HOUSE OF LORDS

SESSION 2008–09

[2009] UKHL 22

on appeal from: [2008]EWCA Civ 30
[2008] EWHC 2326 (Admin)

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Secretary of State for Justice (Respondent) *v* James (FC) (Appellant) (formerly Walker and another)
R (on the application of Lee) (FC) (Appellant) *v* Secretary of State for Justice (Respondent) and one other action

Appellate Committee

Lord Hope of Craighead
Lord Carswell
Lord Brown of Eaton-under-Heywood
Lord Mance
Lord Judge

Counsel

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Respondent: :
Nathalie Lieven QC
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Appellant: (Lee):
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Nick Armstrong
(Instructed by Stephensons LLP)

Interveners (Parole Board):
Pushpinder Saini QC
Dan Squires
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Appellant (Wells):
Tim Owen QC
Nick Armstrong
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LORD HOPE OF CRAIGHEAD

My Lords,

1. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Brown of Eaton-under-Heywood and Lord Judge, the Lord Chief Justice. I gratefully adopt their admirable description of the legislative and factual background. For the reasons they give, with which I agree, I would dismiss all three appeals.

2. It may helpful if, by way of an introduction to the issues that they examine in much greater detail, I were to provide a sketch of the landscape within which the arguments that are before the House must be considered and give some brief reasons of my own for the conclusions that I have reached. Submissions were made about the Secretary of State's duties in public law and the appellants' rights under articles 5(1) and 5(4) of the European Convention on Human Rights. The scope for argument differs under each of those heads, and so does the opportunity that each offers for an effective remedy.

The public law duty

3. There is no doubt that the Secretary of State failed deplorably in the public law duty that he must be taken to have accepted when he persuaded Parliament to introduce indeterminate sentences for public protection ("IPPs") by section 225 of the Criminal Justice Act 2003. He failed to provide the systems and resources that prisoners serving those

sentences needed to demonstrate to the Parole Board by the time of the expiry of their tariff periods, or reasonably soon thereafter, that it was no longer necessary for the protection of the public that they should remain in detention. The Divisional Court (Laws LJ and Mitting J) granted a declaration to that effect on 31 July 2007: *R (Walker) v Secretary of State for Justice* [2007] EWHC 1835 (Admin); [2008] 1 All ER 138. Its decision was affirmed on 1 February 2008 by the Court of Appeal (Lord Phillips of Worth Matravers CJ, Dyson and Toulson LJJ): *R (Walker) v Secretary of State for Justice (Parole Board intervening)* [2008] EWCA Civ 30; [2008] 1 WLR 1977. The Secretary of State has not appealed against that declaration. Very properly, he accepts that it was implicit in the statutory scheme of sections 224 and 225 of the Criminal Justice Act 2003 that he would make provision which allowed IPP prisoners a reasonable opportunity to demonstrate to the Parole Board that they should be released. As Miss Lieven QC for the Secretary of State put it, the scheme was such that it was not rational for him to fail to do so.

4. Steps have been taken to address the problem and the legislation has now been amended, as my noble and learned friends have explained. So the issue to which these appeals are directed is not performance of the public law duty but the consequences of the breach. What remedies, if any, are available? Mr James is no longer in custody, so the remedy which he seeks is compensation for delay in his being released. Mr Lee and Mr Wells, on the other hand, are still serving their sentences. The Parole Board is not yet satisfied in their cases that it is no longer necessary for the protection of the public that they should be confined: see section 28(6)(b) of the Crime (Sentences) Act 1997. They attribute this to the Secretary of State's failure to make provision for them to be able to demonstrate to the Parole Board that this is no longer necessary. They seek a direction that they should be now released, and they also seek compensation for delay.

5. It is plain that the remedies which the appellants seek are not available to them at common law. The Secretary of State's breach of his public law duty to have a system in place which provided prisoners with a reasonable opportunity to demonstrate that they are no longer dangerous does not confer on individuals who are affected by this breach a right to damages. Mr Owen QC for Mr Lee and Mr Wells submitted that they were entitled to writs of habeas corpus. But he accepted that he was unable to challenge the legality of the warrant which authorised their continued detention. As Simon Brown LJ said in *R v Oldham Justices, Ex p Cawley* [1997] QB 1, 13, where there has been a criminal conviction the courts have firmly excluded collateral attack by habeas corpus, holding that the only proper remedy lies by

way of appeal. Sentences of imprisonment for public protection are sentences for an indefinite period, subject to the provisions of Chapter II of Part II of the Crime (Sentences) Act 1997 as to the release of prisoners and duration of licences: Criminal Justice Act 2003, section 225(4). There is no entitlement to release until release has been directed by the Parole Board, and a direction to that effect cannot be given until the Board is satisfied that detention is no longer necessary for the protection of the public. Mandatory orders may be obtained to ensure that the system works properly. But it is not open to the courts to set that system aside by directing release contrary to the provisions of the statute.

6. For this reason I cannot agree with Laws LJ's finding in the Divisional Court that, to the extent that the prisoner remains incarcerated after tariff expiry without any current and effective assessment of the danger that he does or does not pose to the public, detention is unlawful: [2008] 1 All ER 138, 154f-g. In terms of the statute, his detention is lawful until the Parole Board gives a direction for his release. The default position, as Mr Pushpinder Saini QC put it in his helpful intervention for the Parole Board, is that until the direction is given protection of the public requires that the prisoner should be confined.

Convention rights

7. That being the position at common law, attention has been directed instead to the appellants' Convention rights. Access to those rights is afforded in domestic law by the Human Rights Act 1998, so it is through the perspective of its provisions that this part of the argument must be addressed. Section 3(1) provides that, so far as it is possible to do so, the legislation must be read and given effect in a way which is compatible with the Convention rights, and section 4(2) provides that if the court is satisfied that a provision is incompatible with a Convention right it may make a declaration of that incompatibility. The appellants have not asked your Lordships to read or give effect to section 225(4) of the 2003 Act and section 28(6) of the 1997 Act in a way that differs from the ordinary meaning of those provisions. Nor in their written cases did they seek a declaration of incompatibility. In the course of his oral argument Mr Owen suggested that a declaration of incompatibility might be appropriate, but he accepted that the problem which had arisen in his clients' cases was due to a failure of administration. He was unable to say that the incompatibility of which he complained was

inherent in the legislation itself. That being so, I cannot see that there is any basis in this case for a declaration of incompatibility.

8. The question then is whether the appellants are able to show that the Secretary of State has acted in a way which was incompatible with their Convention rights. If he has, his act is made unlawful by section 6(1) of the Human Rights Act 1998. This in turn opens up the possibility of obtaining a judicial remedy under section 8, which enables the court to award damages. But regard must also be had to section 6(2)(a) of the 1998 Act, which provides that section 6(1) does not apply to an act if, as a result of one or more provisions of primary legislation, the public authority could not have acted differently. The effect of that provision is to narrow the scope for argument as to the respects in which the Secretary of State's conduct was unlawful within the meaning of section 6(1).

9. Section 28(7) of the 1997 Act provides that a prisoner to whom that section applies may require the Secretary of State to refer his case to the Parole Board at any time after he has served the minimum term ordered by the sentencing judge. It has not been suggested by the appellants that the Secretary of State was in breach of that duty in their cases. The effect of section 28(5), which provides that it is the duty of the Secretary of State to release the prisoner on licence when directed to do so by the Parole Board, is that he has no power to release the prisoner until the Parole Board gives him that direction. Notwithstanding the criticisms that may be made of the Secretary of State's failure to provide the means by which the appellants could demonstrate to the Parole Board that their continued detention was no longer necessary, the terms of the legislation are such that it cannot be said that he was acting unlawfully in not releasing them until directed to do so by the Parole Board. The court, for its part, would not be acting unlawfully if it too declined to order their release until the Parole Board was satisfied that it was no longer necessary for the protection of the public that they should be confined. Section 6(2)(a) of the 1998 Act leads inevitably to these conclusions.

10. On the other hand the Secretary of State cannot claim the protection of the statutes for his failure to provide the administrative support that was needed for the system that the statutes laid down to operate as it should. It is to that area of his responsibilities and its effect on the performance of its function by the Parole Board that the argument that he acted in a way that was incompatible with the appellant's Convention rights must be directed.

Article 5(1)(a)

11. It is not, and cannot be, suggested that the appellants' detention during the tariff period was incompatible with their right under article 5(1) of the Convention not to be deprived of their liberty. Their detention was in consequence of an order made lawfully after conviction by a competent court in accordance with a procedure prescribed by law: see article 5(1)(a). So the requirement of "lawfulness" in the sense of conformity with domestic law was fully satisfied. More generally, the Strasbourg court has said repeatedly that the purpose of article 5 is to protect the individual from arbitrariness: eg *Ashingdane v United Kingdom* (1985) 7 EHRR 528, para 44; *Stafford v United Kingdom* (2002) 35 EHHR 1121, para 63; *A and others v United Kingdom*, Application No 3455/05 (unreported), 19 February 2009, para 162. The court's assessment of the minimum term that the prisoner must serve before he is considered for release provides that protection.

12. The situation changes as soon as the prisoner has served the minimum term, which is the measure of his punishment. As the Strasbourg court pointed out in *Weeks v United Kingdom* (1987) 10 EHRR 293, para 49, the causal link required by article 5(1)(a) might eventually be broken if a position were to be reached in which a decision not to release or to re-detain was based on grounds that were inconsistent with the objectives of the sentencing court. The objective that justifies continued detention at this stage is public protection. The sentencing judge makes no assessment of the extent to which, if at all, the prisoner will represent a danger to the public once he has served the minimum term. That matter is left entirely to the determination of the Parole Board. It is for the Board to assess whether the causal link with that objective that is required by article 5(1)(a) remains in place or has been broken because it is no longer necessary for the prisoner to be confined.

13. In *Stafford v United Kingdom* (2002) 35 EHHR 1121, para 80 the Strasbourg court said that, once the punishment element of the sentence, as reflected in the tariff, has been satisfied, the grounds for the continued detention must be considerations of risk and dangerousness. Section 28(6)(b) of the 1997 Act meets this requirement. The way that it does so is to require the Parole Board to be satisfied that it is no longer necessary for the protection of the public for the prisoner to be confined before it can direct his release under section 28(5). In *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443, para 40 the court said that a detention which was lawful at the outset would be transformed

into a deprivation of liberty that was arbitrary and hence incompatible with article 5 if the position were reached in which decisions for the prisoner's detention were based on grounds that had no connection with the objectives of the legislature. An example of such a situation is provided by *Stafford v United Kingdom* where a prisoner who had exhausted his punishment for murder and been released in licence was recalled because there was a risk that he might commit further non-violent offences. The court said in para 81 that it could find no sufficient causal connection between the possible commission of other non-violent offences and the original sentence for murder.

14. It is hard to see, however, how there could ever be an absence of the causal connection that is required by "lawfulness" in terms of article 5(1)(a) in the case of a prisoner whose case has been referred to, and is still under consideration, by the Parole Board. The indeterminate sentence which he received was passed on the ground that there was a significant risk to members of the public of serious harm occasioned by the commission by him of further offences of the kind specified in Schedule 15 to the 2003 Act. The essence of it was the need for the public to be protected against that risk. His continued detention cannot be said to be arbitrary, or in any other sense unlawful, until the Parole Board has determined that detention is no longer necessary. As soon as it makes that assessment the causal connection is, of course, broken. A direction must then be given in terms of the statute that he be released on licence. But continued detention that results from any decisions that the Parole Board may issue before that stage is reached must be attributable to the original ground for it. The causal connection will not be broken until the Parole Board, on whom the responsibility rests under the statute, has determined otherwise.

15. It is just possible to conceive of circumstances where the system which the statutes have laid down breaks down entirely, with the result that the Parole Board is unable to perform its function at all. In that situation continued detention could be said to be arbitrary because there was no way in which it could be brought to an end in the manner that the original sentence contemplated. But the failures for which the Secretary of State accepts responsibility, while highly regrettable, cannot be said to have created a breakdown of that extreme kind. The appellants' cases were referred by him to the Parole Board as the statute required. A favourable consideration of them may have been delayed, but performance of its task of monitoring their continued detention was not rendered impossible. Mr Lee and Mr Wells remain in custody because the Board was not yet satisfied that they are no longer a risk to the public. The causal link with the objectives of the sentencing court has

not been broken. I would hold that the Secretary of State's failure in his duties of administration did not violate the appellants' rights under article 5(1(a).

