect of which the PII certificates had been lodged had been produced in answer to calls in specifications of documents approved by the court. The information which they contain appears to be directly relevant to the claims made by the petitioners. The assumption must be that, but for the PII certificates, these documents would all have been released in an unredacted form to the petitioners. The issue for the Lord Ordinary therefore was not whether disclosure of those documents would have a bearing on the case that had been pled or would assist the petitioners in proving or disproving matters that had been raised in the pleadings. It was whether sufficient reasons had been given by the Minister for Justice in her PII certificates in the public interest for withholding the redacted material.

63. As for the procedure that ought to have been adopted, the issue as to whether the withholding of this material was justified by the PII certificates was for the Lord Ordinary herself to determine. The court must always be vigilant to ensure that public interest immunity of whatever kind is raised only in appropriate circumstances and with appropriate particularity: *Balfour v Foreign and Commonwealth Office* [1994] 1 WLR 681, 688, per Russell LJ. The balance between the interests of justice, which favour disclosure, and the public interest which the Minister for Justice asserts, which favours withholding the material and to which due weight must be given in view of its subject matter, was for her to assess. I do not see how she could properly perform this task without examining the documents herself in this case. The White Book 2007, para 31.3.33, dealing with the practice in England and Wales, states that it is generally best if the judge should see the documents before ordering production, and if he thinks that the minister's reasons for refusing production are not clearly expressed he will have to see them too before ordering production. I agree with Lord Mance that the judge could only sensibly determine the matters in issue by inspecting the documents.

64. I have every sympathy for the Lord Ordinary in the task that confronted her. It was not made easier by the volume of material that needed to be considered. Nevertheless it was a task that had to be performed by the court in view of the assumption that must be made that, had it not been for the PII certificates, the documents would have been released in their unredacted form to the petitioners. I would recall the relevant interlocutors and order that the documents be produced for inspection by the Lord Ordinary.

Procedure

65. I agree with Lord Rodger that the course which these cases have taken fits uneasily with the nature and purpose of judicial review according to the procedure that was introduced in response to Lord Fraser of Tullybelton's initiative. The working party that was set up on 27 April 1983 in response to his observations was asked "to devise and recommend for consideration a simple form of procedure, capable of being operated with reasonable expedition": see West v Secretary of State for Scotland, 1992 SC 385, 403-404. The rules which are now set out in chapter 58 of the Rules of the Court of Session 1994 were intended to achieve this. As a result the degree of precision and detail in written pleadings that has traditionally been looked for in other forms of action in Scotland is not to be looked for in petitions for judicial review: Clyde and Edwards, Judicial Review (2000), para 23.19. The core requirement is simply this. The factual history should be set out succinctly and the issues of law should be clearly identified. The aim is to focus the issues so that the court can reach a decision upon them, in the interests of sound administration and in the public interest, as soon as possible. The fact that these aims have not been achieved in this case is as obvious as it is regrettable. I join with my noble and learned friend in expressing the hope that, in the light of all that has happened to date, these cases will be brought to trial as speedily as possible.

Conclusion

66. I would allow the petitioners' appeal on the first, fourth and fifth issues and the Scottish Ministers appeal on the second issue. I would find that a claim for damages as just satisfaction in respect of an act by a member of the Scottish Executive which is outside devolved competence because it is incompatible with a Convention right is not subject to the provisions of section 7(5) HRA.. I would recall the interlocutor of the First Division in Henderson's case in so far as it sustained the plea of time bar so far as directed to the first four periods of segregation and excluded his averments in respect of those periods from probation. I would recall the interlocutors of the First Division in each case in so far as they excluded from probation in each petition the words "disproportionate *et separatim*" where they appear in statement 3(a) and repelled the first plea in law so far as relating to proportionality. I would also recall its interlocutor in each case in so far as they adhered to the terms of the Lord Ordinary's interlocutor of 8 February 2005 in which she refused to order that the documentary material covered by the PII certificates be produced for inspection by the court or to the

petitioners. I would recall that part of the Lord Ordinary's interlocutor in each case and direct that the documentary material be produced for inspection by the Lord Ordinary. Otherwise I would adhere in each case to the First Division's interlocutor.

LORD SCOTT OF FOSCOTE

My Lords,

67. I have had the great advantage of reading in advance the opinions prepared by my noble and learned friends Lord Hope of Craighead and Lord Rodger of Earlsferry and gratefully adopt their exposition of the circumstances in which the five issues identified in the agreed Statement of Facts and Issues (see para 2 of Lord Hope's opinion) arise.

Issue 1

68. The first (and main) issue is whether a claim for damages based on an alleged breach of a Convention right by a member of the Scottish Executive is subject to the time limits prescribed by section 7(5) of the Human Rights Act 1998. This issue, on which I confess I have changed my mind more than once, depends upon the construction and effect of section 100 of the Scotland Act 1998 and, particularly, subsection (3) of that section. A review of the relevant provisions of the Human Rights Act 1998 (the HRA) and the Scotland Act 1998 (the SA) is repetitive, for Lord Hope and Lord Rodger have already carried out the exercise, but unavoidable if my conclusions on the issue are to have any coherence.

69. Both Acts received the Royal Assent in 1998 but whereas the sections of the SA relevant to this appeal came into effect in May 1999, the relevant sections of the HRA did not come into effect until 2 October 2000, some 17 months later. This gap explains section 129(2) of the SA which provides that each of a number of specified provisions of the SA including section 57(2) and (3) and section 100 -

> "… shall have effect until the time when [the HRA] is fully in force as it will have effect after that time."

70. The relevant sections of the HRA are, for present purposes, sections 6, 7 and 8. Section 6(1) declares it to be "… unlawful for a public authority to act in a way which is incompatible with a Convention right". Sections 7 and 8 flesh out the consequences.

71. Section 7(1) enables a person who complains that a public authority has acted in a way made unlawful under section 6(1) and who is a victim of the unlawful act complained of either to bring proceedings against the authority or to "rely on the Convention right or rights concerned in any legal proceedings". There has been some discussion in the hearing of this appeal about the scope of the respective alternatives offered by section 7(1). For my part, I think their effect is clear. The victim can rely on the alleged unlawfulness either in proceedings against the authority that he, the victim, has brought – either by commencing an action or by making a counter-claim in an action the authority has commenced – (subsection (1)), or as a defence in proceedings commenced by someone else, usually but not necessarily the authority, in which he, the victim, has become a party, usually but not necessarily as a defendant (subsection (2)). Subsection (5) of section 7 provides a time limit. Proceedings brought by the victim under subsection (1)(a) must be commenced within one year of the date on which the act complained of took place, or such longer period as the court may consider it equitable to allow, n.b. that reference to an "act" includes a "failure to act" (see s.6(6)). Mr O'Neill QC, counsel for the appellants, had a late new point, namely that proceedings claiming relief against a public authority for an alleged breach of Convention rights could be brought free from the time limits prescribed by section 7(5) provided it were combined with some other claim. In such a case, he suggested, the proceedings would fall under section 7(1)(b), not under section 7(1)(a). I am afraid that, like most last minute thoughts, this was a bad one. It is section 7(1)(a) that enables claims against public authorities for breach of Convention rights to be brought, whether that claim stands alone or is joined with other claims. The restraints imposed by section 7(5) cannot be so easily side-stepped.

72. Section 8(1) of the HRA enables the court in relation to "any act (or proposed act) of a public authority which the court finds … unlawful" to grant such remedy "as it considers just and appropriate". But subsection (3) bars an award of damages unless the court "is satisfied that the award is necessary to afford just satisfaction …" to the claimant, and subsection (4) requires the court, when determining the amount of the award, to take into account the principles applied by the European Court of Human Rights.

73. The SA, as Lord Hope has explained, makes careful provision for the consequences of devolving legislative and executive power to institutions with limited competence. One of the limitations on the legislative competence of the Scottish Parliament and on the legislative and executive competence of the Scottish Ministers and the Scottish Executive is that nothing is to be done that is "incompatible with any of the Convention rights or with Community law" (see s.29(1) and (2)(d), s.54(2) and s.57(2) of the SA). A consequence of these provisions is that an act done by the Scottish Executive that was incompatible with a Convention right (bar a few exceptions irrelevant to this appeal that I shall forbear to explore) would necessarily be *ultra vires*, outside devolved competence. It would be an unlawful act for HRA purposes but would also be unlawful under ordinary Scottish law, as are all *ultra vires* acts done by public authorities with limited powers.

74. I can now come to section 100 of the SA -

> "100(1) This Act does not enable a person –
>
> (a) to bring any proceedings in a court or tribunal on the ground that an act is incompatible with the Convention rights, or
>
> (b) to rely on any of the Convention rights in any such proceedings,
>
> unless he would be a victim for the purposes of …
>
> the Convention …
>
> (2) ……
>
> (3) This Act does not enable a court or tribunal to award any damages in respect of an act which is incompatible with any of the Convention rights which it could not award if section 8(3) and (4) of the [HRA] applied."
>
> (4) In this section 'act' means –
>
> (a) making any legislation,
>
> (b) any other act or failure to act, if it is the act or failure of a member of the Scottish Executive."

75. It will have been noticed that paragraphs (a) and (b) and the "unless" proviso in subsection (1) are in effect identical to their counterparts in section 7(1) of the HRA. So what was the purpose of subsection (1)? And what was the purpose of subsection (3)? Subsection (1) is plainly concerned with *locus standi*. Under section

7(1) only an HRA 'victim' can bring proceedings on the ground that an act is incompatible with a Convention right or rely on that incompatibility as a defence in proceedings brought by others. This *locus standi* control would apply to any contention of incompatibility in any legal proceedings. Bearing in mind that Convention incompatibility is a ground on which any enactment of the Scottish Parliament, any subordinate legislation made by the Scottish Ministers or the Scottish Executive~~s~~ or any act of any member of the Scottish Executive may be held to be outside devolved competence and therefore *ultra vires*, the need to place a strict limit on those entitled to raise such a point in litigation seems to me easy to understand.

76. The purpose of subsection (3) is much more difficult to identify. The appellants' contention, as I understand it, is that a sensible purpose can be attributed to subsection (3) only if it is accepted that the SA, without saying so expressly, has conferred on every person who claims to be an HRA victim the right to bring a damages action for loss caused by an alleged breach of a Convention right. On that footing, subsection (3) limits the damages that the court can award in such an action to the damages that could be awarded if section 8(3) and (4) of the HRA applied. That is the suggested purpose of subsection (3). If it is right that the SA has impliedly created the suggested new right of action, additional and alternative to an action brought in reliance on section 7(1) of the HRA, it would be an action to which the time limit control prescribed by section 7(5) of the HRA would not apply. Section 7(5) only applies to proceedings brought under section 7(1)(a).

77. My Lords, I find the premise on which the suggested purpose of subsection (3) is based very difficult to accept. It seems to me almost unthinkable that Parliament could have intended to create a new cause of action for damages for a limited class of *ultra vires* acts by the new Scottish authorities, namely, acts that were *ultra vires* because in breach of Convention rights, a cause of action independent of an action that could be brought under section 7(1) of the HRA, without saying so expressly. There is no question but that the terms of the SA have made the limits of competence of the new Scottish authorities, Parliament, Ministers and Executive of central importance to the operation of the devolution system. Any enactment of the Scottish Parliament, any subordinate legislation made by the Scottish Ministers or the Scottish Executive, any act of the Scottish Executive or a member of the Scottish Executive may be challenged on the ground that it was outside devolved competence or otherwise *ultra vires*. A whole new chapter of administrative law challenge to actions of these public authorities has been opened up by the SA. A chapter of public law still, however,

largely unwritten relates to the ability of courts, in actions where public law challenges to administrative action have succeeded, to award compensation to those who have sustained loss as a consequence of the administrative action in question. As long ago as 1974 Lord Wilberforce in *Hoffmann-La Roche(F) & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 referred at 359 to English law's "unwillingness to accept that a subject should be indemnified for loss sustained by invalid administrative action …" Lord Nicholls of Birkenhead in *Stovin v Wise* [1996] AC 923 at 933 referred to the "growing unease over the inability of public law, in some instances, to afford a remedy matching the wrong" and to the inability of public law "to give an effective remedy if a road user is injured as a result of an authority's breach of its public law obligations" (p.940). Section 31(4) of the Supreme Court Act 1981 enables the High Court, on an application for judicial review, to award damages to the applicant if satisfied that, had the claim been made in an action begun at the time the judicial review application was made, damages could have been awarded (see also CPR 54.3(2)). These provisions do nothing to cure the deficiency of English law to which Lord Nicholls had referred. There is no general right to recover damages for loss caused by *ultra vires* acts of public authorities. Some recognised tort claim is necessary. I believe the law of Scotland to be in the same state. So section 100(3) of the SA could not have been included in the statutory scheme of the SA in order to control damages awards made in proceedings brought to establish that some legislative or executive act of one or other of the Scottish institutions created by the SA was outside devolved competence and thus *ultra vires*. Parliament must, I think, be taken to have known that damages for loss caused by *ultra vires* acts could not be recovered otherwise than in a delictual, or in England tortious, action under the ordinary law. As to that, it is not hard to construct a case in which the success of an action in delict for damages against, say, the Scottish Executive depends upon the success of the claimant in establishing that a statutory provision, or a rule or regulation, or an act in the exercise of some asserted statutory function, was invalid as being outside devolved competence and accordingly *ultra vires*. If that invalidity were established, with the consequence that the claimant was entitled to delictual damages, it would not, in my opinion, be arguable that the damages would be subject to the provisions of section 100(3). In such a case it would be the Scottish law relating to the recovery of damages for the delict in question that would enable and control the award of damages to be made. The statutory injunction in section 100(3) that "*This Act* does not enable a court or tribunal to award any damages …" etc. would beat the air.

