SOMERVILLE v SCOTTISH MINISTERS

No 10
03 November 2006
[2006] CSIH 52

First Division
Lady Smith

Andrew Somerville, Petitioner (Respondent)—*O'Neill QC, Collins, Carmichael*
William Cairns, Petitioner (Respondent)—*O'Neill QC, Collins, Carmichael*
Samuel Ralston, Petitioner (Respondent)—*O'Neill QC, Collins, Carmichael*
Ricardo Blanco, Petitioner (Respondent)—*O'Neill QC, Collins, Carmichael*
David Henderson, Petitioner (Respondent)—*O'Neill QC, Collins, Carmichael*
Scottish Ministers, Respondents (Reclaimers)—*Brailsford QC, Wolffe, DB Ross*

Administrative law – Judicial review – Adequacy of reasons – Prisons and Young Offenders Institutions (Scotland) Rules 1994 (SI 1994/1931), r 80(1), (2), (4), (8), (9)

Administrative law – Judicial review – Proportionality – Whether independent ground for judicial review generally – Whether fundamental rights at common law infringed such that proportionality test should be applied – Segregation of prisoners

Human Rights – Damages – Proper legal basis for award of damages – Whether claims had to be advanced under the Human Rights Act 1998 or under the Scotland Act 1998 – R v HM Advocate 2003 SC (PC) 21 – Human Rights Act 1998 (cap 42), secs 6(1), (2), 7(1), (5), (7), 8(1), (3), (4), (6) – Scotland Act 1998 (cap 46), secs 57(2), 100(1), (2), (3), (4)

Human Rights – Damages – Statutory time-bar – Whether time began to run from commencement of period of segregation of prisoner or from expiry of that period – Human Rights Act 1998 (cap 42), sec 7(5)

Practice – Pleadings – Relevancy – Mora, taciturnity and acquiescence – Whether specific averments of acquiescence necessary in public law cases

Prisons – Whether segregation orders required to be signed by Scottish Ministers personally – Whether Carltona principle excluded – Prisons and Young Offenders Institutions (Scotland) Rules 1994 (SI 1994/1931), r 80(5), (6)

Process – Recovery of documents – Public interest immunity certificates – Whether court should consider documents before reaching conclusion on disclosure

The Human Rights Act 1998 provides: ''6.–(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; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions. . . . 7.–(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may– (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act. . . . (5) Proceedings under subsection (1)(a) must be brought before the end of– (a) the period of one year beginning with the date on which the act complained of took place; or (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances, but that is subject to any rule imposing a stricter time limit in relation to the procedure in question. . . . (7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act. . . . 8.–(1) In relation to any act (or proposed act) of a

public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. ... (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including– (a) any other relief or remedy granted, or order made, in relation to the act in question (of that or any other court), and (b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made. (4) In determining– (a) whether to award damages, or (b) the amount of an award, the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention. ... (6) In this section– 'damages' means damages for an unlawful act of a public authority; and 'unlawful' means unlawful under section 6(1).''

Section 57(2) of the Scotland Act 1998 provides: ''A member of the Scottish Executive has no power ... to do any ... act, so far as the ... act is incompatible with any of the Convention rights''. Section 100 of that Act provides: ''(1) This Act does not enable a person– (a) to bring any proceedings in a court or tribunal on the ground that an act is incompatible with the Convention rights, or (b) to rely on any of the Convention rights in any such proceedings, unless he would be a victim for the purposes of Article 34 of the Convention (within the meaning of the Human Rights Act 1998) if proceedings in respect of the act were brought in the European Court of Human Rights. (2) Subsection (1) does not apply to the Lord Advocate, the Advocate General, the Attorney General or the Attorney General for Northern Ireland. (3) This Act does not enable a court or tribunal to award any damages in respect of an act which is incompatible with any of the Convention rights which it could not award if section 8(3) and (4) of the Human Rights Act 1998 applied. (4) In this section 'act' means– (a) making any legislation, (b) any other act or failure to act, if it is the act or failure of a member of the Scottish Executive.''

Rule 80 of the Prisons and Young Offenders Institutions (Scotland) Rules 1994 provides: ''(1) Where it appears to the Governor desirable for the purpose of– (a) maintaining good order or discipline; (b) protecting the interests of any prisoner; or (c) ensuring the safety of other persons, he may order in writing that a prisoner shall be removed from association with other prisoners, either generally or during any period the prisoner is engaged or taking part in a prescribed activity. (2) If the Governor makes an order under paragraph (1) in relation to a prescribed activity, he may specify only one prescribed activity in the order. ... (4) If the Governor makes an order under paragraph (1), he shall– (a) specify in the order whether the removal from association is– (i) in general; or (ii) in relation to a prescribed activity; (b) if the removal is in relation to a prescribed activity, specify which activity the order relates to; (c) specify in the order the reasons why he is making it; (d) record in the order the date and time it is made; and (e) explain to the prisoner the reasons why the order is made and provide him with a copy of the written order. (5) A prisoner who has been removed from association generally or during any period he is engaged in or taking part in a prescribed activity by virtue of an order made by the Governor in terms of paragraph (1) shall not be subject to such removal for a period in excess of 72 hours from the time of the order, except where the Scottish Ministers have granted written authority on the application of the Governor, prior to the expiry of the said period of 72 hours. (6) An authority granted by the Scottish Ministers under paragraph (5) shall have effect for a period of one month commencing from the expiry of the period of 72 hours mentioned in paragraph (5) but the Scottish Ministers may, on any subsequent application of the Governor, renew the authority for further periods of one month commencing from the expiry of the previous authority. ... (8) The Governor– (a) may– (i) cancel an order under paragraph (1) at any time if he considers it appropriate to do so; (ii) vary an order made under paragraph (1) in terms of which the prisoner has been removed from association generally in order to restrict the effect of that order to removal from association during any period the prisoner is engaged in or taking part in any one or more prescribed

activities as he may specify in the variation order; (iii) if appropriate, further vary an order under paragraph (1) which has previously been varied under subparagraph (ii) above by further restricting the number of prescribed activities to which removal from association applies; or (b) shall cancel any order under paragraph (1) if a medical officer advises on medical grounds that he should do so. . . . (9) If a prisoner is moved by the Scottish Ministers from any prison to any other prison in terms of section 10 of the Act, any order under paragraph (1), or any authority under paragraph (5), made or granted in relation to the prisoner while confined in the former prison shall cease to have effect, but without prejudice to the power of the Governor of the prison to which the prisoner is moved to make a new order under paragraph (1).''

The petitioners were each convicted of serious crimes and sentenced to custodial terms. While in custody each was, for a period or for a number of distinct periods, removed from association with other prisoners under r 80 of the Prisons and Young Offenders Institutions (Scotland) Rules 1994. The petitioners each contended that the orders were unlawful at common law and under the European Convention for the Protection of Human Rights and Fundamental Freedoms. They sought certain remedies, including declarators and damages. A number of issues arose.

The respondents argued that the petitioners' claims for damages in respect of alleged breaches of Convention rights had to be advanced under the Human Rights Act 1998. They argued that the proceedings were out of time so far as they related to certain periods of segregation in the petitions of H, B and C. The petitioners argued that their claims could only be laid under the Scotland Act 1998, and that they were entitled to public law damages under that Act. They relied on *R v HM Advocate* 2003 SC (PC) 21. The Lord Ordinary (Lady Smith) upheld the petitioners' contention. The respondents reclaimed. They argued that while the governor in exercising his powers under r 80(1) was a ''public authority'' for the purposes of the Human Rights Act 1998, his act was not an ''act of a member of the Scottish Executive'' for the purposes of sec 57(2) of the Scotland Act 1998. They argued that the proper legal basis for any award of damages by reason of a breach of Convention rights lay under the Human Rights Act 1998 and that the Lord Ordinary had erred in regarding herself as bound by *R v HM Advocate* to hold that the Scotland Act was the required route to a remedy in damages for an infringement of sec 57(2) of the Scotland Act 1998. They argued that time began to run from the commencement of any period of segregation, rather than from the expiry of the period of segregation.

The respondents tabled pleas of mora, taciturnity and acquiescence in the petitions at the instance of H, B and C. The period of removal from association referred to by the petitioner H had come to an end on 13 February 2004, and the petition was served in June 2004. The period of removal referred to by the petitioner B ended on 7 January 2003 and the petition was served on 6 November 2003. The period of removal referred to by the petitioner C ended in December 2002 and the petition was served on 14 November 2003. The Lord Ordinary repelled the pleas of mora. The respondents reclaimed. They argued that although there were no specific averments of prejudice or acquiescence, it should not be necessary in public law cases for these elements to be averred.

The petitioners had sought recovery of various documents. The respondents produced several hundred documents, but in many instances parts of the documents had been blacked out on the grounds that disclosure of these parts would be contrary to the public interest in that it would cause real harm to the work of the Scottish Prison Service. Public interest immunity certificates were lodged in each case. The petitioners sought recovery of the documents in an unredacted form, and by agreement counsel for the petitioners were able to consider the redacted parts of the documents. It was part of the agreement that the petitioners' counsel would not disclose the contents of the documents to any other person unless and to the extent that the court should decide that the document should be disclosed notwithstanding the assertion of PII. The petitioners sought to have the material covered by the PII certificates made available. They argued that the Lord Ordinary should, in private session,

examine the documentation in respect of which PII was being claimed, and hear submissions. The Lord Ordinary did not agree to examine the redacted passages herself. The Lord Ordinary held that she could not conclude that the petitioners had made out a case that the material sought was likely to give substantial support to any specific issues identified in their cases, and that the balance between the public interest in non-disclosure and the petitioners' interests in disclosure weighed heavily in favour of refusing to order that the PII material be disclosed. The petitioners cross-appealed. They argued that the court must see the documents before taking a decision about them in performing the balancing exercise.

None of the orders under r 80(5) or (6) in issue in the petitions had been signed by any Scottish Minister. Each was signed by a civil servant within the Scottish Prison Service. The petitioners argued that these grants and renewals of authority were unlawful. The respondents relied on the principle described in *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560. The Lord Ordinary accepted the respondents' contention. The petitioners cross-appealed. They argued that, having regard to sec 39 of the Prisons (Scotland) Act 1989 (cap 45), the terms of the 1994 Rules and the interference with prisoners' rights involved in the application of r 80, it was necessarily implied that the Scottish Ministers would personally perform the functions conferred on them by r 80 and that the *Carltona* principle was thus excluded by necessary implication.

Each petitioner sought declarator that their general segregation under r 80 was disproportionate *et separatim* unreasonable and therefore unlawful. The Lord Ordinary held that the law did not recognise proportionality as an independent ground for judicial review of administrative action. The petitioners cross-appealed. They argued that it was open to the court to recognise proportionality as an independent ground for judicial review generally. They also argued that segregation infringed their fundamental rights at common law, and that in cases concerned with fundamental rights at common law, the courts had already used the proportionality test. The respondents disputed whether proportionality was recognised as a freestanding ground of judicial review available generally at common law, and whether common law fundamental rights were in issue in the petitions. Each petitioner sought declarator that the orders under r 80(1) were unlawful by virtue of non-compliance with r 80(4)(c), for failure to specify adequate and comprehensible reasons. The Lord Ordinary did not accept the petitioners' contentions. The petitioners cross-appealed. They argued that: (a) r 80(4)(c) required more than the reiteration of r 80(1) or a statement of the purpose sought to be attained; (b) reasons for an order for general segregation required to demonstrate why segregation in respect only of a prescribed activity had not been utilised; (c) where the reason stated for segregation under r 80 was conduct which could give rise to disciplinary procedures, the reason for proceeding under r 80 rather than under the disciplinary proceedings should be disclosed; (d) the reasons for any new r 80 order after transfer between prisons had to demonstrate that the governor of the receiving prison had had regard to all the circumstances and not simply continued the previous order; (e) the reasons for a r 80 order had to be adequately and comprehensively related to the purpose of the order.

The Lord Ordinary had excluded various averments from probation on relevancy grounds. The petitioners cross-appealed on the grounds that since the petitions were for judicial review there should have been a further opportunity for adjustment and a continued first hearing.

Held that: (1) the governor, in making a r 80(1) order, was subject to the same *vires* control as the Scottish Ministers (paras 25, 26); (2) to allege that a particular act of the Scottish Ministers was incompatible with a claimant's Convention rights inevitably raised the question of validity under sec 57(2) of the Scotland Act 1998 and therefore inevitably raised a devolution issue, and it followed that the procedure laid down for devolution issues had to be followed, but it did not follow that the entirety of the claimant's remedies had to be sought under the Scotland Act 1998, since the Convention-incompatible act was also unlawful under sec 6 of the Human Rights Act 1998, and the proper basis for a claim for

damages for an act in breach of Convention rights was that such an act was unlawful and a claim for damages was made available under sec 8 of the Human Rights Act 1998 (paras 42, 43, 45, 47, 49, 52, 54–57, 71, 72, 76, 79, 80); (3) time began to run only on the expiry of the relevant period of segregation (para 86); (4) for the plea of mora, taciturnity and acquiescence to be sustained, all three elements must be present, and since the respondents had not made any averment of acquiescence, let alone of circumstances from which it might be inferred, there was no relevant basis for the plea (para 94); (5) there was a very strong public interest in non-disclosure of the redacted material, senior counsel for the petitioners was not inhibited from pointing to specific averments of either party which disclosure of the redacted passages would serve to prove or disprove and without which the petitioner in question would be deprived of the means of proper presentation of his case, and there was good reason for a procedural requirement that the court should be satisfied at the outset that there was sufficient justification for considering unredacted material (para 20); (6) the terms of the Prisons (Scotland) Act 1989 and the 1994 Rules made thereunder did not give rise to any implication that the *Carltona* principle was excluded, and although the exercise of the powers given by r 80(5) and (6) may have important consequences for prisoners that circumstance did not justify the inference that Parliament intended to exclude the application of the principle in that context (para 101); (7) the law did not recognise proportionality as the (or a) criterion by which to test the validity of administrative action generally, and such rights as the petitioners retained in relation to the manner and circumstances of their detention were not common law rights of a fundamental nature, and the petitions did not fall within the class of cases to which the test akin to proportionality had been applied (paras 122–125); (8) the reasons required by r 80(4)(c) were to be distinguished from the purposes listed in r 80(1)(a), (b) and (c); there was no general rule that adequate reasons for a general segregation order had to explain why a more limited order had not been made; there was no obligation to include reasons for proceeding under r 80(1) rather than taking disciplinary proceedings; the fact that the order made by the governor of the receiving prison in effect continued the previous order did not demonstrate that the receiving governor had acted irrationally or had improperly fettered his discretion; the reasons for a r 80(1) order had to be adequately and comprehensibly related to the purpose of the order, but it did not follow that a reason expressed in terms of assessment of the prisoner before returning to association needed expressly to explain why such assessment needed to be carried out with the prisoner in continuing segregation (paras 152–162); (9) two of the orders were not challenged for want of adequate reasons, in one order the reasons stated were accepted to be inadequate, in ten of the orders no relevant ground of challenge had been put forward, and the decision as to the compliance of the other orders with r 80(4)(c) should be reserved until after proof (paras 164–167); (10) the Lord Ordinary had misdirected herself in excluding certain averments from probation by failing to exercise a discretion appropriate to the procedural context of applications for judicial review (para 175); and reclaiming motion *allowed in part* and cross-appeal *allowed in part* and petitions remitted to the Lord Ordinary with a direction to hold a continued first hearing and *quoad ultra* to proceed as accords.