Article 5(4)

16. The essence of the argument that article 5(4) was breached in these cases is that it was not possible for the Parole Board to conduct an effective review without the coursework which the prisoners needed to demonstrate they were no longer a risk to the public. In Mr Lee's case the Secretary of State has already conceded that there had been a breach of his rights under article 5(4), and he does not challenge the decision by Moses LJ that there was a continuing breach of it in Mr Wells' case also: [2008] EWHC (Admin) 2326. In the case of Mr James however this remains a live issue. The Court of Appeal's assessment of the position was that article 5(4) would be breached if his hearing before the Parole Board, which was pending, proved to be an empty exercise. Mr Weatherby on his behalf submitted that the Board was not able to discharge its statutory duty under section 28 of the 1997 Act because of the Secretary of State's failure to provide it with the means of doing so. For the reasons I have just mentioned, I think that this is an overstatement. The performance of its functions by the Board may have been delayed, but it was not rendered impossible. The question remains however whether, in the events that happened, his rights under article 5(4) were violated. This in turn directs attention to the reach of that article, as it has been interpreted in Strasbourg.

17. Article 5(4) provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

This paragraph does not guarantee a right to judicial control of the legality of all aspects or details of the detention: *Ashingdane v United Kingdom* (1985) 7 EHRR 528, para 52. But detainees are entitled to a review hearing upon the procedural and substantive conditions which are essential for the lawfulness of their deprivation of liberty: *Brogan v United Kingdom* (1988) 11 EHRR 117, para 65; *A and others v United*

Kingdom, Application No 3455/05 (unreported), 19 February 2009, para 202. The Strasbourg court has held, in the case of vagrants and persons of unsound mind whose lawful detention is permitted by article 5(1)(e), that the very nature of the deprivation requires a review of lawfulness to be available once a certain period has elapsed since the detention began and thereafter at reasonable intervals: *Winterwerp v The Netherlands* (1979) 2 EHRR 387, para 50; *X v United Kingdom* (1981) 4 EHRR 188, para 52. It has applied this principle to recidivists and habitual offenders detained at the government's disposal to protect society and provide the executive with an opportunity of endeavouring to reform them: *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443, paras 45 and 48.

18. In *A and others v United Kingdom*, Application No 3455/05 (unreported), 19 February 2009, paras 202-203, the Grand Chamber set out the principles arising from its case law. It described article 5(4) as a *lex specialis* in relation to the more general requirements of article 13 as to an effective remedy. The notion of "lawfulness" has the same meaning as in article 5(1). The review which article 5(4) guarantees should be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to article 5(1). The reviewing "court" must not have merely advisory functions but must have the competence to "decide" the "lawfulness" of the detention and to order release if the detention is unlawful. The requirement of procedural fairness under article 5(4) does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. But it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question.

19. I do not detect any departure from these principles in the procedure that the statutes lay down or the role that is performed by the Parole Board. An issue as to the lawfulness of the continued detention of an IPP prisoner is raised as soon as his tariff period has expired. At that point and at reasonable intervals thereafter he becomes entitled to a review by a judicial body of its lawfulness. Lawfulness depends on there being a causal link between the objectives of the sentencing court and the prisoner's remaining in custody. Section 28(7) of the 1997 Act, as applied to a person serving an IPP by section 34(2)(d) of that Act as amended, meets that requirement. The function of the Parole Board is to determine whether it is no longer necessary for the protection of the public that the prisoner should be confined and, if it is of that opinion, to direct his release. The Parole Board has all the powers that it needs to carry out that assessment on the expiry of the tariff period and thereafter at reasonable intervals. The question is what more is demanded of this

system if the guarantee of an effective remedy in a case where continued detention has become unlawful that article 5(4) provides is to be satisfied.

20. The way the Parole Board conducts itself must meet the requirement of procedural fairness. But, as the Grand Chamber said in *A and others v United Kingdom*, para 203, this requirement does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. This suggests that it is a matter for the judgment of the Parole Board to decide what information it needs to make its assessment and on the timetable it should adopt for conducting its review. It will be difficult for a prisoner to establish that he does not pose a risk to the public if he is not provided with the courses or assessments that are normally needed to persuade the Board that his detention is no longer necessary. But this does not mean that he is denied access to the Board when his case has been referred to it. It is open to him to argue his case for release, and to have his position noted, although the contents of his dossier for the time being fall short of what is desirable. Furthermore, determination of the question when it is safe for an IPP prisoner to be released is likely, in many cases, to be a gradual process as the issue is so obviously fact sensitive. Delays are apt to occur for all sorts of reasons even in the best resourced system. Continued detention will only become unlawful when the Board decides that it is no longer necessary for the protection of the public that the prisoner should be confined. Until that stage is reached each step that the Board takes in the review process confirms the lawfulness of the detention.

21. In *R (Walker) v Secretary of State for Justice (Parole Board intervening)* [2008] 1 WLR 1977, para 67 the Court of Appeal said that, if Mr Walker were to be unable to make a meaningful challenge to the lawfulness of his sentence at the time his case was heard by the Parole Board, a review of his case would be an empty exercise that would be likely to result in a breach of article 5(4). In para 68 it made the same assessment of the position in the case of Mr James. I cannot find anything in the jurisprudence of the Strasbourg court that goes that far. Article 5(4) requires that a system must be in place for making that assessment at reasonable intervals which meets the requirement of procedural fairness. How that system works in practice in any given case is a matter for the Parole Board itself to determine. It is open to it to decide how much information it needs, to conclude that for whatever reason the information that is available for the time being is inadequate and to set its own timetable for the information that it needs to be made available. It is entitled to expect co-operation from those who are

responsible for the management of the sentence in meeting its requirements. But a failure to meet them does not of itself mean that there will be a breach of article 5(4). As in the case of article 5(1)(a), it will only be if the system which the statutes have laid down breaks down entirely because the Parole Board is denied the information that it needs for such a long period that continued detention has become arbitrary that the guarantee that article 5(4) provides will be violated and the prisoner will be entitled to a remedy in damages.

LORD CARSWELL

My Lords,

22. I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Hope Craighead, Lord Brown of Eaton-under-Heywood and Lord Judge. For the reasons which they have given I too would dismiss these appeals and make the order proposed by Lord Brown.

23. I would only add that this case provides yet another example of the problems caused by over-prescriptive sentencing legislation. The draconian provisions of section 225 of the Criminal Justice Act 2003, leaving no room for the exercise of any judicial discretion, created entirely foreseeable difficulties when sentences for imprisonment for public protection were passed with short tariff terms. Pelion was piled upon Ossa when for some unfathomable reason it was decided that the new scheme would be resource-neutral and so sufficient facilities necessary for IPP prisoners to demonstrate their fitness for release were not made available. Fortunately section 13 of the Criminal Justice and Immigration Act 2008 has improved the situation materially, but it is to be hoped that future sentencing legislation will be framed in such a way as to avoid the pitfalls into which these misguided provisions fell.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

24. Indeterminate sentences for public protection ("IPPs") were introduced with effect from 4 April 2005 by section 225 of the Criminal Justice Act 2003. Essentially they were a new form of mandatory life sentence to be imposed upon conviction of any one of 153 specified categories of violent or sexual offences punishable by imprisonment for ten years or more if the court thought there to be a significant risk of serious harm to members of the public by the commission of further specified offences. Rapidly IPPs swamped the prison system with increasing numbers of life sentence prisoners (up from 5,807 on 31 March 2005 to 10,911 on 31 March 2008), many with comparatively short tariffs, all of which took the Ministry of Justice's National Offender Management Service (NOMS) by surprise. In the result, for much if not all of the time until 14 July 2008 when section 225 came to be amended by section 13 of the Criminal Justice and Immigration Act 2008, NOMS were quite unable to give effect to the Secretary of State's published policy in Prison Service Order 4700: to give all life sentence prisoners "every opportunity to demonstrate their safety for release at tariff expiry."

25. Section 28(5) of the Crime (Sentences) Act 1997 provides that as soon as a life prisoner has served the tariff period of his sentence and the Parole Board has directed his release "it shall be the duty of the Secretary of State to release him on licence". Section 28(6) provides:

> "The Parole Board shall not give a direction under subsection (5) above . . . unless—
>
> (a) the Secretary of State has referred the prisoner's case to the Board; and
>
> (b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."

For convenience I shall refer to condition (b) as "safety for release" or "safe to release". Section 28(7) provides that a life prisoner may require the Secretary of State to refer his case to the Parole Board at any time

after tariff expiry and "(b) where there has been a previous reference of his case to the Board, after the end of the period of two years beginning with the disposal of that reference".

26. Put shortly, there were neither the systems nor resources available, particularly with regard to short tariff IPP prisoners, to undertake the required assessments and prepare sentence plans so as to identify the relevant risk factors and how to address them, to provide the necessary courses, to move prisoners from local prisons to training prisons where appropriate courses could be undertaken, and generally to enable prisoners to demonstrate their safety for release, let alone treat and correct their offending behaviour. The undoubted consequence was that a number of short tariff IPP prisoners, once their tariff dates expired, even assuming they were then safe to release, would have been unable to demonstrate this to the Board (which sometimes is only possible through their undertaking coursework), and that a further number remained unsafe to release because they had not had the opportunity to undergo courses designed to eliminate or at least reduce the risk they posed.

27. The appellants are three such prisoners. Mr Lee and Mr Wells (whose tariffs respectively were of nine months expiring on 12 February 2006, and twelve months expiring on 17 September 2006) remain detained albeit now in training prisons and undergoing or able to undergo the necessary courses. Mr James's tariff of two years expired on 20 July 2007 and on the Parole Board's direction he was released on 14 March 2008. Since, however, their individual circumstances are not central to the disposal of these appeals I have thought it convenient to summarise them by way of an appendix to this judgment.

28. Before identifying the issues for your Lordships' determination it is convenient next to note the Secretary of State's acknowledgment that it was implicit in the statutory scheme that he would make reasonable provision to enable IPP prisoners to demonstrate to the Parole Board (if necessary by completing treatment courses) their safety for release, and his concession that during the systemic failure to make such provision he was accordingly in breach of his public law duty.

29. The issues before the House are:

> (i) Was (is) the post-tariff detention of all or any of the appellants unlawful at common law?
> (ii) Was (is) the post-tariff detention of all or any of the appellants in breach of article 5(1) of the European Convention on Human Rights (the Convention)?
> (iii) In the case of all or any of the appellants, has there been delay in determining their safety for release such as to breach article 5(4) of the Convention?
> (iv) If any of these issues are resolved in favour of the appellants, what (if any) relief should the Court grant?

It will readily be appreciated that your Lordships' decision on these issues will affect not just these three appellants but hundreds, perhaps thousands, of other IPP prisoners, past and present.

30. It is, I think, helpful at this point to indicate the course of proceedings in these various cases thus far. There have been four relevant decisions.

> (i) *R (Wells) v Parole Board* [2008] 1 AER 138—the decision of the Divisional Court (Laws LJ and Mitting J) on 31 July 2007 on the hearing of conjoined judicial review applications respectively by Mr Wells against the Parole Board and a Mr Walker against the Secretary of State. Mr Wells at the hearing decided not to pursue his application but rather to await the outcome of Mr Walker's case and if appropriate make a fresh application. On Mr Walker's application the court declared that the Secretary of State had acted unlawfully by failing to provide for measures to allow and encourage prisoners serving IPPs to demonstrate to the Parole Board by the expiry of their minimum terms that it was no longer necessary for the protection of the public for them to be confined, and that as soon as a prisoner's minimum term expired his detention was unlawful unless its continuation was justified by a current and effective assessment of the danger he posed (Mr Walker at the time was still within the tariff period of his sentence). I shall refer to this as Law's LJ's decision since he gave the only reasoned judgment.