78. So, in my opinion, it comes to this. Either section 100(3) is contemplating a claim to damages pursuant to section 7(1) of the HRA – in which case the subsection achieves nothing; such an action would in any event have been subject to section 8(3) and (4). Or the appellants are right in contending that section 100(3) requires imputing to Parliament the intention, in enacting the subsection, to create a new cause of action for damages for breach of a Convention right where the breach has had the result that an act of one of the Scottish institutions was *ultra vires* and thus unlawful but where no delict has been committed. My Lords, after much hesitation and an embarrassing number of changes of mind, I prefer the first of these alternatives. I prefer the alternative that assumes Parliament, like Homer, to have nodded, to the alternative that assumes Parliament to have intended, without expressly saying so, the creation of an entirely new and independent cause of action in damages. I think section 100(3) was simply intended to make clear that any action for damages brought in respect of an act alleged to be *ultra vires* because incompatible with a Convention right would be subject to section 8(3) and (4) of the HRA. I do not find the answer that that would have been clear anyway – which I agree it would – sufficient to deflect that conclusion. My reason is the unacceptability of the premise on which the alternative argument rests. Section 100(3) does not, in my opinion, warrant the implication of the creation by the SA of an independent cause of action in damages. It is perhaps pertinent to note that subsection (3) was not in the Bill when introduced in Parliament in January 1998. The provision came in late, on 6 October 1998, by amendment. The Bill received the Royal Assent on 19 November 1998.

79. The pleadings in this case make clear that the appellants' damages claims are not delictual claims. If they had been, they would have been subject not to section 7(5) of the HRA but to the time limits prescribed for the delicts in question by the general law of Scotland. If viable at all, they must, in my opinion, be claims brought pursuant to section 7(1)(a) of the HRA and, as such, subject to section 7(5). On this issue therefore I am in respectful agreement with the conclusion reached by the Inner House and in agreement, also, with the reasons of my noble and learned friend Lord Mance, expressed in his opinion which I have had the advantage of reading in draft, for coming to the same conclusion.

Issue 2

80. The second issue is whether the act of a prison governor, placing a prisoner in segregation in exercise of powers under Rule 80(1) of the 1994 Rules, is to be regarded as an act of the Scottish Executive. I, like Lord Hope and Lord Rodger of Earlsferry, see force in the proposition that a governor exercising powers under the 1994 Rules is discharging an independent function given to him as governor and, in doing so, is not subject to direction or control of the Scottish Ministers. If the appellants' appeal on Issue 1 fails, as I think it should, Issue 2 becomes academic. If not, my view is that for the reasons given by Lord Rodger the appellants should fail on Issue 2 as well.

Issue 3

81. This Issue asks whether, for the purposes of section 7(5) of the HRA, time begins to run from the first date when a breach of Convention rights occurred. A feature of the breach of Convention rights alleged by the appellant Blanco, namely, his segregation under a series of orders made by the prison Governor and extended by the Scottish Ministers, is that the Governor had power, under rule 80(7) of the 1994 Rules, to cancel the segregation at any time. If the orders directing, or extending, segregation were unlawful, as being in contravention of Blanco's Convention rights, it would seem to follow that for so long as the segregation continued there was a day by day breach of Blanco's Convention rights brought about by the Governor's failure to exercise his power to cancel the segregation. Time under section 7(5) begins to run from "the date on which the act complained of took place" (s.7(5)(a)). But "act" includes "a failure to act" so it follows, in my opinion, that the "one year beginning with the date on which the act complained of took place" should simply be calculated back from the date on which the section 7(1)(a) proceedings were commenced. It is likely that, in Blanco's case, and in many similar cases, the commencement of the one year thus calculated would fall somewhere within a period of allegedly unlawful segregation. Where that happened there would, in my opinion, be a clear case for the court to exercise its power under section 7(5)(b) to extend the one year limitation period so as to permit the action to cover the whole of that segregation period. I would answer Issue 3 accordingly.

Issue 4

82. I am in full agreement with what Lord Hope and Lord Rodger say about Issue 4.

Issue 5

83. This Issue asks whether the Inner House erred in accepting the Lord Ordinary's refusal to inspect the redacted documents. My Lords, I have no doubt that the Lord Ordinary should have inspected the documents and that the Inner House should have said so. The starting point for a consideration of this issue is that all the documents in question were relevant to the issues raised in the litigation and *prima facie*, therefore, should have been disclosed. The documents had been identified as relevant by the Scottish Ministers, in whose possession or power they were. The redactions to the documents had not been made on the ground that the parts redacted were said to be irrelevant but because, in the view of the Minister of Justice in the Scottish Executive, the disclosure of those parts would be damaging to the public interest. Reasons supporting that view were given in affidavits and public interest immunity protecting the redacted parts of the documents from disclosure was claimed.

84. The public interest immunity claim was challenged by the appellants and an ad hoc procedure was devised under which counsel for the appellants were allowed to read the redacted parts of the documents on terms that they would not disclose the contents to anyone, including their clients, without the consent of the judge. After they had done so, there was an *in camera* hearing before the judge at which submissions for and against fuller disclosure of the documents were made. The judge was asked, presumably by the appellants' counsel, herself to read the documents so that she could decide whether the P11 claims should be upheld. But she declined to do so. She said, in effect, that counsel had not identified any particular part of any particular document that she should read. Her conclusion was that the appellants had not made out a sufficient case for overriding the P11 that had been claimed.

85. My Lords, we were given to understand that the number of documents that had been redacted was 70 odd. This was not a case where trunk loads of documents were involved. The purpose of full discovery of relevant documents in civil litigation, as of all other procedural rules and practices, is an administration of justice reason, namely, to provide as good a chance as is practicable of the litigation culminating in a just result. It is in the public interest that a just result should be reached. It is also in the public interest that documents the disclosure of which would be damaging to the public interest should be

protected from disclosure. These are conflicting public interests and in every case in which conflict between them arises one must give way to the other. A balance must be struck depending on the circumstances of each case and it is the judge who must strike it. We have come some distance from the days when the balance used to be struck by the Crown. In order to strike the balance the judge must weigh up the value of the documents – or rather, in the present case, the value of the redacted parts – to the issues for which the applicant seeking disclosure will be contending in the litigation and the weight of those issues in determining the outcome of the case. These are the administrations of justice reasons for disclosure that must go into the balance. And it must be a rare case in which a judge is able to weigh up these matters without reading the documents, or perhaps a reasonable selection of the documents. On the other side of the balance will go the public interest reasons that have been given for withholding the documents from disclosure.

86. My Lords, like my noble and learned friend Lord Hope, I do not believe the Lord Ordinary could have properly struck the balance without first examining the documents so as to assess the weight of the need for disclosure. I would therefore allow the appeal on this issue and make the order suggested by Lord Hope.

Summary

87. For the reasons I have given I would dismiss the appeal on Issue 1 but in relation to each of the other issues I would make the order proposed by Lord Hope.

LORD RODGER OF EARLSFERRY

My Lords,

88. The appellants all are, or were, prisoners in Scotland who were at some stage removed, by order of the governor, from general association with other prisoners. The orders were made under rule 80 of the Prisons and Young Offenders Institutions (Scotland) Rules 1994 ("the Prison Rules") as amended by rule 10 of The Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2000 (No. 187) ("the Amendment Rules") which came into effect on 7 July 2000. The

appellants have brought judicial review proceedings challenging the validity of those orders. Their long pleadings are both confused and confusing. But, among many other things, the appellants aver that the decisions to order their segregation and to authorise their continued segregation were incompatible with their article 7 and 8 Convention rights and so (1) unlawful under section 6(1) of the Human Rights Act 1998 ("the HRA") and (2) ultra vires by virtue of section 57(2) of the Scotland Act 1998 ("the Scotland Act"). Furthermore the appellants seek damages for the alleged consequences of those decisions by reference to (1) section 8 of the HRA and (2) section 100(3) of the Scotland Act.

89. By virtue of section 7(5)(a) of the HRA, proceedings against a public authority under the HRA must be brought before the end of the period of twelve months beginning with the date on which the act complained of took place. It is common ground that two of the appellants, Mr Henderson and Mr Blanco, presented their judicial review petitions after the end of the period of twelve months beginning with the date of some, at least, of the decisions relating to their segregation which they challenge in their proceedings. So, if the proceedings are indeed "proceedings against [a public] authority under" the HRA in terms of section 7(1)(a) of that Act, then they were not brought within twelve months from the time of the relevant decisions. On that hypothesis, they were out of time under section 7(5) unless the court considered it equitable, in all the circumstances, that they should have been brought within the actual periods that elapsed in each case: section 7(5)(b).

90. Mr Henderson and Mr Blanco contend, however, that they are not constrained by the time-limit in section 7(5) of the HRA. They have based their proceedings on the provisions of the Scotland Act as well as of the HRA. So they contend that, leaving aside the HRA, the relevant decisions were ultra vires the Scottish Ministers under the Scotland Act because they were incompatible with their article 7 and 8 Convention rights. The Scotland Act contains no equivalent of the time-limit in section 7(5) of the HRA. So, they submit, they can bring proceedings challenging the decisions of the Scottish Ministers as ultra vires and seeking damages by reference to the Scotland Act, even though those proceedings were begun after the expiry of the twelve-month period in section 7(5)(a) of the HRA.

91. In response, the Scottish Ministers say that the decisions of the governors are not decisions of the Scottish Ministers and cannot

therefore be challenged by reference to the Scotland Act. I return to that point later. But, even if they are wrong about that, they say that damages in respect of a violation of Convention rights cannot be obtained under the Scotland Act, but only in proceedings under the Human Rights Act, to which the time-limit in section 7(5) applies.

92. In the petition and in the courts below, the appellants based their contention that the decisions of the Scottish Ministers were ultra vires on section 57(2) of the Scotland Act. It provides, inter alia, that a member of the Scottish Executive has no power to do any act so far as it is incompatible with any of the Convention rights. Shortly before the hearing in your Lordships' House, however, Mr Iain Jamieson published an article on "The Somerville case" 2007 SLT (News) 111. Although Mr O'Neill QC did not mention the article in his oral submissions for the appellants, it was obvious that he had taken account of what Mr Jamieson says about the scope and purpose of section 57(2). Following Mr Jamieson's lead, instead of sticking to section 57(2), he referred to the limitations on the Ministers' powers that are to be found in other provisions in the Act. Neither Mr Moynihan QC for the Scottish Ministers nor the Advocate General suggested that this particular part of the argument in Mr Jamieson's article was wrong. For my part, I would acknowledge the assistance that I have derived from it.

93. Although the Scottish Ministers readily accept that any decision of theirs under rule 80 of the Prison Rules relating to the segregation of the prisoners was ultra vires if it was incompatible with their article 7 or 8 Convention rights, it is perhaps as well to spell out why this is so.

The Vires Controls in the Scotland Act

94. The Scotland Act confers wide, but nevertheless limited, powers on the Scottish Parliament and the Scottish Executive. Essentially, the limitations on the powers of both institutions are similar. In particular, it is beyond the competence of either to do anything that is incompatible with Convention rights. This limitation ensures that the Scottish Parliament and Ministers have no power to do anything that would put the United Kingdom in violation of its international obligations under the European Convention. The limitation also affords protection to the Convention rights of all those who are affected by the acts of the institutions. This is important since the changes brought about by the Scotland Act are actually intended to benefit people by improving the government of Scotland.

95. The Scotland Act recognises that the Scottish Ministers have various functions, both statutory and non-statutory. They exercise their statutory functions on behalf of Her Majesty (section 52(2)). The functions in question are those conferred by any enactment (section 52(7)), the term "enactment" being widely defined (section 126(1)).

96. Before devolution the existing statutory functions of Ministers of the Crown in relation to Scotland were imposed, according to the usual formula, on "the Secretary of State". On devolution, those functions, so far as within devolved competence, became exercisable by the Scottish Ministers: section 53(1)(c). In terms of section 54(3), the restriction "so far as they are exercisable within devolved competence" has the effect that the Ministers cannot exercise the function conferred by any pre-commencement statute (or exercise it in any way) so far as a provision of an Act of the Scottish Parliament conferring the function, or conferring it so as to be exercisable in that way, would be outside the legislative competence of the Scottish Parliament. This is a reference back to section 29(2) under which, inter alia, a provision is outside the legislative competence of the Parliament if it is incompatible with any of the Convention rights. The reference back ensures that the limitation is the same for both the Parliament and the Scottish Ministers.

97. The upshot is that, by virtue of sections 53(1) and 54(3), the Scottish Ministers have no power under pre-devolution legislation to exercise a power, or to exercise it in a way, that would be incompatible with a Convention right. In so far as they purport to do so, they are acting ultra vires.

98. So far as post-devolution legislation is concerned, section 52(1) recognises that statutory functions may be conferred on Scottish Ministers by that name. This could happen in three ways.