Observed the Lord Ordinary had acceded to the parties' motions to allow a proof before answer, rather than a second hearing, and thereafter a debate, rather than a continued first hearing, at a time when it was perfectly clear to those representing the petitioners that the pleadings were incomplete, and the better course would have been to continue the first hearing, as many times as seemed necessary, until the parties were both in a position to say that their pleadings were complete, and at that stage an informed discussion could have taken place to identify the issues which could be disposed of without further inquiry, and those in respect of which a second hearing would be appropriate (para 175).

R v HM Advocate 2003 SC (PC) 21 *distinguished*.

ANDREW SOMERVILLE, WILLIAM CAIRNS, SAMUEL RALSTON, RICARDO BLANCO and DAVID HENDERSON each presented a petition under the judicial review procedure in the Court of Session seeking to bring under judicial review various orders for their segregation under r 80 of the Prisons and Young Offenders Institutions (Scotland) Rules 1994. The Scottish Ministers were called as respondents. In each case parties were allowed a period to adjust their pleadings, and a proof before answer was assigned for 26 October 2004 and the following five weeks. On joint motion the diet of proof was discharged and instead parties were allowed a debate on the relevancy of their respective averments and on any issues arising from the granting of any public interest immunity certificate.

The petitions and answers called before the Lord Ordinary (Lady Smith) for a debate on 16, 17, 18, 19, 23, 24, 25, 26 and 30 November and 1, 2, 3, 7, 8 and 9 December 2004.

At advising, on 8 February 2005, the Lord Ordinary, *inter alia*, excluded certain of the parties' averments from probation and *quoad ultra* allowed a proof ([2005] CSOH 24). On 17 February 2005 both parties were granted leave to reclaim. The respondents reclaimed and the petitioners cross-reclaimed.

Cases referred to:

Advocate (HM) v Copeland 1988 SLT 249; 1987 SCCR 232

Advocate (HM) v R 2002 SLT 834; 2001 SLT 1366; 2002 SCCR 697; 2001 SCCR 915

Air Canada v Secretary of State for Trade [1983] 2 AC 394; [1983] 2 WLR 494; [1983] 1 All ER 910

Albyn Properties Ltd v Knox 1977 SC 108; 1977 SLT 41

Alston v Macdougall (1887) 15 R 78; 25 SLR 74

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223; [1947] 2 All ER 680

Attorney-General's Reference (No 2 of 2001) (Re) [2003] UKHL 68; [2001] EWCA Crim 1568; [2004] 2 AC 72; [2004] 2 WLR 1; [2001] 1 WLR 1869; [2004] 1 All ER 1049

Breen v Amalgamated Engineering Union [1971] 2 QB 175; [1971] 2 WLR 742; [1971] 1 All ER 1148

Brown v Hamilton District Council 1983 SC (HL) 1; 1983 SLT 397

Canada Trust v Stolzenberg (No 2) [2002] 1 AC 1; [2000] 3 WLR 1376; [2000] 4 All ER 481

Carltona Ltd v Commissioners of Works [1943] 2 All ER 560

Caswell v Dairy Produce Quota Tribunal for England and Wales [1990] 2 AC 738; [1990] 2 WLR 1320; [1990] 2 All ER 434

Chief Constable, Lothian and Borders Police v Lothian and Borders Police Board [2005] CSOH 32; 2005 SLT 315

Conlon's Application (Re) [2001] NICA 49

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374; [1984] 1 WLR 1174; [1984] 3 All ER 935; [1985] ICR 14; [1985] IRLR 28

Davidson v Scottish Ministers (No 2) [2004] UKHL 34; 2005 SC (HL) 7; 2004 SLT 895; 2004 SCLR 991

De Becker v Belgium App No 214/56; [1958] 2 YB 214

De Freitas v Ministry of Agriculture [1999] 1 AC 69; [1998] 3 WLR 675

Dempsey v Parole Board for Scotland 2004 SLT 1107

Dyer v Watson [2002] UKPC D1; 2002 SC (PC) 89; 2002 SLT 229; 2002 SCCR 220; [2004] 1 AC 379; [2002] 3 WLR 1488; [2002] 4 All ER 1

Eadie Cairns v Programmed Maintenance Painting 1987 SLT 777

Edwards and Lewis v UK (2005) 40 EHRR 24; [2003] Crim LR 891

Glasgow Corporation v Central Land Board 1956 SC (HL) 1; 1956 SLT 41

Golden Chemical Products Ltd (Re) [1976] Ch 300; [1974] 3 WLR 1; [1976] 2 All ER 543

Goodridge v Chief Constable, Hampshire [1999] 1 WLR 1558; [1999] 1 All ER 896

Hanlon v Traffic Commissioner 1988 SLT 802

Henry's Application (Re) [2004] NIQB 11

Kemp's Application (Re) [2004] NIQB 46

King v East Ayrshire Council 1998 SC 182; 1998 SLT 1287

Lewisham Metropolitan Borough and Town Clerk v Roberts [1949] 2 KB 608; [1949] 1 All ER 815

Maharaj v Attorney-General of Trinidad and Tobago (No 2) [1979] AC 385; [1978] 2 WLR 902; [1978] 2 All ER 670

Martin v Tauranga District Court [1995] 2 NZLR 419
Matthew v State of Trinidad and Tobago [2004] UKPC 33; [2005] 1 AC 433; [2004] 3 WLR 812
Miller v The Queen (1985) 24 DLR (4th) 9
Mills v HM Advocate (No 2) [2002] UKPC D1; 2003 SC (PC) 1; 2002 SLT 939; 2001 SLT 1359; 2002 SCCR 860; 2001 SCCR 821; [2004] 1 AC 441; [2002] 3 WLR 1597
Minister of Home Affairs v Fisher [1980] AC 319; [1979] 2 WLR 889; [1979] 3 All ER 21
Montgomery v HM Advocate [2000] UKPC D1; 2001 SC (PC) 1; 2001 SLT 37; 2000 SCCR 1044; [2003] 1 AC 641; [2001] 2 WLR 779
Nyambirai v National Social Security Authority (1996) 1 LRC 64
Penman v Fife Coal Co 1935 SC (HL) 39; 1935 SLT 401; [1936] AC 45
R v Advocate (HM) [2002] UKPC D3; 2003 SC (PC) 21; 2003 SLT 4; 2003 SCCR 19; [2004] 1 AC 462; [2003] 2 WLR 317
R v Board of Visitors of Hull Prison, ex p St Germain [1979] 1 QB 425; [1979] 2 WLR 42; [1979] 1 All ER 701
R v Chief Constable, Sussex, ex p International Trader's Ferry Ltd [1999] 2 AC 418; [1998] 3 WLR 1260; [1999] 1 All ER 129
R v Crocker, 19 Dec 1997, unreported
R v Deputy Governor of HMP Parkhurst, ex p Hague [1992] 1 AC 58; [1991] 3 WLR 340; [1991] 3 All ER 733
R v Governor of HMP Long Lartin, ex p Ross [1994] TLR 324
R v London Borough of Lambeth, ex p Walters [1994] 2 FLR 336; (1993) 26 HLR 170
R v Lord Chancellor, ex p Witham [1998] QB 575; [1998] 2 WLR 849; [1997] 2 All ER 779
R v Northamptonshire County Council, ex p W [1998] ELR 291; [1998] Ed CR 14; [1998] COD 110
R v Secretary of State for the Home Department, ex p Brind and ors [1991] 1 AC 696; [1991] 2 WLR 588; [1991] 1 All ER 720
R v Secretary of State for the Home Department, ex p Leech [1994] QB 198; [1993] 3 WLR 1125; [1993] 4 All ER 531
R v Secretary of State for the Home Department, ex p Oladehinde [1991] 1 AC 254; [1990] 3 WLR 797; [1990] 3 All ER 733
R v Secretary of State for the Home Department, ex p Simms [2000] 2 AC 115; [1999] 3 WLR 328; [1999] 3 All ER 400
R v Skinner [1968] 2 QB 700; 1968 3 WLR 408; [1968] 3 All ER 124
R v Soneji [2005] UKHL 49; [2006] 1 AC 340; [2005] 3 WLR 303; [2005] 4 All ER 321
R v Westminster City Council, ex p Ermakov [1996] 2 All ER 302; [1996] 2 FLR 208; (1996) 28 HLR 819
R (on the application of Alconbury Developments Ltd and ors) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23; [2003] 2 AC 295; [2001] 2 WLR 1389; [2001] 2 All ER 929
R (on the application of Association of British Civilian Internees: Far East Region) v Secretary of State for Defence [2003] EWCA Civ 473; [2003] QB 1397; [2003] 3 WLR 80
R (on the application of Burkett) v Hammersmith and Fulham London Borough Council and anr [2002] UKHL 23; [2002] 1 WLR 1593; [2002] 3 All ER 97
R (on the application of Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 AC 532; [2001] 2 WLR 1622; [2001] 3 All ER 433
R (on the application of Munjaz) v Mersey Care NHS Trust [2005] UKHL 58; [2006] 2 AC 148; [2005] 3 WLR 793
R (on the application of National Association of Health Stores) v Secretary of State for Health [2005] EWCA Civ 154
Raymond v Honey [1983] 1 AC 1; [1982] 2 WLR 465; [1982] 1 All ER 756
Robertson v Frame [2006] UKPC D2; 2006 SC (PC) 22; 2006 SLT 478; 2006 SCCR 151
Robinson v Secretary of State for Northern Ireland [2002] UKHL 32; [2002] NI 390
Royal Bank of Scotland plc v Holmes 1999 SLT 563; 1999 SCLR 297
Safeway Stores plc v National Appeal Panel 1996 SC 37; 1996 SLT 235
Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014; [1976] 3 WLR 641; [1976] 3 All ER 665
Secretary of State for Trade and Industry v Normand 1994 SLT 1249; 1994 SCLR 930
Simpson v Attorney-General (Baigent's Case) [1994] 3 NZLR 667
Singh v Secretary of State for the Home Department 2000 SLT 533; 2000 SCLR 655
Swan v Secretary of State for Scotland 1998 SC 479; 1998 SCLR 763

Taggart's Application for Judicial Review (Re) 12 Mar 1997, unreported
Thoburn v Sunderland City Council [2002] EWHC Admin 195; [2003] QB 151; [2002] 3 WLR 247; [2002] 4 All ER 156
West v Secretary of State for Scotland 1992 SC 385; 1992 SLT 636; 1992 SCLR 504
Wordie Property Co Ltd v Secretary of State for Scotland 1984 SLT 345
X (Minors) v Bedfordshire County Council [1995] 2 AC 633; [1995] 3 WLR 152; [1995] 3 All ER 353

Textbooks etc referred to:
Bell, W, *Dictionary and Digest of the Law of Scotland* (7th Watson ed, Bell & Bradfute, Edinburgh, 1890), pp 727, 728
Clyde (Lord) and Edwards, DJ, *Judicial Review* (W Green/Scottish Universities Law Institute, Edinburgh, 2000), paras 14.02, 14.10, 17.24, 18.54

The cause called before the First Division, comprising the Lord President (Hamilton), Lord Macfadyen and Lord Nimmo Smith, for a hearing on the summar roll on 10, 11, 12, 13, 17, 18, 19, 20, 24, 25, 26 and 27 January 2006.

At advising, on 3 November 2006, the opinion of the Court was delivered by the Lord President (Hamilton)—

OPINION OF THE COURT—

Introduction

[1] This is the opinion of the Court to which each of its members has contributed substantially.

[2] On 8 February 2005 the Lord Ordinary pronounced, in each of five petitions for judicial review, an interlocutor in which she gave effect to her decisions on certain legal issues earlier argued before her. The Scottish Ministers, who are respondents to each of the petitions, have reclaimed against the interlocutor pronounced in the petitions at the instance of David Henderson, Ricardo Blanco and William Cairns in so far as each interlocutor repelled certain pleas advanced by them (pleas 1, 3 and 4) directed to issues of time-bar. These issues were not raised in the petitions at the instance of Andrew Somerville or Samuel Ralston. Each of the petitioners has, in respect of a range of other issues, cross-appealed against the Lord Ordinary's interlocutor in his case.

[3] The petitioners were each convicted of serious crimes and sentenced to custodial terms: Somerville, Ralston, Blanco and Henderson to long terms of imprisonment and Cairns to a long period of detention in a young offenders institution. While in custody each was, for a period or for a number of distinct periods, removed from association with other prisoners ('segregated') in implement of orders purportedly made under r 80 of the Prisons and Young Offenders Institutions (Scotland) Rules 1994 (SI 1994/19310) (as amended) ('the 1994 Rules'). The petitioners each contend that the order or orders affecting him, together with the grants and renewals of authority extending the length of the relative period or periods of segregation, were unlawful. These contentions are advanced at common law and on the basis of alleged infringements of the petitioners' rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention'). They seek certain remedies, including declarators and awards of damages.

[4] Rule 80 of the 1994 Rules, in so far as material, provides:

'(1) Where it appears to the Governor desirable for the purpose of–

(a) maintaining good order or discipline;
(b) protecting the interests of any prisoner; or
(c) ensuring the safety of other persons,

he may order in writing that a prisoner shall be removed from association with other prisoners, either generally or during any period the prisoner is engaged or taking part in a prescribed activity.

(2) If the Governor makes an order under paragraph (1) in relation to a prescribed activity, he may specify only one prescribed activity in the order. [Rule 80(3) defines each of six prescribed activities] ...

(4) If the Governor makes an order under paragraph (1), he shall–

(a) specify in the order whether the removal from association is–
    (i) in general; or
    (ii) in relation to a prescribed activity;
(b) if the removal is in relation to a prescribed activity, specify which activity the order relates to;
(c) specify in the order the reasons why he is making it;
(d) record in the order the date and time it is made; and
(e) explain to the prisoner the reasons why the order is made and provide him with a copy of the written order.

(5) A prisoner who has been removed from association generally or during any period he is engaged in or taking part in a prescribed activity by virtue of an order made by the Governor in terms of paragraph (1) shall not be subject to such removal for a period in excess of 72 hours from the time of the order, except where the Scottish Ministers have granted written authority on the application of the Governor, prior to the expiry of the said period of 72 hours.

(6) An authority granted by the Scottish Ministers under paragraph (5) shall have effect for a period of one month commencing from the expiry of the period of 72 hours mentioned in paragraph (5) but the Scottish Ministers may, on any subsequent application of the Governor, renew the authority for further periods of one month commencing from the expiry of the previous authority. ...

(8) The Governor–

(a) may–
    (i) cancel an order under paragraph (1) at any time if he considers it appropriate to do so;
    (ii) vary an order made under paragraph (1) in terms of which the prisoner has been removed from association generally in order to restrict the effect of that order to removal from association during any period the prisoner is engaged in or taking part in any one or more prescribed activities as he may specify in the variation order;
    (iii) if appropriate, further vary an order under paragraph (1) which has previously been varied under subparagraph (ii) above by further restricting the number of prescribed activities to which removal from association applies; or
(b) shall cancel any order under paragraph (1) if a medical officer advises on medical grounds that he should do so. ...

(9) If a prisoner is moved by the Scottish Ministers from any prison to any other prison in terms of section 10 of the Act, any order under paragraph (1), or any authority under paragraph (5), made or granted in relation to the prisoner while confined in the former prison shall cease to have effect, but without prejudice to the power of the Governor of the prison to which the prisoner is moved to make a new order under paragraph (1).'