(ii) *James v Secretary of State for Justice* [2007] EWHC 2027 (Admin)—Collins J's decision of 20 August 2007, a month after Mr James's tariff expired. Applying Laws LJ's decision, Collins J ordered Mr James's immediate release subject to a stay pending the determination of the Secretary of State's appeals in both cases.

(iii) *R (Walker) v Secretary of State for Justice* [2008] 1 WLR 1977—the decision of the Court of Appeal (Lord Phillips of Worth Matravers CJ, Dyson and Toulson LJJ) on 1 February 2008 on the hearing of the Secretary of State's appeals (the Parole Board intervening) respectively from Laws LJ's decision in Mr Walker's case and Collins J's decision in Mr James's case. Essentially the Court of Appeal upheld Laws LJ's declaration as to the Secretary of State having acted unlawfully but held that the Court had erred in holding that this breach of duty under public law rendered the imprisonment of IPP prisoners unlawful once they had served their tariff periods. The Court of Appeal accordingly set aside the order for Mr James's release. Mr James (but not Mr Walker) now appeals to your Lordships by leave granted on 24 November 2008.

(iv) *Lee and Wells v Secretary of State for Justice* [2008] EWHC 2326 (Admin)—Moses LJ's decision, sitting as a single judge of the Administrative Court, on 25 July 2008, dismissing Mr Lee's and Mr Wells's claims under article 5(1), noting the Secretary of State's concession that there had been a breach of Mr Lee's rights under article 5(4), and holding there to be a continuing breach of Mr Wells's article 5(4) rights. Mr Lee had claimed judicial review on 27 February 2008; Mr Wells (as foreshadowed in the Divisional Court in *Walker*) had issued a fresh claim on 4 June 2008. Mr Lee and Mr Wells now appeal to the House by leave granted on 15 January 2009 following a leapfrog certificate granted by Moses LJ with the consent of the parties pursuant to section 12 of the Administration of Justice Act 1969.

Issue (1): The position at common law

31. Given the Secretary of State's admitted breach of his public law duty to give IPP prisoners every opportunity to demonstrate their safety

for release at tariff expiry, was (is) their post-tariff detention unlawful at common law?

32. Laws LJ so held in *Walker*. The most directly relevant passages of his judgment are these:

> "47. . . .when sentence is passed it is not to be presumed against the prisoner that he will *still* be dangerous after his tariff expires, let alone months or years later. He may or may not be. Whether he is or not, *and therefore whether his continuing incarceration is justified or not*, can only be determined by reference to up-to-date (at the very least reasonably up-to-date) information enabling the decision-maker, the Parole Board, to form a view of the question of risk in his case. To the extent that the prisoner remains incarcerated after tariff expiry without any current and effective assessment of the danger he does or does not pose, his detention cannot in reason be justified. It is therefore unlawful.
>
> 48. . . . The Crown has obtained from Parliament legislation to allow—rather, require: the Court has no discretion—the indefinite detention of prisoners beyond the date when the imperatives of retributive punishment are satisfied. But this further detention is not arbitrary. It is imposed to protect the public. As soon as it is shown to be unnecessary for that purpose, the prisoner must be released . . . Accordingly there must be material at hand to show whether the prisoner's further detention is necessary or not. Without current and periodic means of assessing the prisoner's risk the regime cannot work as Parliament intended, and the only possible justification for the prisoner's further detention is altogether absent. In that case the detention is arbitrary and unreasonable on first principles, and therefore unlawful.
>
> 49. Such a consequence would not be averted merely by prompt and regular sittings of the Parole Board. The law has already insisted on those: Noorkoiv's case. . . .Periodic reviews by the Parole Board . . . only have value to the extent that they are informed by up-to-date information as to the prisoner's progress. So much is at least required. But so also are measures to allow and encourage the

> prisoner to progress, for without them the process of review is a meaningless one. . . . Reducing the risk posed by lifers must be inherent in the legislation's purpose, since otherwise the statutes would be indifferent to the imperative that treats imprisonment strictly and always as a last resort. Whether or not the prisoner ceases to present a danger cannot be a neutral consideration, in statute or policy. If it were, we would forego any claim to a rational and humane (and efficient) prison regime. Thus the existence of measures to allow and encourage the IPP prisoner to progress is as inherent in the justification for his continued detention as are the Parole Board reviews themselves; and without them that detention falls to be condemned as unlawful as surely as if there were no such reviews."

33. Paragraph 49 appears to go even further than paragraphs 47 and 48 and to hold that continuing post-tariff detention is unlawful not merely when up-to-date material is not available to enable the Parole Board to form a view on risk, but also when risk-reducing courses or treatment have not been made available to the prisoner. But put that aside.

34. Before the Court of Appeal Mr Weatherby sought to uphold these findings; Mr Owen QC expressly did not. Mr Weatherby continues to submit that Laws LJ was right to hold detention in the circumstances postulated to be unlawful at common law. In my judgment, however, the argument is unsustainable. As the Court of Appeal pointed out at paragraph 47, section 225(4) expressly makes IPP prisoners subject to the release provisions in section 28 of the 1997 Act and:

> "Central to this is the requirement that the Parole Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. It is not possible to describe a prisoner who remains detained in accordance with these provisions as 'unlawfully detained' under common law. The common law must give way to the express requirements of the statute."

35. Were the post-tariff prisoners in question to be regarded as unlawfully detained, inevitably they would have to be released. But this would breach the 1997 Act. As Mr Weatherby acknowledges, it would

also carry the consequence that, even were an IPP prisoner found by the Parole Board on a delayed consideration of his case to be plainly dangerous, the Court on a subsequent challenge would be obliged to order his release since his detention would have been unlawful during the earlier period when, through the Secretary of State's systemic failures, there was no "current and effective assessment of the danger" he posed.

36. It is one thing to say—as, indeed, is now undisputed—that the Secretary of State was in breach (even systemic breach) of his public law duty to provide such courses as would enable IPP prisoners to demonstrate their safety for release and, to some extent at least, courses enabling them to reduce the risk they pose, duties inherent in the legislation (the legislation's "underlying premise" as Laws LJ described it); quite another to say that such breach of duty results in detention being unlawful. I respectfully agree with the Court of Appeal that it does not.

37. The remedy for such breach of public law duty—indeed the only remedy, inadequate though in certain respects it may be—is declaratory relief condemning the Secretary of State's failures and indicating that he is obliged to do more. *Mandamus* could not, I think, be ordered: it would be impossible to articulate the nature and extent of the obligation with sufficient precision. Once the systemic failure is ended (as certainly it is by now), no further relief is appropriate. Past failures do not sound in damages at common law. It is accordingly unnecessary to decide just when the systemic failure was brought to an end.

Issue 2: Article 5(1)

38. During the period of systemic failure, was post-tariff detention in breach of article 5(1)? Article 5(1) provides:

> "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 . . ."

For detention to be justified under article 5(1)(a) there must be "sufficient causal connection between the conviction and the deprivation of liberty" (*Weeks v United Kingdom* (1987) 10 EHRR 293, para 42).

39. *Weeks* itself concerned the recall to prison of a life sentence prisoner (sentenced aged 17 for armed robbery) for "a series of incidents involving minor violence" whilst on licence. The Court said at para 49:

> "Applying the principles stated in the *Van Droogenbroeck* judgment, the formal legal connection between Mr Weeks's conviction in 1966 and his recall to prison some ten years later is not on its own sufficient to justify the contested detention under article 5(1)(a). The causal link required by subparagraph (a) might eventually be broken if a position were reached in which a decision not to release or to re-detain was based on grounds that were inconsistent with the objectives of the sentencing court. 'In those circumstances, a detention that was lawful at the outset would be transformed into a deprivation of liberty that was arbitrary and, hence, incompatible with article 5' [a quotation from *Van Droogenbroeck*, to which I shall return]."

The Court there rejected the argument that the causal link was broken. Accepting that there were grounds for believing "the applicant's continued liberty would constitute a danger to the public and to himself" (para 51), it observed (para 50):

> "As a matter of English law, it was inherent in Mr Weeks's life sentence that, whether he was inside or outside prison, his liberty was at the discretion of the executive for the rest of his life (subject to the controls subsequently introduced by the 1967 Act, notably the Parole Board). This the sentencing judges must be taken to have known and intended. It is not for the Court, within the context of article 5, to review the appropriateness of the original sentence . . . "

40. Before turning to *Van Droogenbroeck*, it is instructive first to contrast *Weeks* with the later decision in *Stafford v United Kingdom* (2002) 35 EHRR 32, another case concerning a life sentence prisoner recalled from licence, this time a murderer recalled for fraud. In *Stafford* the Court found the link broken, stating (para 81):

> "The Court finds no sufficient causal connection, as required by the notion of lawfulness in article 5(1)(a) of the Convention, between the possible commission of other non-violent offences and the original sentence for murder in 1967."

41. *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443 concerned a recidivist, sentenced to two years imprisonment for theft and subjected to a further order that he be "placed at the Government's disposal" for ten years pursuant to a 1964 "Social Protection" Act. The Court there rejected the article 5(1) complaint but, importantly in the present context, said this (para 40):

> "In fact, sight must not be lost of what the title and general structure of the 1964 Act, the drafting history and Belgian case law show to be the objectives of the statute, that is to say not only 'to protect society against the danger presented by recidivists and habitual offenders' but also 'to provide [the Government] with the possibility of endeavouring to reform [them]'. Attempting to achieve these objectives requires that account be taken of circumstances that, by their nature, differ from case to case and are susceptible of modification. At the time of its decision, the court can, in the nature of things, do no more than estimate how the individual will develop in the future. The Minister of Justice, for his part, is able, through and with the assistance of his officials, to monitor that development more closely and at frequent intervals but this very fact means that with the passage of time the link between his decisions not to release or to re-detain and the initial judgment gradually becomes less strong. The link might eventually be broken if a position were reached in which those decisions were based on grounds that had no connection with the objectives of the legislature and the court or on an assessment that was unreasonable in terms of those objectives. In those

> circumstances, a detention that was lawful at the outset would be transformed into a deprivation of liberty that was arbitrary and, hence, incompatible with article 5."

42. Plainly the objectives of an IPP include the prisoner serving the tariff period of his sentence. No one disputes that. Almost equally plainly, they include the continued detention of the prisoner until he can be safely released. Do they, however, as the appellants contend, also include the prisoner's reform and rehabilitation, more particularly the provision of risk-reducing courses or treatment? And, if so, did the Secretary of State's systemic failure to provide these mean that the causal link between the sentence and the prisoner's continuing detention became broken? Alternatively, is the link broken by a prolonged failure to enable the prisoner to demonstrate whether or not he is safe to release?

43. Two earlier Court of Appeal authorities must be noted before consideration of the decisions now under appeal: *R (Noorkoiv) v Secretary of State for the Home Department)* [2002] 1 WLR 3284 and *R (Cawser) v Secretary of State for the Home Department* [2004] UKHRR 101, both concerning automatic life sentence prisoners. *Noorkoiv* established that the Secretary of State's routine delay at the time in referring cases to the Parole Board under section 28(7) of the 1997 Act breached article 5(4) but not article 5(1). Lord Woolf CJ said (para 61):

> "Article 5(1) is not relevant because the justification for the detention of a prisoner sentenced to life imprisonment (whether discretionary or automatic or mandatory) is that sentence and not the fixing of the tariff period."

At paragraph 54, having acknowledged that paragraph 49 of *Weeks* contemplates that the required causal link might "eventually" be broken, I suggested that "that would be so only in very exceptional cases. Mere delay in article 5(4) proceedings, even *after* the tariff expiry date, would not in my judgment break the causal link."

44. *Cawser* established that, whilst it would be irrational to have a policy of making release dependent upon a prisoner undergoing a treatment course without making reasonable provision for such courses, it would be solely this public law duty to act rationally to which the

Secretary of State is subject; detention in these cases would not become unlawful under article 5(1) even were no provision made for such courses. Cawser had had to wait 21 months before (two years after his tariff expiry date) a place became available to him on an extended sex offender treatment programme. This had inevitably delayed his likely release date. At para 32 of my judgment, after referring to *Noorkoiv*, I continued:

> "If the Parole Board's delay in deciding on the prisoner's continuing dangerousness does not break the causal link, still less in my judgment would it be broken by a delay in providing (or a failure to provide) treatment which itself may or may not thereafter serve to establish the absence of continuing dangerousness."

