HOUSE OF LORDS SESSION 2006–07
[2006] UKHL 54

on appeal from [2004] EWCA Civ 514

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

R (on the application of Clift) (FC) (Appellant) *v.* Secretary of State for the Home Department (Respondents)
Secretary of State for the Home Department (Respondent) *v.* Hindawi (FC) (Appellant) and another
Secretary of State for the Home Department (Respondent) *v.* Hindawi and another (FC) (Appellant) (Conjoined Appeals)

Appellate Committee

Lord Bingham of Cornhill
Lord Hope of Craighead
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
For Clift
Tim Owen QC
Kris Gledhill
For Hindawi and Headley
Tim Owen QC
Hugh Southey
(Instructed by Amal for Clift, Birnberg Peirce for Hindawi and Irwin Mitchell for Headley)

Respondents:
David Pannick QC
Steven Kovats
Parishil Patel
(Instructed by Treasury Solicitor)

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ON
WEDNESDAY 13 DECEMBER 2006

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LORD BINGHAM OF CORNHILL

My Lords,

1. These three appeals, arising on somewhat differing facts, present a common question. The appellants are former or serving prisoners. The question is whether the early release provisions to which each of the appellants respectively was subject discriminated against him, unjustifiably, in breach of article 14, in conjunction with article 5, of the European Convention on Human Rights.

Sean Clift

2. The first-named appellant (Sean Clift) is a British national. On 30 April 1994 he was sentenced at Lincoln to 18 years' imprisonment for very serious crimes including attempted murder, which carried a maximum sentence of life imprisonment. Under the legislative regime applicable to his case he became eligible for release on parole on 13 March 2002 and entitled to release on 18 March 2005. On 25 March 2002 the Parole Board recommended his release on parole but the Secretary of State rejected that recommendation on 25 October 2002. The Parole Board reconsidered the case and on 17 March 2003 did not recommend release, but on 25 February 2004 it again did so. On this occasion the Secretary of State accepted the recommendation, and on 10 March 2004 Mr Clift was released on licence.

3. Had Mr Clift been sentenced to a term of less than 15 years, or had he been sentenced to life imprisonment, the Secretary of State would have been legally obliged to comply with the recommendation of the Parole Board. That is the effect of sections 33(2) and (5), 34, 35 and 50(2) of the Criminal Justice Act 1991, section 28 of the Crime (Sentences) Act 1997, section 275 of the Criminal Justice Act 2003 and paragraph 2 of the Parole Board (Transfer of Functions) Order 1998 (SI 1998/3218) ("the 1998 Order"). But paragraph 2 of the 1998 Order preserved the Secretary of State's final power of decision, following a recommendation for release by the Parole Board, in relation to prisoners serving determinate terms of 15 years or more.

4. The first-named appellant contends that this early release regime discriminated against him in breach of his rights under articles 5 and 14 of the European Convention, without justification, in denying him a right enjoyed by long-term prisoners serving determinate sentences of less than 15 years or life sentences prisoners: the right to be released on the recommendation of the Parole Board.

Nezar Hindawi

5. The second-named appellant (Nezar Hindawi) is a foreign national. On 24 October 1986 he was sentenced at the Central Criminal Court to 45 years' imprisonment for very serious terrorist offences. A deportation order was made against him on about 13 November 2000. Under the parole regime in force when he was sentenced, which continues to apply, he became eligible for release on parole on 18 April 2001, although he is not entitled (on the agreed facts) to be released until 8 June 2016. On 20 June 2001 and 2 April 2003 the Secretary of State rejected an application by Mr Hindawi for early release. He remains in prison. Because he is a long-term prisoner liable to removal from the United Kingdom, the Parole Board has no power to recommend his release, and the decision on release rests with the Secretary of State alone. If he were not liable to removal, the Parole Board would have power to recommend release although the Secretary of State would not be legally obliged to give effect to the recommendation since he is serving a sentence of more than 15 years. That is the effect of sections 33(2) and (5), 35, 46(1) and 50(2) of the 1991 Act and paragraph 2 of the 1998 Order.

6. Mr Hindawi contends that this early release regime discriminates against him in breach of his rights under articles 5 and 14 of the

Convention, without justification, in denying him a right enjoyed by long-term prisoners not liable to removal serving determinate sentences of less than 15 years or life sentences: the right to be released on the recommendation of the Parole Board. He says, invoking section 6 of the Human Rights Act 1998, that sections 46(1) and 50(2) of the 1991 Act are incompatible with the Convention.

Prince Charles Headley

7. The third-named appellant (Prince Charles Headley) is a foreign national. On 31 January 2000 he was sentenced at Sheffield to seven years' imprisonment for drugs offences. A deportation order was made against him on 9 December 2003. Under the regime applicable to him he became eligible for early release on parole on 7 January 2003. His application for early release was referred to the Parole Board in error: it was refused by the Board on 15 January 2003 and by the Secretary of State on 9 May 2003. But a further application to the Secretary of State was successful, and he was released from his sentence on 23 December 2003. He was thereafter detained with a view to deportation, recalled to prison, remanded in custody and eventually sentenced for other offences. These later events are not material to his appeal. Under his seven-year sentence, as a long-term prisoner liable to removal from the United Kingdom, the decision on his early release rested with the Secretary of State alone. Had he not been liable to removal the Parole Board and not the Secretary of State would have decided on his release. That is the effect of sections 33, 35 and 46(1) and 50(2) of the 1991 Act and paragraph 2 of the 1998 Order.

8. Mr Headley contends that this early release regime discriminated against him in breach of his rights under articles 5 and 14 of the Convention, without justification, in denying him a right enjoyed by long-term prisoners not liable to removal serving sentences of less than 15 years or life sentences: the right to be released on the recommendation of the Parole Board. He makes the same case on incompatibility as Mr Hindawi.

9. The provisions referred to above have been repealed and replaced by the Criminal Justice Act 2003. But they continue to apply to offences committed before 4 April 2005 under the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005 (SI 2005/950 (C 42)), and therefore continue to apply to these appellants.