[5] The issues which were raised by the parties in the reclaiming motion, and which are discussed in the following sections of this opinion, are given these

headings: Recovery of documents and public interest immunity (paras 6–21); Statutory time-bar (paras 22–89); Mora (paras 90–95); *Carltona* (paras 96–105); Proportionality (paras 106–126); Adequacy of reasons (paras 127–167); and Procedural and pleading issues (paras 168–175).

Recovery of documents and public interest immunity

Introduction

[6] In this section we consider the relationship between the petitioners' entitlement to recover certain documents and a decision of the Minister for Justice that a claim for public interest immunity ('PII') ought to be made for some of these documents, in whole or in part. Some months prior to the substantive hearing before the Lord Ordinary commission and diligence was granted to the petitioners for recovery of the documents called for in various specifications of documents lodged on behalf of each of the petitioners. We have not been invited to consider the full terms of these specifications, but it appears from the Lord Ordinary's opinion that the documents in question related to the background to and the making of the decisions to segregate the petitioners. Mr CJ MacAulay QC was appointed commissioner.

[7] The Scottish Ministers were the only havers. They produced several hundred documents in response to the various calls. In many instances there were, however, parts blacked out so as to delete certain references, names and passages. In some cases, entire pages were blacked out. This was because the Minister for Justice had formed the view that the disclosure of these parts would be contrary to the public interest in that it would cause real harm to the work of the Scottish Prison Service ('SPS'). PII certificates were lodged in each case which set out in detail the fact that she had formed that view and the reasons why disclosure would cause such harm. The relevant passage, which is the same in all the PII certificates, is set out below. (It appears that the expression which has come to be used for the process of blacking out passages in documents in circumstances such as the present so as to render these passages illegible is 'redaction'. This seems to be derived from that sense of the word which relates to putting a written work into appropriate form for publication; we use it out of deference to the fact that it was used by the Minister for Justice and by counsel before us.)

[8] The petitioners, however, insisted on seeking to recover the documents in an unredacted form, except in so far as the redacted parts expressly disclosed the identities of any of the persons referred to in the PII certificates. By agreement between the parties, and in accordance with a protocol, the terms of which are set out below, counsel for the petitioners were able to consider the redacted parts of the documents, with the exception of those parts in respect of which the above concession had been made. They had, accordingly, prior to the hearing before the Lord Ordinary, had sight of all the documents for which PII was claimed in an unredacted form, apart from the redaction of identities as provided for in the protocol. It should also be mentioned that in the course of the proceedings before the commissioner certain other passages were redacted because they contained material which was confidential to third parties and which was not within the terms of the specifications. No issue was taken with this. The Lord Ordinary heard submissions about the outstanding issues in camera, the only persons present being the parties' counsel and agents. In her interlocutor dated 8 February 2005 in each

petition the Lord Ordinary, *inter alia*, refused to order that the documentary material covered by the relative PII certificate be produced for inspection by the court or to the petitioner. The petitioners now appeal against this decision.

Reasons for the PII certificates

[9] In making her decision to grant the PII certificates the Minister for Justice personally examined the full unredacted text of each of the documents. In the certificates she stated that with the benefit of advice from Mr Michael Duffy, the Director of Prisons in the SPS (who had provided an affidavit) and other officials in SPS, she had satisfied herself that for the reasons of public interest set out in the certificates, certain references, names and passages in the documents attracted PII. That material had therefore been redacted. She stated in each certificate that the first and paramount question for her was whether the material attracted PII. The approach that she had adopted was to focus specifically on the damage that would be done by disclosure of particular documents. Accordingly, she had not asserted PII unless she believed that disclosure of a document or piece of information would cause real harm to the public interest. If, applying the real harm test, the material attracted PII, the second question for her was whether the public interest in non-disclosure was outweighed by the public interest in disclosure of the material for the purposes of doing justice in the proceedings. She stated that it was open to her to consider and balance the relevant competing public interests and to agree to the disclosure of material that attracted PII if she was satisfied that the overall public interest favoured disclosure. This had, on occasion, caused her to disclose material which would otherwise attract PII.

[10] The Minister stated that the aims of the SPS, in this context, were to ensure that prisoners did not escape, to secure the preservation of the safety of staff, prisoners and other persons working in prisons, and of their relatives, friends and associates, to see that good order was maintained and to prevent the commission of crime. There was a very clear public interest in the maintenance of a regime which would assist in the achievement of those aims, and there was an obvious and widely recognised need to preserve the effectiveness of the measures taken by SPS to secure them. She was satisfied that disclosure of particular information contained within the documents would cause real harm to the work of SPS and the safety of those mentioned above. In para 7 of each certificate she stated:

> '7. The reason why disclosure would cause such harm is that the relevant parts of the documents in the Annex include information of one or more of the following kinds:
>
> a. information relating to persons providing information or assistance in confidence to SPS staff, disclosure of which would endanger or risk endangering the persons concerned or other persons or would impair or risk impairing their ability or willingness to continue providing information or assistance, or the ability of SPS staff to obtain information and assistance from the persons concerned or other persons;
> b. information relating to the identity, appearance, deployment or training of members of SPS staff, disclosure of which would endanger or risk endangering them or other individuals or would impair or risk impairing their ability to operate effectively as members of SPS staff or the ability of those services to recruit and retain staff in the future;
> c. information received in confidence by SPS from outside sources, disclosure of which would jeopardise or risk jeopardising the provision of such information in the future;

d. information relating to operations and the capabilities of SPS staff, disclosure of which would jeopardise present and future intelligence-gathering operations and capabilities;
e. information relating to any method, technique or equipment deployed by SPS staff, disclosure of which would reduce or risk reducing the value of the method, technique or equipment in current or future operations;
f. other information likely to be of use to prisoners or their families or contacts, and disclosure of which would impair or risk impairing the performance by SPS of their functions;
g. information as to the methods by which information and intelligence is gathered directly or indirectly by SPS staff, and as to the methods by which information or intelligence material is recorded, analysed, assessed and internally presented or reported and the use made of intelligence material;
h. information relating to the management of incidents of disruptive behaviour, disorder or concerted action on the part of prisoners; the role and deployment of SPS staff and other agencies in response to such incidents; and the strategies, tactics, techniques and resources for dealing with such incidents.'

[11] The Minister went on to state that the general nature of the concerns set out in the preceding paragraph needed little elaboration. They were aimed at protecting the integrity of SPS operations and the safety and usefulness of those who worked for SPS or provided information to them, including organisations outside the Scottish prison system. The provision of intelligence to SPS by third parties, whether inside or outside the prison system, relied on those third parties having confidence that the information, and their part in assisting SPS, would not be disclosed. To disclose in breach of such confidentiality created a serious risk that such information would be less readily forthcoming in the future. The Minister was particularly concerned for the safety of those people, usually but not always prisoners, who provided information in confidence to prison staff. She noted, from Mr Duffy's affidavit, that the disclosure of the identity of such informers would place them in very great danger of physical harm. In the case of each redaction she was satisfied that disclosure of the information redacted would cause real harm for one or more of the reasons set out above, and therefore that that information should be withheld.

[12] Mr Duffy's affidavit was before the Lord Ordinary, who summarised it in her opinion. He had management responsibility for security and intelligence systems in SPS and responsibility for its operational stability. He explained how and why the gathering of intelligence could be crucial to managing a prison effectively, why it was necessary to maintain confidentiality regarding intelligence, why it was necessary to restrict access to and knowledge of intelligence systems, and why it was necessary to restrict access to knowledge of the prison service's incident management strategies and capacity. The effective management he had in mind concerned, largely, the avoidance of violence, escapes, possession of illicit articles, disruptive incidents and bullying. SPS used a standard form, known as an IIR form, for reporting intelligence and information gathered by staff. This was a crucial element within the system. A significant number of the redacted documents were IIR forms. Disclosure of the full information contained in an IIR form would allow identification of the person who had submitted the information, the evaluation of it and the action taken as a result. The evaluation code enabled a degree of identification of the source of the information in respect that it could be deduced whether the

source was a prisoner or a prison officer. This might be enough to enable a prisoner to work out which individual had provided the information. Mr Duffy also expressed concern that disclosure of the redacted parts of the IIR forms would enable prisoners to work out SPS's methodology and strategies for dealing with particular types of intelligence, which could have serious outcomes. If the redacted parts of documents relating to certain incidents at HMP Shotts and HMP Glenochil referred to in the pleadings were disclosed, given the need to protect the confidentiality of the strategies, tactics, resources and equipment used and available for dealing with such incidents, individuals would be put at serious risk of harm and SPS's ability to manage incidents safely and effectively would be compromised.

Examination of redacted documents by petitioners' counsel

[13] The protocol referred to above was in the following terms, which we reproduce in full for the benefit of those considering a similar procedure:

> '1. Aidan O'Neill QC and Simon Collins and Ailsa Carmichael, Advocates (hereinafter ''the petitioners' counsel'') will be permitted to examine documents in respect of which PII is asserted for the purposes of considering whether or not to advance any argument that the Court should over-ride the Lord Advocate's [*sic*] assertion of PII in respect of any of those documents or any of their contents. This protocol sets out the basis upon which they will be permitted to do so.
>
> 2. The documents which the petitioners' counsel will be permitted to examine are those documents which fall within the calls of the specification and in respect of which PII is asserted. The documents which they will be permitted to examine will be marked so as to obscure the names and addresses of: (a) any informer; and (b) any other person whose identity, if disclosed, would put that person at risk of harm, whether physical or otherwise.
>
> 3. The examination will take place at SPS Headquarters, The Gyle, Edinburgh at a time to be agreed. A room will be made available to the petitioners' counsel where they will be permitted to examine the documents outwith the presence of any other person. Counsel for the Lord Advocate, a solicitor from OSSE and an appropriate member or members of SPS staff will be available (but not present in the same room) to provide any explanation which may be requested by the petitioners' counsel as to why PII has been asserted in respect of a particular document or entry in a document.
>
> 4. The documents are being made available for inspection by the petitioners' counsel on a counsel-to-counsel basis. The petitioners' counsel will not disclose the contents of the documents to any other person (including, for the avoidance of doubt but without prejudice to the generality, any of the petitioners or any agent instructed by the petitioners) unless and to the extent that the Court should decide that the document should be disclosed notwithstanding the assertion of PII.
>
> 5. When inspecting the documents, the petitioners' counsel may make notes on their respective laptops. The notes made: (a) will not be printed out; (b) will not be copied onto any disc or other medium of electronic storage apart from the hard drive of the laptop; (c) will not be e-mailed (whether between the petitioners' counsel or to any third party); and (d) will be deleted from the hard drive of the laptop after all issues arising from the assertion of PII have been finally resolved whether by agreement or ruling by the Court.
>
> 6. The parties agree that any further procedure involving the documents (including any hearing before the Court at which the Court is invited to require disclosure of any document notwithstanding PII and any commission) should take place in camera and that the only persons who will be present on behalf of the petitioners shall be the petitioners' counsel. They will concur in any motion which may be required in that regard.'

The Lord Ordinary records that counsel for the petitioners examined the documents in accordance with the protocol, taking two full afternoons to do this and make notes on their laptop computers. They had, accordingly, prior to the hearing before her had sight of all the documents for which PII was claimed in a form which was unedited apart from the blacking out of identities as provided for in the protocol.

Lord Ordinary's decision

[14] After considering the authorities which, so far as relevant for present purposes, are set out below, the Lord Ordinary sought to apply the relevant law to the facts and circumstances of the present petitions. She did not agree to examine the redacted passages herself. She stated that the petitioners sought to have the material covered by the PII certificates made available to them, other than that which was blacked out to protect express identities. Despite their counsel having seen the material sought, they did not specifically identify any document or part of a document as being required for the furtherance of any specific issue in any one of the individual cases. They were apparently content to rest their assertion that the material was required on the general proposition that they required to see what evaluation of intelligence had been made without relating it to any particular period of segregation or any particular petitioner. The petitioners' counsel had had ample opportunity to examine the material withheld and identify what, in particular, they required for the purposes of their cases, and why. In these circumstances, the Lord Ordinary could not conclude that the petitioners had made out a case that the material sought was likely to give substantial support to any specific issues identified in their cases. She did not, as she put it, in short, find that there were definite grounds for expecting to find material of real importance to the petitioners. Separately, it seemed to her clear that the balance between the public interest in non-disclosure and the petitioners' interests in disclosure for the purposes of these petitions weighed heavily in favour of refusing to order that the PII material be disclosed. Any risk to the security and safety of Scottish prisons, seven of which were involved in these petitions, required to be regarded as being of high public importance. The petitioners' interests in the pecuniary remedies that they sought in these petitions did not fall to be regarded in the same light. Furthermore, she could not, on the petitioners' averments and the submissions made on their behalf, conclude that the recovery of the materials sought would, in any event, make any material difference to the presentation of their cases.

Applicable law and the issues in the appeal

[15] It was not in dispute before the Lord Ordinary, and again before us, that the Minister was entitled to be satisfied that disclosure of the information redacted would cause real harm for the reasons set out in the PII certificates, or that the claim for PII was asserted on a justifiable basis. Again, there was no dispute that the Scottish courts have an inherent power to override such an objection by a Minister if other aspects of the public interest require it: *Glasgow Corporation v Central Land Board*. In that case, Lord Radcliffe said (p 18):

> 'The power reserved to the Court is therefore a power to order production even though the public interest is to some extent affected prejudicially. This amounts to a recognition that more than one aspect of the public interest may have to be surveyed in reviewing the question whether a document which

> would be available to a party in a civil suit between private parties is not to be available to the party engaged in a suit with the Crown. The interests of government, for which the Minister should speak with full authority, do not exhaust the public interest. Another aspect of that interest is seen in the need that impartial justice should be done in the Courts of law, not least between citizen and Crown, and that a litigant who has a case to maintain should not be deprived of the means of its proper presentation by anything less than a weighty public reason.'

[16] The task of the court is therefore to balance two competing aspects of the public interest. The question which then arises is how this should be done in any particular case, in accordance with the general law and the practice and procedure of the court. In the grounds of appeal for the petitioners it is alleged that the Lord Ordinary erred in law in asserting that the petitioners had not made out a case that the material sought was likely to give substantial support to any specific issues identified in their cases and that she did not find that there were definite grounds for expecting to find material of real importance to the petitioners. It is stated that the Lord Ordinary was advised, on the authority of senior counsel for the petitioners, that the redacted material which the Lord Ordinary had not seen did contain information relevant to and important for establishing each petitioner's case and challenging or testing the case for the Scottish Ministers. She chose not to accept this assurance, however, and, as it is put in the grounds of appeal, referred to it as a 'generalisation' not related to the 'specifics' of the case. She made these observations while aware, from the terms of the protocol, that counsel for the petitioners were not permitted to disclose the actual contents of any of the documentation to her. In the whole circumstances, it is alleged, the Lord Ordinary was unfair and made an error of law. The grounds of appeal continue with the statement that a motion in respect of the PII material made to the Lord Ordinary on behalf of the petitioners was that she, 'or some Article 6 compliant independent and impartial tribunal or judge', should, in private session, examine the documentation in respect of which PII was being claimed and hear the submissions of counsel for both parties in relation to the specifics of this documentation and why it should, or should not, be made available for use in court, and under what conditions, if any. It is alleged that in refusing this motion (which was made only after counsel for the petitioners had, after inspection of the full documentation, judged that there was material of sufficient importance to the petitioners' cases such as should outweigh the claim of PII made therefore by the respondents) the Lord Ordinary acted in a manner incompatible with the requirements of Art 6 and hence unlawfully as contrary to sec 6 of the Human Rights Act 1998.