Laws LJ (para 44) contemplated "the residual possibility that the Secretary of State might impose a condition on the release of a post-tariff prisoner so hard of fulfilment that his continued detention, for the failure to meet the condition, ought no longer to be regarded as justified by the original sentence of the criminal court." Arden LJ, having referred in particular to *Van Droogenbroeck*, concluded (para 54):

> "provisionally it seems to me that if due to a lack of resources the Secretary of State cannot provide a place on a treatment course for someone in the applicant's position for an inordinately long period, it may be argued that the reason for the prisoner's continued detention was not the original conviction or the objectives of the sentence but rather the refusal of the Secretary of State to allocate adequate resources."

I shall have to return later to *Noorkoiv* and *Cawser* in relation to the article 5(4) argument.

45. Turning then to Laws LJ's decision (in *Walker*), he observed (para 36) that:

> "Cawser's case closes off the possibility of argument in this court that the continued detention of a lifer past his tariff expiry date, incurred by reason of a failure to provide offending behaviour courses, might be held to breach article 5(1) of the Convention. But the case was a trailer for another argument, that such a state of affairs might in some circumstances amount to a violation of the rule of reason, the requirement of rationality in public decisions which the common law imposes."

I have already dealt with the remaining part of his judgment concerning the position at common law.

46. The Court of Appeal's judgment below included the following passages:

> "61. …So long as the prisoner remains dangerous, his detention will be justified under article 5(1)(a) whether or not it is subject to timely periodic review that satisfies the requirements of article 5(4). If, however, a very lengthy period elapses without such a review a stage may be reached at which it is right to conclude that the detention has become arbitrary and no longer capable of justification under article 5(1)(a).
>
> 69. The primary object of the IPP sentence is to protect the public, not to rehabilitate the offender. Detention of [the claimants] will cease to be justified under article 5(1)(a) when the stage is reached that it is no longer necessary for the protection of the public that they should be confined or if so long elapses without a meaningful review of this question that their detention becomes disproportionate or arbitrary. That stage has not yet been reached. Failure to comply with the obligations of article 5(4) will not, of itself, result in infringement of article 5(1)(a). Nor will delay in the provision of rehabilitative treatment necessary to obviate the risk that they would pose to the public if released.
>
> 72. This appeal has demonstrated an unhappy state of affairs. There has been a systemic failure on the part of the Secretary of State to put in place the resources

> necessary to implement the scheme of rehabilitation necessary to enable the relevant provisions of the 2003 Act to function as intended. So far as the two claimants [Walker and James] are concerned the appropriate remedy is limited to declaratory relief. For the reasons that we have given, however, the prevailing situation is likely to result in infringement of article 5(4) and may ultimately also result in infringement of article 5(1)."

47. In his extempore judgment in *Lee* and *Wells's* case, Moses LJ (at para 23) drew

> "a distinction between those cases where it cannot be ascertained whether the prisoner is a danger or not and those cases where he can be judged to remain a danger, notwithstanding the failures to provide him with the opportunity to reduce or to eliminate the level of danger and of showing that he has done so".

He had observed (at para 22):

> "The position of a prisoner whose level of dangerousness cannot be ascertained is the same as one who ceases to be a danger. The original justification for the sentence, namely his dangerousness, has ceased to exist."

In those circumstances, he said, there would be a breach of article 5(1). In the event he decided that neither Mr Lee nor Mr Wells could establish an article 5(1) breach since in each case he thought the evidence available to the Parole Board sufficient to enable them to reach a conclusion on dangerousness.

48. In determining the objectives of an IPP it is important to have in mind the provisions of section 142 of the 2003 Act. Section 142(1)(c) requires that amongst the purposes of sentencing to which ordinarily the Court must have regard are "the reform and rehabilitation of offenders". Until, however, the IPP scheme came to be amended with effect from 14 July 2008, this provision was specifically disapplied to IPP sentences by section 142(2)(c). It appears that this may have been overlooked in the

course of the judgments below. Clearly the Court of Appeal was correct (at para 69 quoted at para 46 above) to say that the primary object of IPPs is to protect the public, not to rehabilitate the offender. But other passages in the judgment suggest that they regarded rehabilitation at least as *an* objective of the sentence and seemingly Laws LJ so regarded it—see, for example, his para 49 quoted at para 32 above. It was not.

49. My noble and learned friend, Lord Judge, the Lord Chief Justice, has explained in his opinion the detailed history of this legislation and I do not propose to repeat it. Amongst the objects of the Belgian statute considered in *Van Droogenbroeck* (para 40 quoted at para 41 above) was "to provide [the Government] with the possibility of endeavouring to reform [recidivists]". The IPP legislation to my mind goes no further than this: the Government has the opportunity to introduce treatment courses but "the provision of rehabilitative treatment necessary to obviate the risk" (para 69 of the Court of Appeal's judgment quoted at para 46 above) is not amongst the specific legislative objectives. Suffice it to say that in my judgment a decision not to release an IPP prisoner because the Parole Board remain unsatisfied of his safety for release could never be said to be inconsistent with the "objectives of the sentencing court" (*Weeks* para 49) or to have "no connection with the objectives of the legislature and the court" (*Van Droogenbroeck* para 40).

50. Whilst it is correct to say (as Laws LJ said at para 47 of *Walker*) that "it is not to be presumed against the prisoner that he will still be dangerous after his tariff expires", and whilst the Parole Board's task is essentially one of evaluating all the evidence rather than deciding whether the prisoner has discharged a burden of proving his safety for release, the default position under section 28(6)—in contrast to the position under the Criminal Justice Act 1991 in the case of extended sentences: *R (Sim) v Parole Board* [2004] QB 1288—is that the prisoner is to remain detained unless the Board are satisfied he can be safely released. I simply cannot accept what Moses LJ said at paragraph 22 of his judgment in *Lee* and *Wells* (see para 47 above). Rather I am in full agreement with what Lord Judge says in paragraph 103 of his opinion: detention beyond the tariff period is justified because the sentencing court decided that the prisoner would continue to be dangerous at the expiry of the punitive element of the sentence; the necessary predictive judgment will have been made.

51. In my opinion, the only possible basis upon which article 5(1) could ever be breached in these cases is that contemplated by the Court

of Appeal at paras 61 and 69 of their judgment (quoted at para 46 above), namely after "a very lengthy period" without an effective review of the case. The possibility of an article 5(1) breach on this basis is not, I think, inconsistent with anything I said either in *Noorkoiv* or in *Cawser*. *Cawser*, it is important to appreciate, was a case all about treating the prisoner to reduce his dangerousness, rather than merely enabling him to demonstrate his safety for release. To my mind, however, before the causal link could be adjudged broken, the Parole Board would have to have been unable to form any view of dangerousness for a period of years rather than months. It should not, after all, be forgotten that the Act itself provides for two-year intervals between references to the Parole Board. Whatever view one takes of the position under article 5(4) (to which I turn next), in my judgment there can be no question of a breach of article 5(1) in the case of any of these appellants.

Issue 3: Article 5(4)

52. Has article 5(4) been breached in the case of all or any of these appellants? Article 5(4) provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

As noted at para 30(iv) above, the Secretary of State conceded a breach of Mr Lee's article 5(4) rights and Moses LJ found a continuing breach in Mr Wells's case too—a finding which has not been appealed. In Mr James's case the Court of Appeal (paras 67 and 68) held that there was likely to be a breach of article 5(4) on the basis that when he came to have his first post-tariff review (which had been adjourned pending the outcome of the Secretary of State's appeal from Collins J's order for his immediate release), he would not have done the necessary courses to be "in a position to show any reduction of risk" and so "would not be able to make a meaningful challenge to the lawfulness of his sentence". The Parole Board's review would, therefore, be "an empty exercise".

53. Although Miss Lieven QC contends that there never was in fact an article 5(4) breach in Mr James's case prior to his release on 14

March 2008, I understand the Secretary of State to continue to concede that article 5(4) will be breached when, but only when, it has been impossible for the Board to undertake any meaningful review of risk. Generally, Miss Lieven submits, there will be sufficient material before the Board to enable an effective review to be carried out without the prisoner having undergone any courses at all. In this connection she draws attention to rule 6 of the Parole Board Rules 2004 which requires the Secretary of State to provide the Board and the prisoner before the review with certain specified information and reports including (under Part B of Schedule 1 to the Rules) "pre-trial and pre-sentence reports examined by the sentencing court on the circumstances of the offence", "an up-to-date home circumstances report", and, perhaps most relevantly for present purposes, "current reports on the prisoner's risk factors, reduction in risk and performance and behaviour in prison, including views on suitability for release on licence as well as compliance with any sentence plan". The Parole Board dossier will always contain a good deal of information. Even when, as in Mr James's own case, it never became possible to provide the Board with a full risk assessment (that, said a prison report of 2 April 2007, would only be done at the sentence planning stage at the first stage lifer centre when it was likely that Mr James would need to undertake CALM and PASRO courses to ensure risk reduction), the Parole Board was in fact able to determine risk and order his release largely through the evidence of an independent psychologist commissioned by Mr James himself, funded under his legal aid certificate. The Court of Appeal's forecast was thus belied.

54. Plainly, however, there will be (or at least will have been) occasions when, unless the prisoner could undertake a course necessary to demonstrate his safety for release, it would be impossible for the Board to reach any judgment as to his dangerousness so that the review would in that sense be an empty exercise and the default position of continued detention would inevitably result. In such cases I understand the Secretary of State still to concede that article 5(4) is breached.

55. In paragraph 66 of its judgment below the Court of Appeal drew a distinction between "the role of treatment in changing the prisoner so that he ceases to be dangerous and the opportunity that treatment provides for assessing whether the prisoner is dangerous". Sometimes in argument these were characterised respectively as "the substantive role of treatment" and "the evidential role of treatment". I do not pretend to find this distinction altogether easy, particularly with regard to certain courses, and I note that Mr Owen's printed case describes the "not knowing/not treating" distinction as "unworkable in practice." But

put this aside: much of the argument rests on it. The Secretary of State's concession extends only to the evidential role of treatment. In other words, for a review to be meaningful, the prisoner must have been given a fair chance of demonstrating that he had ceased to be dangerous; he need not, however, have been given the chance of actually ceasing to be dangerous. Lack of resources may provide a complete answer to any complained-of lack of courses to reduce dangerousness (subject to a public law irrationality challenge in respect of systemic failures)—see *Cawser*. But it provides no answer to the complained-of lack of courses necessary to demonstrate the prisoner's existing safety for release—see *Noorkoiv*. That certainly is the argument advanced by the appellants.

56. The Parole Board, however, intervening in these appeals as an Interested Party, submits that the Secretary of State's concession, qualified though it is, still goes too far and that article 5(4) has not in fact been breached in any of these cases. Mr Pushpinder Saini QC submits on the Board's behalf that, provided only the prisoner can have a review of his case at tariff expiry, as *Noorkoiv* requires, and that the dossier required by rule 6 of the Parole Board Rules is made available to the Board, article 5(4) is satisfied. Even if the material before the Board leaves it unable to form any clear view of the prisoner's continuing dangerousness, it will be able to decide the lawfulness of his continued detention. Necessarily the decision will be that detention continues to be lawful because the Board cannot be satisfied that the prisoner is safe to release. But article 5(4) will not have been breached. Article 5(4), submits the Board, is concerned with procedure, not substance.

57. In support of his argument Mr Saini relies strongly upon *Cawser* where not only did Mr Owen concede that his article 5(4) challenge there was "hopeless" but the Court explained at length why that was so. My own judgment referred both to domestic authority and to the Strasbourg Court's decision in *Ashingdane v United Kingdom* (1985) 7 EHRR 528, about a detained mental patient, as establishing that article 5(4) is simply not concerned with suitable treatment or conditions. There can, for example, be no article 5(4) challenge to the Secretary of State's refusal to accept a Parole Board's recommendation to transfer a prisoner to open conditions with a view to improving his prospects of release—see *R v Secretary of State for the Home Department ex parte Gunn* [2000] Prison Law Reports 62 and *R (Burgess) v Secretary of State for the Home Department* [2000] Prison Law Reports 257. The court below, submits Mr Saini, erred in holding (at para 65) that *Cawser* affords no assistance on the article 5(4) issue arising here.