10. The parties very helpfully agreed that three issues arise for decision by the House. But the second question arises only in the appeal of Mr Clift, and not in the other two appeals. Depending on the answer to the second issue in Mr Clift's appeal, the answer to the third issue may, in his case, not be decisive.

Articles 5 and 14 of the European Convention

11. Articles 5 and 14 of the European Convention, given domestic effect by the 1998 Act and in force at all times material to these appeals, are now very familiar. So far as relevant, the articles provide:

> "*Article 5*
>
> *Right to liberty and security*
>
> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court; …
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful …"
>
> "*Article 14*
>
> *Prohibition of discrimination*
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The first issue

12. The first issue, arising in all three appeals, is whether the appellants' applications for early release came within the ambit of article 5 of the European Convention so as to engage article 14 of the Convention. The issue is so expressed in recognition of a clear,

consistent and very well-established line of Strasbourg authority. A recent summary of the relevant principles was given by a Grand Chamber of the Strasbourg court in *Stec v United Kingdom* (2005) 41 EHRR SE 295 in a passage directed of course to the case then before the court:

> "38. The Court recalls that Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to 'the enjoyment of the rights and freedoms' safeguarded by those provisions (see, amongst many authorities, *Sahin v Germany* [GC], (2003) 36 EHRR 765 at [85]. The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. It is necessary but it is also sufficient for the facts of the case to fall 'within the ambit' of one or more of the Convention Articles (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v United* Kingdom (1985) 7 EHRR 471 at [71]; *Schmidt (Karlheinz) v Germany* (1994) 18 EHRR 513 at [22]; and *Petrovic v Austria* (1998) 33 EHRR 307 at [22].
>
> 39. The prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention article, for which the State has voluntarily decided to provide. This principle is well entrenched in the Court's case law. It was expressed for the first time in *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252 at [9], when the Court noted that the right to obtain from the public authorities the creation of a particular kind of educational establishment could not be inferred from Article 2 of Protocol No 1, and continued as follows:
>
> > '… nevertheless, a State which had set up such an establishment could not, in laying down entrance requirements, take discriminatory measures within the meaning of Article 14.'
>
> 40. The Court must decide, therefore, whether the interests of the applicants which were adversely affected by the impugned legislative scheme fell within the 'ambit' or 'scope' of Article 1 of Protocol No 1."

13. In *M v Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91, the House had recent occasion to review the Strasbourg jurisprudence on the applicability of article 14, and attempted to distil the essence of the relevant principles. Although different members of the House used different language, and the outcome vividly illustrated the difficulty which may arise in applying the principles to a concrete case, none of these opinions was criticised as inaccurate or incomplete, and I do not think any purpose will be served by repeating those opinions or citing passages from them. Plainly, expressions such as "ambit", "scope" and "linked" used in the Strasbourg cases are not precise and exact in their meaning. They denote a situation in which a substantive Convention right is not violated, but in which a personal interest close to the core of such a right is infringed. This calls, as Lord Nicholls said in *M*, at para 14, for a value judgment. The court is required to consider, in respect of the Convention right relied on, what value that substantive right exists to protect.

14. The appellants invoke article 5. There is no doubt what value article 5 exists to protect. It is the fundamental right to liberty and personal security. Thus the article sanctions infringement of that right only in certain situations, defined with some particularity in paragraph (1)(a)-(f); only in accordance with a procedure prescribed by law; and only subject to a detainee's right to challenge before a court the lawfulness of his detention. The presumption, as under the Bail Act 1976, is in favour of freedom.

15. It was argued by the Secretary of State that each of the appellants was lawfully detained after conviction by a competent court. Article 5(1)(a) was therefore satisfied. The sentences imposed by the court were not themselves criticised as discriminatory, and could have been challenged had they been so. Those sentences provided lawful authority for detention of the appellants until such time as, under domestic law, they became entitled to release: *R (Giles) v Parole Board* [2003] UKHL 42, [2004] 1 AC 1. At that point continued detention would become unlawful (*R v Governor of Brockhill Prison, Ex p Evans* (*No 2*) [2001] 2 AC 19), but not before. Article 5(4) had no part to play in implementing the sentence before release. It followed that discriminatory implementation of the sentence, however extreme and unjustifiable, was not within the ambit of article 5.

16. This argument is in my judgment a mixture of the true and the false. I would agree that the sentences passed on the respective

appellants satisfied article 5(1)(a) and provided lawful authority for the detention of the appellants until such time as, under domestic law, their detention became unlawful. *Giles* established that a prisoner sentenced to a determinate term of years cannot seek to be released at any earlier time than that for which domestic law provides. During the currency of a lawful sentence, article 5(4) has no part to play. But the Secretary of State's argument founders, in my opinion, on a failure to recognise both the importance, in our system, of the statutory rules providing for early release and the close relationship between those rules and the core value which article 5 exists to protect.

17. The Convention does not require member states to establish a scheme for early release of those sentenced to imprisonment. Prisoners may, consistently with the Convention, be required to serve every day of the sentence passed by the judge, or be detained until a predetermined period or proportion of the sentence has been served, if that is what domestic law provides. But this is not what the law of England and Wales provided, in respect of long-term determinate prisoners, at the times relevant to these appeals. That law provided for a time at which (subject to additional days of custody imposed for disciplinary breaches) a prisoner must, as a matter of right, be released, and an earlier time at which he might be released if it was judged safe to release him but at which he need not be released if it was not so judged.

18. A number of grounds (economy and the need to relieve over-crowding in prisons) have doubtless been relied on when introducing pre-release schemes from determinate sentences such as those under consideration here. But one such consideration is recognition that neither the public interest nor the interest of the offender is well served by continuing to detain a prisoner until the end of his publicly pronounced sentence; that in some cases those interests will be best served by releasing the prisoner at the earlier, discretionary, stage; and that in those cases prisoners should regain their freedom (even if subject to restrictions) because there is judged to be no continuing interest in depriving them of it. I accordingly find that the right to seek early release, where domestic law provides for such a right, is clearly within the ambit of article 5, and differential treatment of one prisoner as compared with another, otherwise than on the merits of their respective cases, gives rise to a potential complaint under article 14.