[17] The invocation of Art 6 by counsel for the petitioners led to much discussion before the Lord Ordinary and in written notes of argument lodged by the parties before the hearing of this reclaiming motion. At the hearing, however, during the course of several exchanges between counsel, junior counsel for the Scottish Ministers recognised that the court would wish to adopt a procedure which was compatible with Art 6, and senior counsel for the petitioners said that he did not need a finding from the court that Art 6 was engaged. Counsel were therefore agreed that the question was one of fairness as between the parties, and that the question for this court was one of practice. This being so, it is unnecessary for us to discuss the European cases to which reference was made at earlier stages: indeed, senior counsel for the petitioners (rather uncharacteristically) described the European cases as an 'irrelevant sideline'.

[18] This being so, we can confine our reference to authority to the following cases. In *Air Canada v Secretary of State for Trade* Lord Fraser of Tullybelton said (p 435):

> 'My Lords, I do not think it would be possible to state a test in a form which could be applied in all cases. Circumstances vary greatly. The weight of the public interest against disclosure will vary according to the nature of the particular documents in question: for example, it will in general be stronger where the documents are Cabinet papers than when they are at a lower level. The weight of the public interest in favour of disclosure will vary even more widely, because it depends upon the probable evidential value to the party seeking disclosure of the particular documents, in almost infinitely variable circumstances of individual cases. The most that can usefully be said is that, in order to persuade the court even to inspect documents for which public interest immunity is claimed, the party seeking disclosure ought at least to satisfy the court that the documents are very likely to contain material which would give substantial support to his contention on an issue which arises in the case and that without them he might be ''deprived of the means of ... proper presentation'' of his case'.

The last words were taken from the passage in Lord Radcliffe's speech in *Glasgow Corporation v Central Land Board* quoted above. Junior counsel for the Scottish Ministers submitted that the test for us to apply remained as it was stated in *Air Canada*. While not taking issue with this, senior counsel for the petitioners submitted that, as could be seen from the decision of Moore-Bick J in *Goodridge v Chief Constable, Hampshire*, 'things had come on' since *Air Canada*, under European influence. He referred in particular to a passage (p 1567) in which the judge said that, on the authorities, the right approach to take was that it was for the plaintiff in the first place to show that the document should be disclosed to the court under the ordinary rules of discovery, and that thereafter it was for the court to embark on the exercise of balancing the conflicting interests, namely the need to do justice to the plaintiff and the need for proper protection of the public interest, to determine whether the document should be disclosed.

[19] Senior counsel for the petitioners characterised this as a short and straightforward point. He submitted that the court must see the documents before taking a decision about them in performing the balancing exercise. He was clear that in the documents which he had seen there was material that was relevant to the petitioners' cases. The process which had been followed was flawed. On behalf of the Scottish Ministers, and under reference to *Edwards and Lewis v UK* (para 54) junior counsel submitted that the issue was procedural. While no doubt senior counsel for the petitioners had been placed in a difficult position, the court was nevertheless entitled to be satisfied that there was sufficient justification in all the circumstances that the order sought should be made.

Discussion

[20] In our opinion the principle to be applied remains as stated by Lord Fraser in *Air Canada v Secretary of State for Trade*. Given that the issue is one of procedure, we do not find assistance in English cases which turn on the procedure of discovery. As we understand it, this imposes a duty of disclosure, which may be contrasted with the Scottish procedure, under which it is always for the party seeking recovery of documents to satisfy the court that an order should be made. The procedure to be adopted must necessarily depend on the state of the pleadings and other relevant

circumstances in any particular case. A special aspect of the Scottish procedure is the appointment of a commissioner, of a level of seniority and experience appropriate to the subject-matter, who in a case such as the present may be expected to dispose of all other issues before the court is called on to decide whether passages which have been redacted pursuant to a PII certificate should nevertheless be disclosed to the party seeking recovery of the documents. In addition, in the present case, the parties followed a course which we would encourage in other suitable cases, whereby it was possible for counsel for the petitioners, in terms of the protocol, to examine the redacted material. Thus, by the time that the issue came before the Lord Ordinary, it should have been possible for the issue to be sharply focused and for well-informed arguments to be presented to her. It is not in dispute that it was for the Lord Ordinary, in the exercise of her discretion, to carry out a balancing exercise. It is for the petitioners to satisfy us that in so doing she misdirected herself. It was clear to her, as it is to us, that there was a very strong public interest in non-disclosure of the redacted material. It therefore required sufficiently compelling reasons to counter this. While senior counsel for the petitioners was no doubt in a difficult position by reason of the terms of the protocol which he had agreed, it was no more difficult than many situations encountered in practice, and we do not accept that he was inhibited from pointing to specific averments of either party which disclosure of the redacted passages would serve to prove or disprove and without which the petitioner in question would be deprived of the means of proper presentation of his case. A general comparison of parties' pleadings with the nature of the redacted information as described by the Minister does not suggest any such disadvantage. Senior counsel for the petitioners did not maintain that that description was inaccurate. Furthermore, each petitioner will, at best, be entitled to an award of damages which, on any view, is likely to be modest. By contrast, a process of gathering information on which the SPS necessarily depends for the maintenance of good order in prisons and for the safety of prisoners may suffer serious damage. Individual informers may come to harm. This was recognised before the Lord Ordinary and again before us. Yet no attempt was made to direct the Lord Ordinary's attention to any averment, proof of which depended upon or would even be advanced by disclosure of any redacted passage. There is good reason for a procedural requirement that the court should be satisfied at the outset that there is sufficient justification for considering unredacted material. We are satisfied that the Lord Ordinary reached the correct decision both in principle and in its application to the circumstances of the present case.

[21] For these reasons the above grounds of appeal fail.

Statutory time-bar

[22] In each of the petitions at the instance of Henderson, Blanco and Cairns, the Scottish Ministers contend that any claim which any of these petitioners may have to damages in respect of alleged breaches of Convention rights must be advanced under reference to the Human Rights Act 1998 ('the Human Rights Act'). Before the Lord Ordinary the petitioners contended that the Scotland Act 1998 ('the Scotland Act') was the only appropriate route for their claims. That contention was advanced notwithstanding frequent references in their pleadings to the Human Rights Act. The Lord Ordinary upheld the petitioners' contention. In the course of the reclaiming motion it became clear that, while the petitioners contended strongly that their

claims to damages lay, and could only lie, under the Scotland Act, they were not abandoning their claims under the Human Rights Act — which would be advanced in the (as senior counsel for the petitioners saw it, extraordinary) event of their primary contention being rejected. The issue of the proper legal basis for a claim for damages in circumstances where the claimant maintains that the Scottish Ministers have acted beyond their powers was a major element in the discussion before us.

Rule 80(1) of the 1994 Rules

[23] Before addressing that matter it is convenient first to deal with a related issue. As is clear from r 80(1) the power to make an order in writing that a person be removed from association with other prisoners is conferred on the 'governor'. Rule 3(1) of the 1994 Rules provides that in certain rules including, subject to immaterial exceptions, any rule in Pt 9 (in which Part r 80 appears) 'governor' means any of a number of officers there specified. The Scottish Ministers contend that the acts of the governor (as so defined) in making an order under r 80(1) are acts by him exercising statutory powers given to him *qua* governor and for that reason, apart from any wider consideration, any claim that those acts were incompatible with the petitioners' Convention rights falls to be advanced under reference to the Human Rights Act. The Lord Ordinary rejected that contention.

[24] Before us the Scottish Ministers submitted that the structure of r 80 supported their contention. Reference was made to r 80(5) and (6), and to r 80(8)(a) and (b). The powers there conferred on the governor were to be seen in the context of other rules, namely r 78(1) (which imposed on the governor the responsibility for the supervision of the whole prison and the control of the prisoners confined therein) and r 13(2) (which empowered the governor, having regard to any matter affecting the management of a prisoner, to allocate within a prison a particular part of it in which a prisoner might be confined). These rules, so the argument ran, clearly distinguished between powers given to the Scottish Ministers and powers given to the 'governor'. The latter exercised the powers conferred on him by virtue of the statutory powers given for the purposes of r 80(1) and (7) and not because he was a civil servant or an official of the Scottish Ministers. While the governor in exercising his powers was a 'public authority' for the purposes of the Human Rights Act, his act was not an 'act of a member of the Scottish Executive' for the purposes of sec 57(2) of the Scotland Act. Any claim directed against the validity of orders made under r 80(1) was properly articulated under reference only to the Human Rights Act. The Lord Ordinary had erred in law in her view that this argument was difficult for the Scottish Ministers, having regard to their contentions (in a separate chapter) based on the *Carltona* doctrine (*Carltona Ltd v Commissioners of Works*), and her conclusion that it would produce the result of 'a civil servant being in a stronger position as regards *vires* than the Minister to whom he is answerable'.

[25] In our view the Scottish Ministers' contention on this aspect of the case is unsound. By sec 53(1) of the Scotland Act certain functions are, 'so far as they are exercisable within devolved competence', exercisable by the Scottish Ministers instead of by a Minister of the Crown. These functions include those of the Secretary of State under the Prisons (Scotland) Act 1989. It was in furtherance of the powers conferred by sec 39(1) of that Act that the 1994 Rules were made. Amendments to the Rules, including to r 80, have been made by the Scottish Ministers in exercise of the functions transferred to them. Section 3(1A) of the Act (as inserted by para 27(3) of sch 8 to the Scotland Act) provides that every prison shall have a governor and

such other officers as may be necessary. Governors and other such officers are appointed by the Scottish Ministers. Section 39(12) of the 1989 Act provides that rules made under that section may (without prejudice to the generality of subsec (1)) confer functions on a governor. Section 54 of the Scotland Act makes provision in respect of 'devolved competence' in a manner which relates it to the scope of the legislative competence of the Scottish Parliament. Section 29(2) of the Scotland Act provides that a provision of an Act of the Scottish Parliament is outside the competence of that Parliament so far as any of certain paragraphs apply. Paragraph (d) applies if the provision is incompatible with any of the Convention rights.

[26] The cumulative effect of these provisions is, in our view, that an appointee of the Scottish Ministers (such as a governor) is circumscribed by the same limit of competence as his appointer. It matters not that the rules made under statutory powers confer on such an appointee (and only upon such an appointee) certain powers, including the power to make orders under r 80(1). These powers must in turn be exercised within the competence enjoyed by the appointer. Accordingly, a governor has no power to make a r 80(1) order which is incompatible with any of the Convention rights. In the result the governor is thus, in making such an order, subject to the same *vires* control as the Scottish Ministers. If that were not so, the anomaly would arise that, while the Scottish Ministers were personally subject to the *vires* control, members of the Scottish Administration, implementing devolved functions on their behalf, would not be.

[27] By way of illustration of that analysis the petitioners pointed out that all 12 substantive criminal appeals brought (as at January 2006) before the Judicial Committee of the Privy Council involved challenges to acts not of the Lord Advocate personally but of other persons (Advocate-deputes and procurators fiscal) acting as public prosecutors. In five of these the prosecutor (whose acts had been challenged) had been a procurator fiscal or a procurator fiscal-depute. It was clear that such persons were office-holders in the Scottish Administration (see Scotland Act, sec 126(6), (7), (8); Scottish Administration (Offices) Order 1999 (SI 1999/1127), reg 2). It had not been suggested in any of these appeals that the issues to be decided were not 'devolution issues' and so not within the jurisdiction of the Judicial Committee. While, as the point had never been raised, there was no decision on it, it would be surprising if any incompetence had not been noticed.

[28] We are satisfied that no specialty arises by reason of the power to make a r 80(1) order being vested in the governor. Accordingly, for the purposes of addressing the main issue in respect of time-bar, no distinction falls to be made between the making of an order under that sub-rule and the authorisation of its extension or further extension under r 80(5) or r 80(6).

Relationship of the Scotland Act to the Human Rights Act

[29] The main issue in respect of time-bar raises an important question about the Scotland Act and its relationship with the Human Rights Act. Section 6 of the latter Act 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; or
>
> (b) in the case of one or more provisions of, or made under, primary

> legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.'

It is not disputed that both the Scottish Ministers and all 'governors' who made relevant r 80(1) orders are public authorities within the meaning of sec 6.

[30] Section 7 provides:

> '(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may–
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
> (b) rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act.
>
> [Subsection (2) defines ''appropriate court or tribunal''] ...
>
> (5) Proceedings under subsection (1)(a) must be brought before the end of–
>
> (a) the period of one year beginning with the date on which the act complained of took place; or
> (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,
>
> but that is subject to any rule imposing a stricter time limit in relation to the procedure in question. ...
>
> (7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.'

Section 8 provides:

> '(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. ...
> (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including–
>
> (a) any other relief or remedy granted, or order made, in relation to the act in question (of that or any other court), and
> (b) the consequences of any decision (of that or any other court) in respect of that act,
>
> the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.
> (4) In determining–
>
> (a) whether to award damages, or
> (b) the amount of an award,
>
> the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention. ...
> (6) In this section– ...
>
> ''damages'' means damages for an unlawful act of a public authority; and ''unlawful'' means unlawful under section 6(1).'

[31] The Scottish Ministers' contention is that the petitioners' claims for damages are subject to the provisions of the Human Rights Act, including in particular sec 7(5). As in respect of certain, though not all, of the periods of segregation complained of, the present petitions were not brought before the end of the period of one year beginning with the date on which the act complained of took place, then — subject to the exercise by the court of its equitable power under sec 7(5)(b) — the proceedings are, so far as they relate to such periods of segregation, out of time. (There was no suggestion that, in respect of petitions for judicial review in Scotland, any stricter time-limit currently applied.) The petitioners' primary contention is that the provisions of the Human Rights Act are irrelevant to their claims for damages. These claims, they contend, in so far as based on infringement of Convention rights, are laid — and can only be laid — under the Scotland Act. That Act provides by sec 57(2) that: 'A member of the Scottish Executive has no power . . . to do any . . . act, so far as the . . . act is incompatible with any of the Convention rights'. The Act makes no express provision entitling a person who complains that his Convention rights have been infringed by the act of any member of the Scottish Executive (or any member of the staff of the Scottish Administration) to bring proceedings for damages, or indeed for any other remedy. However, the petitioners maintain that, on a sound construction of the Scotland Act, they are entitled to claim 'public law' damages for such infringement under that Act and, in so far as concerns the Scottish Ministers or any other person constrained by the *vires* limitation of sec 57(2), only under that Act. In that regard they rely upon the decision of the Privy Council in *R v HM Advocate* (which they maintain answers the issue conclusively in their favour), together with submissions based on various provisions of the Scotland Act itself and of other statutes enacted at or about the same time — in particular the Northern Ireland Act 1998 (cap 47) ('the Northern Ireland Act') and the Government of Wales Act 1998 (cap 38) ('the Government of Wales Act').