58. To my mind, however, *Cawser* cannot bear the full weight Mr Saini seeks to put upon it. It is not to be regarded as having decided the very point arising here. *Cawser*, as I have already said (para 51 above), was concerned essentially with the substantive role of treatment rather than its evidential role. The article 5(4) complaint here is not that the Secretary of State has failed to make IPP prisoners less dangerous but rather that he has failed to enable them to demonstrate to the Parole Board that they are already safe to release. Does article 5(4) require not only that the Board is available to decide whether the prisoner has satisfied it that he can safely be released but also that the Secretary of State has enabled him to establish this—in the words of the court below (para 65), has enabled him to make "a meaningful challenge to the lawfulness of his detention". That is the critical issue for your Lordships and for my part I confess to having found it a difficult one to decide.

59. The appellants' argument is a strong one. What is the point of having a Parole Board review of the prisoner's dangerousness once his tariff period expires unless the Board is going to be in a position then to assess his safety for release? In some cases at least, it is accepted, that will not be so: the Board will be unable to reach a judgment on dangerousness. The review is then "an empty exercise" and article 5(4) must be regarded as breached: the right to take "proceedings" will have been rendered worthless; the Board will not have decided the "lawfulness" of the continuing detention since that depends entirely upon whether the prisoner continues to be dangerous and ex-hypothesi that is something the Board will have been unable to judge.

60. In the end, however, I have come to the contrary view. I have concluded that article 5(4) requires no more than that "a court" (the Parole Board) shall speedily decide whether the prisoner continues to be lawfully detained, and this will indeed be the case unless and until the Board is satisfied of his safety for release (or so long has elapsed without any effective review of his dangerousness that the article 5(1) causal link must be presumed broken as discussed above). I accept that article 5(4) requires the basic rule 6 dossier to be made available: without this the Board simply cannot function. But I cannot accept that article 5(4) requires anything more in the way of enabling the Board to form its judgment. Not infrequently, your Lordships were told, the Board and the Secretary of State find themselves disagreeing as to just what, if any, further material is necessary to enable the Board to decide the question of dangerousness. The Board want the prisoner to undergo another course to ensure that this, that or the other aspect of his offending has been satisfactorily addressed. The Secretary of State thinks this unnecessary and suggests that the Board is well able to

decide the question on the material available. Sometimes the prisoner himself wants the review postponed on the basis that soon he will be better able to demonstrate his safety for release whereas were he now to fail he might have to wait two years for the next review. Regularly, your Lordships were told, the Board is threatened with an article 5(4) challenge unless it requires from the Secretary of State some further report or information designed to improve the prisoner's prospects of release.

61. I have reached the conclusion that article 5(4) simply has no part to play in all this. As Mr Saini submits, it is concerned with procedure, not substance. Certainly, as the Court said in *Brogan v United Kingdom* (1988) 11 EHRR 117 (a case concerning the detention of terrorist suspects in Northern Ireland):

> "By virtue of paragraph (4) of article 5, arrested or detained persons are entitled to a review hearing upon the procedural and substantive conditions which are essential for the 'lawfulness', in the sense of the Convention, of their deprivation of liberty. This means that, in the instant case, the applicants should have had available to them a remedy allowing the competent court to examine not only compliance with the procedural requirements set out in section 12 of the 1984 [Prevention of Terrorism] Act but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention."

In the same way, however, as the remedy of *habeas corpus* was found to satisfy that entitlement in *Brogan*, so too in my opinion the Parole Board review scheme satisfies it here. Clearly the Board is able to examine the substantive question of the prisoner's dangerousness. The fact that on the material before the Board the prisoner may be unable to demonstrate his safety for release no more involves a breach of article 5(4) than that those detained in Northern Ireland may have been unable on a *habeas corpus* challenge to refute the reasonableness of the suspicion grounding their arrest.

62. Nothing in the Strasbourg jurisprudence appears to me to support the appellants' article 5(4) argument here. I have cited (at para 41) paragraph 40 of the Court's judgment in *Van Droogenbroeck* dealing with the article 5(1) complaint. Although the article 5(4) complaint

succeeded there, this was only because the Board for Recidivists which carried out the review process lacked the characteristics of a court. In short, none of the authorities put before the House suggest any requirement under article 5(4) for the detainee to be assisted, other than procedurally, in challenging the lawfulness of his detention. It may be that Strasbourg would be prepared to go further than they have. Consistently, however, with the approach dictated by *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, 350, para 20 (and the many subsequent endorsements of that approach), I would leave any such development to the ECtHR itself.

63. I would accordingly hold that Mr James's article 5(4) claim must fail. It follows that I regard Mr Lee's and Mr Wells's article 5(4) claims as also having been unsustainable. Since, however, the former was conceded and the latter held established and unappealed, the House has no alternative but to remit their consequential claim for damages to the Administrative Court for assessment. Article 5(5) provides that: "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation." Unless the claimants can establish that, had they been given the opportunity to demonstrate their safety for release, they would have been (or at least would have had a real chance of being) released, it is difficult to see how they could be entitled to any substantial award of damages. That, however, must be a matter for the judge below, not your Lordships.

Issue 4: Relief

64. If your Lordships agree that the appellants fail on all three of the above issues, no question of relief arises (save only as to the remission of Mr Lee's and Mr Wells's article 5(4) claims for compensation in the manner just indicated). Plainly, however, had the appellants succeeded on their article 5(1) claims, section 6(2)(a) of the Human Rights Act 1998 would have presented them with acute difficulty. Section 6 provides:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

> (2) Subsection (1) does not apply to an act if – (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; . . ."

Given section 28 of the 1997 Act, it is difficult to see how either the Secretary of State or the Parole Board could have acted differently in these cases so that it would not have been unlawful for them (under domestic law, as opposed to the UK under international law) to act incompatibly with article 5(1). Section 3 of the 1998 Act could not help—see, for example, *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837. The Secretary of State suggested that he could exercise discretion under section 30 of the 1997 Act to release prisoners detained incompatibly with article 5(1) so that section 6(2) of the 1998 Act would not after all apply. Section 30(1) provides:

> "The Secretary of State may at any time release a life prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds."

It would seem to me a very remarkable use of that power to do as the Secretary of State suggests. For the reasons given, however, all this is academic and I prefer to express no further view upon the question.

Conclusion

65. In the result all three appeals fail and must be dismissed. I cannot, however, part from this case without registering a real disquiet about the way the IPP regime was introduced. It is a most regrettable thing that the Secretary of State has been found to be—has indeed now admitted being—in systemic breach of his public law duty with regard to the operation of the regime, at least for the first two or three years. It has been widely and strongly criticised, for example by the Select Committee on Justice. Many of the criticisms are to be found in the judgments below and I shall not repeat them. The maxim, marry in haste, repent at leisure, can be equally well applied to criminal justice legislation, the consequences of ill-considered action in this field being certainly no less disastrous. It is much to be hoped that lessons will have been learned.

APPENDIX TO LORD BROWN'S OPINION

The individual circumstances of the three appellants

Jeffrey Lee

66. Mr Lee is aged 43. On 2 September 2005 at Bolton Crown Court he was sentenced to IPP (for the minimum term of 9 months—half the nominal determinate sentence—less time on remand) for burglary with intent to do unlawful damage: on 13 April 2005 in a drunken rampage he had caused criminal damage to a flat in which his former wife and young children were present, being arrested and remanded in custody the following day. His tariff period was, therefore, 163 days expiring on 12 February 2006. He had a total of eight previous convictions, including offences of assault occasioning actual bodily harm and criminal damage. His only previous custodial sentence, however, had been two months imprisonment for breach of a community punishment order.

67. A probation officer's pre-sentence report assessed Mr Lee as a medium risk of reconviction but a high risk of causing serious harm to Mrs Lee "or alternatively any other woman with whom he may form a close attachment". A consultant forensic psychiatrist, Dr Wilson, said that during childhood Mr Lee had developed a range of emotional and behavioural problems with poor temper control and a limited ability to cope with stress and he could therefore be said to suffer from a personality disorder with a mixture of dissocial, emotionally unstable and obsessional traits.

68. Following sentence, reports at his local prison, HMP Forest Bank, described Mr Lee as motivated to change and actively seeking out offending behaviour programmes. No accredited coursework was, however, available to him.

69. Following a hearing on 30 June 2006 (some four and a half months after his tariff expiry date) the Parole Board noted that, through no fault of his own, Mr Lee had yet to attend the required programmes to address the risk factors which Mr Wilson had identified. The Board concluded that "the alcohol and violence risk factors must be addressed

in closed conditions before your risk is sufficiently reduced to enable you to be transferred to open conditions".

70. Over a year later, on 21 August 2007, the prison probation officer reported that "due to the current overcrowding and difficulties with allocation of IPP prisoners to first stage lifer prisons, Mr Lee has not had the opportunity to sit a sentence plan Board" and that he needed accredited courses.

71. The Parole Board had intended a further review of Mr Lee's case in January 2008 but for want of the necessary assessments and reports the hearing was postponed.

72. On 7 March 2008, following Mr Lee's judicial review application on 27 February 2008, he was transferred to HMP Wymott where a number of assessments were then carried out. On 20 June 2008 it was recommended that Mr Lee be assessed for the Healthy Relationships Programme (HRP) to explore what psychological risk factors were present.

73. Mr Lee's judicial review hearing before Moses LJ was on 24 and 25 July 2008. Also on 25 July the Parole Board reviewed Mr Lee's case but deferred their decision until receipt of Moses LJ's judgment (which they did not get until 6 October). In the meantime, on 18 September 2008, Mr Lee was transferred to HMP Erlestoke to be assessed for the HRP. For this reason the Parole Board on 24 October 2008 again deferred their review of the case until after Mr Lee's assessment for, and, if found suitable, completion of, the HRP.

74. The three months' HRP was due to start on 30 October 2008 but in the event did not. Quite why is a matter of dispute but essentially it appears that there were aspects of the course which Mr Lee was not prepared to undertake because of his concern about their impact on his mental health (he having previously suffered from depression), at any rate without assurances of adequate support in this regard.

75. In the result, the Parole Board issued further decisions respectively on 22 December 2008 and 12 January 2009 expressing deep concern about the apparent impasse now reached. The Secretary of State for his part contends that it is not for the Parole Board to manage

Mr Lee's sentence and that they should cease deferring his case and instead decide it. None of this, of course, is entirely satisfactory but clearly none of it can affect the outcome of these appeals.

Mr Wells

76. Mr Wells is aged 25. On 14 November 2005, for the attempted robbery of a taxi driver, he was sentenced at Bolton Crown Court to IPP with the minimum term of 12 months less 58 days on remand, consecutive to an extended sentence with a custodial term of 12 months imposed at the same court on 15 August 2005 for offences of criminal damage, theft, common assault and assault with intent to resist arrest, and a concurrent sentence of two years for possession of a class B drug. He had previous convictions from 1997 onwards for both violent and acquisitive offences, linked to the misuse of drugs, his first custodial sentence being nine months in a Young Offender Institution at the age of 15. He had been remanded in custody on 10 June 2005 so that his tariff expiry date was 17 September 2006.

77. Pre-sentence reports assessed him at high risk of reconviction but as posing a low risk of causing serious harm save for a medium risk with regard to prison staff.

78. In March 2006 HMP Forest Bank reported that Mr Wells was motivated to address his offending behaviour but was having difficulties in prison including seven adjudications against him. The report recommended that he engage in programmes for PASRO (Prison: Addressing Substance Related Offending), ETS (Enhanced Thinking Skills), CALM (Controlling Anger and Learning to Manage It) and Victim Awareness. None of these, however, was available to him.

79. On 23 March 2007 Mr Wells issued his first judicial review application (as to which see para 30(i) of this opinion). On 19 April 2007 Sullivan J ordered the Parole Board to hear Mr Wells's case on 9 May which it duly did. On 15 May 2007, however, the Board decided not to direct his release. It accepted that Mr Wells wanted to undertake the necessary offending behaviour courses and that it was not his fault that they were unavailable to him, and indeed would remain so until he was moved to another prison. Until they were completed, however, the Board's view was that his risk would remain high.