19. This is a conclusion I would unhesitatingly reach even if there were no Strasbourg authority on the point. But the Strasbourg institutions have consistently recognised the possibility of a claim under

article 14, in relation to article 5, where a parole scheme is operated in an objectionably discriminatory manner. In *Webster v United Kingdom* (Application No 12118/86), (unreported) 4 March 1987 the Commission, in an admissibility decision, said:

> "The Commission notes that the applicant was detained in accordance with a procedure prescribed by law after conviction by a competent court, pursuant to Article 5 para. 1(a) … of the Convention. According to that conviction the applicant could have been expected to serve his full five year sentence. The Commission considers, nevertheless, that if a prison pre-release scheme were operated in a discriminatory manner, an issue could arise under Article 5 of the Convention, read in conjunction with Article 14 … . Article 14 … guarantees freedom from discrimination in the securement of Convention rights such as the right to liberty and security of person laid down in Article 5 … ."

In *Gerger v Turkey* (Application No 24919/94) (unreported) 8 July 1999 the applicant complained that, as a defendant convicted of terrorism, he was denied parole until a later stage in his sentence than other prisoners. The court held the complaint to be inadmissible, but in doing so said:

> "68. The Government submitted that Article 5 § 1 (a) did not secure convicted prisoners a right to automatic parole. They added that in any event the restrictions on entitlement to parole imposed on persons convicted of an offence under the Prevention of Terrorism Act were warranted by the intrinsic seriousness of such offences.
>
> 69. The Court considers, firstly, that, although Article 5 § 1 (a) of the Convention does not guarantee a right to automatic parole, an issue may arise under that provision taken together with Article 14 of the Convention if a settled sentencing policy affects individuals in a discriminatory manner."

20. At first instance in Mr Clift's case, counsel for the Secretary of State accepted that legislation providing for early release on parole fell sufficiently within the ambit of article 5(1) to engage article 14, although he reserved the point for argument on appeal: [2003] EWHC 1337 (Admin), para 16, per Hooper J. No similar concession was made

by the Secretary of State when the application of Messrs Hindawi and Headley came before McCombe J at first instance, but having reviewed some of the domestic and Strasbourg authorities as they then stood the judge concluded that the concession had been rightly made: [2004] EWHC 78 (Admin), para 24.

21. When Mr Clift's case reached the Court of Appeal, it posed as the first issue, whether the case was within the ambit of article 5. It did not express a clear answer to that question, but may be taken to have concluded that the case was, or well might be, within the ambit of article 5: Lord Woolf CJ, Rix and Carnwath LJJ, [2004] EWCA Civ 514, [2004] 1 WLR 2223, paras 14-18.

22. The members of the Court of Appeal expressed differing views on this question in the appeal of Messrs Hindawi and Headley: Kennedy, Sedley and Neuberger LJJ, [2004] EWCA Civ 1309, [2005] 1 WLR 1102. Kennedy LJ, relying on *Giles* and the Court of Appeal decision, since reversed, in *R (Smith) v Parole Board (No 2)* [2003] EWCA Civ 1269, [2004] 1 WLR 421 accepted the Secretary of State's submission already summarised: see paras 9-22. For reasons already given, I do not think that meets the appellants' case.

23. Sedley LJ also decided this issue against Messrs Hindawi and Headley, although on narrower grounds. He held against them (paras 38-41) not because early release during the currency of a lawful sentence could not be brought within article 5, but because what they were seeking was not a right to be released but a right that the Secretary of State should receive the advice of the Parole Board. This was so in the case of Mr Hindawi, if Mr Clift's appeal (already dismissed) had been rightly decided, as the Court of Appeal was bound to assume. But it was not so in the case of Mr Headley, who was contending that the Parole Board's recommendation should be decisive, as in the case of other long-term determinate sentence prisoners serving less than 15 years but not subject to removal. But in any event I consider the right to seek the early release recommendation of an independent, court-like, body, expert in the assessment of risk and immunised against external pressure, to be a right of sufficient value to engage, potentially, the application of article 5.

24. Neuberger LJ considered this issue at some length (paras 48-83). At para 75 he said:

> "The fact that article 5 cannot be invoked to justify a prisoner claiming the right to be granted early release where no early release system exists, does not mean that where an early release system exists, it is not within the ambit of article 5 for the purposes of engaging article 14."

For reasons already given, I agree. He expressed his conclusion in para 82:

> "If it be the case that the right to early release engages article 5, I consider that it follows that the right to be considered for early release is within the ambit of article 5, and consequently, where there are discriminatory provisions between different types of prisoner in relation to the circumstances in which, or the basis upon which, they can seek early release, article 14 is, at least in principle, capable of being invoked."

Again, I agree. I would resolve this issue in favour of the appellants.

The second issue

25. The second agreed issue is whether the differential treatment to which all three appellants were admittedly subject was on one or other of the grounds listed in article 14 of the Convention. In the cases of Messrs Hindawi and Headley, so far as their liability for removal is concerned, there is no live issue. The Secretary of State accepts that they were treated differently from other prisoners on the ground of national origin. But there is a live issue in Mr Clift's case, where the differential treatment was the result of the length of his sentence and this differential treatment would still be applicable to Mr Hindawi even if he were not liable to be removed.

26. In the case of Mr Clift, he contends that the differential treatment of which he complains falls within article 14 because it is based on the length of his determinate sentence and this, he says, is "any ground such as … other status". The Secretary of State challenges this contention.