[32] It will be necessary in due course to return to these statutory provisions. It is, however, convenient at this point to notice that sec 100 of the Scotland Act provides:

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

Contentions of the Scottish Ministers

[33] The Scottish Ministers do not dispute that sec 57(2) of the Scotland Act imposes a *vires* limit on an act of a member of the Scottish Executive and that where, as here, it is alleged that such a member has acted incompatibly with Convention

rights, there is a devolution issue to which the procedural provisions of sch 6 to the Scotland Act apply (*Mills v HM Advocate (No 2)*). They maintain, however, that the proper legal basis for any award of damages by reason of a breach of Convention rights lies under the Human Rights Act, which provides an explicit procedural and remedial scheme for it. They acknowledge that declaratory and reductive remedies may, in appropriate circumstances, be sought and obtained against them by reference solely to the Scotland Act but maintain that the mere fact that the act of a member of the Scottish Executive who has acted *ultra vires* does not on its own provide a relevant basis for a claim to financial compensation. A claim for damages against a public authority might be founded, it was argued, on a common law ground of liability (such as for negligence) or on a statutory provision (such as sec 8 of the Human Rights Act) but not on an *ultra vires* act alone (*X (Minors) v Bedfordshire County Council*, per Lord Browne-Wilkinson, p 730F–H) — although the existence or absence of statutory power might be relevant to whether or not there was a defence to a claim in respect of an act of a public authority which was otherwise wrongful. Views expressed in *R v HM Advocate* by each of Lord Hope of Craighead and Lord Rodger of Earlsferry to the effect that a claim for damages against the Scottish Ministers in respect of alleged infringements of Convention rights could — and should — be articulated under reference to the Scotland Act were *obiter* and mistaken. The correct view was that articulated by Lord Reed at first instance (*HM Advocate v R*, para 40). The reasoning in *R v HM Advocate* of the majority of the committee (which had included Lords Hope and Rodger) had been disapproved by the majority in *Attorney-General's Reference (No 2 of 2001)*. It was unnecessary to postulate a separate and free-standing claim to damages under the Scotland Act, for which (in contrast to the position under the Human Rights Act) no procedural scheme had been laid down. Section 100 of the Scotland Act, on a sound construction, did not impliedly envisage such a claim. The Lord Ordinary had erred in regarding herself as bound by *R v HM Advocate* to hold that the Scotland Act was not only the route, but the required route, to a remedy in damages for an infringement of sec 57(2). She had further erred in her construction of sec 100 of the Scotland Act and in her view that, by reason of the interval of 15 months between the bringing into force of the Scotland Act and the bringing into force of the Human Rights Act, the Scottish Ministers' analysis would produce an anomalous result.

Petitioners' contentions in outline

[34] The petitioners' primary submission was that the ratio of *R v HM Advocate*, binding on this court, was to the effect that the Scotland Act was the route, and the only route, for all remedies (including a remedy in 'just satisfaction' damages), arising out of an act which was *ultra vires* by reason of sec 57(2) of the Scotland Act. The Privy Council had made it clear that the Scotland Act was to be read as a constitutional statute which provided, within its four corners, a complete system of rights, obligations and remedies as regards the devolved governance of Scotland. Section 57(2) deprived the Scottish Ministers of all power to act incompatibly with Convention rights. A similar position applied to legislation of the Scottish Parliament which was beyond competence. The Scotland Act had, against the principle that Convention-incompatible acts of the Scottish devolved administration or legislature were *ultra vires*, made distinct procedural provisions to deal with 'devolution issue' challenges. These included requirements for intimation to the

relevant law officer or officers of the jurisdiction of the United Kingdom in which the proceedings in question were to take place (sch 6, paras 5, 16, 26), for preliminary references (sch 6, paras 7–9, 18–21, 28, 29) and for the ultimate jurisdictional supremacy of the Judicial Committee of the Privy Council. Provision had also been made under which a court or tribunal could remove or limit the retrospective effect of a decision made by it that legislation of the Scottish Parliament (or subordinate legislation made by a member of the Scottish Executive) was *ultra vires* and suspend the effect of its decision (Scotland Act, sec 102). These and other features were shared with the Northern Ireland Act and the Government of Wales Act. These provisions pointed to a constitutional regime.

[35] It was important to see the Scotland Act as part of a settlement which embraced the Northern Ireland Act and the Government of Wales Act. As it was a constitutional settlement, the approach to the interpretation of the provisions should be quite different from that applicable to the interpretation of the provisions of ordinary statutes. Reference was made to *Robinson v Secretary of State for Northern Ireland*, *Minister of Home Affairs v Fisher*, *Matthew v State of Trinidad and Tobago* and *Thoburn v Sunderland City Council* (esp Laws LJ, paras 62, 63). If, as was urged, the Scotland Act was a constitutional statute, it should be read in its own terms as a 'self-contained, self-standing, self-understood' instrument. Its interpretation should be approached 'generously'. In relation to the absence of time limits, it was important to notice the distinctive provision contained in sec 102 of the Scotland Act (and replicated in sec 81 of the Northern Ireland Act and sec 110 of the Government of Wales Act) which allowed for control by the courts over the time at which decisions should have effect. Section 101(2) of the Scotland Act pointed to the need for a generous interpretative approach (see also sec 83 of the Northern Ireland Act). This provision was parallel with, but distinct from, that made by sec 3 of the Human Rights Act.

[36] There were some features shared in the devolution statutes on the one hand and the Human Rights Act on the other. These included that acts (or failures to act), were reviewable on Convention grounds, that there was the same 'victim' test and that damages for infringement of Convention rights should be assessed having regard to the 'just satisfaction' test of European jurisprudence; but the checks and balances were quite different. The imperative of the Human Rights Act was to preserve the sovereignty of the Westminster Parliament; the imperative of the Scotland Act was to impose a *vires* control which was subject to judicial adjudication. A Scottish Minister (other than the Lord Advocate in his prosecutorial role), whose act was *ultra vires* under sec 57(2) of the Scotland Act, as being incompatible with any of the Convention rights, could not rely by way of defence on sec 6(2) of the Human Rights Act. Where a devolution issue arose, the only route for a person seeking a remedy was by way of the devolution statute. If litigants were in a position to pick and choose which statute to claim under, there would be constitutional chaos. There was nothing to suggest that the Privy Council, in the exercise of its devolution jurisprudence could not award (or vary an award of) damages.

[37] If one approached the Scotland Act as a constitutional document, it was clear that it envisaged an award of damages as a remedy available under that statute. In particular, sec 100 envisaged such a remedy. Although sec 100(1) was framed negatively, it was to a positive effect — it did enable a person to bring proceedings if he was a victim. Likewise sec 100(3), although framed negatively, enabled a court to make an award under the Scotland Act provided that such an award could be made if sec 8(3) and (4) had applied. Section 100(2) was also in its effect positive — the law

officers could bring proceedings albeit they were not victims; they exercised a 'policing' function, no such function being conferred under the Human Rights Act. Section 100(4)(a) envisaged a situation for which there was no parallel in the Human Rights Act; there was a parallel to sec 100(4)(b) but the Human Rights Act provision was different. The end result was that the systems of remedies were parallel but distinct. Thus a claim for damages against the Scottish Ministers framed on the basis of the Human Rights Act would be fundamentally irrelevant — or at least would be incompetent unless the procedural requirements pertinent to devolution issues had been observed. That was the effect of *Mills v HM Advocate (No 2)* and of *R v HM Advocate*.

[38] The Scotland Act had been in force for some 15 months prior to the Human Rights Act being brought into force. The Westminster Parliament must have thought that the former statute could stand alone without the latter. The Scotland Act, which had been enacted 10 days after the Human Rights Act, could be regarded as a more specialised statute impliedly repealing (though that was not necessary for the argument) any more generalised provision of the Human Rights Act. Section 129(2) of the Scotland Act was a co-ordinating provision but it pointed to no more than that the Scotland Act and the Human Rights Act provisions ran in parallel but distinct tracks. That section had its parallels in the Northern Ireland Act and in the Government of Wales Act.

[39] The constitutional model for the Scotland Act was that the judges had the last word. The protection of the present petitioners' rights lay not in any unlawfulness under sec 6(1) of the Human Rights Act (which might be claimed to be justified under sec 6(2)) but in the absence of power in the Scottish Ministers. In such circumstances (where the challenged act was void) the concept of a time-bar was inappropriate; on the other hand, as what was being sought was a public law remedy, the court had a discretion as to whether or not any award of damages should be made. Any mischief of delay could and should be dealt with in the exercise of that discretion.

Discussion

[40] The issue on this aspect of the reclaiming motion is whether the time-limit of one year, provided for by sec 7(5) of the Human Rights Act 1998, has effect on the claims for damages made by certain of the petitioners in respect of alleged infringements of their Convention rights (and in particular those under Art 8 of the Convention) by acts of the Scottish Ministers. The affected petitioners maintain in the first place that this issue is, so far as the Lord Ordinary and this court are concerned, foreclosed in their favour by the decision of the Privy Council in *R v HM Advocate*. Accordingly, if that is so, this court, whatever doubts might be entertained by its members, is obliged to decide this aspect of the reclaiming motion as the petitioners contend.

[41] In *R v HM Advocate* each of Lord Hope of Craighead and Lord Rodger of Earlsferry expressed views to the effect that the terms of sec 100 of the Scotland Act implied a power under that statute to award damages for infringement by the Scottish Ministers of an individual's Convention rights. Lord Rodger (para 120) quoted certain observations by the presiding judge in that case at the preliminary diet (Lord Reed) on the question of remedies for an infringement of Convention Rights (*HM Advocate v R*, para 40). Lord Reed had suggested that in relation to a claim for damages in circumstances where there was no effective remedy under the

law of delict, the Human Rights Act might be the only basis upon which such damages could be awarded by a court. Lord Rodger stated that he found difficulty with some of Lord Reed's observations.

[42] The Human Rights Act, the Scotland Act, the Northern Ireland Act and the Government of Wales Act were all enacted within a period of four months in 1998. Each was, in our view, a constitutional enactment, affecting in the case of the first all the constituent parts of the United Kingdom; in the case of the last three, constituent elements of that kingdom. While the last three set up institutions and the first did not, its essential rationale of 'bringing home' the rights and freedoms of the European Convention on Human Rights can properly be regarded as constitutional in character. It would be remarkable if these statutes were not to be construed on the basis that they were closely interrelated each with the other. They plainly are so. The circumstance that the Scotland Act proceeds on the basis of a *vires* control of parliamentary and executive action and the other statutes do not does not, in our view, justify treating the Scotland Act as a 'self-contained, self-standing, self-understood' instrument, if by that is meant that it is to be construed without reference to its close constitutional neighbours.

[43] Senior counsel for the petitioners argued that the Scotland Act was to be construed in the context of the wider constitutional settlement of which the Northern Ireland Act and the Government of Wales Act were part. He acknowledged that there were certain features common to these three Acts and the Human Rights Act. These included the features (1) that acts or omissions were reviewable on Convention grounds, (2) that the 'victim' test applied and (3) that when awarding damages the relevant court or tribunal should have regard to the 'just satisfaction' test established under European jurisprudence. Notwithstanding these common features and the virtually contemporaneous enactment of all four statutes, counsel's submissions would not allow the same interrelationship between all four as between the Human Rights Act and the other three. We are unable to accept that submission. The Human Rights Act and the Scotland Act provide different mechanisms for the control of acts and omissions. Under the former the infringing act is unlawful; under the latter it is void by reason of the act being *ultra vires*. The former approach maintains the sovereignty of the UK Parliament; the latter renders void infringing acts of the Scottish Parliament and of the Scottish Executive. The Northern Ireland Act and the Government of Wales Act share certain features with the Scotland Act. All three provide for 'devolution issues' (Scotland Act, sch 6, para 1(d); Northern Ireland Act, sch 10, para 1; Government of Wales Act, sch 8, para 1(1)); each excludes from justiciability a devolution issue where it appears to the relevant court or tribunal that that issue is frivolous or vexatious (Scotland Act, sch 6, para 2; Northern Ireland Act, sch 10, para 2; Government of Wales Act, sch 8, para 2); each provides that the Judicial Committee of the Privy Council is the ultimate body to which an appeal may lie and for any decision by it to be binding in all legal proceedings, other than proceedings before the Committee itself (Scotland Act, sch 6, paras 10–13 and sec 103(1); Northern Ireland Act, sch 10, paras 9, 10 and sec 82(1); Government of Wales Act, sch 8, paras 10, 11, 32); each provides for the making of a preliminary reference (Scotland Act, sch 6; Northern Ireland Act, sch 8; Government of Wales Act, sch 10, all *passim*) and each makes special provision as regards Law Officers (eg Scotland Act, sec 100(2); Northern Ireland Act, sec 71(2); Government of Wales Act, sec 107(3)). Further, in each case power is given to a relevant court or tribunal to remove or limit any retrospective effect of certain decisions and to suspend the effect of its decision (Scotland Act, sec 102(2);

Northern Ireland Act, sec 81(2); Government of Wales Act, sec 110(2)) and special provision is made for interpretation (Scotland Act, sec 101; Northern Ireland Act, sec 83).

[44] Certain legislative features are shared by the Human Rights Act and the Scotland Act. These include provision for the review of acts or omissions on Convention grounds (Human Rights Act, sec 6(6); Scotland Act, sch 6, para 1(e) and sec 100(4)(b)), for the same 'victim' test (Human Rights Act, sec 7(1), (7); Scotland Act, sec 100(1) — see also Northern Ireland Act, sec 71(1)); and for the awarding of damages on a 'just satisfaction' basis (Human Rights Act, sec 8(3), (4); Scotland Act, sec 100(3) — see also Northern Ireland Act, sec 71(3)(b)).

[45] Senior counsel for the petitioners maintained that the Northern Ireland Act and the Government of Wales Act were part of the same constitutional settlement as the Scotland Act, notwithstanding that the former two statutes rendered infringing acts unlawful while the Scotland Act rendered such acts and omissions *ultra vires*. While the mechanisms are different, that difference is not, in our view, so radical as to justify a wholly different approach to the Scotland Act from that appropriate to its neighbours. The Human Rights Act is no less a constitutional statute than is the Scotland Act (*Thoburn v Sunderland City Council*, per Laws LJ, para 62).

[46] At this point it is appropriate to notice a particular contention advanced by senior counsel for the petitioners; he categorised the Scotland Act as a '*lex specialis*'. That statute received the Royal Assent on 19 November 1998, 10 days after the Human Rights Act. Counsel submitted that (in so far as might be necessary for the purposes of his argument — which he stated it was not) the effect of this chronology was that the later statute impliedly repealed as respects Scotland any provision of the earlier which was inconsistent with it. It was not, however, clear what the nature and extent of such repeal was suggested to be. By '*lex specialis*' we understood counsel to denote a statute dealing with some specific matter, in contrast to an 'ordinary' statute. The Scotland Act was said to fall within the former category while the Human Rights Act fell within the latter.

[47] We reject that argument. Both statutes have, in our view, the same status for present purposes, namely, that of constitutional instruments. Neither repeals any provision of the other. Nor is the Human Rights Act 'simply of comparative interest', as counsel maintained. It is, for the reasons which we give later, closely interrelated with the Scotland Act.

[48] The resolution of the present issue turns on the nature of the relationship between the Scotland Act and the Human Rights Act, and in particular upon a construction of sec 100 of the former statute and on the relationship, if any, between that section and sec 7 of the Human Rights Act. Senior counsel for the petitioners laid much emphasis on the constitutional nature of the Scotland Act and the approach to construction which, he contended, was accordingly appropriate. He relied on *Minister of Home Affairs v Fisher* where Lord Wilberforce, in delivering the advice of the Privy Council, observed (p 328), that the instrument there under discussion established a constitution and that it, and its relative antecedents, called for 'a generous interpretation avoiding what has been called ''the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to [in the relevant provision]'. His Lordship, in approaching the interpretation of a particular word ('child'), preferred a *sui generis* interpretation consistent with the constitutional character of the instrument 'without necessary acceptance of all the presumptions that are relevant to legislation of private law' (p 329). The inappropriateness of a legalistic and

over-literal interpretation of constitutional instruments has also been noticed by the dissenting minority (comprising Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Steyn and Lord Walker of Gestingthorpe) in *Matthew v State of Trinidad and Tobago* (para 34). Reference in this context was also made to *Robinson v Secretary of State for Northern Ireland* where it was indicated that the constitution of Northern Ireland should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions were intended to embody (Lord Bingham, para 11).