80. On 18 December 2007 an OASys (Offender Assessment System) rated Mr Wells as at high risk of reconviction and as posing a high risk of harm to the public.

81. On 29 March 2008 Mr Wells was recommended for the same courses as had been recommended two years previously and which still remained unavailable to him. On 29 May 2008 his supervisor recorded Mr Wells's "almost intolerable" frustration with his lack of progress, a hardly surprising reaction on his part.

82. On 26 June 2008, shortly after his second judicial review application was issued on 4 June, Mr Wells was transferred to HMP Risley. Whilst there he has undertaken the PASRO course (between 22 August and 26 September 2008, making extremely positive progress), the ETS course (between 28 October and 3 December 2008), and the CALM course (begun on 6 January 2009 and due to be completed on 3 March 2009).

Mr James

83. Mr James is aged 23. On 28 September 2005 in the Leeds Crown Court he was sentenced to IPP (with a tariff of two years less time on remand) having pleaded guilty to unlawful wounding with intent: on 14 August 2005 he had smashed two beer glasses into a man's face at a public house. On 26 August 2005 he was remanded in custody. His tariff period therefore expired on 20 July 2007.

84. Mr James had previous convictions from the age of 17 for, amongst other things, battery, common assault, affray, disorderly behaviour, racially abusive behaviour and assault occasioning actual bodily harm.

85. After sentence Mr James remained at his local prison, HMP Doncaster, and whilst there took all such courses as he was able to take: an IT course through "Learn Direct", a first aid course and a Think First course (similar to an ETS). More particularly recommended, however, were ASRO (Addressing Substance Related Offending), CALM and PASRO courses, none of which were available to him whilst he remained at HMP Doncaster. He was not transferred to HMP Lindholme, a first stage prison, until 21 December 2007, five months

after his tariff expiry date. Meanwhile, on 21 May 2007 (before his tariff expired) Mr James had issued judicial review proceedings and (as stated at para 30(ii) of this opinion) on 20 August 2007 obtained from Collins J an order for his immediate release, stayed pending appeal. On 14 September 2007, in the light of that order and at the request of Mr James's counsel, the Parole Board granted deferral of their hearing until after the appeal. Ultimately, on 14 March 2008 (some six weeks after the Court of Appeal's decision) Mr James was released on the Board's recommendation without ever in fact undergoing the recommended courses in the circumstances explained in para 53 of this opinion.

LORD MANCE

My Lords,

86. I have had the benefit of reading in draft the speeches of my noble and learned friends, Lord Hope of Craighead, Lord Brown of Eaton-under-Heywood and Lord Judge. In agreement with all of their speeches and for the reasons they give, I also agree that all three appeals fail and must be dismissed.

LORD JUDGE

My Lords,

87. The problem of the dangerous offender is perennial. The sentence for imprisonment for public protection (IPP) created by section 225 of the Criminal Justice Act 2003 (the 2003 Act) represents the penal system's most recent endeavour to address the problem. The sentence of imprisonment for life (whether mandatory or discretionary) is familiar and needs no further discussion. IPP is the second indeterminate sentence now available to sentencing courts. The relevant provisions were brought into effect on 4 April 2005. The previous provisions relating to dangerous offenders found in the Powers of Criminal Courts (Sentencing) Act 2000 (the 2000 Act), other than those related to imprisonment for life, were entirely replaced. With effect from 14 July 2008 many of the provisions relating to the new sentence were amended by the Criminal Justice and Immigration Act 2008 (the 2008 Act).

These appeals are concerned with the effect of the legislation in force before the latest amendments.

The Legislative Structures

88. Before 4 April 2005, section 79(2)(b) of the 2000 Act, itself repeating section 2(2)(b) of the Criminal Justice Act 1991, as subsequently amended, provided the sentencing court with power to pass a "longer than commensurate sentence" on a dangerous offender who had committed a violent or sexual offence (as defined in the legislation). The court was required to assess the sentence which would be commensurate with the seriousness of the offence, or the combination of one or more offences associated with it, and to order "…such longer term (not exceeding that maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender".

89. This sentence was not an indeterminate sentence. To provide public protection it could and sometimes did result in the imposition of very prolonged periods of imprisonment, significantly beyond the normal punitive level. Release was subject to the ordinary principles which applied to determinate sentences.

90. The Parole Board was responsible for the release of prisoners sentenced to life imprisonment. This was governed by section 28 of the Crime (Sentences) Act 1997 (the 1997 Act). This provides:

> "… (5) As soon as –
>
> (a) a life prisoner to whom this section applies has served the relevant part of his sentence,
>
> (b) the Parole Board has directed his release under this section,
>
> it shall be the duty of the Secretary of State to release him on licence.

(6) The Parole Board shall not give a direction under sub-section (5) above with respect to a life prisoner to whom this section applies unless –

(a) the Secretary of State has referred the prisoner's case to the Board; and

(b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.

(7) A life prisoner to whom this section applies may require the Secretary of State to refer his case to the Parole Board at any time –

(a) after he has served the relevant part of his sentence; and

(b) where there has been a previous reference of his case to the Board, after the end of the period of 2 years beginning with the disposal of that reference; and

(c) where he is also serving a sentence of imprisonment or detention for a term, after he has served one half of that sentence…"

91. The long understood residual jurisdiction of the Secretary of State to order the release of a prisoner on compassionate grounds is currently embodied in section 30(1) of the 1997 Act. This provides:

"The Secretary of State may at any time release a life prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds."

The exercise of the Secretary of State's power has nothing to do with the administration of the prison regime, nor with the amelioration of its deficiencies. Rather it addresses circumstances personal to or involving the individual prisoner, or his family, which properly justify the exercise of executive clemency. Section 30(1) does not abrogate or amend any of the specific responsibilities exclusively vested in the Parole Board by section 28(6) of the Act, nor provide a route by which the Secretary of State may assume or exercise these responsibilities for himself.

92. The structures for dealing with dangerous offenders were radically altered by Chapter 5 of the 2003 Act. Section 225 provides :

> "(1) This section applies where –
>
> (c) a person aged 18 or over is convicted of a serious offence committed after the commencement of this section, and
>
> (d) the court is of the opinion that there is significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences."

93. Section 225 continues:

> "(2) If –
>
> (a) the offence is one in respect of which the offender apart from this section be liable to imprisonment for life, and
>
> (b) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life,
>
> the court must impose a sentence of imprisonment for life.

(3) In a case not falling within sub-section (2), the court must impose a sentence of imprisonment for public protection.

(4) A sentence of imprisonment for public protection is a sentence of imprisonment for an indeterminate period, subject to the provisions of Chapter 2 of Part 2 of the Crime (Sentences) Act 1997 as to the release of prisoners and duration of licences… "

94. Similar provisions are made for sentencing young offenders to detention for public protection, but they need no special attention in the present context. More significant is the creation of the new extended sentence (new, that is, in substance, but confusingly, not in name, because the name of an earlier utterly different sentence found in section 85 of the 2000 Act is reused). The release of the prisoner during the second half of the custodial term involves the recommendation of the Parole Board. Section 247(3) of the 2003 Act therefore adds yet further to its burdens.

95. Section 224(3) defines serious harm as "death or serious personal injury, whether physical or psychological", and for the purposes of IPP must result from the commission of "specified offences" as defined in section 224(1) and (3). The number of such offences is multitudinous; some are at what can properly be described as the lower end of criminality, but all, or virtually all, involve danger to life or limb or interference with sexual autonomy. In the course of an invaluable analysis of the statutory provisions, intended to provide sentencing judges with guidance about the circumstances in which the new sentence should be imposed, in *R v Lang and others* [2006] 1 WLR 2509 Rose LJ observed that the imposition of the sentence required that risk should be established "in relation to two matters: first, the commission of further specified, but not necessarily serious, offences; and, secondly, the causing thereby of serious harm to members of the public". He emphasised that the risk must be a significant risk, and that the threshold was higher than the "mere possibility of occurrence". However, all that said, when addressing a possible IPP the sentencing court is not exercising a broad sentencing discretion. In truth it is making a predictive judgment whether the offender represents a significant risk to public safety. If he does, but a sentence of imprisonment for life would be inappropriate, an IPP must be ordered. There is no broad judicial discretion by the exercise of which an offender may be permitted to

escape from the consequences of a finding that he represents the risk described in the statute.

96. In making this judgment, the court is directed to consider and apply section 229 of the Act. This provides that in making the assessment of the dangerousness of the offender who has not previously been convicted of any relevant offence, the court

> "(a) must take into account all such information as is available to it about the nature and circumstances of the offence,
>
> (b) may take into account any information which is before it about any pattern of behaviour of which the offence forms part, and
>
> (c) may take into account any information about the offender which is before it." (sub-s(2))

97. Where, however, the offender has previous relevant convictions, that is convictions for any specified offence,

> "…the court must assume that there is such a risk as is mentioned in sub-section (1)(b) unless, after taking into account –
>
> > (a) all such information as is available to it about the nature and circumstances of each of the offences,
> >
> > (b) where appropriate, any information which is before it about any pattern of behaviour of which any of the offences forms part, and
> >
> > (c) any information about the offender which is before it,
>
> the court considers that it would be unreasonable to conclude that there is such a risk".

98. In summary, IPP may be ordered whether or not an adult offender has previous convictions, if in the judgment of the court he is dangerous. However in making the assessment in relation to an offender with relevant previous convictions, there is an assumption that he is to be assessed as dangerous, unless this conclusion would be unreasonable. In the end, however, section 229 is directed to evidential questions, appropriate to inform the judgment of the court: it does not affect the consequences which would follow from that judgment.

99. In *R v Johnson and others* [2007] 1 CAR (S) 112, the Court of Appeal Criminal Division considered a number of cases which raised questions arising from the dangerous offender provisions in section 225. The court observed:

> "…Before analysing the relevant provisions, we should emphasise that even a cursory glance at them makes it plain that the sentence is concerned with *future* risk and public protection. Although punitive in its effect, with far reaching consequences for the offender on whom it is imposed, strictly speaking it does not represent punishment for past offending. As any such assessment of future risk must be based on the information available to the court when sentence is passed, the potential for distraction from the real issue is obvious. Nevertheless, when the information before the court is evaluated, for the purposes of this sentence, the decision is directed not to the past, but to the future, and the future protection of the public".

100. Among the many changes to the sentencing framework brought about by the 2003 Act, section 142(1) requires every court passing sentence to have regard to five specific purposes of sentencing. These are

> "(a) the punishment of offenders,
>
> (b) the reduction of crime (including its reduction by deterrence),
>
> (c) the reform and rehabilitation of offenders,
>
> (d) the protection of the public, and

(e) the making of reparation by offenders to persons affected by their offences.

Importantly for present purposes, by section 142(2)(c) section 142(1) is expressly disapplied to sentences imposed under "any of sections 225-228 of the Act (dangerous offenders),…". The reason is plain. The first and obvious purpose of these provisions is the protection of the public from the risks posed by dangerous offenders.

101. The second purpose is punishment. It is a well understood responsibility of the sentencing court that, as part of and integral to the IPP, it must address and specify the punitive element of the sentence, that is, the minimum term to be served by the offender before any question of his release may arise. This is the "relevant part" of the sentence or its "minimum term". This second element of the sentence requires an assessment of the appropriate level of punishment which, irrespective of and ignoring any risk to the public posed by the offender, properly reflects the seriousness of the instant offence, or the combination of the offence and one or more offences associated with it, in the light of the aggravating and mitigating features. Thereafter, to ensure consistency with the release provisions which apply to those serving determinate sentences, the punitive term falls to be halved. It is unnecessary to stumble through the maze of statutory provisions which leads to the conclusion that section 82A(2) of the 2000 Act applies to each IPP. They are summarised in paragraphs 4-6 of the judgment the Court of Appeal, and for present purposes they are uncontroversial. It remains to add by way of footnote that, again to ensure consistency, under section 240 of the 2003 Act, credit must be given for any period on remand served by the prisoner sentenced to IPP, which must be set against the punitive element of the sentence.