99. First, functions could be conferred on the Scottish Ministers by an Act of the Scottish Parliament. But any provision in such an Act is not law in so far as it is incompatible with any of the Convention rights (section 29(1) and (2)(d)). It follows that an Act of the Scottish Parliament cannot confer a function on the Scottish Ministers that would be incompatible with a Convention right or confer a function so as to be exercisable in a way that would be incompatible with a Convention right. (This way of more fully describing the limit on legislative competence is suggested by section 54(3).) Therefore, when the

function in question derives from an Act of the Scottish Parliament, the function itself cannot be incompatible with Convention rights. And, if the Scottish Ministers exercise the function in a way that is incompatible with any Convention right, they must be acting ultra vires.

100. The second possible case is where a member of the Scottish Executive makes subordinate legislation after devolution, but under a power in a pre-commencement Act of Parliament. Then section 57(2) comes into play and provides that he has no power to make such legislation so far as it is incompatible with any of the Convention rights. So a member of the Scottish Executive cannot make subordinate legislation conferring a function on the Scottish Ministers that would be incompatible with a Convention right or conferring a function so as to be exercisable in a way that would be incompatible with a Convention right. Again, if the Scottish Ministers purport to exercise the function in a way that is incompatible with Convention rights, they must be acting ultra vires.

101. The third possible situation is where a post-devolution Act of Parliament confers a function on the Scottish Ministers. Since Parliament is supreme, it could confer a function on Scottish Ministers that would be incompatible with a Convention right. Unless the later Act of Parliament overrides it, however, section 57(2) prevents any member of the Scottish Executive (apart from the Lord Advocate) from doing anything that is incompatible with a Convention right, even if that would otherwise be authorised or required by the later Act.

102. So, whether the functions of the Scottish Ministers are conferred by pre-commencement or post-devolution legislation, the proper, intra vires, exercise of their functions cannot be incompatible with Convention rights. If what they do is incompatible with Convention rights, it is ultra vires.

103. In applying this analysis to the present case, the first thing to note is that the Scottish Ministers' functions in relation to the segregation of prisoners derive from rule 80 of the Prison Rules which were originally made in 1994 under section 30 of the Prisons (Scotland) Act 1989 ("the 1989 Act"). After devolution, a member of the Scottish Executive made the Amendment Rules, also under section 30. So the functions of the Scottish Ministers under rule 80 are, in part, functions conferred on the Secretary of State by a pre-commencement enactment, but now exercisable "within devolved competence" by the Scottish Ministers, in

terms of section 53(1), (2)(c) and (3)(b). It would be outside the devolved competence of the Ministers to exercise those functions, or to exercise them in any way, so far as it would be incompatible with any Convention right to do so: section 54(3).

104. Equally, by virtue of section 57(2), the member of the Scottish Executive who made the Amendment Rules under section 30 of the Prisons (Scotland) Act 1989 had no power to make any subordinate legislation so far as it was incompatible with any Convention rights. To the extent that he did so, the legislation would be ultra vires. It follows that any amendment to rule 80 made by the Amendment Rules did not permit the Scottish Ministers to exercise their functions incompatibly with Convention rights.

105. In summary, by a combination of these provisions, the Scottish Ministers have to exercise their functions under rule 80 of the Prison Rules in a way that is compatible with any relevant Convention rights, including any article 7 and 8 Convention rights. If they do otherwise, their purported exercise of their functions is ultra vires. As indeed the parties and intervener all agree.

The First Issue

106. The petitions for judicial review are drafted on the basis that both the HRA and the Scotland Act are in play where a decision of the Scottish Ministers is challenged as being incompatible with a Convention right. Nevertheless, both in the First Division and before your Lordships' House, counsel for the appellants argued that, since the Scotland Act was a discrete constitutional Act applying to the Scottish Parliament and Executive, the Scotland Act alone applied to the functions of the Scottish Ministers. The Scotland Act was, in effect, a lex specialis which superseded the lex generalis, the HRA, so far as the Scottish Ministers were concerned. So any challenge to the Scottish Ministers' exercise of their functions as being incompatible with Convention rights had to be brought under the Scotland Act rather than under the HRA.

107. The First Division rejected that argument. They were right to do so. There can be no doubt that the Scottish Ministers are a public authority in terms of section 6(3) of the HRA and that, accordingly, under section 6(1) it is unlawful for them to act in a way that is incompatible with a Convention right. If the Ministers' decisions on the

segregation of the appellants were indeed incompatible with the appellants' Convention rights, under section 6(1) the Ministers acted unlawfully in taking them. Equally, as already explained, under the Scotland Act, if the decisions were incompatible with the appellants' Convention rights, the Ministers acted ultra vires in purporting to take those decisions. Both Acts would apply in the circumstances.

108. So, at any time before the time-limit in section 7(5) cuts in, a person who claims that the Scottish Ministers have exercised their statutory functions in a way that is incompatible with any of his Convention rights can raise proceedings on either of two bases. He can proceed on the basis that the Scottish Ministers' act or failure to act was unlawful in terms of the HRA or on the basis that, by virtue of the Scotland Act, their act or failure to act in the purported exercise of their functions was ultra vires. Indeed, there is no need for him to choose one basis rather than the other. He can put his case in both ways. Even if he chooses to stick to the HRA, however, the question whether the Scottish Ministers' act or failure to act in the purported exercise of their functions was incompatible with any of the Convention rights will still be a devolution issue in terms of para 1(d) of Schedule 6 to the Scotland Act. The procedural regime in the Schedule will apply.

109. The Scottish Ministers accept all that. But with a caveat. They say that damages are different. If the person concerned wishes the court to grant him relief against the Ministers in the shape of damages for the violation of his Convention rights, then he must make that claim under section 8 of the HRA in proceedings brought within the time allowed by section 7(5). A court has no power, they argue, to award damages for the violation of his Convention rights by virtue of the Scotland Act. There is, accordingly, no possibility of using proceedings based on the Scotland Act to obtain damages when the time for making a claim against the Ministers for damages under the HRA has passed. This is said to make sense since the two Acts are intended to work together, not in conflict with one another.

110. My Lords, the argument would be compelling if the time-limit in section 7(5) applied only to claims for damages under the HRA or else if the Scotland Act contained an equivalent of section 7(5), limiting the time within which proceedings could be brought against the Scottish Ministers to challenge the vires of their acts or of their exercise of their functions. Parliament did not frame the legislation in either of these ways, however. It chose instead to make the two Acts work differently.

111. Under section 7(1)(a) of the HRA a person who claims that a public authority has acted in a way which is made unlawful by section 6(1) may bring proceedings against the authority under the Act in any appropriate court or tribunal. The proceedings are described by reference to what the person bringing them says about the way in which the public authority has acted, not by reference to the remedy which he seeks. If a breach of Convention rights is established, the court or tribunal will find that the act of the public authority was unlawful. It may then grant the relief that it considers just and appropriate: section 8(1).

112. The time-limit relating to section 7(1)(a) proceedings in section 7(5) is purely procedural. As is apparent from both section 7(1)(b) and section 7(5)(b), an unlawful act remains unlawful even after the twelve-month limit for taking proceedings under section 7(1)(a) has expired. Moreover, the time-limit applies to all proceedings of the kind described in section 7(1)(a), irrespective of the nature of the relief which is sought or which the court may eventually decide should be granted. So, if a petitioner wishes to bring judicial review proceedings against the Scottish Ministers under the HRA, he must raise those proceedings within the twelve-month period. That limit applies, irrespective of whether he seeks a mere declarator that the relevant decision was unlawful, reduction of the decision, interdict against the Ministers taking a similar decision in future, or damages under section 8. The remedy of damages under section 8 is therefore simply one of a number of possible forms of relief that the court may grant against the Scottish Ministers in the proceedings that must be brought within the period allowed by section 7(5).

113. By contrast, the Scotland Act contains no time-limit within which a petitioner or pursuer, who claims that the Scottish Ministers acted in a way that was ultra vires, must bring any proceedings against them. So someone may bring proceedings for judicial review on the ground that a decision of the Ministers was beyond their competence under the Scotland Act because it was incompatible with his Convention rights at a time when, by reason of section 7(5), he could not bring judicial review proceedings of the same decision under the HRA. If the court found in favour of the petitioner, it could then grant a decree of declarator, decree of reduction and decree for interdict, as appropriate.

114. Unlike in England, where judicial review proceedings generally have to be started within three months, in Scotland there is no fixed time-limit. Nevertheless, proceedings should be brought promptly. If

they are not, the court may exercise its discretion to refuse judicial review where that is appropriate, having regard to the public interest in public authorities and third parties not being kept in suspense as to the legal validity of a decision for any longer than is absolutely necessary in fairness to the person affected by it. See the opinion of the First Division in *King v East Ayrshire Council* 1998 SC 182, 196, referring to the speech of Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237, 280H-281A.

115. The upshot is that, in enacting the two statutes, Parliament has not imposed the same time-limit on proceedings by reference to the Scotland Act as on proceedings under the HRA. In enacting the Scotland Act, Parliament may well have thought that it would be bad policy to cut off the right to bring proceedings based on violations of Convention rights, while allowing proceedings based on other, more technical, grounds to go ahead. In any event, it is not for the courts to second-guess Parliament's quite deliberate decision to frame the two statutes differently in this respect.

116. The First Division came to a very different conclusion. On the basis that the HRA and the Scotland Act are to be regarded as closely interdependent, they held, 2007 SC 140, 168, para 55, that:

> "it is right and proper to conclude that Parliament, in the absence of some compelling reason to the contrary, intended that section 7(5) should apply to limit in terms of time proceedings where a devolution issue arose as well as those where none arose."

As they went on to make clear, what they meant was that Parliament intended section 7(5) to apply to limit the time for bringing proceedings with reference to the vires limits in the Scotland Act as well as proceedings under the HRA.

117. I cannot agree. Contrary to what their Lordships say, nothing in the relationship between the two Acts would make it "right" or "proper" to conclude that section 7(5) of the HRA should apply to limit any proceedings other than the proceedings which Parliament has chosen, very deliberately, to make it limit. The First Division's construction flies in the face of the words which Parliament used in enacting section 7(5). By its express terms, section 7(5) of the HRA applies only to the proceedings "under this Act" specified in subsection (1)(a) – not even to the other cases described in subsection (1)(b). Given its express terms,

section 7(5) cannot possibly apply by implication to other proceedings – least of all, to proceedings brought by reference to a vires limit contained in another Act. In short, there is absolutely nothing in section 7(5) or any other provision of the HRA, or in any provision of the Scotland Act, which applies the time-limit in section 7(5) to proceedings brought against the Scottish Ministers by reference to the Convention right vires limit in the Scotland Act. The point does not bear elaboration.

118. Not surprisingly, counsel for the Scottish Ministers did not adopt this aspect of the decision of the First Division. On the contrary, Mr Moynihan accepted that, after the time-limit for proceedings under the HRA had expired, proceedings could be brought for, say, declarator that the Ministers' decisions were ultra vires under the Scotland Act because they were incompatible with Convention rights. Where appropriate, the court could also grant decree of reduction. His argument was simply that, because the only vehicle for getting damages for an infringement of Convention rights was proceedings under the HRA, once the time for such proceedings had expired, a prisoner who had been the victim of any infringement could not obtain damages, even though he could obtain the other remedies by reference to the Scotland Act.

119. Indeed Mr Moynihan also accepted that, where appropriate, other private law remedies would still be open where the Scottish Ministers had exercised their functions in a way that was incompatible with someone's Convention rights. For instance, if they were to institute a charge for some service which only women had to pay, this would involve discrimination on the ground of sex and would be incompatible with article 14. A woman who had been obliged to pay the charge could bring proceedings to have it declared ultra vires under the Scotland Act – even if the charge had been levied more than a year before. If she was successful, then at any time within the appropriate prescriptive period she could obtain repetition of the sum that she had paid, on the ground that the Scottish Ministers had been unjustly enriched. The common law would provide that remedy in the circumstances. But the court could not give her damages, even if, according to the Strasbourg jurisprudence, damages would be necessary to afford her just satisfaction for, say, her distress in having her Convention right violated in this way. She could only get the, ex hypothesi necessary, damages by raising proceedings under a different Act with a different time-limit. I am unable to see what policy objective would be served by a limping arrangement of this kind. A time-limit cutting off all proceedings for a violation of Convention rights after twelve months would make sense; a

time-limit cutting off only one remedy for that violation makes no sense at all.

120. The crux of this aspect of the case is section 100 of the Scotland Act which provides:

> "(1) This Act does not enable a person -
>
> (a) to bring any proceedings in a court or tribunal on the ground that an act is incompatible with the Convention rights, or
>
> (b) to rely on any of the Convention rights in any such proceedings, unless he would be a victim for the purposes of Article 34 of the Convention (within the meaning of the Human Rights Act 1998) if proceedings in respect of the act were brought in the European Court of Human Rights.
>
> (2) Subsection (1) does not apply to the Lord Advocate, the Advocate General, the Attorney General or the Attorney General for Northern Ireland.
>
> (3) This Act does not enable a court or tribunal to award any damages in respect of an act which is incompatible with any of the Convention rights which it could not award if section 8(3) and (4) of the Human Rights Act 1998 applied.
>
> (4) In this section 'act' means -
>
> (a) making any legislation,
>
> (b) any other act or failure to act, if it is the act or failure of a member of the Scottish Executive."