[49] We have no difficulty in accepting that the Scotland Act is a constitutional instrument and that the principles of interpretation referred to in the authorities cited above should be applied in construing it. As, however, is there indicated, any interpretation must be consistent with the language used. We return to these principles in the context of the construction of sec 100 of the Scotland Act.

[50] There are, of course, differences between the Human Rights Act and the Scotland Act. As already noticed, the control provided by the former statute is one of rendering unlawful acts which infringe Convention rights; the control provided by the latter is by way of *vires*, rendering null and void infringing acts. A further related difference is that by sec 6(2) of the Human Rights Act, subsec (1) of that section (which renders unlawful incompatible acts of a public authority) is disapplied where, as a result of one or more provisions of primary legislation, the authority could not have acted differently; a similar disapplication applies to subordinate legislation where the authority is acting so as to give effect to or enforce primary legislation. By contrast the existence of primary legislation having such results does not save acts amenable to the control of the Scotland Act. This difference, however, is simply an aspect of the different mechanisms which the UK Parliament has provided for control under the different statutory regimes. It goes no distance to support any proposition that the Scotland Act and the Human Rights Act are essentially different in character in what they respectively seek to achieve.

[51] Senior counsel for the petitioners throughout his submissions contended that proceedings under the Human Rights Act and proceedings under the Scotland Act constituted different 'routes', albeit leading to the same result. These routes were 'parallel', although, hardly consistently with principles of geometry, they met at a common destination, namely, the end result of the proceedings. Where a devolution issue arose, so ran the argument, an affected person required to travel by the Scotland Act route; where it did not, his or her route was that provided by the Human Rights Act. The case maintained by the Scottish Ministers involved, counsel argued, that the choice of route depended on the remedy sought: where a declarator or interdict was sought, the route was by the Scotland Act, where damages were sought the route was by the Human Rights Act, though damages could also be sought, it seemed, under the Scotland Act. This interpretative route led, so ran the argument, to chaos, the result being that the litigant could pick and choose at will which route to follow. The true structure was that the Scotland Act was a 'self-contained, self-standing, self-understood instrument', uninfluenced to any extent by the Human Rights Act. If damages for an act or omission constituting an infringement of a Convention right were sought by an affected person, that remedy could be obtained under and only under that self-contained statute. The Human Rights Act had no part to play in the construction and effect of the Scotland Act. Thus, the limitation provision constituted by sec 7(5) of the former statute was irrelevant to proceedings (such as the present) in which damages were sought by a person who complained of an infringing act by the Scottish Executive.

[52] We reject that argument. As we have sought to explain, the Scotland Act and the Human Rights Act are each of equivalent status as constitutional instruments. Their proximity in time of enactment and the cross-references between them point, with other factors, to the plain conclusion that they each (with the Northern Ireland Act and the Government of Wales Act) form part of a single constitutional settlement. These statutes share many provisions. There are also differences between and among them. But these differences do not militate against the proposition that they together constitute a unity. Once that state of affairs is recognised, as in our view it must be, the question of statutory interpretation raised by these proceedings can receive a simple and straightforward answer.

[53] We have already set forth the terms of sec 100 (para 32). Each of subsecs (1), (2) and (3) is expressed negatively. Senior counsel for the petitioners submitted that the negative was used for the avoidance of doubt and that each subsection contained inferentially a positive proposition. In particular sec 100(3) could and should be read as stating:

> 'This Act enables the court or tribunal to award damages in respect of an act which is incompatible with any of the Convention rights which it could award if section 8(3) and 8(4) of the Human Rights Act applied.'

Likewise subsec (1) could and should be read as stating:

> 'This Act enables a person (a) to bring proceedings in a court ... and (b) to rely on any of the Convention rights ... if he would be a victim for the purposes of Article 34';

and subsection (2) could and should be read as stating in effect:

> 'The Lord Advocate, the Advocate General, the Attorney General and the Attorney General for Northern Ireland can raise proceedings notwithstanding that he or she does not meet the victim test referred to in subsection (1).'

Counsel elaborated his argument as follows. The test applied in the *Minister of Home Affairs v Fisher* should be applied (*Montgomery v HM Advocate*, p 18C–D). The first step to be taken by a person aggrieved by an act or omission of the Scottish Ministers was to look at the Scotland Act, which itself told him what to do. That Act provided a complete scheme for the protection of the rights of such a person, as it had done during the 15 months while it was in force but the Human Rights Act was not. The UK Parliament had provided that the Scotland Act should stand alone without the Human Rights Act. In each of *Mills v HM Advocate (No 2)* and *R v HM Advocate* the Advocate General had rightly argued (and accepted) that any complaint of infringement of Convention Rights should be raised under the Scotland Act and not the Human Rights Act. Section 129(2) of the Scotland Act was a co-ordinating but limited provision which ensured that the proceedings under these Acts were separate but parallel. That subsection stipulated that the Scotland Act provisions had full force and effect even if the Human Rights Act was never brought into force. The Lord Ordinary's approach to this subsection had been sound. Section 129(2) had been introduced at a relatively late stage in the parliamentary progress of the relative Bill. Equivalent provisions were to be found in the Northern Ireland Act (sch 14, para 1) and in the Government of Wales Act (sec 153(2)). Where the treatment was different that reflected the circumstance that the UK Parliament remained sovereign (the Executives and the Assemblies

were given the defence provided by sec 6(2) of the Human Rights Act). Section 129(2) of the Scotland Act had effect upon secs 29(1)(d), 126(1), 57(2), 57(3) and 100. Under the scheme laid down by the Scotland Act the judges, by their adjudication upon issues of competency, had the last word. The concept of time-bar was inappropriate to a scheme which depended upon a competency test. Such a scheme, however, would be expected to and here did provide for the public law remedy of damages, into which was built a judicial discretion; that discretion might in an appropriate case deny that remedy on the ground of excessive delay. An attempt to import a different model (such as that provided by the Human Rights Act) was to destroy the model provided by the Scotland Act. It would be wrong to construe sec 129(2) as incorporating into the Scotland Act the whole scheme of the Human Rights Act. Section 100(3), soundly construed against the interpretative canons applicable to constitutional instruments, positively enabled this court to award such damages as it could have awarded if the Human Rights Act had applied (which it did not). The consistency of this provision so interpreted with sec 57 was to be found in the circumstance that sec 100(3) specified only subsecs (3) and (4) of sec 8 of the Human Rights Act, and not sec 6(2). The equivalent provisions in the Northern Ireland Act and in the Government of Wales Act were secs 71 and 107 respectively.

[54] We are unable to accept this argument. We adopt a generous and purposive approach to the exercise of construction. Adopting that approach we are satisfied that sec 129(2) is not merely of 'comparative interest' but that its purpose was to ensure that, even during any period when the Human Rights Act was not in force, it was to be treated as if it were in force. Once in force, that statute had of itself the force of law. Accordingly, as from the time of the coming into force (in May 1999) of the Scotland Act, the Human Rights Act was for the purposes of the Scotland Act to be treated as in force (in the event until October 2000) and thereafter was for all purposes in force. That points in our view not only to a close interrelationship between the Scotland Act and the Human Rights Act but also to an intention of Parliament that, as from the coming into force of the Scotland Act, it should be read and construed consistently with the Human Rights Act. It points, in our view, to a close dependency of the former statute on the latter. The notion that the Scotland Act is to be read as a 'self contained, self-standing, self-understood' instrument is wholly inconsistent with the generous and purposive canon of construction upon which senior counsel for the petitioners (rightly) relied.

[55] It is then necessary to address sec 100. It is not suggested that there is any provision of the Human Rights Act which is inconsistent with that section. In particular, it is not suggested that sec 7(5) of the Human Rights Act is inconsistent with it. It plainly is not. Accordingly, if the two statutes are, as we hold, to be regarded as closely interdependent, it is right and proper to conclude that Parliament, in the absence of some compelling reason to the contrary, intended that sec 7(5) should apply to limit in terms of time proceedings where a devolution issue arose as well as those where none arose. We use the phrase 'where a devolution arose' advisedly because we regard it as a misconception to speak of proceedings 'under the Scotland Act'. There are no such proceedings in relation to claims for damages. Proceedings, whether by summons or petition, may give rise to a devolution issue which may in turn require certain procedural steps, such as intimation to the Advocate General for Scotland, to be taken; but that does not mean that the proceedings themselves are taken 'under' the Scotland Act.

[56] Section 100, properly construed, clearly has a purpose. Its purpose is to ensure that in proceedings in which a devolution issue is raised (1) the victim test is

generally applied to the issue of title and interest to sue, (2) the Law Officers do not require to satisfy the victim test and (3) that, in proceedings in which damages are awarded, the fact that the act in question is *ultra vires* by reason of sec 57(2) does not avoid the requirement that the court or tribunal apply to its assessment the just satisfaction test of European jurisprudence. The purpose of sec 100 is, in our view, plain and that purpose is not, with respect to the members of the Judicial Committee who took a contrary view, the purpose favoured by them.

[57] The Lord Ordinary took the view that she was bound by the decision of the Privy Council in *R v HM Advocate* to reach the decision which she did. In our view she was mistaken in that matter. As however we also are bound, whatever our personal views, by the ratio of any decision of the Privy Council, we must first endeavour to identify that ratio.

[58] In *R v HM Advocate* the accused was charged in the High Court with indecent behaviour against children. Prior to his trial he lodged in respect of two of these charges a plea in bar of trial. His basic contention was that proceedings in respect of these two charges had not been brought within a reasonable time. Parties were heard by the trial judge (Lord Reed), who repelled the plea in bar of trial but granted leave to appeal. He also granted leave to the accused to amend the minute to include a submission in terms of sec 57(2) of the Scotland Act. The appellant appealed to the High Court of Justiciary. The court refused the appeal but granted leave to the accused to appeal to the Privy Council. The appellant appealed to the Judicial Committee of the Privy Council.

[59] The committee by a majority allowed the appeal, Lord Steyn and Lord Walker of Gestingthorpe dissenting. By this stage the appellant had confined his contention to the proposition that the act of the Lord Advocate, in pursuing a prosecution of the two charges, was *ultra vires* under the Scotland Act and that accordingly he should be prohibited from continuing the prosecution of these charges. The committee decided that the Lord Advocate was indeed acting *ultra vires*. An issue then arose as to the accused's remedy. Lords Hope of Craighead, Clyde and Rodger of Earlsferry held that the appropriate remedy was to allow the appeal by sustaining the plea in bar and dismissing the charges from the indictment. The minority (Lords Steyn and Walker) were of the view that, while there had been a breach of the reasonable time guarantee under Art 6 of the Convention, the appellant's remedy lay not in dismissal of the charges but in the circumstance being brought into account on consideration of any penalty to be imposed in the event of the appellant being convicted on the charges.

[60] In the joint statement of facts and issues provided to the Judicial Committee, four issues were identified. The first two of these were in the following terms:

> '1. Whether the continuation of this prosecution by the Lord Advocate on charges (1) and (3) after a reasonable time has elapsed constitutes a violation of [A]rticle 6(1).
>
> 2. Whether, in view of section 57(2) of the Scotland Act 1998, the Lord Advocate still has power to prosecute the appellant on charges (1) and (3) after a reasonable time has elapsed.'

The third stated issue was held not to raise a devolution issue and thus to be outwith the jurisdiction of the committee. The fourth issue (namely, whether the act of the Lord Advocate in continuing to prosecute the appellant after a reasonable time had elapsed constituted an 'act' within the meaning of sec 57(2) of the Scotland Act) is not germane to the questions arising for decision in the present case.

[61] Lord Hope, after dealing with the fourth issue, concentrated first on the second, which raised the question of remedy. He did so in order to demonstrate that the effect of sec 57(2) was that, 'once it has been established that *a proposed or continuing act* is incompatible with a person's Article (6) Convention right, the Lord Advocate is *prohibited* from doing the act by the statute.' (Emphasis in original.) He continued (para 53): 'The only course which the court can take is to order him not to do it and bring the proceedings to an end.' Having referred to a statement in *Mills v HM Advocate (No 2)* (para 51) that it was important to start with the position of domestic law, Lord Hope continued:

> 'The proper approach is first to identify the remedy which would ordinarily be thought to be appropriate in domestic law for a breach of the kind that has taken place, and then to consider whether the remedy which has thus been identified would achieve just satisfaction for the breach as indicated by the jurisprudence of the European court.'

He developed that approach as follows (para 60):

> 'Section 8 of the Human Rights Act 1998 gives power to a court to grant such relief or remedy for a breach of a person's Convention rights as it considers appropriate. There is no equivalent provision in the Scotland Act 1998, so the power of the court to grant relief or to provide a remedy is left to common law principles. One of these is the familiar principle which provides a civil cause of action where there has been a breach of a statutory duty which results in injury to a person of a class which the statute was designed to protect: see *Solomons v R. Gertzenstein Limited* [1954] 2 QB 243. In the present context it may be sufficient to point to the fact that the Scotland Act itself envisages that the person who would be a victim for the purposes of [A]rticle 34 of the Convention if proceedings in respect of the Act were brought in the European Court of Human Rights is entitled to a remedy: see section 100(1). A power to award damages is clearly implied by section 100(3), as it prevents a court or tribunal from awarding any damages in respect of an act which is incompatible with any of the Convention rights which it could not award under section 8(3) and (4) of the Human Rights Act which requires the court to apply the principles which the European Court should apply. As Clayton and Tomlinson, *The Law of Human Rights*, page 1416, paragraph 21.13 explain, the award of damages in these circumstances is regarded as a public law remedy.'

[62] He observed that there was no reason to think that the position was different in criminal cases. He added that the ordinary remedy which our domestic law provided where the unlawful act was in prospect or was still continuing was to pronounce an order whose effect would be to prevent that act from taking place or to bring it to an end. Having referred to the *dictum* of Hardie Boys J in the New Zealand Court of Appeal ('the right is to trial without undue delay; it is not a right not to be tried after undue delay'), he expressed the opinion that it would be wrong to regard that *dictum* as a guide to the consequences in Scotland of a finding that the Lord Advocate's proposed act was in breach of the Convention right (para 66). Having then addressed the question of incompatibility (which he described as the 'crucial question in this case'), he held that, on his analysis and on the agreed facts, a finding that the Lord Advocate's act in continuing to prosecute the appellant on those charges was incompatible with the right to the determination of those charges in a reasonable time seemed to him to be inevitable (para 79). In drawing that section to a close Lord Hope observed that all that needed to be said 'with great emphasis' about *Attorney-General's Reference (No 2 of 2001)* was that the decision (in the Court of Appeal) in that case proceeded 'upon the assumption that under the

Human Rights Act there is a choice of remedies' (para 83). For these reasons and for the reasons given by Lord Rodger 'with whose carefully reasoned judgment I am in full agreement' Lord Hope stated that he would allow the appeal (para 84).