102. It is plain therefore that there are two elements to the IPP sentence. The first is the appropriate measure of punishment for the offender's crimes; the second is the protection of the public from the further and indefinite risk he represents. The punitive element of the sentence is not concerned with the potential dangerousness of the offender, and the minimum term or tariff period should not be longer than commensurate with the seriousness of the crime: future risk is addressed by the protective element of the IPP. If there is no predictive risk that, in the sense specified in section 225(2)(b) as explained in *R v Lang and others*, the defendant will be dangerous at the end of the tariff period, an IPP would be unjustified. There would be no sufficient risk of serious harm to members of the public for the purposes of the statute.

Even if the ambit of section 225(2)(b) extends to prison officers and fellow inmates (and I believe that it does) the prison regime itself is intended to and should reduce the risk of serious harm to acceptable levels, and in any event, an IPP would not offer them greater protection than that which would be provided by a determinate sentence. Therefore if therefore the tariff period sufficiently addresses the element of future danger, an IPP would be inappropriate and should not be ordered. This principle was recently confirmed in *R v Terrell* [2008] 2 CAR (S) 49 where it was decided that an IPP should not be passed where other available sentences, including, for example, a sexual offences prevention order, would minimise the risk otherwise presented by the offender.

103. As the court is required to make an informed predictive assessment at the date of sentence, and the justification for detention beyond the tariff period is found in the judgment of the court that an IPP is indeed necessary, I respectfully disagree with the views expressed by Laws LJ in the Divisional Court in *R (Walker)* that what he described as "further detention" after the expiry of the tariff period was "not at all justified by or at the time of sentence, for the very reason that the extent to which, or the time for which, the prisoner will remain a danger is unknown at the time of sentence…The justification for detention during the tariff period is of course spent; it is spent the moment the tariff expires". For the same reasons I am unable to accept the observations of Moses LJ in *R (Lee) and R (Wells)* in the Administrative Court, no doubt reflecting the earlier judgment of Laws LJ, that "the position of a prisoner whose level of dangerousness cannot be ascertained is the same as one who ceases to be a danger. The original justification for the sentence, namely his dangerousness, has ceased to exist". In my judgment detention beyond the tariff period is justified just because the sentencing court has decided that the prisoner would continue to be dangerous at the expiry of the punitive element of the sentence. The necessary predictive judgment will have been made.

104. As we have seen, section 225(4) of the 2003 Act applied section 28 of the 1997 Act to every IPP sentence and by the insertion of section 34(1)(2)(d) to the 1997 Act effected by section 230 of and paragraph 3 of Schedule 18 to the 2003 Act, added a defendant serving an IPP to the ambit of the phrase "life prisoner" in section 28 of the 1997 Act. Therefore both indeterminate sentences are subject to identical release provisions. The assessment is left to the Parole Board. For this purpose it acts as a judicial body independent of the Secretary of State, and having done so, if release is appropriate, it is not making a recommendation to the Secretary of State that release should follow, but

giving a mandatory direction which must be implemented. It is, in effect, making a court order with which he must comply. Although the IPP prisoner may "require" that his case should be referred to the Parole Board, the entitlement is subject to a pre-condition that his tariff period should have expired. In other words until the punitive element of the sentence has been served, the prisoner has no such statutory entitlement, and he cannot seek a reference in anticipation of the end of that period.

105. The statutory regime for dealing with indeterminate sentences is predicated on the possibility that, save for those for whom the punitive element of the sentence requires that life imprisonment should indeed mean imprisonment for the rest of the offender's natural life, prisoners may be reformed or will reform themselves. A fair opportunity for their rehabilitation and the opportunity to demonstrate that the risk they presented at the date of sentence has diminished to levels consistent with release into the community should be available to them. The IPP sentence does not require the abandonment of all hope for offenders on whom it is imposed. They are not consigned to penal oblivion. To the contrary, common humanity, if nothing else, must allow for the possibility of rehabilitation. As Lord Phillips CJ, in the Court of Appeal, giving the judgment of the court observed, at paragraph 41:

> "We also accept that those who promoted the 2003 Act and Parliament that enacted it must have anticipated that the lifer regime …would be available to IPP prisoners so as to give them a fair chance of ceasing to be, and showing that they had ceased to be, dangerous. This was the context in which the legislation was enacted. To use Laws LJ's phrase [2008] 1All ER 138, para 26, it was 'a premise of the legislation'".

In this context, this premise of the legislation is not however synonymous with its purpose. As we have seen, the statutory structure applicable to IPPs provides for two purposes, commensurate punishment and public protection.

106. We cannot be blind to the realities. The reality for the offender subject to IPP is that the prison regime in which he may (or may not) be provided with the opportunity for rehabilitation is dependent on the structures provided by the Secretary of State. The similar reality for the Parole Board is that the material on which to form its decision that the offender may (or may not) have ceased to represent a public danger is

equally dependant on the regime structured for this different purpose by the Secretary of State.

107. Section 239 of the 2003 Act provides:

> "(3) the Board must, in dealing with cases as respects which it makes recommendations under this Chapter or under Chapter 2 of Part 2 of the 1997 Act, consider –
>
> (a) any documents given to it by the Secretary of State, and
>
> (b) any other oral or written information obtained by it…
>
> (5) Without prejudice to subsections (3) and (4) the Secretary of State may make rules with respect to the proceedings of the Board…
>
> (6) The Secretary of State may also give to the Board directions as to the matters to be taken into account by it in discharging any functions under this Chapter or under Chapter 2 of Part 2 of the 1997 Act; and in giving any such directions the Secretary of State must have regard to –
>
> (a) the need to protect the public from serious harm from offenders, and
>
> (b) the desirability of preventing the commission by them of further offences and of securing their rehabilitation."

When exercising its responsibilities therefore the Parole Board must consider any documentary material provided by the Secretary of State, together with any oral or written information obtained by it, including material which the prisoner himself may submit.

108. The test to be applied by the Parole Board is provided by section 28(6). A direction that the prisoner should be released cannot be given unless the Parole Board is satisfied that the protection of the public *no longer* requires his detention. This provision represents a direct link with the predictive judgment made by the sentencing court that the

prisoner would continue to represent a danger at the expiry of the period. The sole basis on which a direction that the prisoner should be released can be given is the conclusion of the Parole Board that he no longer represents that danger. If so, the purpose of the indeterminate sentence will have been served. The protective element of the sentence will have been addressed and satisfied. Thus continued detention is no longer necessary and release should follow. If however the Parole Board is not so satisfied, the IPP continues to provide the legal justification for the prisoner's continued detention.

The Public Law Duty of the Secretary of State

109. Before the IPP regime was created, the Secretary of State had exercised his powers under section 32(6) of the Criminal Justice Act 1991 (the 1991 Act) (now section 239 (6) of the 2003 Act) to issue Direction 6. This provides:

> "In assessing the level of risk to life and limb presented by a lifer, the Parole Board shall consider the following information, *where relevant and where available*, before directing the lifer's release…
> (d) whether the lifer has made positive and successful efforts to address the attitudes and behavioural problems which led to the commission of the index offence…
> (h) the lifer's awareness of the impact of the index offence, particularly in relation to the victim or victim's family, and the extent of any demonstrable insight into his/her attitudes and behavioural problems and whether he/she has taken steps to reduce risk through the achievement of life sentence plan targets…"

110. Rules issued by the Secretary of State under section 32(5) of the 1991 Act include the Parole Board Rules 2004 and the policy set out in the Prison Service Order 4700 (PSO 4700). Rule 6, together with schedule 1, require the Secretary of State to provide the Parole Board with

> "Current reports on the prisoner's risk factors, reduction in risk and performance and behaviour in prison, including

views on suitability for release on licence as well as compliance with any sentence plan".

111. The offender's sentence plan is covered by PSO4700. More important to the present appeal specific provision relating to those described as short tariff lifers is made. These are offenders sentenced to a sentence with a punitive element of 5 years or less. Paragraph 4.13.1 provides:

> "Short tariff lifers are normally regarded as those who have a tariff of 5 years or less. The majority of these will be prisoners who have received an automatic life sentence…but there can occasionally be mandatory or discretionary lifers who also receive a short tariff and automatics who will have received tariffs longer than 5 years".

Paragraph 4.13.2 provides:

> "Lifers with short tariffs are managed differently from lifers with longer tariffs because of the overall objective to release lifers on tariff expiry if risk factors permit. The statutory entitlement to a review by the Parole Board may for a short tariff lifer be triggered relatively shortly after conviction… *They must be prioritised for offending behaviour programmes according to the length of time left till tariff expires. The same principle must apply for all lifers, so that length of time to tariff expiry is taken into account when allocating offending behaviour programme resources. In other words, lifers must be given every opportunity to demonstrate their safety for release at tariff expiry"*. (original emphasis)

112. PSO4700 as well as the Parole Board Rules were both made before 4 April 2005 when the IPP regime was introduced. At the time when they were promulgated, there will have been comparatively few short tariff lifers. It was apparently not appreciated that that position would not and could not hold good for the new indeterminate sentence. Surprisingly therefore when the IPP regime was introduced neither the policy nor the rules were reconsidered and amended. They were simply

transposed and applied expressly to IPPs in exactly the same way as they applied to sentences of life imprisonment. Accordingly, in relation to IPPs the Secretary of State was under a public law duty to ensure that they were complied with.

113. Statistics were made available to the Divisional Court from the Deputy Head of the Public Protection Unit at the National Offender Management Service. The number of prisoners serving indeterminate sentences shortly before the IPP sentence was introduced was just short of 6000 (5807) and within two years had rocketed to virtually 9000 prisoners (8977).

114. We are told on behalf of the National Offender Management Service and the Ministry of Justice that it was assumed that the "overall impact" of the new regime would be resource-neutral. In other words, it was believed that the implementation of the provisions relating to imprisonment for public protection would create very little additional demand on all the relevant processes.

115. The foundations for this belief are unclear and, given the express and clear legislative provisions, somewhat mysterious. Perhaps the genesis of the problem can be traced to the recommendations of Mr John Halliday in his Report following a review of the sentencing framework, *Making Punishments Work*, published in July 2001, which provided the basis for many of the sentencing provisions which were subsequently enacted in the 2003 Act. The IPP he recommended was quite different to the IPP as enacted. If his proposals had been implemented IPP would not have involved indefinite detention. Instead of automatic release halfway through their sentences (that is, what is now described as the tariff period), the offenders to whom IPP applied would have been liable to continue to be detained until the end of the determinate sentence. They would then have been entitled to be released. The Parole Board would not have been involved in the process. Direction 6 issued pursuant to section 239(6) of the 2003 Act and rule 6 of and Schedule 1 to the Parole Board Rules 2004 would not have applied to them. Nor would PSO4700. If Mr Halliday's recommendations had been implemented, fresh thought would presumably have been given to the situation faced by those sentenced to IPP, and appropriate policies to govern their release, if they ceased to be dangerous, before the end of their determinate sentences, would have been introduced.

116. Mr Halliday's Report emphasised that the successful implementation of his recommendations required the provision of adequate resources. Thus, for example, one of three factors identified as critical to success was "comprehensive assessment of needs for investment in infrastructure and services, including…obtaining necessary human and financial resources". In relation to what he described as the "main drivers of additional costs", he identified the "new sentence for dangerous offenders". He expressly cautioned that "the framework should not be implemented until the necessary infrastructure and resources are available to all services, including offender assessment systems, and prisoner release planning systems". This warning was unequivocal, and yet, although Mr Halliday's recommended IPP was a more modest proposal and would have been less resource intensive than the IPP actually introduced by the 2003 Act there is no satisfactory evidence to demonstrate that the serious issue of consequent demands on resources was adequately addressed.

117. The Government's response, *Justice for All*, was published in July 2002. The Government wished to ensure that the public was adequately protected from those offenders whose offences did not currently attract a maximum penalty of life imprisonment but who were nevertheless assessed at dangerous. "…such offenders should remain in custody until their risks are considered management in the community. For this reason we propose to develop an indeterminate sentence for sexual and violent offenders who have been assessed and considered dangerous. The offender would be required to serve a minimum term and would then remain in prison beyond this time, until the Parole Board was completely satisfied that the risk had sufficiently diminished for that person to be released unsupervised in the community".