In *R v HM Advocate* 2003 SC (PC) 21 I analysed the language of section 100. That analysis was not necessary for the decision in the case. The First Division were therefore entitled to depart from it. Which they did, holding that my construction of the section was erroneous: 2007 SC 140, 176, para 76. Rather than provide any competing detailed analysis of section 100, their Lordships contented themselves with saying, 2007 SC 140, 168-169, para 56:

> "Section 100, properly construed, clearly has a purpose. Its purpose is to ensure that in proceedings in which a devolution issue is raised (1) the victim test is generally applied to the issue of title and interest to sue, (2) the Law Officers do not require to satisfy the victim test and (3)

> that, in proceedings in which damages are awarded, the fact that the act in question is *ultra vires* by reason of section 57(2) does not avoid the requirement that the court or tribunal apply to its assessment the just satisfaction test of European jurisprudence. The purpose of section 100 is, in our view, plain and that purpose is not, with respect to the members of the Judicial Committee who took a contrary view, the purpose favoured by them."

Later their Lordships summarised their conclusion on section 100 in this way, 2007 SC 140, 177, para 80:

> "There is nothing unacceptable about a claimant seeking to raise proceedings under section 7 of the Human Rights Act, and seeking the remedies, including just satisfaction damages, provided for in section 8, provided at the same time he also follows the procedural requirements applicable to a devolution issue. On that view, there is no need to look for a basis for a claim for damages in the Scotland Act. Section 100 can be given its natural negative meaning, rather than be distorted into an implied positive assertion of a right to claim damages. Its purpose is the limited one of making clear, *ob majorem cautelam*, that the Scotland Act cannot be used as a way of getting round the Human Rights Act requirements (1) that claimants should demonstrate victim status (subsection (1)), and (2) that damages be confined to just satisfaction (subsection (3))."

Here too, while saying that section 100 has been "distorted", they do not themselves address and analyse the language of the section. Without such an analysis, it is impossible to determine the meaning and purpose of the provision.

121. Up to the end of the hearing of this appeal, I deliberately refrained from re-reading what I said about section 100 in *R v HM Advocate*. Having now read it through in the light of counsel's submissions, I am not persuaded that my interpretation distorted the meaning of the section. Nevertheless, I think it right to add some further remarks on the section.

122. As the side-note indicates, section 100 relates to human rights only. Subsection (1) does not pose any real difficulties of interpretation

but is nevertheless significant for the argument. Subsection (1) is cast in a negative form. It explains what the Scotland Act does not enable a person to do, i e, bring proceedings on the ground that an act is incompatible with the Convention rights or to rely on any of them unless he would be a victim for the purposes of Article 34 "if proceedings in respect of the act were brought in the European Court of Human Rights." Clearly, however, subsection (1) presupposes that the provisions of the Scotland Act relating to incompatibility with Convention rights do enable proceedings to be brought – so long as the pursuer or petitioner qualifies as a victim. The First Division accept that. Indeed counsel for the Scottish Ministers rather swept the implication aside as being too obvious to be worth mentioning. Subsection (1) serves to limit the class of persons who are enabled to bring the proceedings. To see whether he can bring proceedings, the person concerned has to engage in a hypothetical exercise. He has to imagine that he had brought proceedings in respect of the same act in Strasbourg and decide whether, in that event, he would be a victim under article 34 of the Convention. Unless he would, the Act does not enable him to bring proceedings.

123. Whereas subsection (1) deals with who is not enabled to bring proceedings, subsection (3) deals with what damages a court or tribunal is not enabled to award. Again the provision is cast in the negative and refers to a hypothetical situation. This time the court must put itself in the situation in which section 8(3) and (4) of the HRA apply. That is, ex hypothesi, a situation where the court is considering whether to award damages in respect of an act that is incompatible with any of the Convention rights. The exercise of envisaging that situation only makes sense if, in its actual situation, the court is considering whether or not it is enabled to award damages for an act that is incompatible with Convention rights.

124. According to section 100(3), the Scotland Act does not enable the court to award damages in respect of an incompatible act which it could not award under section 8(3) and (4) of the HRA. This tells the court two things, as a domestic example shows. If you tell a French girl visiting you on an exchange that she cannot go to a club if her parents would not allow her to go to a similar club in France, you tell her two things: first, that she cannot go to the club if her parents would not permit her to do so in similar circumstances in France; but, secondly, that she can go to the club if they would permit it. Similarly, section 100(3) tells the court both what the Act does not enable it to do and what it does enable it to do. The court cannot award damages if it could not award them under section 8(3) and (4); but also the court can award

damages if it could award them in respect of the act in question under section 8(3) and (4). The structure of subsections (1) and (3) is so similar that the First Division and Scottish Ministers cannot, consistently, draw the plain inference from the wording of subsection (1) but refuse to draw it from the wording of subsection (3).

125. According to the First Division, the purpose of section 100(3) is to make clear, ob majorem cautelam, that the Scotland Act cannot be used as a way of getting round the HRA requirement that damages be confined to just satisfaction. But if that were the purpose of subsection (3), Parliament need only have said that, for the avoidance of doubt, the Act does not enable any damages to be awarded in respect of an act which is incompatible with any of the Convention rights. The actual wording is much more subtle. Indeed, leaving other matters aside, the First Division's interpretation is objectionable precisely because it makes this carefully drafted provision superfluous: on their reading, it exists merely to tell someone suing for damages under the Human Rights Act what that Act already tells him loud and clear - that he cannot get more than section 8(3) and (4) allow. Why stop there? Why not also "make clear" that the Scotland Act cannot be used to get round the limitation in section 8(2) of the HRA? Indeed - on the First Division's approach - why not "make clear" that the Scotland Act cannot be used to get round section 7(5)? The possibilities for "making clear" are endless.

126. The interpretation of section 100(3) proposed by the Scottish Ministers and interveners is equally problematical. They suppose a case, for example, where the Scottish Ministers did something to you or your property which would constitute a delict if not authorised by a statutory provision. If that statutory provision is held to be ultra vires by reason of being incompatible with Convention rights, you can sue the Ministers for the delict. I assume, for the sake of the argument, that the analysis is correct. The Ministers then contend that the purpose of section 100(3) is to cap your right to damages for the delict at the amount which could be recovered by way of damages under section 8(3) and (4) of the HRA.

127. In my view, that construction would pervert the purpose of section 8(3) and (4): the subsections do not exist to cap other remedies, but to give the court the power to grant further relief by way of damages, if but only if that is necessary to afford just satisfaction. In other words, section 8(3) presupposes that all the other remedies provided by statute or the common law (including, if appropriate, the

law of delict) are available and then allows the court to give an additional remedy by way of damages where that is necessary to afford just satisfaction. As Lord Bingham of Cornhill observed in *R (Greenfield) v Home Secretary* [2005] 1 WLR 673, 684, para 19, the HRA "is not a tort statute." So the damages that a court can award under section 8 have nothing to do with tort or delict: as section 8(6) says, they are damages for the unlawful act of the public authority. There is therefore no conceivable reason why section 8(3) or (4) should impinge on any damages for tort or delict that the court would otherwise award. Equally, there is no warrant for interpreting section 100(3) of the Scotland Act as imposing a restriction on any common law remedy of damages for delict that section 8(3) and (4) of the HRA would not impose.

128. When enacting the Scotland Act, Parliament foresaw that it would be in force before the HRA. As my noble and learned friend, Lord Hope of Craighead, has shown, Parliament made careful provision in section 129(2) to ensure that the Scotland Act could operate during that period in the same way as it would operate once the HRA was in force. Two points arise, one involving the First Division's construction of section 100(3), the other involving the respondents' construction.

129. During the interim period when the HRA was not in force, no one could bring proceedings under it. On the First Division's construction, section 100(3) serves only to make clear to someone bringing proceedings under the HRA that he cannot use the Scotland Act to get round the requirement that damages should be limited to just satisfaction. So, on that interpretation, section 100(3) could serve no purpose whatever during the interim period. But section 100 is one of the provisions which Parliament said, in section 129(2), was to have effect during the interim period as it would have have effect after the HRA was in force. The First Division try to surmount this insuperable barrier by saying that during the interim period "the Human Rights Act … was to be treated as if it were in force": 2007 SC 140, 168, para 54. It is sufficient to say that this is an impossible construction of section 129(2), which quite explicitly applies only "before the Human Rights Act 1998 has come into force (or come fully into force)" and which deals only with the effect of certain specified provisions of the Scotland Act, not of the HRA, during that period.

130. Section 129(2) also causes problems for the respondents' construction of section 100(3). On their version, Parliament deliberately devised a system for the interim period under which the Scottish courts

were powerless to afford just satisfaction to those whose Convention rights were violated by the Scottish Ministers. Counsel was unable to suggest any reason why Parliament should have adopted such an obviously unsatisfactory approach.

131. By contrast, on a proper interpretation, section 100 completes the coherent scheme of the legislation. From the outset, the Scotland Act has enabled a victim, who brings proceedings for something which the Scottish Ministers have done or failed to do in breach of his Convention rights, to obtain just satisfaction. Depending on the circumstances, he can obtain, say, a decree of declarator, a decree of reduction, a decree of repetition of any sum paid over as the result of an ultra vires demand, and a decree of interdict. In addition, the court can award him damages - but section 100(3) makes sure that, exactly as under section 8(3) and (4) of the HRA, damages cannot be awarded unless the court is satisfied that they are necessary to afford the victim just satisfaction in all the circumstances. The award of damages involves no breach of principle since it is being made in respect of an act or failure to act that was ex hypothesi unlawful. By giving the court power to grant the necessary damages, the law provides the effective remedy for the violation of the victim's Convention rights which article 13 of the European Convention requires.

132. For these reasons, as well as those given by Lord Hope of Craighead, I would accordingly hold that the time-limit in section 7(5) of the HRA does not apply to the proceedings brought by Mr Henderson and Mr Blanco by reference to the Scotland Act. If, but only if, damages were necessary to give the appellants just satisfaction, the court could award them in those proceedings. In these circumstances I do not need to deal with the arguments about the scope of section 7(1)(a) and (b) of the HRA which Mr O'Neill first advanced in his reply.

133. Since a majority of the House agree with that view, it follows that the time-limit in section 7(5) of the HRA does not apply to the proceedings against the Scottish Ministers brought by Mr Henderson and Mr Blanco by reference to the Scotland Act. This has a bearing on the other issues raised in the appeals.

The Second Issue

134. The appellants were all segregated by an order of the relevant prison governor under rule 80(1) of the Prison Rules. But they were not

subject to segregation for more than 72 hours unless, on an application by the governor, the Scottish Ministers granted written authority prior to the expiry of the 72 hour period: rule 80(5). That authority had effect for a period of one month from the expiry of the 72 hour period and it could be renewed for further periods of a month on a subsequent application by the governor: rule 80(6).

135. The terms of these rules would therefore suggest that, while the basis for the initial segregation of 72 hours would be the governor's order, the basis for any segregation for a period of longer than that would be constituted by the governor's order plus the written authority granted by the Scottish Ministers.

136. During the course of the hearing before the House reference was made to the power of a governor under para (7)(a)(1) to cancel an order made under rule 80(1) at any time if he considers it appropriate to do so. It appeared to be accepted by the respondents that this power applied at any time, even when the Scottish Ministers had granted authority under rule 80(5) and (6). Despite the distinction drawn between a para (1) order and a para (5) authority in rule 80(8), I am prepared to accept that this is indeed the position, especially since the duty in para 7(b), to cancel an order if a medical officer advises that it should be done, must surely apply at any time when the prisoner is segregated. It follows that, at any time during the appellants' detention, the governor had a power under para 7(a)(1) to cancel the segregation order if he considered it appropriate to do so. He therefore had a continuing role in relation to the appellants' detention, even though it had been authorised by the Scottish Ministers.

137. The appellants all seek a declarator that in their case both the initial orders by the governors under Rule 80(1) and the grants of authority by the Ministers under Rule 80(5) and (6) were incompatible with their article 8 Convention rights and so unlawful under section 6(1) of the HRA and ultra vires by virtue of section 57(2) of the Scotland Act. So far as they relate this claim against the Ministers to the Scotland Act, no question of a time-limit arises.

138. On the other hand, the Scottish Ministers argued that, when making an order under rule 80(1) or making an application to the Ministers under rules 80(5) and (6), the governor of a prison is exercising a specific power which the Prison Rules confer on governors and which cannot be exercised by the Ministers themselves. Counsel for

the appellants submitted that, while this might be an appropriate conclusion where the functions were conferred exclusively on some unique office holder, the position was different here where, in terms of rule 3(1), the term "governor" in rule 80 covers a variety of people down to "the most senior officer who is present in prison at that time".

139. In my view, having regard to the express terms of the relevant paragraphs of Rule 80, the Ministers' submission on this point should be accepted. In *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533, 578D-E, Lord Oliver of Aylmerton held, in the case of a governor carrying out his disciplinary functions under the English Prison Rules 1964, that the governor "is not a mere servant or alter ego of the Secretary of State but a statutory officer performing statutory duties." Mutatis mutandis, I would apply his reasoning to the governor's role under rule 80.