27. As Lord Walker of Gestingthorpe pointed out in *R(Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173, para 52, "or other status" (in the French version "toute autre situation") is far from precise. But plainly the language is not intended to cover differential treatment on any ground whatever: if it were, the list of grounds in article 14 (reproduced, in this respect, in article 1(2) of the Twelfth Protocol, which the United Kingdom has not ratified) would be otiose. So it must impose some restriction. In *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, para 56, the Strasbourg court explained that

> "Article 14 prohibits, within the ambit of the rights and freedoms guaranteed, discriminatory treatment having as its basis or reason a personal characteristic ('status') by which persons or groups of persons are distinguishable from each other."

See also *Budak v Turkey* (Application No 57345/00) (unreported) 7 September 2004, para 4. Differential treatment based on previous suspicion or, it seems, the seriousness of crimes committed do not fall within the prohibition: *R(S) v Chief Constable of the South Yorkshire Police* [2004] UKHL 39, [2004] 1 WLR 2196, paras 46-52; *Gerger v Turkey* (Application No 24919/94), (unreported) 8 July 1999, para 69.

28. I do not think that a personal characteristic can be defined by the differential treatment of which a person complains. But here Mr Clift does not complain of the sentence passed upon him, but of being denied a definitive Parole Board recommendation. Is his classification as a prisoner serving a determinate sentence of 15 years or more (but less than life) a personal characteristic? I find it difficult to apply so elusive a test. But I would incline to regard a life sentence as an acquired personal characteristic and a lifer as having an "other status", and it is hard to see why the classification of Mr Clift, based on the length of his sentence and not the nature of his offences, should be differently regarded. I think, however, that a domestic court should hesitate to apply the Convention in a manner not, as I understand, explicitly or impliedly authorised by the Strasbourg jurisprudence, and I would accordingly, not without hesitation, resolve this question in favour of the Secretary of State and against Mr Clift.

The third issue

29. The third issue is whether the differential treatment of the respective appellants was objectively justified at the relevant time. It is common ground that the burden of showing justification lies on the Secretary of State, that what must be shown is objective justification and that the relevant time is that at which the respective appellants were differentially treated.

30. In Mr Clift's case, Hooper J found the differential treatment of those sentenced to more than 15 years to be justified (para 39). Such prisoners were liable to pose particular problems for public safety and order, Parliament had entrusted the final decision to the Secretary of State and appropriate deference should be paid to that decision (para 35). The Court of Appeal endorsed his view: dividing lines must be drawn; and the Secretary of State could reasonably say that he should remain democratically accountable for decisions on the release of those who had committed the most serious crimes or had the worst records, or both (para 26).

31. Counsel for the Secretary of State justified retention in his hands of the power of final decision on the release of prisoners serving determinate sentences of 15 years or more as a decision well within the area of discretionary judgment or the margin of appreciation enjoyed by member states. Any line could be criticised as arbitrary, but it is necessary to draw lines. Not every difference of treatment is to be stigmatised as discrimination. In the field of social strategy, even greater weight than in other fields should be given to the judgment of the national authorities. Reliance was placed on cases such as *James v United Kingdom* (1986) 8 EHRR 123, para 68; *National and Provincial Building Society v United Kingdom* (1997) 25 EHRR 127, para 88; *Wilson v First County Trust Ltd* (*No 2*) [2003] UKHL 40, [2004] 1 AC 816, para 74; *R(Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173, paras 41, 91; and *Stec v United Kingdom* (Application Nos 65731/01 and 65900/01) (unreported) 12 April 2006, para 52. Counsel roundly disclaimed any suggestion that the Secretary of State, in making decisions on the risk presented by prisoners in this category, would bow to public pressure, but contended that this power was one reasonably reserved for the Secretary of State. It was nonetheless so because, in unwilling compliance with European Court decisions, the Secretary of State no longer exercises a similar power in the cases of discretionary lifers, automatic life sentence prisoners, HMP detainees and mandatory lifers.

32. For Mr Clift it was argued that this regime now lacks all coherence. If his crime had been judged to be even more serious than it was, and he had been sentenced to life imprisonment, the risk of releasing him would have been definitively assessed, and a decision on his release conclusively made, by the Parole Board, an expert body with the characteristics already described. There could be no rational justification for denying him such an assessment and decision because his crimes, although very serious, were not judged sufficiently grave to merit a life sentence. The Parole Board is in any event subject to the directions of the Secretary of State, and it was not said to have neglected its duty.

33. When, in October 2002, the Secretary of State rejected the Parole Board's recommendation that Mr Clift be released on parole, discretionary lifers and HMP detainees had already been brought within the definitive jurisdiction of the Parole Board, and *Stafford v United Kingdom* (2002) 35 EHRR 1121, requiring the same procedure for mandatory lifers, had already been decided. The differential treatment of prisoners serving 15 years or more had, in my opinion, become an anomaly. That would not, in itself, be a ground for holding it to be unjustified. Anomalies are commonplace. But by 2002 it had, in my opinion, become an indefensible anomaly because it had by then come to be recognised that assessment of the risk presented by any individual prisoner, in the application of publicly promulgated criteria, was a task with no political content and one to which the Secretary of State could not (and did not claim to) bring any superior expertise. I would accordingly resolve this issue in favour of Mr Clift and against the Secretary of State.

34. In the cases of Messrs Hindawi and Headley, McCombe J was unable to find objective and proportionate justification for their differential treatment (para 30). He quoted from the Carlisle Committee's 1988 Report on The Parole System in England and Wales (Cm 532), but found it hard to reconcile the committee's conclusions with later developments. The Court of Appeal expressed differing views. Kennedy LJ (para 31) considered that there was objective, reasonable and proportionate justification for differential treatment of those liable to removal, as the Carlisle Committee had opined. Sedley LJ, who had already resolved the ambit issue against these appellants, found considerable difficulty in finding their differential treatment to be justified (para 42), since the rationale of the distinctions made by the Carlisle Committee had faded to almost nothing (para 43). Neuberger LJ resolved this issue against the Secretary of State (paras 87-91). The

relevant legislation was justifiable when introduced, but had ceased to be so.