[63] Lord Clyde observed that the critical question was one of construction of sec 57(2) of the Scotland Act (para 86). He noted that the consequence of members of the Scottish Executive doing an act which was incompatible with Convention rights or with Community law was that that act, being *ultra vires*, was necessarily void and of no effect. He added that sec 57(2) did not detail what remedy, if any, beyond that invalidity there might be where someone had suffered because a member of the Scottish Executive had acted beyond his or her power but that it did render ineffectual any act incompatible with Convention rights or with Community law. Having concluded that the continued prosecution of the appellant was incompatible with his Convention right Lord Clyde observed that one then looked to the domestic law to find the consequence. Section 57(2), he said, gave a fair answer in providing that the Lord Advocate had no power to prosecute after an unreasonable delay and that the prosecution must then be dismissed. For these reasons he also was of opinion that the appeal should be allowed.

[64] Lord Rodger, having referred to sec 6(1) of the Human Rights Act and sec 57(2) of the Scotland Act, noted that the Lord Advocate was a 'public authority' for the purposes of the former provision. It followed, he said, that in so far as an act was indeed incompatible with a party's Convention right any of the provisions of the Human Rights Act and the Scotland Act that might be applicable might be engaged. He added (para 118):

> 'Therefore, an accused person cannot conduct proceedings on the basis that he wants the court to consider the question of incompatibility of an act of the Lord Advocate only in terms of section 6(1) of the Human Rights Act. That would be to ask the court to fail to apply the law that Parliament has enacted in the Scotland Act for such cases of incompatibility. What must be ascertained in any given case is the actual legal position: that is determined by applying the relevant legislation enacted by Parliament, not by applying merely those parts of the relevant legislation which a particular party may have chosen to rely on. It is for this reason that, as the High Court held in *Mills v HM Advocate (No 2)* (2001), the question of the incompatibility of any act of the Lord Advocate with Convention rights is necessarily a question under the Scotland Act and one which constitutes a devolution issue for the purposes of schedule 6.'

Turning to remedies under the Scotland Act Lord Rodger referred to the earlier proceedings in the case. He said (para 120):

> 'In his thought-provoking opinion in this case, however, the presiding judge at the preliminary diet (Lord Reed) gave two examples of acts of members of the Scottish Executive that would be incompatible with Convention rights: the ill-treatment of a prisoner in violation of [A]rticle 3 and the reading of the prisoner's correspondence in violation of [A]rticle 8 (*HM Advocate v R.* (2001) at page 1377H, paragraph 40).
>
> He [Lord Reed] then added:
>
> ''In such a case, section 57(2) would appear to have the consequence that the act in question cannot be treated as being within the lawful powers of the person who committed it, and so prevents the possible justification or defence from being put forward. It does not however in itself enable any effective remedy to be granted by the court in a case of that kind''.

I would respectfully agree that the purpose of section 57(2) is to prescribe the

consequences in law if the members of the Scottish Executive do an act that is incompatible with Convention rights. The presiding judge went on to observe at page 1377I–K:

> ''Where the act can be treated as delictual under the ordinary law of delict (e.g. an assault on a prisoner), then the court can provide an effective remedy under the law of delict, for example in the form of damages. Where the act is not delictual under the ordinary law, then section 57(2) does not confer upon the court a power to award damages. The Human Rights Act may however enable such damages to be awarded, since the conduct is also an unlawful act within the scope of section 6(1) of that Act, and section 8 empowers the court to grant a wide range of remedies, which may include damages, in respect of such an act. In other words, section 57(2) of the Scotland Act only addresses the issue whether the act in question falls within the powers of the Scottish Executive; and there may be circumstances in which a violation of the Convention has occurred, as a result of an act which falls within the scope of section 57(2), but in which the only effective remedy may lie under sections 7 to 9 of the Human Rights Act.'' '

Lord Rodger stated that he had more difficulty with some of those observations. He added that secs 29(2)(d) and 57(2) were provisions of cardinal importance in the overall constitutional structure created by the Act. He referred to *Simpson v Attorney-General* (*Baigent*'s case) and the authorities cited there by the New Zealand Court of Appeal. He continued (para 122):

> 'Like Lord Hope of Craighead, however, I find in section 100 of the Scotland Act the clear implication that the Act does indeed itself enable people to bring proceedings and to defend themselves where legislation or acts are incompatible with Convention rights. The power to do so can be seen from the restrictions that Parliament has placed on it. Section 100 provides: [His Lordship then set out the terms of sec 100 and continued:]
>
> The section is designed to limit the situations in which a party can invoke Convention rights in litigation. So no one can bring proceedings or rely on his Convention rights unless he would be a victim for the purposes of [A]rticle 34 of the Convention if proceedings were brought in the European Court of Human Rights (''the European court''). The implication must be that ''this Act'' *does* enable a person to do both these things if he would qualify as a victim in European court proceedings. The fact that the Scotland Act itself is the source of this power is confirmed by subsection (3). It is concerned to say that the Act does not enable a court or tribunal to award any damages which it could not award if section 8(3) and (4) of the Human Rights Act applied. Again, the implication must be that the Scotland Act *does* enable a court or tribunal to award the damages that it could award if section 8(3) and (4) of the Human Rights Act applied. Moreover, subsection (3) shows that the court or tribunal is not awarding damages under section 8 of the Human Rights Act: the Scotland Act itself enables the court or tribunal to award the same damages as it could award if it were awarding them under section 8 of the Human Rights Act. The remedy of damages is the only one that is specifically mentioned — and then only because of the special restrictions placed on it.'

[65] In the following paragraph he noted that section 100 had a counterpart in sec 7 of the Human Rights Act and expressed the view that, especially in the light of that provision, he would infer from sec 100(1) of the Scotland Act that the Act itself enabled a person, who claimed that an act or a proposed act of a member of the Scottish Executive was incompatible with his Convention rights, to bring proceedings in a court or tribunal or to rely on his Convention rights in any proceedings in a court or tribunal. Convention rights, and the remedies for vindicating them belonged, he added, in the sphere of public, rather than private, law. At this point

he referred to *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* and *Baigent's case*. He concluded this discussion by saying that the Scotland Act itself would enable a prisoner who had been ill-treated in contravention of Art 3 to sue the Scottish Ministers for damages. Similarly, the Scotland Act would provide the basis for the prisoner to obtain appropriate redress from Scottish Ministers for the reading, or threatened reading, of his correspondence in violation of Art 8 (para 123).

[66] Lord Rodger noted (para 126) that, if only the Human Rights Act applied, then the result of any finding of incompatibility would be that the Lord Advocate's 'act' would be unlawful. There would be an act of the Lord Advocate but an unlawful act. He continued:

> 'But the Lord Advocate is not simply a public authority to whom section 6(1) of the Human Rights Act applies; he is also a member of the Scottish Executive to whom, in addition, section 57(2) of the Scotland Act applies. And subsection (2) goes further than section 6(1) of the Human Rights Act. By virtue of subsection (2) the Lord Advocate actually has no power to do an act so far as is incompatible with any of the appellant's Convention rights. To that extent any such ''act'' by the Lord Advocate is invalid: it is not truly an ''act'' at all but merely a ''purported'' act.'

[67] Lord Rodger noted that in the appeal before the Board the appellant was not invoking any remedy given to him by the Convention itself or any remedy given to him by the Human Rights Act. Rather, relying under the Scotland Act on his Convention right, he was saying that the Lord Advocate's act in continuing to prosecute him on charges (1) and (3) was incompatible with the Convention and that, by reason of sec 57(2), the act was invalid, a nullity. That was the correct basis for his challenge. Addressing the expression 'incompatible' in sec 57(2), Lord Rodger observed that (para 141): 'Parliament chose to use the Scotland Act as the vehicle for bringing Convention rights to bear on the devolved institutions: *Rights Brought Home*, paragraph 2.21.' He finally addressed the question of remedy under sec 57(2). Having referred to the legislative position in other jurisdictions and to the interpretation of such legislation by the local courts, Lord Rodger concluded that the effect of the legislation applicable to Scotland was that the Lord Advocate had no power to continue the prosecution on the charges complained of (para 155). He stated that for the reasons given by him, as well as for the reasons given by Lord Hope with which he agreed, he would allow the appeal.

[68] Lord Steyn described the central point in the case as being whether, under sec 57(2) of the Scotland Act, a breach of the reasonable time guarantee under Art 6(1) of the Convention automatically rendered a continuation of the prosecution incompatible with the rights of the accused (para 7). He held that it did not. There was no automatic remedy (para 11). In his view a breach of the reasonable time guarantee, in a situation in which a fair trial was still possible, did not *by itself* (Lord Steyn's emphasis) trigger a right not to be prosecuted. He quoted with approval Hardie Boys J's *dictum* in *Martin v Tauranga District Court*. He expressed the view that Lord Reed at first instance in *R v HM Advocate* had rightly invoked that *dictum*. That view, he said, was also consistent with the observation of Lord Millet in *Dyer v Watson*. While not endorsing everything said in the judgments under appeal (*HM Advocate v R*) the emphasis in them on the fact that a breach of a reasonable time guarantee did not invariably result in a stay or dismissal of the proceedings

was consistent, in his view, with the interpretation which he had put forward (para 14). He would have dismissed the appeal.

[69] Lord Walker agreed with Lord Steyn. He differed from Lord Hope and Lord Rodger as to whether the facts of the case disclosed what could properly be called a continuing breach (para 163). He described the decision of the Court of Appeal of New Zealand in *Martin v Tauranga District Court* as containing an illuminating discussion of the problem as it arose in the equivalent domestic law. He would have dismissed the appeal.

[70] Senior counsel for the petitioners submitted that the analysis advanced by Lord Hope (para 45) had been concurred in by Lord Steyn, that this was, or was part of, the ratio of the decision of the Judicial Committee and that that ratio was determinative of the present case. Accordingly, counsel argued, the Lord Ordinary had correctly held that she was bound by *R v HM Advocate* and that this court was likewise so bound. He invited us, if we were in any doubt on the matter, to make a reference to the Committee under para 10 of sch 6 to the Scotland Act.

[71] We decline to make such a reference. We are also satisfied that the ratio of the decision of the Judicial Committee in *R v HM Advocate* is not determinative of the issue for decision in the present proceedings. It may be (though we express no opinion on the matter) that the members of the Committee were at one in the views expressed by Lord Hope (para 45). But that is nothing to the point as regards the present proceedings. Lord Hope (para 45) was discussing what constituted an 'act' of the Lord Advocate. Subject to the issue earlier discussed in respect to a governor, it is not disputed that in this case the material acts were acts of the Scottish Ministers. The true ratio of *R v HM Advocate* concerned the nature of the remedy available to the appellant in circumstances where the Lord Advocate, as prosecutor, was threatening to infringe the appellant's Convention right. The majority held that the appellant was entitled to require the court to dismiss the two charges, the minority that his remedy lay in the fact of delay being brought into account when any question of penalty fell to be considered.

[72] It follows in our view that the opinions expressed by Lord Hope and Lord Rodger as to the basis on which a remedy in damages lay were *obiter*. As however they were enunciated by judges of great distinction it is incumbent on us to explain why it is that respectfully we are unable to share their views.

[73] Lord Hope expressed the view that the proceedings before the Committee were a case which 'has been brought under the Scotland Act and not the Human Rights Act' (para 83) and that the appellant's challenge 'must be brought under the Scotland Act' (para 50). Lord Hope noted (para 60) that sec 8 of the Human Rights Act gave power to a court to grant such relief or remedy for a breach of a person's Convention rights as it considered appropriate and that there was no equivalent provision in the Scotland Act. The power of the court to grant relief or provide a remedy was accordingly left to common law principles. One of them, he noticed, was the familiar principle which provided a civil cause of action where there had been a breach of his statutory duty which resulted in injury to a person of a class which the statute was designed to protect. He also expressed the view that sec 100(3) of the Scotland Act implied a power to award damages. As Lord Rodger would have allowed the appeal for the reasons given by Lord Hope as well as for his own reasons, he must be taken to have concurred in the views summarised above. Lord Rodger, in a part of his speech devoted to sec 6(1) of the Human Rights Act and sec 57(2) of the Scotland Act, stated that what must be ascertained in any given case was the actual legal position that is determined by applying the relevant

legislation enacted by Parliament, not by applying merely those parts of the relevant legislation which a particular party might have chosen to rely on (para 118). In the following paragraph he posed the questions 'But is this a case where both section 6(1) and section 57(2) apply? Or does one rather than the other apply and, if so, which?' To answer these questions, he said 'It is necessary to examine how the Scotland Act works'. It is doubtful whether his Lordship answered the questions he posed. For in the next section, having made the observations quoted in para 64, he concluded that the Scotland Act itself enabled the claimant to bring proceedings. While it may not have been necessary for the purposes of the case under discussion, his Lordship nowhere, it seems, examines the question, which is crucial to the issue in this case, of the interrelationship, if any, between the provisions of the Scotland Act and those of the Human Rights Act. For that reason, if for no other, his observations are of limited assistance for the purposes of this case.

[74] It is useful at this stage to examine *Simpson v Attorney-General* (*Baigent's case*) to which Lord Rodger makes reference. The instrument there under discussion was the New Zealand Bill of Rights Act 1990 (no 109). The home of a Mrs Baigent and her son was at 16 London Road, Korokoro. Police officers, proceeding either on mistaken information or on a misunderstanding of information obtained from the local energy board, obtained a search warrant for that property and proceeded to enforce it. By the time the relevant proceedings reached the Court of Appeal Mrs Baigent had died but the action was continued by her executor and by her son. A number of causes of action were advanced. Only one of these, alleged breach of the New Zealand Bill of Rights Act, is relevant for present purposes. Cooke P opened his discussion of this matter by observing that in previous Bill of Rights cases he had tried to emphasise the importance of a straightforward and generous approach to the provisions of the Act. He noted that, although the New Zealand Act contained no express provision about remedies, this was probably not of much consequence and that 'the rights and freedoms [in the relevant Part] have been affirmed as part of the fabric of New Zealand law'. He added (p 676):

> 'Hitherto the main remedy granted for breaches of the rights and freedoms has been the exclusion of evidence. But that has been because most of the cases have concerned evidence obtained unlawfully; exclusion has been the most effective redress and ample to do justice. In other jurisdictions compensation is a standard remedy for Human Rights violations. There is no reason for New Zealand jurisprudence to lag behind.'

The Crown, in resisting the claimants' contention, relied on the absence of a remedies clause in the Act; but the court held that in principle there was no valid distinction between constitutions containing an express remedies clause and those without such express provision once it was held (as it was) that effective remedies were to be available under the New Zealand Act for violation of affirmed rights. The claimants, it was held, were entitled to 'public law compensation' and the court made an award accordingly. Casey J (p 691) noted that the Act contained no express provision for endorsement or vindication of the rights and freedoms it contained. It applied only to acts done by the legislative, executive or judicial branches of government, or by persons performing public functions, powers or duties (sec 3). This focus on public responsibilities suggested that appropriate remedies for the breach could also be in the public law sphere, reflecting the State's (ie New Zealand's) undertaking in Art 3 to ensure that any person whose rights or freedoms

were violated should have an effective remedy. He was also of opinion that it would be wrong to conclude that Parliament did not intend there to be any remedy for those whose rights had been infringed (p 691). Hardie Boys J, having examined a number of cases from other jurisdictions, observed (p 702) that the New Zealand Bill of Rights Act, unless it was to be no more than an empty statement, was a commitment by the Crown that those who in the three branches of government exercised its functions, powers and duties would observe the rights that the Bill affirmed. It was, he considered, implicit in that commitment, indeed essential to its worth, that the courts were not only to observe the Bill in the discharge of their own duties but were able to grant appropriate and effective remedies where rights had been infringed. Gault J and Mackay J each delivered concurring judgments.