140. The fact that the definition of "governor" is flexible enough to cater for various circumstances cannot affect the fundamental point that whoever is acting as governor for the purposes of rule 80 at the relevant time is exercising a distinct function, or distinct functions, which cannot be carried out by the Scottish Ministers. Lord Oliver cannot have thought that there was any particular magic in the term "governor" since rule 99 of the Prison Rules 1964, which were in issue in *Leech*, provided that "'governor' includes an officer for the time being in charge of a prison." That definition, too, is designed to introduce a certain measure of flexibility even in cases of discipline. Under rule 80 of the Scottish Prison Rules, the Scottish Ministers have their own distinct functions. The division between the role of the governor and the role of the Ministers is indeed essential if the protections for prisoners contained in the rule are to be effective. It follows that the familiar principle in *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 has no application to what the governor does under rule 80.

141. Neither party suggested that, if the House allowed the appeal on the first issue, this second issue could simply be left over to be decided after any proof. Admittedly, it is not clear at this stage how significant any case based on the orders and the applications of the governors may turn out to be when any proof has been held since, on any view, their actions, while distinct, were closely tied up with the actions of the Scottish Ministers. In such circumstances it would often be appropriate to leave such an issue until the end, when its practical significance, if any, should become clearer. But two related matters seem to me to point strongly against adopting that course here.

142. First, if it is indeed the case that the governors are carrying out a distinct function that is conferred on them alone and for which the

Scottish Ministers are not responsible, then their actions are not covered by the Scotland Act. This does not, of course, leave any gap in the protection of prisoners' Convention rights since any acts or failures to act by the governors which were incompatible with prisoners' Convention rights would be unlawful under section 6(1) of the HRA. On the other hand, it does mean that any proceedings in respect of an alleged violation of the appellants' Convention rights by the governors would need to be based on the HRA and the time-limit in section 7(5) would apply to those proceedings. It may not be without significance that in their written submissions counsel for the appellants refer to the possibility of amending the pleadings to seek an equitable extension of the time-limit in terms of section 7(5)(b). The Scottish Ministers reserve their position until any motion is made to amend. I shall come back to this point shortly.

143. Secondly, and even more importantly, if – as I hold - the Scottish Ministers are correct and they are not responsible for the actions of the governors, any proceedings relating to the actions of the governors would need to be directed, not against the Scottish Ministers, but against the governors themselves. The present proceedings were served on the governors as interested parties, but they were not made respondents and they have not entered the process.

144. If indeed it is the case that any proceedings for relief in respect of the governors' actions would have to be directed against the governors themselves, then it is a point which should be addressed now and not postponed until after the proof. Deciding the point against the appellants at that stage could either cause them substantial prejudice or else lead to attempts to bring fresh proceedings in some form or another, with further expense and delay. Accordingly, since the Scottish Ministers have raised the point and both sides have addressed it, I consider that the House should decide it by sustaining the argument for the Scottish Ministers. The point is also of significance for the third issue to which I now turn.

The Third Issue

145. The third issue relates to the appropriate starting point for the running of the time limit in section 7(5) of the HRA. Like the first issue, this point arises only in the cases of Mr Blanco and Mr Henderson. Moreover, once your Lordships have held that section 7(5) of the HRA does not apply to the proceedings against the Scottish

Ministers by reference to the Scotland Act, it arises as a live issue only in relation to proceedings against the respective governors based on section 6(1) of the HRA. As I have just noted, the governors are not respondents in the present proceedings and, therefore, Mr Blanco and Mr Henderson do not have any claim for any relief by way of damages under section 8 against them. So the issue would only really arise if and when counsel for Mr Blanco and Mr Henderson sought leave to amend their petitions to make the governors respondents and to seek remedies against them. In that eventuality, it would seem at least arguable that any proceedings, so far as directed against the governors as public authorities, would have been commenced well after the expiry of the one-year period in section 7(5)(a) of the HRA. On that view the appellants would have to seek an equitable extension under section 7(5)(b). It would then be for counsel acting on behalf of the governors to argue against such an extension, if so advised.

146. But it would be wrong to speculate on these matters at this stage. Once it is held, as I have held, that the Scottish Ministers are not responsible for the actions of the governors under rule 80, it follows that the Ministers have no interest or locus to take any point on the application of section 7(5) to possible proceedings against the governors. It is quite simply a point that does not arise in these proceedings in their present form. I would accordingly express no view on it.

The Fourth Issue

147. The fourth issue relates to the relevancy of the averments that the orders and grants and renewals of authority were disproportionate et separatim unreasonable at common law. So far as the orders and grants of authority themselves are concerned, the petitioners have averments and craves based on article 8 of the Convention. Similarly, the appellants have averments and craves relating to the conditions of their segregation which are again based, in part, on article 8. Proportionality is built into the article and so the averments relating to the proportionality of the Scottish Ministers' actions are relevant to that aspect of the cases. If article 8 is held to apply and the appellants show that the Ministers' actions in granting or extending authority were disproportionate, then the appellants will succeed without having to rely on the common law. So the relevancy, at common law, of the appellants' averments that the Ministers' actions were disproportionate will arise as a live issue only if the court holds (1) that article 8 does not

apply to the relevant grants of authority etc of the Ministers or that those grants of authority etc were not disproportionate under article 8; (2) that those grants of authority etc were not *Wednesbury* unreasonable but (3) that they might none the less be disproportionate at common law. In my view the point can safely and prudently be left until such a contingency occurs.

The Fifth Issue

148. The fifth and final issue relates to the procedure adopted by the Lord Ordinary and approved by the Inner House in relation to the public immunity claim made by the Minister of Justice in respect of certain documents. Since I agree with what your Lordships have said on the point, I can deal with it briefly.

149. More often than not, procedural questions are best left to the Inner House. But here, in deciding that the Lord Ordinary should not look at the documents concerned, both the Lord Ordinary herself and the Inner House have proceeded on a mistaken basis.

150. In judicial review proceedings the respondent public authority is expected to lodge the documents which relate to the decision under review and so, frequently, the petitioner will not need to ask the court to order production. Nevertheless, there are cases, such as the present, where the petitioner wants to recover documents which the other side has not lodged and is unwilling to lodge. In such cases, in the usual way, the petitioner must draw up a document specifying or describing the documents which he wants. That document is then lodged in process and a motion is made for the judge to take the necessary steps to require the person holding the documents to hand them over. In the present case the documents in question were in the hands of the respondents. The motion to recover the documents listed in the specification no 12 of process was granted unopposed. The petitioners then sought a further batch of documents listed in the specification no 13 of process. The Lord Ordinary heard counsel By Order and her interlocutor of 18 August 2004 records that she granted the order sought, "there being no objection". Since a party is not entitled to recover any document unless it is of potential relevance to an averment in the pleadings, the fact that there was no objection by counsel for the respondents shows that they accepted that documents falling within the terms of the specification were indeed relevant to the issues raised in the pleadings.

151. Ordinarily, that would have been an end of the matter: the respondents would simply have had to produce all the documents falling within the terms of the specification. But, in the same interlocutor, the Lord Ordinary refers to the respondents having asserted a claim to public interest immunity in respect of certain documents. That assertion presupposed that the documents in question were covered by the terms of the specification and would have to be produced unless the Lord Ordinary upheld the respondents' claim for public interest immunity in respect of them.

152. In terms of an agreement contained in a "protocol", under conditions of the strictest confidentiality, senior counsel for the petitioners was allowed to inspect the complete versions of the documents for which the respondents were claiming public interest immunity. Although devised with the best of intentions, this procedure was, in my view, wrong in principle. As a result, it not only gave rise to very real practical difficulties but led the court to adopt a mistaken approach to the inspection of the documents by the Lord Ordinary.

153. If the respondents' claim that, in the public interest, the redacted parts of the documents should not be revealed was valid, then, in normal course, it was valid against counsel for the petitioners who should therefore not have seen the full version. As it was, counsel for the petitioners was left in a very difficult situation where, as a result of reading the documents, he had information that he was not able to reveal to, or discuss with, his clients or instructing solicitors. He even felt inhibited from revealing it to the Lord Ordinary. The result was a certain paralysis in the procedure. In agreement with all of your Lordships, I am satisfied that no such procedure should be followed in future.

154. Counsel for the petitioners moved the Lord Ordinary to have the documents produced to the court so that she could decide whether the redacted passages should be disclosed to the petitioners. By her interlocutor of 8 February 2005, however, the Lord Ordinary refused to order that the documentary material covered by the public interest immunity certificate should be produced for inspection by the court. The First Division refused the reclaiming motion against that decision. In doing so, they proceeded on the basis that, having seen the documents, counsel for the petitioners should have been able to point to specific averments in the pleadings which disclosure of the redacted

passages would serve to prove or disprove and without which the petitioner in question would be deprived of the means of the proper presentation of his case.

155. That approach presupposes, contrary to principle, that counsel for the petitioners has read the unredacted material – something which had happened in this case only because of the protocol. The correct starting point, as I have said, is that the redacted passages are indeed relevant to one or more issues in the petitioners' cases, since otherwise there could be no question of them being produced under the specification. In these circumstances, there was no onus on counsel for the petitioners to show why they should recover the full version of the documents, including the redacted passages. The decision on whether they should do so was one for the Lord Ordinary after balancing the competing interests of the petitioners in having relevant material and of the public in maintaining the confidentiality of that material. I can see no way in which the Lord Ordinary could carry out that vital balancing exercise in this case without actually looking at the documents in question. In holding that she should not look at them, both the Lord Ordinary and the Inner House appear to have attached undue weight to an isolated remark of Lord Fraser of Tullybelton in *Air Canada v Secretary of State for Trade* [1983] 2 AC 394, 436C-D, and not enough weight to a passage in his earlier speech in *Science Research Council v Nassé* [1980] AC 1028, 1085F-H. There he indicated that, where the holder of documents objected to producing them on the ground of confidentiality, it would be the duty of the judge to read them and decide whether disclosure of the contents was necessary for the fair disposal of the case.

156. The procedure which should be followed was outlined recently by Lord Brown of Eaton-under-Heywood in *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650, a judicial review case where issues of proportionality were in play. He said, at p 674, para 58:

> "[T]he judge should receive from the respondent and inspect the full text of the disputed documents (consistently with the practice laid down by the House of Lords in *Science Research Council v Nassé* [1980] AC 1028); if he concludes that realistically their disclosure could not affect the outcome of the proportionality challenge he will dismiss the appellant's application for inspection; if, however, he reaches the contrary conclusion he will need to consider (with counsel's assistance) the question of redaction; only then may he

> still need to determine the respondent's public interest immunity claim."

Similar guidance is to be found in the speech of Lord Bingham at p 656, para 5. If the Lord Ordinary reaches the stage when she has to determine the public immunity claim, then, as laid down in *Science Research Council v Nassé*, the test to be applied is whether production of the full version of the document to the petitioners is necessary for disposing fairly of the proceedings.

157. For these reasons I would allow the appeal on this issue.

158. I would accordingly dispose of the appeals as Lord Hope proposes.

159. I have already mentioned that judicial review proceedings should be brought promptly in the interests of good administration. Precisely the same interests dictate that they should also be disposed of promptly. The reforms introduced in the wake of Lord Fraser of Tullybelton's observations in *Brown v Hamilton District Council* 1983 SC (HL) 1, 49, were designed to produce a speedy result by, for example, requiring only succinct pleadings. The pleadings in this case are the reverse of succinct and are anything but clear. That has undoubtedly contributed to some of the delays that have occurred. I can only express the hope that everything will be done by the Lord Ordinary to ensure that the cases come to trial as speedily as possible, given that they have already been in court for over four years.

LORD WALKER OF GESTINGTHORPE

My Lords,

160. In November 2004 the Lord Ordinary was to have embarked on the full hearing of these linked claims. But one item of evidence (a specialist's report) was not ready and it was decided that the time set aside for the hearing should be devoted to argument on a number of pleas in law and other interlocutory issues. These arguments before the Lord Ordinary occupied 15 days. A further 12 days' argument took

place before the First Division during January 2006, and by interlocutors dated 29 November and 13 December 2006 the First Division gave leave to appeal to your Lordships' House on five issues.

161. The Lord Ordinary's decision to hear so much interlocutory argument was no doubt intended to save time and costs in the long run, but I very much doubt whether that aim will ultimately be achieved. Important issues of law have been argued without a proper evidential basis of findings of fact, and even (as your Lordships were told more than once in the course of argument) without the pleadings being in their final form.

162. The difficulty of identifying the real issues has been exacerbated (for those not very familiar with Scottish procedure) by the huge amount of duplicated and redundant material in the voluminous papers placed before the House. The papers seem to have been prepared with more regard to the letter than to the spirit of the appropriate practice directions. All this juggernaut of litigation is being conducted at public expense.

163. The most important issue of law is as to the interaction of the Human Rights Act 1998 and the Scotland Act 1998. On that issue your Lordships are equally divided, with each side regarding the outcome as tolerably clear. I have to say that I have found this point much more difficult.

164. The debate centres on section 100 of the Scotland Act 1998 which was introduced, as your Lordships were told, as a late amendment to the Bill. Subsections (1) and (3) are expressed in an unusual way in that they are (in terms of what is expressly enacted) wholly negative in their effect. Reading and rereading these subsections, and trying to put them into their proper legislative context, I find it very difficult to accept that they represent a subtle and deliberate choice made by Parliament in order to produce a coherent legislative scheme. If that is indeed what they represent I can only say, facing up as best I can to the Swiftian strictures of my noble and learned friend Lord Rodger of Earlsferry, that the subtlety passes me by.