35. In seeking to justify the differential treatment of these appellants, the Secretary of State relied on general arguments along the lines of those summarised in paragraph 31 above, and also relied on the Carlisle Committee's view that prisoners liable to removal should be subject to a different regime. It was pointed out, for example, that prisoners liable to immediate deportation on release could not be (and in practice are not) subject to licence conditions and possible recall to prisons. For the appellants it was argued that the premises of the Carlisle Committee's thinking had been falsified by later developments, depriving the regime to which the appellants were subject of rational justification.

36. The Carlisle Committee proposed (para 473) that

> "those sentenced to more than 4 years should be statutorily excluded from parole eligibility if they … have had a deportation order signed against them. Instead the Home Secretary should be empowered to release them and deport them once they have reached what would have been their parole eligibility date at the 50% point of the sentence."

This recommendation was not given full effect. In reaching it, however, the committee was influenced by two considerations. The first (para 463) was the difficulty of knowing what criteria the Parole Board could sensibly apply where there was, by definition, no release plan in this country and no prospect of normal supervision. The second (para 470) was the anomaly of assessing the risk that a person would commit further offences here if he were allowed to remain, when in fact he is going to be sent away.

37. The question is not whether these points were valid when made 18 years ago, but whether they remained valid in 2001-2003. As to the first, it is clear that Appendix D to Chapter 9 of Prison Service Order 6000 Parole Release and Recall Manual ("Criteria for the release of those long-term prisoners liable to deportation or removal from the UK"), similar in effect to the Secretary of State's "Directions to the Parole Board under the Criminal Justice Act 1991, section 32(6) … ", sets out clear and readily intelligible criteria, which have no doubt been applied (without any suggestion of difficulty) in the case of

indeterminate sentence prisoners and HMP detainees liable to removal. As to the second, it has been authoritatively decided (*R v Parole Board, Ex p White* (unreported) 16 December 1994, Divisional Court) that the risk which the Parole Board must assess is not limited to those within the United Kingdom but extends also to those elsewhere. The potential risk of a person released early on parole in any country to which he is removed is, therefore, a risk which the Parole Board is able to and does assess in the case of indeterminate sentence prisoners.

38. As in the case of Mr Clift, the Secretary of State has not criticised the Parole Board's discharge of its duties in relation to indeterminate sentence prisoners liable to removal, nor suggested that he brings any superior expertise to the task. Whatever the position in the past, the differential treatment of determinate sentence prisoners liable to removal seems to me to be, now, an indefensible anomaly, for very much the same reasons as in the case of Mr Clift. The decision in question is not a political decision, appropriate to be made by a minister. It is no longer capable of rational justification. I would accordingly resolve this issue also in favour of the appellants and against the Secretary of State.

Disposal

39. For the reasons I have given, and those given by my noble and learned friends Lord Hope of Craighead, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood, I would dismiss the appeal of Mr Clift, with the ordinary consequences as to costs.

40. For the reasons I have given, and those given by my noble and learned friends Baroness Hale and Lord Brown, I would allow the appeals of Messrs Hindawi and Headley. The parties are agreed that the legislation of which these appellants complain cannot be read and given effect under section 3 of the 1998 Act in a way which is compatible with their Convention rights. I would therefore make a declaration that sections 46(1) and 50(2) of the Criminal Justice Act 1991 are incompatible with article 14 (in conjunction with article 5) of the European Convention on Human Rights to the extent that those sections prevent prisoners liable for removal from having their cases reviewed by the Parole Board in the same manner as other long term prisoners. The Secretary of State must pay the costs of these appellants, in the House and below.

LORD HOPE OF CRAIGHEAD

My Lords,

41. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. For the reasons he gives, I would dismiss the appeal of Mr Clift, allow the appeals of Mr Hindawi and Mr Headley and make the declaration of incompatibility in the cases of Mr Hindawi and Mr Headley that he proposes. I should however like to add some comments on the second agreed issue which, as Lord Bingham has explained, arises only in Mr Clift's case.

42. The differential treatment in Mr Clift's case is the result of the length of his sentence. The question is whether his complaint falls within article 14 of the European Convention. He can only succeed in bringing himself within its protection if his sentence can be said to have conferred a "status" on him within the meaning of the article. Following the guidance given by the European Court in *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, para 56, we can take it that status means a personal characteristic by which persons or groups of persons are distinguishable from each other. How does that description fit with the situation in Mr Clift's case?

43. The protection which article 14 provides can be analysed in this way. It does not prohibit discrimination on any ground whatever. Its scope is limited to discrimination in the enjoyment of Convention rights. As the European Court put it in *Kjeldsen*, para 56, the article prohibits discriminatory treatment within the ambit of the rights and freedoms guaranteed. To attract this protection, the discrimination must be on some ground. This is, of course, what discrimination is all about. It is the grounds on which persons or groups of persons are treated differently that separate out treatment which is discriminatory from treatment that does not attract that criticism. The list of grounds on which discrimination in the enjoyment of Convention rights is prohibited is not exhaustive. That is made clear by the words "such as" which precedes the list. But, as Lord Steyn said in *R (S) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196, para 48, the words "or other status" which end the list show that the proscribed grounds are not unlimited.

44. The effect of the Parole Board (Transfer of Functions) Order 1998 of which Mr Clift complains is to discriminate between long-term prisoners serving determinate sentences of 15 years or more on the one hand and long-term prisoners serving determinate sentences of less than 15 years and prisoners serving life sentences on the other. It denies prisoners serving sentences of 15 years or more the right to be released from custody on the recommendation of the Parole Board. Prisoners in the other two groups have this right. Those in Mr Clift's group are discriminated against in a way that affects the enjoyment of what my noble and learned friend Lord Brown of Eaton-under-Heywood aptly describes as the core value of article 5 of the Convention, which is the right to liberty. The length of their sentence is the sole ground on which they are treated differently in this respect from prisoners in the two other groups. The difficult question is whether the length of their sentences has conferred a status, or a personal characteristic, on them within the meaning of article 14. It is, as Lord Bingham indicates, an elusive test.