118. It was an inevitable consequence of the legislation, and the application of the statutory presumption in section 229(3) of the Act, that even when the punitive element appropriate to the offender's crimes was measured in months rather than years, IPP would arise for consideration. Sentencing judges loyally followed the unequivocal terms of the statute and very many more defendants than anticipated were made subject to IPPs. However no extra resources were made available to address the consequent and inevitable increase in the number of inmates subject to indeterminate custody. The result is the seriously defective structures identified in these appeals. Numerous prisoners have continued to be detained in custody after the expiration of the punitive element of their sentences, without the question either of their rehabilitation or of the availability of up to date, detailed information becoming available about their progress (or lack of it). The

National Offender Management Service acknowledges "that the need to ensure a proper allocation of resources across the prison estate has meant that a number of those serving IPP sentences have not had as full an opportunity to progress within the system as had been hoped". This is hardly an exaggeration.

119. The problems created by a vast increase in those serving indeterminate sentences resulted in a fast track review by the National Offender Management Service of indeterminate sentence prisoners, with particular reference to those sentenced to IPP. The Lockyer Review was set up in April 2007. Concerns which the Review was asked to address included the "clear weaknesses throughout the IPP offender journey, including; pre- and post-sentence assessments; custodial allocation; targeting of intervention; parole hearings; release and re-settlement; and consistent co-working and communications between the custodial and community sectors". The pressures on the system would become increasingly acute as more offenders passed their tariff dates. Attention was drawn to criticism into the arrangements for IPP prisoners by the Chief Inspector of Prisons and, of particular significance in relation to the article 5(4) issues which arise, the Chairman of the Parole Board.

120. The Review, published in August 2007, acknowledged that "the current reliance on the lifer management arrangements for dealing with all IPP prisoners has failed. IPPs are stacking in local prisons and are not moving to establishments where their needs can be assessed or better met." It noted that "places in the lifer estate are more costly and scarce, and there is no compelling case for managing IPPs within the traditional lifer management arrangement. The profile of IPP is not similar to lifers (more high risk, more likely to suffer from personality disorder, and more sexual offences and robbery) and therefore assessment and intervention needs may not be the same. Given the scarcity of lifer places and the growing number stacking up in local prisons, there is a real imperative for finding an alternative way of managing this population overall". The Review referred to a bottleneck caused by a small number of specialised lifer centres, and pointed out that over 1,500 prisoners serving IPPs were held currently in local prisons because space in lifer centres was unavailable, and the problems posed by this number was exacerbated by an additional 1,000 prisoners serving sentences of life imprisonment who were similarly held in local prisons.

121. The preparation for the inevitable consequences of the new sentencing provisions relating to IPPs was wholly inadequate. To put it bluntly, they were comprehensively unresourced. The deficiencies are,

at last, being made good. Speaking very generally, courses and training are available and offenders may take advantage of them. The information being made available to the Parole Board when considering whether the offenders should remain in custody is more extensive and evidence-based, and it can make better informed decisions. In addition, the statute has been amended by the 2008 Act. The statutory assumptions in section 229 have been eradicated. With exceptions irrelevant for present purposes, imprisonment for public protection cannot now be imposed unless the determinate sentence for offences would be at least 4 years' imprisonment, or a tariff period of 2 years: in any event it is now a discretionary rather than a mandatory sentence. (For a summary of these changes, see *R v C and others* [2008] EWCA Crim 2790). This has led to a decline in the numbers of orders of IPP, but no less important for the administration of the sentence, for those subjected to IPP after 14 July 2008, there will at least be a reasonable time for the offender, and indeed the offender management system, properly to address IPPs and in particular, for the risks which led the sentencing court to conclude that the public needed protection to diminish while the punitive element of the sentence is being served.

122. Notwithstanding the undoubted improvements in the processes effected following the Lockyer Review, the appellants and indeed other prisoners were victims of the systemic failures arising from ill considered assumptions that the consequences of the legislation would be resource-neutral. Having applied the identical policies and rules relating to life imprisonment to IPPs, the Secretary of State failed to provide the resources to implement them. As tariff periods expired, nothing had been done to enable an informed assessment by the Parole Board of the question whether the protection of the public required the prisoner's continued detention. That, of course, did not mean that they had become safe, or that the risk they presented had significantly diminished, but the conclusion that the Secretary of State was in breach of his public law duties owed to the appellants and many others subject to the IPP regime is inevitable.

123. In my opinion, however, the Secretary of State's breach of his public law duties cannot be converted into a re-enactment or amendment of the statutory provisions, and in particular section 28(6) of the 1997 Act. The provisions are clear. The power to direct any such release is vested exclusively in the Parole Board which cannot direct release unless satisfied that the continued confinement of the prisoner for the protection of the public is no longer necessary. The IPP sentence cannot be overridden or deprived of its effect either by the Secretary of State or indeed on the basis of the conclusion in proceedings for judicial review

that the Secretary of State is in breach of his public law obligations. The declaratory relief to that effect is appropriate: release from custody however is not.

Article 5(1) and Article 5(4) of the European Convention on Human Rights

124. I have had the advantage of reading the opinion in draft of my noble and learned friend, Lord Brown of Eaton-under-Heywood, about the application of articles 5(1) and 5(4) of the European Convention, as well as section 6(2)(a) of the Human Rights Act 1998, and I respectfully agree with his reasoning and his conclusions. In view of the difficulty posed by article 5(4) considerations, I shall add some brief observations of my own.

125. Article 5(1) of the European Convention of Human Rights provides:

> "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..".

Article 5(4) provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful"

126. For the reasons already given, there is no doubt that, based on the order of the sentencing court, the continued detention of persons subject to IPP after the expiry of their tariff periods is lawful. In relation to article 5(1) the question which arises is whether the breach of the

Secretary of State's public law duty should lead to the conclusion that the causal link between the original conviction and the continuing detention has been broken. (For this principle, see, among other authorities, *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443, *Weeks v United Kingdom* (1987) 10 EHRR 293 and *Stafford v United Kingdom* (2002) 35 EHRR 32.) If one of the purposes of an IPP were rehabilitation, and if the continued detention after the expiry of the tariff period were dependent on a specific finding by the Parole Board that it would be inappropriate to direct the prisoner's release it would then, of course, be arguable that the causal link between the IPP and any later detention of the appellants was broken. As I have endeavoured to demonstrate from an analysis of the structure of the legislation, that proposition is ill founded.

127. My view is reinforced by two decisions of the Court of Appeal, *R (Noorkoiv) v Secretary of State for the Home Department* [2002] 1 WLR 3284 and *R (Cawser) v Secretary of State for the Home Department* [2004] UKHRR 101. The principle is encapsulated in the observations of Lord Woolf CJ in *Noorkoiv* that : "…the justification for the detention of a prisoner sentenced to life imprisonment (whether discretionary or automatic or mandatory) is that sentence and not the fixing of the tariff period". In *Walker*, Laws LJ summarised the effect of the decision in *Cawser*, to which he himself had been a party, in this way: "*Cawser's* case closes off the possibility of argument in this court that the continued detention of a lifer past his tariff expiry date, incurred by reason of a failure to provide offending behaviour courses, might be held to breach article 5(1) of the Convention." *Noorkoiv* and *Cawser* were, of course, cases of imprisonment for life rather than IPPs: nevertheless the same reasoning holds good. What is more, it is entirely consistent with the legislative structure relating to IPPs.

128. I should perhaps add that, like Lord Brown, I should not exclude the possibility of an article 5(1) challenge in the case of a prisoner sentenced to IPP and allowed to languish in prison for years without receiving any of the attention which both the policy and the relevant rules, and ultimately common humanity, require.

129. In relation to article 5(4) there is an immediate forensic problem. The Secretary of State conceded that Mr Lee's article 5(4) rights were contravened and he has not appealed the decision of Moses LJ to the same effect in the case of Mr Wells. The Court of Appeal concluded that Mr James would be likely to establish such a breach at the time when the first Parole Board review took place. Although the factual

basis for that finding is challenged on behalf of the Secretary of State, it is not contended that absent the opportunity for the prisoner to demonstrate that he ceased to represent the risk which led to the imposition of the IPP, any section 28(6) review by the Parole Board would, in the words of the Court of Appeal, be an "empty exercise", and accordingly that a breach of article 5(4) would be made out.

130. The Parole Board, as Intervener, suggests that these concessions were wrongly made and that no breach of article 5(4) has been established in any of these cases. So we must examine whether such a breach is established in the context of concessions made by the Secretary of State with which the Parole Board disagrees, and when it is the Parole Board, not the Secretary of State, which in article 5(4) terms is "the court" vested with the responsibility for deciding whether the prisoner's release should be ordered.

131. Stripped to essentials, and without reference to authority, the right provided by article 5(4) postulates the requirement that everyone in detention shall be entitled to challenge the lawfulness of that detention. This right predicates the availability of a tribunal vested with appropriate jurisdiction before which the prisoner is provided with the opportunity to address argument that it is not.

132. In my opinion article 5(4) is not directed to the operational inadequacies of a prison regime which may make it impossible for the prisoner to address his offending in the hope of or with a view to his reform and rehabilitation. In the context of the exercise of the Parole Board's section 28(6) responsibilities, article 5(4) addresses the prisoner's ability to take proceedings to demonstrate that his continued detention is no longer justified just because the basis on which it would otherwise continue no longer applies: in short, that the risk he represented at the date of sentence has dissipated. It is not the forum for addressing complaints about the inadequacies of the prison regime in relation to the provision of opportunities for reform and rehabilitation, or the consequences of the Secretary of State's breaches of his public law obligations. They may be and are addressed in judicial review proceedings. As the ECtHR observed in *Ashingdane v United Kingdom* [1985] ECHR 8225/78, (1985) 7 EHRR 528 "Article 5(4) does not guarantee a right to judicial control of the legality of all aspects or details of the detention". The same reasoning can be discerned in the judgment of the ECtHR in *Van Droogenbroeck*. This conclusion appears to me to be logically consistent with the legislative structure which applies to those sentenced to IPP.

133. That leaves the question of the exercise by the Parole Board of its section 28(6) responsibilities if and when the consequence of the deficiency in the arrangements made by the Secretary of State is the absence of sufficient material with which to make a fully informed but fresh assessment of risk. At the risk of repetition, there can be no problem with continued lawfulness of the prisoner's detention. The possibility of a judicial challenge to its continuation can only arise if and when the Secretary of State has failed to comply with a release direction by the Parole Board. The question whether the Parole Board believes itself to be sufficiently informed is a matter for the Parole Board. We know that the criticisms by the Chairman of the Board of the operation of the IPP regime contributed to the setting up of the Lockyer Review and the subsequent improvements in the process. If the Parole Board failed to comply with its own public duty, or if complaints legitimately made by the Board were ignored by the Secretary of State, then the Administrative Court might see fit to intervene, to direct either the Parole Board better to fulfil its responsibilities, or the Secretary of State to comply with the reasonable requests by the Parole Board for improvements to the IPP regime, sufficient to enable the Parole Board to be satisfied that it can fully discharge its own section 28(6) public law responsibilities. The precise form of order would be for debate but an appropriate declaration would probably suffice.

134. In expressing myself in this way, I am not to be taken to being encouraging applications by prisoners for judicial review on the basis that the prisoner may somehow direct the process by which the Parole Board should decide to approach its section 28(6) responsibilities either generally, or in any individual case. These are question pre-eminently for the Parole Board itself. Although possessed of an ultimate supervisory jurisdiction to ensure that the Parole Board complies with its duties, the Administrative Court cannot be invited to second-guess the decisions of the Parole Board, or the way it chooses to exercise its responsibilities. Your Lordships were told that the Board is frequently threatened with article 5(4) challenges unless it requires the Secretary of State to provide additional material. Yet it can only be in an extreme case that the Administrative Court would be justified in interfering with the decisions of what, for present purposes, is the "court" vested with the decision whether to direct release, and therefore exclusively responsible for the procedures by which it will arrive at its decision.

135. In my opinion these appeals should be dismissed. I agree with Lord Brown's conclusions about the proper disposal of article 5(4) claims by the appellants.