165. I have at times during the appeal been attracted to the notion that section 100 may have had no clear positive purpose (that is, to confer a statutory cause of action) but had only the negative purpose of setting limits on any such right of action as the court might ultimately hold to

have been conferred. That would have been a curiously unambitious aim, but not wholly implausible at a time when there was continuing uncertainty about the principles governing claims for damages against public authorities (*X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 was decided by this House in June 1995).

166. I have however come to the conclusion that that notion, and the alternative approaches canvassed by my noble and learned friends Lord Scott of Foscote and Lord Mance, face even greater difficulties than the views set out by my noble and learned friends Lord Hope of Craighead and Lord Rodger. I would therefore join with them in allowing the appeal on the first issue.

167. On all the other issues I agree with the opinions of Lord Hope and Lord Rodger. I would make the order which Lord Hope proposes. I respectfully concur in the observations in para 65 of Lord Hope's opinion and the final paragraph of Lord Rodger's opinion.

LORD MANCE

My Lords,

Introduction

168. I have had the benefit of reading in draft the opinions prepared by all of your Lordships. I gratefully adopt the summary of the issues and account of the background which my noble and learned friend Lord Hope of Craighead gives in paragraphs 1 to 9. I have however reached different conclusions on issues (1) and (3).

Issue 1: the relationship between the Scotland Act and the Human Rights Act in the context of claims based on breach of Convention rights

(a) General

169. The Human Rights Act 1998 was enacted on 9th November 1998 ten days before the Scotland Act 1998, although its provisions were (with presently immaterial exceptions) only brought into force on

2 October 2000. The two statutes are essential elements of the architecture of the modern United Kingdom. It is important that they interact precisely and coherently. Their drafters had this in mind, as evidenced by cross-referencing in both. We should construe both statutes in the same spirit. This is of great relevance to the main issue on this appeal: whether the Scotland Act enables claims to be made for damages in respect of acts incompatible with Convention rights, which would be free of the time limit applicable to similar claims under s.7(5) of the Human Rights Act.

170. The Human Rights Act makes it "unlawful" for a public authority to act in a way which is incompatible with a Convention right (s.6(1)). S.7(1) enables a person who claims that a public authority has acted (or proposes to act) in such a way to "(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or (b) to rely on the Convention right or rights concerned in any legal proceedings", but in each case only if he is or would be a victim of the unlawful act. This limitation reflects the Strasbourg test of standing. It has been criticised as too restrictive of challenges by public interest groups. But what is presently relevant is the requirement under s.7(5) that proceedings under s.7(1)(a) (though not s.7(1)(b)) be brought before the end of "the period of one year beginning with the date on which the act complained of took place; or …. such longer period as the court or tribunal considers equitable having regard to all the circumstances". This is subject to any rule imposing a stricter time limit in relation to the procedure in question.

171. Under English procedure, subject to the court's power to extend time, judicial review proceedings must be begun promptly and in any event not later than three months after the grounds to make the claim first arose (CPR 54). There is no equivalent limit in Scotland, though principles of *mora*, taciturnity and acquiescence may in some circumstances bar proceedings. But the appellants' damages claims are based (at present solely) on allegations of acts incompatible with the appellants' Convention rights, and the respondents submit that they can only be brought subject to the time limit in s.7(5) of the Human Rights Act. The practical result (depending on how that time limit applies) could be to preclude pursuit of certain claims or aspects of the petitioners' claims, subject to the court's discretion to extend time. The appellants submit that their claims can be made under or by reference to the Scotland Act and without express time limit. Further, in his submissions in reply, Mr O'Neill raised a new point: that the appellants' claims would anyway fall within s.7(1)(b), rather than s.7(1)(a) of the

Human Rights Act, and so would not be subject to the time limit in s.7(5) in any event.

(b) The HRA s.7

172. It is convenient to take this new point first. In Mr O'Neill's submission, the only proceedings falling within s.7(1)(a) are proceedings for breach of Convention rights alone. Any other proceedings fall, in his submission, within s.7(1)(b), even though they include a claim which, pursued by itself, would fall within s.7(1)(a). Here, the claims were brought by way of judicial review, and included claims for declarators as well as damages and expenses. Hence, he submits they fell within s.7(1)(b). If that were right, it would often make it a matter of chance, or choice for a claimant, whether the time limit applied. By formulating his claim to include a claim for judicial review or declarator or a common law claim, a claimant could ensure that it would fall outside s.7(1)(a) and s.7(5).

173. I cannot accept Mr O'Neill's argument. Proceedings against a public authority under the Human Rights Act may be brought by simple claim without more, but not infrequently they involve an application for judicial review of some decision, with damages being claimed as consequential relief in respect of any breach of Convention rights: see e.g. Lester & Pannick, *Human Rights Law and Practice*, para. 2.7.3, Clayton & Tomlinson, *The Law of Human Rights*, para. 21.101 (referring in the English context to what is now CPR 54) and Feldman, *English Public Law*, para.19.09. The provisions of s.7(3), (4) and (5) and of s.9 confirm that judicial review was envisaged as the procedure by which claims could be brought under s.7(1)(a). The references in s.7(3) and (4) to "proceedings …. brought" and "proceedings … made" echo the phrase "bring proceedings" in s.7(1)(a). S.9(1) expressly refers to proceedings being brought under s.7(1)(a) in respect of a judicial act by way of an application (in Scotland a petition) for judicial review. The concluding words of s.7(5) contemplate that proceedings under s.7(1)(a) may involve a procedure imposing a stricter time limit than the one year limit which that subsection introduces. The most obvious example of a procedure with a stricter time limit is English judicial review.

174. Mr O'Neill referred to *Pepper v. Hart* [1993] AC 593 and to ministerial statements in Parliament by Lord Irvine of Lairg LC (HL Hansard 3 November 1997, vol. 582, col. 1232) and Mr O'Brien, Under-Secretary of State for the Home Department (HC Hansard 24 June 1998,

vol. 314, cols. 1055-58 and 1094-95). Neither the circumstances nor the citations appear to me to satisfy the tests for use of *Pepper v. Hart*. The statute is not open to real doubt, and the statements are not clear, consistent or of any real assistance to Mr O'Neill's argument. A distinction between reliance on an existing cause of action and proceedings on Convention grounds alone does not take proceedings for judicial review of an act, as being incompatible with Convention rights, outside s.7(1)(a). Proceedings based on Convention grounds alone are quite capable of including claims advanced by way of judicial review. That a claim for judicial review will, under the concluding words of s.7(5), be subject in England to the shorter, three month time limit prescribed by CPR 54(5) was in fact mentioned by Mr O'Brien on 24 June 1998 at col. 1095 in a passage not quoted in Mr O'Neill's submissions. Mr O'Brien stated specifically that "the most obvious …. case" of proceedings under s.7(1)(a) attracting the shorter time limit under s.7(5) was judicial review. This (although not easy to reconcile with an earlier statement by Mr O'Brien on the same day at col. 1056) is inconsistent with Mr O'Neill's argument.

175. The position under the Human Rights Act is thus, I consider, as follows. S.7(1)(a) and consequently s.7(5) apply to claims brought for breach of Convention rights, by whatever procedure they are pursued and whether or not they are pursued alone or in conjunction with other claims. In so far as any common law claim existing independently of the Human Rights Act is conjoined with a claim within s.7(1)(a), it will have its own separate limitation period, which will continue to apply. S.7(1)(b) enables reliance on Convention rights in situations not within s.7(1)(a), as where a Convention right is relied upon in defence in civil or criminal proceedings brought by a public authority or in the development or application of common law principles. It is understandable that the Human Rights Act should not contain any time limit for reliance under s.7(1)(b). Civil proceedings against the person relying on Convention rights will be subject to ordinary time limits, such as those prescribed by the Limitation Act 1980 or equity. Some criminal proceedings are subject to statutory time limits. Assuming such proceedings to be in time, it would be inappropriate for there to be a time limit preventing reliance on Convention rights to defend them. As to reliance by a claimant on Convention rights in the development or application of common law principles in civil proceedings brought for a cause of action not arising under the Human Rights Act, again that cause of action will have its own limitation period.

(c) The HRA s.8

176. Another issue arising under the Human Rights Act and of potential relevance to the present appeal concerns s.8. That section provides in subsection (1) that "In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate". In relation to claims founded directly on a Convention right, the section shows that the Human Rights Act does *not* give rise to a tortious action for breach of statutory duty. Rather, it gives the court a special statutory discretion, modelled in relation to damages on the approach of the European Court of Human Rights. But what is the position when a claimant invokes a Convention right in reply to a defence which would at common law bar the claim? S.8 is on its face applicable generally to situations within s.7(1)(a) and (b), and in *Attorney-General's Reference (No. 2 of 2001)* [2003] UKHL 68; [2004] 2 AC 72 at para.8 my noble and learned friend Lord Bingham of Cornhill referred in general terms to s.8 in relation to the right of a victim to rely on his Convention right in any legal proceedings; further, at para. 33 my noble and learned friend Lord Nicholls of Birkenhead said that the width of the discretion granted to the court by s.8 "is to be expected", since "the circumstances in which s.6(1) is in point will vary greatly". The majority of the House in that case, although emphasising the width of the discretion provided by s.8, did not consider that it could allow a court to hold a criminal trial if the trial itself would be unfair. In contrast, the minority consisting of my noble and learned friends, Lord Hope of Craighead and Lord Rodger of Earlsferry forcefully expressed their view that even this would fall within the wide discretion provided by s.8: see e.g. paras. 76 and 175-6. *Attorney-General's Reference (No. 2 of 2001)* underlines both the width and the room for differing views about the width of the discretion conferred by s.8.

177. The House was not referred on the present appeal to any case considering the position if unlawfulness under s.6(1) were invoked in civil proceedings in reply to a defence which would otherwise exist to a claim. But two hypothetical examples may be taken. First, the case of a claim for trespass involving wrongful demolition of a property by a public authority. What if the public authority relies on a statutory power, but the house-owner establishes that its exercise in his case was disproportionate and so contrary to the First Protocol? The claim will succeed, but does the case fall within s.8(1) (so that the court will award the "just and appropriate" relief or "just satisfaction" provided by s.8(3) and (4))? Or is it to be regarded as a simple case of a successful tort claim, a defence to which has been defeated by unlawfulness, so that the

damages to be awarded will be tort damages? The practical distinction in terms of the sums awarded may not on these facts be significant. But the principle may be important in the context of s.100(3) of the Scotland Act (cf paragraph 189 below). A second example is provided by the facts of *R (Greenfield) v. Secretary of State of the Home Department* [2005] UKHL 14; [2005] 1 WLR 673, where the House considered and applied the European Court of Human Right's approach of awarding just satisfaction. The claimant, a prisoner, was ordered to serve an additional 21 days in disciplinary proceedings which were held to involve a criminal charge within article 6 of the Convention. That article was broken since the proceedings were not before an independent tribunal and he was wrongly denied legal representation. Suppose the prisoner, instead of proceeding directly for breach of article 6, had sued for false imprisonment - a tort of strict liability: cf *R v. Governor of Brockhill Prison, ex p. Evans* [2001] 2 AC 19 - and had met the Governor's defence of lawful statutory detention by relying on article 6. Again, would the case fall within s.8 or would it be a simple case of a successful common law claim?

178. In Mr O'Neill's submission, both these examples are to be regarded as simple cases of successful common law claims, where a potential defence has been defeated by unlawfulness and damages are to be awarded at common law, rather than under s.8. Any other analysis would, he submits, treat the Human Rights Act as restricting common law rights, whereas s.8 was intended only to "top up" recovery. But there is no restriction of common law rights in either case, since apart from the Human Rights Act there would be no claim. It is only by reliance on the Human Rights Act that either claim could succeed at all. It seems to me very arguable that the remedy where a claimant meets a defence by reliance on Convention rights is a discretionary remedy falling within the court's power under s.8 to do what is "just and appropriate". The Human Rights Act was meant to domesticate the Convention rights, not to enlarge their scope. As Lord Bingham of Cornhill stated with reference to previous authority in *R (SB) v. Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100, para. 29:

> "First, the purpose of the Human Rights Act 1998 was not to enlarge the rights or remedies of those in the United Kingdom whose Convention rights have been violated but to enable those rights and remedies to be asserted and enforced by the domestic courts of this country and not only by recourse to Strasbourg."

It also seems unlikely that Parliament should have taken care to ensure that claims brought in direct reliance on a Convention right should be subject to the principles applied by the European Court of Human Rights (cf s.8(3) and (4)), but at the same time have intended that the incorporation into domestic law of Convention rights should enable a claimant, by formulating his claim on a common law basis and relying on the Convention in reply to an otherwise available defence, to escape the carefully crafted discretion provided to the court under s.8. Accordingly, it seems to me quite likely and on any view very arguable that s.8 was meant to cover the situation of unlawfulness under s.6(1) invoked in reply to a defence otherwise available to the claim.