45. Each of the specific grounds of discrimination listed in article 14 shares one feature in common. This is that they exist independently of the treatment of which complaint is made. In that sense they are personal to the complainant. They can be an acquired characteristic, such as the person's religion or political opinion. They can also, like a person's race or birth, be a characteristic over which he has no control. On the other hand in *Gerger v Turkey* (Application No 24919/94) (unreported) 8 July 1999 the court held that prisoners who were treated differently simply because of the category of the offences which they had committed were not within the protection of article 14. As the court put it in para 69 of its judgment, the distinction was not between different groups of people but between different types of offence according to the legislature's view of their gravity.

46. It could be said in Mr Clift's case that the length of his sentence did confer a status on him which can be regarded as a personal characteristic. This is because prisoners are divided by the domestic system into broadly defined categories, or groups of people, according to the nature or the length of their sentences. These categories affect the way they are then dealt with throughout the period of their sentences. As a result they are regarded as having acquired a distinctive status which attaches itself to them personally for the purposes of the regime in which they are required to serve their sentences. This is most obviously so in the case of prisoners serving life sentences and where distinctions are drawn between short-term and long-term prisoners serving determinate sentences. It is less obviously so in the case of long-term prisoners serving determinate sentences of different lengths.

47. It must be accepted, as Lord Bingham points out, that a personal characteristic cannot be defined by the differential treatment of which a person complains. It is plain too that the category of long-term prisoner into which Mr Clift's case falls would not have been recognised as a separate category had it not been for the Order which treats prisoners in his group differently from others in the enjoyment of their fundamental right to liberty. But he had already been sentenced, and he had already acquired the status which that sentence gave him before the Order was made that denied prisoners in his group the right to release on the recommendation of the Parole Board. The question which his case raises is whether the distinguishing feature or characteristic which enables persons or a group of persons to be singled out for separate treatment must have been identified as a personal characteristic before it is used for this purpose by the discriminator.

48. The function of article 14, read with article 1 of the Convention, is to secure to everyone within the jurisdiction of the High Contracting Parties the enjoyment of the rights and freedoms set out in section 1 of the Convention without discrimination on grounds which, having regard to the underlying values of the Convention, must be regarded as unacceptable. This suggests that a generous meaning should be given to the words "or other status" while recognising, of course, that the proscribed grounds are not unlimited. It seems to me, on this approach, that the protection of article 14 ought not to be denied just because the distinguishing feature which enabled the discriminator to treat persons or groups of persons differently in the enjoyment of their Convention rights had not previously been recognised.

49. But the Strasbourg jurisprudence has not yet addressed this question and, as my noble and learned friend Baroness Hale of Richmond points out, it is possible to regard what he has done, rather than who or what he is, as the true reason for the difference of treatment in Mr Clift's case. As Lord Bingham said in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20, the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time. A measure of self-restraint is needed, lest we stretch our own jurisprudence beyond that which is shared by all the States Parties to the Convention. I am persuaded, with some reluctance, that it is not open to us to resolve the second agreed issue in Mr Clift's favour.

BARONESS HALE OF RICHMOND

My Lords,

50. I have had the advantage of reading in draft the opinions of my noble and learned friends, Lord Bingham of Cornhill and Lord Brown of Eaton-under-Heywood. For the reason they give, with which I agree, I too would allow the appeals of Mr Hindawi and Mr Headley and dismiss the appeal of Mr Clift. I wish to add a few words on issue two, the prohibited grounds of discrimination, which is in many ways the most difficult question in the case.

51. The 14th Amendment to the Constitution of the United States of America requires that 'No state shall . . . deny to any person within its jurisdiction the equal protection of the laws'. Yet many laws have to draw distinctions between different groups or classes of people. The US courts have therefore had to construct a hierarchy of grounds of distinction, from those which they will readily hold to be rationally justified to those which they will subject to the strictest of scrutiny. Modern human rights instruments, on the other hand, have tended to contain a list of grounds which are automatically suspect. Article 26 of the International Covenant on Civil and Political Rights (synthesising articles 2 and 7 of the Universal Declaration of Human Rights), for example, provides that:

> 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

Article 14 of the European Convention on Human Rights adds 'association with a national minority' to this list. The list is clearly non-exhaustive so that analogous grounds may be recognised as social conditions change. The most obvious example is sexual orientation: see *Salgueiro Da Silva Mouta v Portugal*, (1999) 31 EHRR 1055.

52. But as Harris, O'Boyle and Warbrick have pointed out (in *The Law of the European Convention on Human Rights*, 1995, p 472) "The list of 'badges' in article 14 is long and not exclusive. The question is whether it is limited at all." The French text is even more open-ended from the English referring to 'toute autre situation' rather than 'other status'. So, was article 14 intended to be a general prohibition of discrimination in relation to the enjoyment of the Convention rights unless it could objectively be justified, with the specific grounds listed as a warning that discrimination on such grounds would be particularly difficult to justify? Or were the grounds and the reference to 'other status' intended to limit the kinds of classification which might be covered by the article?

53. The classic accounts of article 14 repeated time and time again in the Strasbourg case law do not specifically address this question. For example, in *Rasmussen v Denmark* (1984) 7 EHRR 371, paras 35 and 38, citing *Van der Mussele v Belgium* (1983) 6 EHRR 163, para 46, and *Marckx v Belgium* (1979) 2 EHRR 330, para 33, the court said this:

> "Article 14 safeguards individuals who are 'placed in analogous situations' against discriminatory differences of treatment . . . For the purposes of article 14, a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'."