(d) Analysis

179. Issue 1 involves, as my noble and learned friend Lord Hope notes, an issue of statutory interpretation, though one in relation to which it is legitimate to have regard to the plausibility or otherwise of Parliament having intended by implication to create or recognise duplicate remedies enabling just satisfaction to be claimed under two connected statutes under different conditions. The Human Rights Act is concerned with acts or omissions to act which are "unlawful". S.8 provides for circumstances in which an award of damages may be made in respect of such acts or omissions. The time limit introduced by s.7(5) for a claim by a victim against a public authority is understandable. In contrast, the Scotland Act is concerned with the limits of the devolved competence, or vires, of the Scottish Parliament (s.29(1) and (2)), the Scottish Ministers (ss.53(1) and 54(2) and (3)) or members of the Scottish Executive (s.57(2)). (Under s.44(2) the members of the Scottish Executive are referred to collectively as the Scottish Ministers.) Competence or vires determines the validity of the legislation, acts or omissions of such bodies as regards the world generally. S.100(2) read with the provisions of Schedule 6 enables the Lord Advocate, the Advocate General or the Attorney General to challenge the vires of an Act of the Scottish Parliament or of a function or its purported or proposed exercise by the Scottish Ministers or Executive without restriction. S.100(1) introduces the victim test as a limitation on the ability of others to mount any such challenge. The omission of any time limit for a challenge to the validity of legislation or an act or omission is understandable. But claims for damages raise different considerations.

180. The issue on this appeal is *not* whether the Human Rights Act provides the only mechanism for a challenge to an act or omission of the Scottish Ministers as incompatible with a Convention right. Such a

challenge can be mounted under the Scotland Act, as stated in the previous paragraph. This does *not* mean that all the consequences of a successful challenge are to be found in the Scotland Act, still less that the Scotland Act provides for damages as one of such consequences. As my noble and learned friend Lord Hope indicates in paragraph 17 the Scotland Act must be taken to have been drafted against the background of domestic law remedies and European Community law, and did not need to make provision for these. So, if an act or omission is ultra vires, any monies paid will ordinarily be recoverable at common law as having been wrongly extracted or as paid under a mistake of law: see e.g. *Woolwich Equitable Building Society v. Commissioners of Inland Revenue* [1993] AC 70; *Kleinwort Benson Ltd. v. Lincoln C.C.* [1999] 2 AC 349; *Deutsche Morgan Grenfell Group Plc v. H. M. Commissioners of Inland Revenue* [2006] UKHL 49; [2007] 1 AC 558 and *Sempra Metals Ltd v. Commissioners of Inland Revenue* [2007] UKHL 34; [2007] 3 WLR 354. Likewise, European Community law, which has primacy in the United Kingdom under the European Communities Act 1972, provides - quite independently of the Scotland Act - for remedies including damages in respect of acts or omissions contrary to the European Treaties: *Francovich and Others* (Joined Cases C-6/90 and 9/90); [1995] ICR 722;]1991] ECR I-5357 and *Brasserie du Pêcheur SA v Federal Republic of Germany; R v Secretary of State for Transport, Ex p Factortame Ltd (No 4)* (Joined Cases C-46/93 and C-48/93); [1996] QB 404.

181. The only issue on this appeal is whether the Scotland Act, in addition to dealing with matters of competence or vires, provides for or enables claims for damages for the passing of legislation or for acts or omissions which lie outside the devolved competence of the relevant Scottish body because incompatible with a Convention right. The respondents' short submission is that it does not: the Scotland Act enables proceedings to establish the validity or otherwise of legislation or of an act or omission. But the only basis for a claim for damages is the Human Rights Act. A victim who seeks damages alone or in addition to a declaration of invalidity must rely on both Acts. The damages claim will face a time limit which the other claims do not.

182. In support of this analysis, the respondents deploy some powerful, considerations. First, a breach of a public law right by itself gives rise to no claim for damages. A claim for damages must be based on a private law cause of action: see *X (Minors) v. Bedfordshire County Council* [1995] 2 AC 633, 730F-731B, per Lord Browne-Wilkinson. The only available candidate, among four possibilities mentioned by Lord Browne-Wilkinson, would be breach of statutory duty simpliciter,

of which he went on to say that "a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule …. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action."

183. In *HM Advocate v R* [2002] UKPC D3; [2004] 1 AC 462, para 60 my noble and learned friend Lord Hope of Craighead treated the Scotland Act as falling within "the familiar principle which provides a civil cause of action where there has been a breach of a statutory duty which results in injury to a person of a class which the statute was designed to protect". I respectfully disagree. The Scotland Act is not framed in terms of duty, but competence. The limitations of devolved competence are a matter of public interest. But they exist as part of the constitutional arrangements of the United Kingdom, and neither directly nor obviously for the protection of individuals. Further, as Lord Browne-Wilkinson's formulation suggests, it is necessary to consider whether other means of recourse exist, since it is only in their absence that it may be appropriate to treat a statute as providing or enabling a private right of action. Here, even confining attention for the moment to cases of legislation or acts or omissions incompatible with a Convention right, it is both unnecessary, and in my view inappropriate, to treat the Scotland Act as providing or giving rise to any right to claim damages when the Human Rights Act, with which it is closely associated, was clearly designed for that purpose. S.100, on which Lord Hope relied in *HM Lord Advocate v R*, was not in my opinion designed and is not apt to lead to any different conclusion (cf paragraphs 187 to 189 below).

184. Second, this conclusion is reinforced by the fact that ss.6-8 of the Human Rights Act were deliberately formulated so as *not* to give rise to a common law claim for damages for breach of statutory duty, in the event of an act unlawful under s.6 because it was incompatible with a Convention right. On the contrary, these sections give rise to the carefully crafted discretionary power provided by s.8. This makes it even less likely that Parliament intended that an act rendered ultra vires under the Scotland Act, because incompatible with a Convention right, should give rise to a common law claim for damages for breach of

statutory duty. To meet this point, my noble and learned friend Lord Hope, in paragraph 19 of his present opinion suggests that s. 100(3) "makes it clear that that a common law claim of damages for breach of statutory duty is excluded", but "assumes that damages for just satisfaction may be claimed in respect of an act which is outside devolved competence because it is incompatible with a Convention right". But this involves in effect implying into the Scotland Act all, or at any rate the parts dealing with damages, of the positive provisions of s.8(1) and (2) of the Human Rights Act. These provisions were however not replicated in the Scotland Act – and this can only have been deliberate. Again, I shall return to consider s.100(3) in paragraphs 187 to 189.

185. A third, connected consideration is that the courts should be reluctant to develop alternative remedies supplementing those provided by the Human Rights Act. As regards claim for damages, it can, as Lord Bingham of Cornhill said in *Watkins v. Secretary of State for the Home Department* [2006] 2 AC 395, paragraph 26, "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". A similar theme appears in *Wainwright v. Home Office* [2003] UKHL 53; [2004] 2 AC 406, paras. 33-34 and 51-52 in the speech of my noble and learned friend, Lord Hoffmann. While the Scotland Act allows matters of competence to be tested, damages claims are regulated by the Human Rights Act with a carefully balanced time limit provision. There is no obvious reason why Parliament would have given Scottish claimants an easy escape route around that provision.

186. Fourth, if the Scotland Act were held to imply or indicate the existence of a right to claim damages for an ultra vires act or omission incompatible with the Convention rights, the question arises whether, and if so how and why, this would be limited to breach of Convention rights. Would the right to damages exist in respect of any legislation of the Scottish Parliament or any act or omission of the Scottish Executive outside devolved competence for *any* of the reasons stated in s.29 and applied under ss.53-54? If the Scotland Act is treated as creating a privately enforceable duty in respect of compliance with the limits of devolved competence regarding Convention rights, why should the line be drawn there? In particular, would a statutory right to damages exist in respect of any such legislation, act or omission inconsistent with European Community law? If so, the Scotland Act would have the surprising effect of giving a new, alternative, domestic remedy in damages apparently unqualified by the European law conditions

identified in *Francovich and Others* (Joined Cases C-6/90 and 9/90; [1995] ICR 722 [1991] ECR I-5357) and *Brasserie du Pêcheur SA v Federal Republic of Germany; R v Secretary of State for Transport, Ex p Factortame Ltd (No 4)* (Joined Cases C-46/93 and C-48/93) [1996] QB 404. These conditions (in addition to requiring that the rule infringed be intended to confer rights on individuals) require that any infringement be "sufficiently serious" in the sense that "the Member State … concerned manifestly and gravely disregarded the limits on its discretion" and that there be a direct (and strict) causal link between the breach and the damage: see the *Brasserie du Pêcheur* and *Factortame* cases, paragraphs 55 and 65 and more generally Arnott, *The European Union and its Court of Justice* (2nd ed.) pages 309-310 and 329.

187. Fifth, the appellants rely on the provisions of s.100 as implying or indicating the existence on the part of a victim to claim damages for any ultra vires act or omission incompatible with Convention rights. That negatively framed section was not in the original bill introduced in January 1998; it was introduced only late in the passage of the bill on 6th October 1998. It would seem a surprising place to find so important a provision as the appellants suggest this to be. Further, if it was the section's role or effect to recognise a right to claim damages in relation to Convention rights, one would have expected Parliament also to address the question mentioned in the previous paragraph, viz whether a claim to damages is available in the event of other instances of excess of devolved competence.

188. The general impression given by s.100 is that, far from providing or confirming the existence of an alternative remedy free from the time limit restriction in the Human Rights Act, it was intended to ensure consistency with that Act. S.100(1) does just that by introducing the victim requirement, while s.100(2) qualifies that restriction in relation to the Lord Advocate, the Advocate General and the Attorney General. So it is that Mr O'Neill falls back on s.100(3) as indicating that a right to claim damages must exist for any legislation, act or omission outside devolved competence under the Scotland Act because incompatible with a Convention right. S.100(3) provides that "This Act does not enable a court …. to award any damages in respect of an act which is incompatible with any of the Convention rights which it could not award if section 8(3) and (4) of the Human Rights Act applied". The unlikelihood that this negatively framed subsection was intended to imply or recognise a positive right to claim damages is not to my mind reduced by the comparison which Mr O'Neill drew between it and s.8(3) of the Human Rights Act. S.8(3) follows s.8(1) and (2) as well as the provisions of s.7(1), all of which make clear in positive terms that

unlawfulness under the Human Rights Act gives rise to a privately enforceable complaint in respect of which the court may as a matter of discretion award damages. No equivalent of these subsections, or other provisions, exists in the Scotland Act. This is a powerful pointer in my view against any conclusion that s.100(3) of the Scotland Act creates, or assumes the existence under the Scotland Act of, duplicate claims to just satisfaction in respect of acts incompatible with Convention rights and outside devolved competence.

189. As to what s.100(3) in fact achieves, taken in context, one clear possibility identified by the Inner House (paragraph 80) is that it was inserted as a matter of major caution. After preparing the main part of this opinion I had the benefit of reading in draft the opinion of my noble and learned friend Lord Scott of Foscote. He gives to my mind convincing reasons for preferring this conclusion even if the subsection is not actually necessary. But a particular situation to which I consider it may well also have been directed is that considered in paragraphs 176 to 179 above. Take a common law claim which succeeds solely because an act is unlawful as being incompatible with the Human Rights Act (as where the unlawfulness is relied upon by a claimant in reply to a defence). If s.8 would govern this situation under the Human Rights Act, then s.100(3) of the Scotland Act ensures that the same discretionary measure of recovery applies if a claimant chooses to defeat the defence on the basis that the act is outside devolved competence under the Scotland Act. Even if s.8 were held not to cover such a situation (and there is as yet no identifiable authority on the point), the considerable possibility that the drafters of both Acts or of the Scotland Act contemplated that it would or might do so is itself sufficient to explain the inclusion of s.100(3).

190. Sixth, I do not find it surprising that Parliament should in the Scotland Act have regulated matters of competence and vires, leaving claims for damages to be dealt with under the Human Rights Act. Where claims in both categories are pursued, no difficulty exists in combining them in one set of proceedings. Nor do the different dates on which the main provisions of the two Acts came into force militate against this conclusion. Incompatibility with Convention rights could be raised or relied upon as rendering invalid any Scottish legislation, act or omission taking place during the period of about 17 months between the coming into force of the Scotland Act in May 1999 and the coming into force on 2nd October 2000 of the Human Rights Act. But claims for damages could only arise in respect of Convention incompatible legislation, acts or omissions occurring after the Human Rights Act came into force. That represents a coherent scheme – the alternative to my mind does

not. Invalidity is one thing, exposure to damages another. It is understandable that Parliament should not to wish to expose the Scottish Parliament, Ministers or Executive to claims for damages for Convention-incompatible conduct long before there was any exposure to such claims in any other United Kingdom context.

191. S.129(2) of the Scotland Act also provided that if various provisions of the Scotland Act should come into force before the Human Rights Act had "come into force (or come fully into force)", these provisions should have the same effect as they would have after the Human Rights Act was fully in effect. Such provisions included sections 29(2)(d) and 57(2) and (3) (making it competent for the Scottish Parliament or Executive to legislate or act incompatibly with Convention rights) as well as section 100. I do not consider that anything can be deduced from the wholesale reference here to section 100. It was on any view necessary to refer to sections 100(1), (2) and (4) and, since section 129(2) covered the possibility that unspecified parts of the Human Rights Act might not yet have come into force, there was reason to cover every possibility by embracing s.100(3) also. In any event, however, I regard this point as marginal and incapable of determining the first issue.

192. Seventh, when considering the proper interpretation of the Scotland Act, it is improbable that Parliament envisaged or intended that damages claims in respect of breaches of Convention rights could be brought under the Scotland Act free of the one year time limit applicable to such claims under the Human Rights Act. The improbability is increased when arguments of competence under the Scotland Act only arise in relation to legislation or acts of the Scottish Parliament, Ministers and Executive. Such arguments cannot arise in relation to the acts of other public authorities not part of and not treated (under the principle in *Carltona Ltd v. Commissioners of Works* [1943] 2 AER 560) as acting on behalf of the Scottish Executive. This latter category includes judges (cf s.9 of the Human Rights Act), and other office-holders with a role independent of the Executive. In answering issue (2) (below) the House is at one in concluding that this category also includes a Prison Governor. It is doubly improbable that Parliament intended that certain Scottish public authorities should benefit by the time limit in s.7(5) of the Human Rights Act in the defence of claims against them for conduct incompatible with Convention rights, whereas others certainly do not.

(e) Conclusion on issue 1

193. I find myself, as a result, in full agreement with Lord Reed in the High Court of Justiciary in *HM Advocate v R* 2001 SLT 1366, para. 40, when he said that "Where the act is not delictual under the ordinary law, then section 57(2) [of the Scotland Act] does not confer upon the court a power to award damages" and that in that situation "the only effective remedy may lie under sections 7 to 9 of the Human Rights Act". The same conclusion is spelled out by the Inner House in para. 80 of its opinion in the present case, where, while recognising that issues of vires could be raised under the Scotland Act, the Inner House held that "there is no need to look for a basis for a claim for damages in the Scotland Act" when ss.7 and 8 of the Human Rights Act provided one. With this, I agree. On appeal to the Judicial Committee of the Privy Council in *HM Advocate v R* [2002] UKPC D3; [2004] 1 AC 462, I understand my noble and learned friends, Lord Hope of Craighead (at para. 50-51) and Lord Rodger of Earlsferry (at paras. 121-123) to have been addressing an either-or choice between two extreme analyses - *either* the Scotland Act gave rise to no constitutional remedies at all *or* all remedies including damages in respect of any infringement of Convention rights leading under the Scotland Act to invalidity of Scottish legislation or of an act or omission of the Scottish Ministers or Executive had to be found in or by reference to that Act. Neither analysis would in my opinion be correct. The situation is different from that considered in *Simpson v. Attorney-General (Baigent's Case)* [1994] 3 NZLR 667, where the unattractive argument advanced to the New Zealand Court of Appeal was that there was no relevant remedy in damages at all in respect of breach of the New Zealand Bill of Rights Act 1990. Here there is a closely related constitutional measure, the Human Rights Act, which explicitly provides for the relevant remedy. The correct analysis is a nuanced analysis which recognises the different functions of the two Acts. The Scotland Act regulates the competence of the Scottish Parliament and Executive and enables its control (at the instance of a "victim", or of the Lord Advocate, Advocate General or Attorney General representing the public interest). One (though only one) aspect of competence is compatibility with the Convention. But claims for damages for conduct incompatible with Convention rights belong to the context of the Human Rights Act.

194. For these reasons, I would dismiss the appeal on issue 1 and hold that the appellants' damages claims against the Scottish Ministers can only be pursued under ss.6-8 and are subject, therefore, in particular to the time limit in s.7(5) of the Human Rights Act.

Issue 2 – does a Prison Governor's order under rule 80(1) count as an act of the Scottish Ministers?

195. This question arises from the submission made by both the Scottish Ministers and the Lord Advocate as intervener that the appellants' complaints about the Prison Governors' exercise of their powers under rule 80(1) of The Prisoners and Young Offenders Institutions (Scotland) Rules 1994 (1994 No. 1931 (S.85)) do not involve any claim against the Scottish Ministers, and, even if the appeal succeeds on issue 1, can therefore only be pursued under ss.6-8 of the Human Rights Act. Although I consider that the appeal on issue 1 should fail, issue 2 is not entirely academic, since it raises the question to what extent the Scottish Ministers (the only respondents in the present proceedings) are answerable for the alleged acts or defaults of the Prison Governors. In my view the Scottish Ministers' and Lord Advocate's submission on this point is correct for the reasons more fully given by my noble and learned friend Lord Rodger or Earlsferry in his opinion. The *Carltona* principle does not apply to the acts or omissions of persons exercising an independent decision-making function, not as part of or on behalf of the Scottish Ministers. Such persons have of course to exercise their functions compatibly with the Convention rights. But the remedy in the event of failure to do so is, on any view of the answer to issue 1, under the Human Rights Act.

Issue 3 – the running of time under s.7(5) of the Human Rights Act

196. As Lord Hope explains (para. 5) this issue only affects the petitioners Henderson and Blanco. Henderson commenced proceedings more than one year after the end of four of the periods of segregation of which he complains. Blanco commenced proceedings on 6 November 2003, in respect of his segregation under a series of orders made over time between 1 August 2002 and 7 January 2003. Each order made in the cases of Henderson and Blanco was initially made by the Prison Governor for a maximum period of 72 hours, but was within that period authorised and so extended by the Scottish Ministers for one month from the expiry of the 72 hour period: cf rule 80(1), (5) and (6). It was under rule 80(7) open to the Prison Governor at any time to cancel such an order or to vary it to restrict its effect. Potentially, therefore, Henderson and Blanco have complaints about the making and/or authorisation of each order and/or about the Prison Governor's failure to cancel or vary it during its operation.

197. Assuming that s.7(5) of the Human Rights Act applies, the language of s.7(5) appears to me clear-cut. The starting point is to identify "the date on which the act complained of took place". Each monthly order and authorisation constitutes for that purpose a separate act. Subject to any shorter time limit, a segregated prisoner who complains of segregation pursuant to any such order or authorisation must do so within one year of the relevant order or authorisation under s.7(5)(a), or ask the court to grant an "equitable" extension under s.7(5)(b). Similarly, so far as the complaint is that during any monthly period the Prison Governor failed to exercise his power under rule 80(7) to cancel or vary, that complaint can under s.7(5)(a) only relate to any such failure occurring within the year prior to the bringing of proceedings, or otherwise the court's discretion must be invoked under s.7(5)(b). No doubt, the court's equitable discretion would be exercised to take account of the fact of continuing segregation (although segregation does not equate with absence of access to legal assistance) as well as the undesirability of confining attention to only part of an overall picture. The fact of any prior segregation (even if the time limit did prevent it being the subject of any claim) would also be relevant when considering the justification for any subsequent segregation in relation to which any complaint was not time barred.

Issue 4 - proportionality

198. I agree with Lord Hope's observations on this issue and his conclusion that it would not be appropriate to decide it in the present circumstances.

Issue 5 – inspection by the judge of the redacted documents

199. On 21 July and 18th August 2004 the Lord Ordinary granted diligence, or made an order, against the havers, the Scottish Ministers, for the recovery, or disclosure, of documents listed in a specification. These included documents showing or tending to show the applications and grants of authority to segregate, assessments of the need to segregate and incident and intelligence reports. Evidently, the Lord Advocate had already made plain that documents or parts of documents would be withheld on grounds of public interest immunity ("PII"), since, on the same occasion, the Lord Ordinary acceded to a procedure set out in a protocol agreed between counsel, whereby counsel for the petitioners was to be permitted to inspect such documents, with the names and addresses obscured of any informer and of any other person whose identity, if disclosed, would put that person at risk of harm. This procedure was explained to be for the purpose of counsel for the petitioners advancing any argument that the court should override the

claim to PII. Counsel undertook not to disclose the contents of the documents to any other person, including his clients or their agents, unless and to the extent that the court should override the PII claim. Counsel was permitted to make laptop notes of the documents seen, but not to print them out or transmit them elsewhere, and undertook to delete them from the hard drive after all issues relating to the assertion of PII had finally been resolved.

200. Inspection took place on this basis. Subsequently, the Minister for Justice by certificate dated 21 October 2004 stated that she had inspected the full unredacted text of the documents and on that basis made a formal PII claim in respect of references, names and passages in the documents. The claim went extensively beyond the limited redactions in the documents inspected by counsel for the petitioners. Its effect was that in a number of cases the whole document was blanked out, while in others a highly redacted version was provided. The public interest claimed related to matters such as the identity of informers, the nature and source of information received, the identity, deployment or training of staff and operational information, capabilities, techniques, tactics and methods, all capable of giving rise to considerations of public interest immunity.

201. The House was shown examples of the more extensively redacted documents, and was told that there are some 75 now in issue. No comment is possible on those documents which are completely blanked out. It cannot be known into what category they fall. Some comments may be made about the documents which are partially obscured. For example, the standard prison information and intelligence report form lists four possible categories of source, ranging from a source which has "proved to be reliable in all instances and where there is no doubt about authenticity and competence" to "a previously untried source or a source who so far has proved unreliable". Mr O'Neill submits with force that the justification for segregation on the basis of information and intelligence may well depend upon which category of source has provided the same. Yet the category of source (and not simply any name) is obscured in many documents. So also is the evaluation and even the action taken. Contemporaneous accounts of alleged incidents leading to segregation orders have also been deleted.

202. The petitioners in these circumstances sought full disclosure (subject to the redactions made to the documents as seen by their counsel), and they invited the Lord Ordinary to inspect the relevant documents for herself to form a judgment on the balance between the

public interest and the interests of justice in relation to the petitioners' claims. She declined to inspect and the Inner House upheld her decision. She said that counsel had failed specifically to identify any particular document as required in the furtherance of any specific issue or as relating to any particular period of segregation. Her primary reason for rejecting the submission that matters bearing on the evaluation of intelligence material should be revealed was her decision that the case that the segregation was disproportionate was inadmissible. But whether the segregation was disproportionate remains a potentially relevant issue in relation to the petitioners' claims which are based on the Convention. The Lord Ordinary nevertheless declined herself to inspect, taking the view that this would fall foul of Lord Fraser of Tullybelton's injunction in *Air Canada v. Secretary of State for Trade* [1983] 2 AC 394, 436C-D that it "should …. not be encouraged to 'take a peep' just on the off chance of finding something useful".

203. I must start by expressing disagreement with the Inner House's view that the course adopted under the parties' protocol and endorsed by the Lord Ordinary is to be encouraged. On the contrary, in my view. It involves disclosure to another party's (here the petitioners') counsel of material which the public interest may require should not be disclosed to anyone other than the Scottish Executive. It puts counsel in an invidious and unsustainable position in relation to his or her client. In this respect the observations in *R v. Davis* [1993] 1 WLR 613, 616H-617H per Lord Taylor of Gosforth CJ, *R v. Preston* [1994] 2 AC 130, 152H-153D, per Lord Mustill and *R v. B & G* [2004] EWCA Crim 1368, para. 13, per Rose V-P are relevant, although made in a criminal context. As in this case, such a procedure may also put counsel into a position where he or she is uncertain what it is permissible to disclose or say when making submissions to the court about PII.

204. The procedure has no precedent of which I am aware in the present context, and should not become one. As in a criminal context, issues of PII should so far as possible be discussed in open court in the presence of both parties. In some circumstances, the nature of the documents may make it appropriate for the judge to hear submissions (and if necessary evidence) from the haver in the absence of anyone else, and even for the claim to PII itself only to be made ex parte. If a PII claim cannot be determined on the basis on which it is advanced without further consideration of the content of the relevant documents, it is for the court itself to undertake the task of inspecting the documents to confirm whether or not the documents should be provided to the party applying for them and with what if any redactions. The court may in exceptional circumstances consider it appropriate to invite the

appointment of independent counsel to give it assistance (compare *R v. H* [2004] 2 AC 134, paras. 22 and 36(4) per Lord Bingham of Cornhill).

205. The House in the *Air Canada* case considered that there was a threshold to be crossed before a court would agree to inspect documents for itself. There was some variation in the language in which this threshold was expressed. Mere relevance is clearly not sufficient, since a claim to PII necessarily postulates relevance. The test of inspection adopted by Lord Scarman was "likelihood that the documents will be necessary for disposing fairly of the case or saving costs" (p.445B); he added that "if …. the court should think that the documents might be 'determinative' of the issues …., the court should inspect" (p.445B). As Professor Adrian Zuckerman observes in *Civil Procedure* (2nd ed.) para. 18.19, too rigid an application of the threshold requirement would mean that a claim to PII would become automatic in many cases, depriving the balancing exercise of meaningful content. Different considerations may, as he goes on to point out, apply where national security is in issue.

206. In the present case the matters in respect of PII is claimed are unrelated to national security, but they centre on decisions to segregate and to continue segregation which are said by the petitioners to have been unjustified and/or unreasonable or disproportionate. The documents are presently redacted in a way which appears likely to make it either impossible or extremely difficult to understand or evaluate the actual decision-making process. The basis for and reasoning behind the decisions are central to any resolution of the issues raised by the petitioners' claims. The petitioners by their claims challenge any suggestion that they were involved in any conduct justifying their segregation or continued segregation. The apparent centrality of the contents of the documents to the issues raised by the claims cannot or should not be dismissed at this stage on a basis which comes close to simply assuming that the claims have no real foundation. Whether this is so, and what support the documents may give to the petitioners' evidence, can only sensibly be judged by inspection. Counsel for the petitioners, who has (however inappropriately) seen the documents in a largely unredacted form, was able to submit to the judge that they were of real importance to his clients' claims. He felt, not surprisingly, inhibited about the extent to which he could base any specific submissions on the fuller contents of documents that he had seen.

207. I consider that, in the circumstances of this case and bearing in mind the apparent centrality of the documents to the issues which it involves, the Lord Ordinary ought to have acceded to the application to

inspect the documents for herself. Neither the number nor the nature of the documents involved would appear to have presented any obstacle. It would also have proved a simpler, quicker and certainly more appropriate procedure than that which has led to the appeal on this issue.