54. Many of the Strasbourg cases simply address these two issues and do not separately discuss the question of a prohibited ground. Perhaps the most striking example of this is *Stubbings v United Kingdom* (1996) 23 EHRR 213. There, it was argued that discrimination in the limitation periods laid down for intentional and negligent torts was contrary to article 14. The court did not address the government's argument that article 14 was concerned with discrimination based on a personal characteristic of the victim rather than the character of the acts against them. But it had little difficulty in concluding that the two groups were not in analogous situations and that, even if they were, the difference in treatment could be justified. (See also *Bullock v United Kingdom* (1996) 21 EHRR CD85, where the Commission held a complaint of discrimination against the owners of pit bull terriers manifestly ill founded because the distinction had an objective and reasonable justification; and *Spadea and Scalabrino v Italy* (1995) 21

EHRR 482, where the Commission and the Court held that discrimination between the landlords of residential and non-residential property was justified; the Commission also considered that they were not in an analogous situation. It appears that in neither case was it argued that these were not prohibited grounds.)

55. In view of this, it is perhaps not surprising that in *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617, Brooke LJ appears to have rejected an argument that article 14 only prohibited discrimination based on a personal characteristic. But he did so citing *Bullock* and *Spadea* above, where the issue was not addressed; and *Chassagnou v France* (1999) 29 EHRR 615, where the court expressly found, at para 95, that a discrimination between large and small landowners was 'on the ground of property'.

56. Although the issue is not always addressed, when it is addressed it is clear from the Strasbourg case law that not every basis of distinction between different sorts of people is included in the list of prohibited grounds and residual category of 'other status'. Thus in *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, at para 56, the court stated:

> " . . . Article 14 prohibits, within the ambit of the rights and freedoms guaranteed, discriminatory treatment having as its basis or reason a personal characteristic ('status') by which persons or groups of persons are distinguishable from each other."

57. As Karen Reid explains, in *A Practitioners' Guide to the European Convention on Human Rights* 2nd ed (2004), pp 261-2, "It thus aims to strike down the offensive singling out of an individual or members of a particular group on their personal attributes." This is reminiscent of the approach of the Canadian Supreme Court to the equal protection section of their own Charter of Rights and Freedoms, in *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497:

> "It may be said that the purpose of section 15(1) [of the Charter] is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice,

> and to promote a society in which all person enjoy equal recognition at law as human beings or members of Canadian society, equally capable and equally deserving of concern, respect and consideration."

58. In the vast majority of Strasbourg cases where violations of article 14 have been found, the real basis for the distinction was clearly one of the proscribed grounds or something very close: race (eg *East African Asians v United Kingdom* (1973) 3 EHRR 76; *Cyprus v Turkey* (2001) 35 EHRR 30; *Nachova v Bulgaria*, 39 EHRR 793, sex (eg *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471; *Schmidt v Germany* (1994) 18 EHRR 513; *Schuler-Zgraggen v Switzerland* (1995) 21 EHRR 404; *Petrovic v Austria* (1998) 33 EHRR 307, religion (eg *Hoffmann v Austria* (1993) 17 EHRR 293; *Cyprus v Turkey* 35 EHRR 30, marital or birth status (eg *Marckx v Belgium* (1979) 2 EHRR 330; *Inze v Austria* (1987) 10 EHRR 394; *Sahin v Germany*, (2003) 15 BHRC 84; *Sommerfeld v Germany*, (2002) 38 EHRR 756, national origin (e.g. *Gaygazuz v Austria* (1996) 23 EHRR 364), foreign residence (eg *Darby v Sweden* (1990) 13 EHRR 774), language (eg *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252), or sexual orientation (eg *Salgueiro Da Silva Mouta v Portugal* 31 EHRR 1055; *Karner v Austria* (2003) 38 EHRR 528). Unusually, in *Pine Valley Developments Ltd v Ireland* (1991) 14 EHRR 319, the court found a violation of article 14 without reference to a prohibited ground, but the point was not argued because the government was denying that the legislation drew the distinction complained of at all.

59. More instructive are the cases in which the basis of the discrimination has been held to fall outside the proscribed grounds. One example is different laws in different jurisdictional regions within the territory of a member state. Thus, it was not a difference in treatment on grounds of personal status for people in Scotland to be subject to the poll tax before people in England (*P v United Kingdom*) (Application No 13473/87) (unreported) 11 July 1988) or for juvenile offenders in Scotland not to be entitled to the remission granted to juvenile offenders in England and Wales (*Nelson v United Kingdom* (Application No 11077/84) (unreported) 13 October 1986, 49 DR 170).

60. Another example, pertinent to this case, is differences in the treatment of different criminal offences. In *Gerger v Turkey* (Application No 24919/94) (unreported), 8 July 1999, the court deduced from the fact that people convicted of terrorist offences would be treated less favourably with regard to automatic parole "that the distinction is

made not between different groups of people, but between different types of offence, according to the legislature's view of their gravity": para 69. In *Budak v Turkey* (Application No 57345/00) (unreported), 7 September 2004, the court repeated the "personal characteristic" test from *Kjeldsen* and held that a distinction in procedure and sentences for offences tried before the state security court from those tried before other courts was made, again, not between different groups of people but between different types of offence.

61. All of this is entirely consistent with the view taken by this House in *R(S) v Chief Constable of South Yorkshire Police* [2004] 1 WLR 2196. At para 48, Lord Steyn cited *Kjeldsen* and continued:

> " . . . the proscribed grounds in article 14 cannot be unlimited, otherwise the wording of article 14 referring to 'other status' beyond the well-established proscribed grounds, including things such as sex, race or colour, would be unnecessary. It would then preclude discrimination on any ground. That is plainly not the meaning of article 14."

In that case it was held that the possession of fingerprints and DNA samples by the police was simply a matter of historical fact rather than the personal status or characteristics of the people who had supplied them.

62. In this case, it is plain, and now accepted by the Secretary of State, that a different parole regime for foreigners who are liable to deportation from that applicable to citizens or others with the right to remain here, falls within the grounds proscribed by article 14 and thus (subject to the ambit issue) requires objective justification. The same would surely apply to a difference in treatment based on race, sex or the colour of one's hair. But a difference in treatment based on the seriousness of the offence would fall outside those grounds. The real reason for the distinction is not a personal characteristic of the offender but what the offender has done.

63. The result is that the difference of treatment between Mr Clift and people sentenced either to shorter determinate sentences or to life imprisonment is not covered by article 14 at all. The law may look odd. But not every apparent anomaly is a breach of Convention rights. This

one is the result of what the Home Secretary chose to do in relation to people sentenced to shorter terms of imprisonment and what he was obliged by the terms of article 5 itself to do in relation to life imprisonment. The law has since been changed and one can well understand why. But it is not for us to declare legislation which Parliament has passed incompatible with the Convention rights unless the Convention and its case law require us so to do. For the reasons given above, in amplification of those given by my noble and learned friend, Lord Bingham of Cornhill, we are not required to do so in this case.

LORD CARSWELL

My Lords,

64. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Bingham of Cornhill, with which I am in agreement. For the reasons which he gives I too would dismiss the appeal of Mr Clift, allow the appeals of Messrs Hindawi and Headley and make the declaration which he proposes.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

65. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill. I am in complete agreement with it on all the issues raised and there are essentially only two aspects of these appeals on which I wish to add a few paragraphs of my own.

66. The first concerns issue one, whether the appellants' applications for early release came within the ambit of article 5 of the European Convention on Human Rights so as to engage article 14 of the Convention. As stated, I agree with all that Lord Bingham has said upon this issue. But it does seem to me worth noticing in addition the remarkable consequences which the Secretary of State's argument, if

accepted, would have. As Sedley LJ observed in his judgment in the Court of Appeal in the cases of Mr Hindawi and Mr Headley [2005] 1 WLR 1102, para 40, if the Secretary of State's argument is correct "a law or rule which allowed women but not men to obtain parole would still not come within the ambit of article 5 so as to attract the operation of article 14." And, indeed, the point can be taken further still. Suppose that for a given offence the law prescribed a minimum penalty of six years imprisonment for men, three years for women. That, Mr Pannick QC readily acknowledged, would clearly constitute a direct breach of article 5 (probably without the need to invoke article 14) and be unlawful. If, however, the law prescribed the same sentence for both, but then provided that women but not men are to be released at the halfway stage, that, he must argue, is beyond the reach of the Convention. It cannot be so and it is not so because the core value protected by article 5 is liberty and, where the penal system includes a parole scheme, liberty is dependent no less upon the non-discriminatory operation of that than on a fair sentencing process in the first place.

67. The second point I wish to make concerns issue three, whether the differential treatment of the respective appellants was objectively justified at the relevant time, in particular in the case of Mr Clift. The position with regard to him, as your Lordships will appreciate, is in two respects moot as to the issue of objective justification. In the first place, for the reasons given by Lord Bingham in paragraphs 27 and 28 of his opinion, he cannot establish that the differential treatment to which he was subjected was on grounds of "status" so that his article 14 complaint fails this threshold test. Secondly, Mr Clift was in any event released on 10 March 2004.

68. For understandable reasons, Lord Bingham has considered the question of objective justification in Mr Clift's case (at para 33 of his opinion) in October 2002 and has concluded that even by then the differential treatment suffered by those serving determinate sentences of 15 years or more (compared with both those serving lesser determinate sentences and those serving every sort of indeterminate sentence) had become indefensibly anomalous (a judgment with which I respectfully agree and with which it appears that the Court of Appeal too might have agreed had Mr Clift at that stage invited comparison with discretionary life prisoners rather merely than with lesser determinate sentence prisoners—see paragraph 24 of Lord Woolf CJ's judgment). The point I wish to make, however, is that the anomalous position of those like Mr Clift (assuming he were still detained) has since the 2003 Act become yet more stark and indefensible. As Lord Bingham explains in para 9 of his opinion, the parole regime which applied in Mr Clift's case

continues to apply to all those sentenced to determinate terms of 15 years or more for offences committed before 4 April 2005. Those whose offences were committed subsequently, however, are dealt with under the Criminal Justice Act 2003 and by section 244 of that Act all such prisoners (unless serving extended sentences) are automatically to be released after serving one half of their sentence (with the Secretary of State's discretion being limited to releasing them up to 135 days earlier), on licence until the end of their sentence. With regard to determinate sentence prisoners the Parole Board will continue to have a role only in the case of those serving extended sentences: their release, after serving half "the appropriate custodial term" determined by the sentencing board, is dependent upon the Parole Board's discretion. Save for his 135 day discretion (and save also in the case of those subject to removal whose offences were committed before 4 April 2005, ie those in Mr Hindawi's and Mr Headley's position) the Secretary of State is to have no control whatever over release dates. It follows that only those in Mr Clift's position, a substantial but obviously dwindling number of 15 year or longer determinate sentence prisoners sentenced for offences committed before 4 April 2005, will continue to have their release dates determined by the Secretary of State. Not only, therefore, are they now to be contrasted with lesser determinate sentence prisoners and all life sentence prisoners but they are to be contrasted too with all those whose offences were committed after 4 April 2005. Such discrimination in their cases is plainly unjustifiable (although not actually unlawful because, as stated, they do not have the "status" to complain under article 14) and it is difficult to see why the Secretary of State would wish to perpetuate it.

69. I add only this. Under the 2003 Act the Secretary of State has surrendered his discretion (save in respect of 135 days) with regard to *all* determinate sentence prisoners whose offences were committed after 4 April 2005, ie those subject to removal no less than nationals. The anomaly in the case of Mr Hindawi and Mr Headley, therefore, has similarly become yet more plainly indefensible. Given that the House is now to declare the legislation which still affects these two appellants to be incompatible with their Convention rights, the Secretary of State will surely wish to consider whether the time has not now come to leave *all* future decisions as to release on licence (fewer, of course, under the 2003 Act than in the past) exclusively to the Parole Board.