[75] The essential relevant question in *Baigent's case* was whether the New Zealand Bill of Rights Act 1990, which made no express provision for public law compensation, was to be construed as implicitly allowing for such a remedy where a public law remedy was not otherwise available. There is no dispute but that the petitioners are, if they establish a relevant breach of their Convention rights, entitled in principle to a remedy in 'public law' damages. That remedy is expressly provided by the Human Rights Act, a statute of the like constitutional status as the Scotland Act and passed almost contemporaneously with it. The former statute provides, however, that a claim for damages must be brought within a specified time. For the reasons we have already given it is so limited.

[76] Reverting to the reasoning of Lord Hope and Lord Rodger in *R v HM Advocate* we note that Lord Hope (para 60) mentions the familiar principle that a civil cause of action arises where breach of a statutory duty results in injury to a person of a class which the statute was designed to protect. It is not clear to what extent Lord Hope relied upon that principle. In any event there is no need to do so where Parliament has otherwise provided a remedy. Lord Hope's principal reason for holding that the remedy arises under the Scotland Act is his construction of sec 100. For the reasons we have already given that construction is, in our view, mistaken. For the same reason Lord Rodger's construction of that section is erroneous. As we have sought to demonstrate, there is no need (and it is consequentially illegitimate) to imply a right to public law damages under the Scotland Act where the essentially contemporaneous Human Rights Act provides such a remedy. In *Baigent's case* by contrast there was no contemporaneous statute of equivalent status (such as the Human Rights Act) which provided expressly for both right and remedy.

[77] Before us there was also some discussion of *Attorney-General's Reference (No 2 of 2001)* in the House of Lords but we find it unnecessary to discuss that decision in this already over-lengthy opinion.

[78] Passing reference was also made by senior counsel for the petitioners to sec 11 of the Human Rights Act which provides: 'A person's reliance on a Convention right does not restrict– ... (b) his right to make any claim or bring any proceedings which he could make or bring apart from sections 7 to 9.' But that provision does not assist the petitioners unless a right to public law damages arises under the Scotland Act (as in our view it does not). Counsel also submitted that a limitation of time provision could not be relied on where the act complained of was null. Reference was made to *Penman v Fife Coal Co*. But that principle does not assist the claimants here. While the act complained of, if established, was null, it was also unlawful. It is its unlawfulness which confers a remedy of damages. That remedy is properly circumscribed by the limitation provision.

[79] The Lord Ordinary took the view that she was bound by the ratio of *R v HM Advocate*. In our view, for the reasons stated above, she was in that matter mistaken. She also (para 57) addressed the question 'whether, in the event that a claim for damages can properly be advanced against the respondents under the Scotland Act, the time-bar provisions of the Human Rights Act have been imported into section 100.' She was not persuaded that they had. There is, in our view, no question of the time-bar provisions of the Human Rights having been 'imported' into sec 100. One is not concerned purely with a construction of that section. The view that we have come to turns on the interrelationship, as we see it, of the Human Rights Act and the Scotland Act, both being constitutional instruments enacted virtually contemporaneously. They accordingly require to be read together. The approach adopted by Lords Hope and Rodger in *R v HM Advocate* to the basis for a claim for damages, if adopted here, would fail to do that.

[80] Our decision on this aspect of the case may be summarised as follows. The fundamental flaw in the petitioners' approach is that they insist that proceedings in respect of an act which is incompatible with Convention rights must be made either under the Human Rights Act (to the exclusion of the Scotland Act) or under the Scotland Act (to the exclusion of the Human Rights Act). The true position is that the Human Rights Act and the Scotland Act are both on the statute book, and a decision must be made, not as to which of them is applicable to a given claim, but rather as to whether there are provisions made by one or other or both of them which are applicable to a particular claim. An act of the Scottish Ministers which is incompatible with the Convention rights of an individual is simultaneously (1) *ultra vires* of the Scottish Ministers by virtue of sec 57(2) of the Scotland Act and (2) an unlawful act by virtue of sec 6 of the Human Rights Act. To allege that a particular act of the Scottish Ministers is incompatible with a claimant's Convention rights inevitably raises the question of validity under sec 57(2), and therefore inevitably raises a devolution issue. It follows that the procedure laid down for devolution issues must be followed in any case raising such an issue. But it does not follow that the entirety of the claimant's remedies must be sought under the Scotland Act. So to hold involves ignoring the fact that the Convention-incompatible act is also, for that reason, unlawful under sec 6 of the Human Rights Act. It also involves ignoring the remedies which the Human Rights Act provides for such unlawful acts. There is nothing unacceptable about the same act being both (1) *ultra vires* in terms of sec 57(2) of the Scotland Act and (2) unlawful under sec 6 of the Human Rights Act. There is nothing unacceptable about a claimant seeking to raise proceedings under sec 7 of the Human Rights Act, and seeking the remedies, including just satisfaction damages, provided for in sec 8, provided at the same time he also follows the procedural requirements applicable to a devolution issue. On that view, there is no need to look for a basis for a claim for damages in the Scotland Act. Section 100 can be given its natural negative meaning, rather than be distorted into an implied positive assertion of a right to claim damages. Its purpose is the limited one of making clear, *ob majorem cautelam*, that the Scotland Act cannot be used as a way of getting round the Human Rights Act requirements (1) that claimants should demonstrate victim status (sec 100(1)), and (2) that damages be confined to just satisfaction (sec 100(3)). In so far as Lords Hope and Rodger suggested that, where there is a devolution issue, damages fall to be claimed under the Scotland Act rather than the Human Rights Act, their observations were *obiter*, and erroneous. An *ultra vires* act does not per se give rise to a claim for damages. It may remove a defence to a common law claim for damages in delict or the like, which would have been

available if the act had been *intra vires*. The proper basis for a claim for damages for an act in breach of Convention rights is, however, that such an act is unlawful and that a claim for damages (limited to just satisfaction) is made available under sec 8 of the Human Rights Act. It follows that such a claim is properly subject to the time-bar imposed by sec 7(5) of the Human Rights Act.

Running of time

[81] Section 7(5) of the Human Rights Act provides that proceedings

> 'must be brought before the end of–
>
> (a) the period of one year beginning with the date on which the act complained of took place; or
> (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances'.

In the case of the petitioner Henderson, the first four periods of segregation had both commenced and expired more than one year prior to the service of this petition. The fifth period commenced more than one year prior but expired within that period. The application of sec 7(5) to that period accordingly depends on when time is treated as having begun to run and when proceedings were brought. Henderson's sixth and subsequent periods of segregation both commenced and concluded within the one-year period. No explanation is tendered for the relevant delays.

[82] The Scottish Ministers contended that time began to run against the petitioner from the commencement of any period of segregation and was interrupted only by the service of a petition in which such segregation was complained of. On that argument, part of Henderson's fifth period of segregation would be time-barred. Counsel for Henderson contended that, in respect of any period of segregation, time began to run only upon the expiry of any such period. On that argument no part of Henderson's fifth period of segregation was time-barred.

[83] There is authority for the proposition that time is interrupted on the service of a relevant petition (*Canada Trust v Stolzenberg (No 2)*, per Lord Hope of Craighead, p 1397; *Alston v Macdougall*). (In some circumstances the material date may be where the first order on a petition is granted (*Secretary of State for Trade and Industry v Normand*) but the distinction is not important for present purposes). The Scottish Ministers argued that that proposition applied to the present circumstances; senior counsel for the petitioners did not concede that service of the petition interrupted the running of time but presented no positive argument in support of that position.

[84] The Human Rights Act (in contrast to other statutory provisions in respect of limitation or prescription, eg Prescription and Limitation (Scotland) Act 1973 (cap 52)) makes no express provision in respect of when time begins to run. The Scottish Ministers' argument focused upon the date of the decision complained of, that of senior counsel for the petitioners on the expiry of the period from which that decision had an adverse effect. Junior counsel for the Scottish Ministers drew our attention to the rule in European jurisprudence that applications to the Court of Human Rights must be made within six months of the date when the final decision in domestic proceedings was taken, which had been interpreted as not applicable to a continuing state of affairs (*De Becker v Belgium*). European authority had also addressed the issue of the effect on a continuing status of detention when the Convention had come into force in a country in the course of such a period. On that

basis the Scottish Ministers accepted that, and so far as concerned a single continuous period of segregation, it would not be appropriate to exclude from probation averments about that period which occurred earlier than the one-year period but submitted that such an earlier period would be relevant only for the purposes of determining (a) whether or not the events or circumstances which did occur within the one-year period involved a breach of Convention rights and (b) remedy.

[85] Senior counsel for the petitioners submitted that the Human Rights Act as a constitutional statute should be interpreted generously and that, so interpreted, time began to run only at the expiry of any period of segregation. If the Scottish Ministers' argument was correct, an aggrieved party, it was argued, might be barred from bringing proceedings even before he knew that a breach of his Convention rights had occurred.

[86] In the absence of any argument to the contrary and of the citation of other relevant authority we are satisfied that proceedings were interrupted only upon the service of the relevant petition. As to the date from which time begins to run, we are of opinion that the relevant consideration is, in the circumstances, not only the decision complained of but also the practical effect of that decision on the complainer. Accordingly time began to run only on the expiry of the relevant period of segregation. This is in accordance with a generous interpretation of the Human Rights Act as a constitutional statute. It also appears to be consistent with pertinent European jurisprudence.

[87] We accordingly hold that in the case of Henderson his fifth and subsequent periods of segregation are not time-barred.

[88] In the cases of each of Blanco and Cairns we note that certain of their earlier detentions may be struck at by the operation of time-bar. We were not, however, invited to make for this reason any exclusion in either of their cases, and accordingly do not do so.

Disposal of the statutory time-bar issue

[89] In the event we shall, in respect of this chapter, recall the Lord Ordinary's interlocutor in the petition at the instance of Henderson in so far as she repelled the Scottish Ministers' first plea in law, sustain said plea in so far as directed towards Henderson's first four periods of segregation and exclude from probation Henderson's averments in respect of said periods. *Quoad ultra* we shall, as regards statutory time-bar, allow to proceed his petition and those at the instance of Cairns and Blanco.

Mora

[90] In each of the petitions at the instance of Henderson, Blanco and Cairns, in addition to the time-bar plea discussed above, the Scottish Ministers have tabled a plea in these terms: 'The petitioner being barred by mora, taciturnity and acquiescence from insisting in this petition, the petition should be dismissed.' The answers to each petition contain an averment in terms similar to those of the plea in law. In the answers to the petition at the instance of Henderson, this is followed by an averment that the period of removal from association referred to by the petitioner came to an end on 13 February 2004. (Although not the subject of express averment, Henderson's petition appears from the relative interlocutors to have been served on

the Scottish Ministers between 9 and 30 June 2004.) In the answers to the petition at the instance of Blanco, it is followed by averments that the petition was served on the Scottish Ministers on 6 November 2003, and that the period of removal referred to by the petitioner came to an end on 7 January 2003. In the answers to the petition at the instance of Cairns, it is followed by an averment that the petition was served on the Scottish Ministers on 14 November 2003, and that the period in which the petitioner was removed from association came to an end in December 2002. Our attention was not directed to any other averments of potential relevance to the plea in any of these three cases.

[91] The Lord Ordinary narrated in her opinion that counsel for the petitioners drew attention to the requirements for a relevant plea of mora, under reference to *Hanlon v Traffic Commissioner*, *Dempsey v Parole Board for Scotland*, *Singh v Secretary of State for the Home Department* and *Caswell v Dairy Produce Quota Tribunal for England and Wales*, and submitted that the Scottish Ministers had failed to make averments that could support such a plea. The Lord Ordinary further narrated that counsel for the Scottish Ministers accepted that they did not have sufficient averments to support a plea of mora, but submitted that, since the remedy sought by each petitioner was a public law remedy and inherently discretionary, it was open to the court to withhold it if the claim was not brought promptly. No authorities were cited to the Lord Ordinary in support of this submission. She held that the submission for the Scottish Ministers was not well-founded; there was no lesser plea than that of mora where a party sought to rely on the other's delay in raising proceedings; the authorities relied on by the petitioners all concerned public law remedies, and it was clear from a consideration of them that, for delay to be relevant, it required to be delay in circumstances where there had been relevant reliance or prejudice to the party seeking to rely on it. She said that there was no suggestion in the authorities that it was open to the court, in the exercise of its general discretion, to refuse the remedy sought simply because the proceedings could be characterised as not having been brought promptly. She accordingly repelled the pleas in question.

[92] Before us, senior counsel for the Scottish Ministers withdrew the concession that they did not have sufficient averments to support a plea of mora. He submitted that, although there were no specific averments of prejudice or acquiescence, it should not be necessary in public law cases for these elements to be averred in order for the plea to be sustained, and that the law should be developed accordingly. In support of this argument, counsel referred to *dicta* in four cases. In *King v East Ayrshire Council* Lord President Rodger, in delivering the opinion of the court, said (p 188):

> 'We accept that, in general, applications for judicial review should be made at the earliest possible opportunity and a failure to do so may well lead to an inference of acquiescence which will be fatal to the application.'

In *Swan v Secretary of State for Scotland* Lord President Rodger, in delivering the opinion of the court, said (p 487):

> 'It is, of course, the case that judicial review proceedings ought normally to be raised promptly and it is also undeniable that the petitioners let some months pass without starting these proceedings. None the less, in considering whether the delay was such that the petitioners should not be allowed to proceed, we take into account the situation in which time was allowed to pass.'

After explaining certain aspects of the petitioners' position, he continued:

> 'We have explained that in our view the respondent was not prejudiced by any lapse of time before the proceedings began. In these circumstances we do not consider that any delay was such that the petitioners should be denied the right to pursue these proceedings.'

In *Singh v Secretary of State for the Home Department* Lord Nimmo Smith said (p 537):

> 'It is well recognised that a plea of mora, taciturnity and acquiescence may, in appropriate circumstances, be sustained in an application for judicial review. The classic definition of the plea is found in the opinion of Lord President Kinross in *Assets Co. Limited v Bain's Trustees* (1904) 6 F 692 at page 705 (the decision in the House of Lords [(1905) 7 F (HL) 104] does not affect this statement). The passage concluded with this sentence:
>
> > ''But in order to lead to such a plea receiving effect, there must, in my judgment, have been excessive or unreasonable delay in asserting a known right, coupled with a material alteration of circumstances, to the detriment of the other party.''
>
> The plea of mora, taciturnity and acquiescence is a plea to the merits: *Halley v Watt* 1956 SC 370. The definition in *Assets Co. Limited v Bain's Trustees* is more readily applicable to a case involving private rights, but in a series of decisions that has been held to be applicable in the field of judicial review. Reference was made during the course of the hearing to *Hanlon v Traffic Commissioner* 1988 SLT 802, *Watt v Secretary of State for Scotland* [1991] 3 CMLR 429, *Atherton v Strathclyde Regional Council* 1995 SLT 557, *Conway v Secretary of State for Scotland* 1996 SLT 689, *Ingle v Ingle's Trustee* 1999 SLT 650 and *Noble v City of Glasgow Council* 2000 Hous LR 38. It does not appear to me to be possible to define the plea of mora, taciturnity and acquiescence more precisely than the *dictum* in *Assets Co. Limited v Bain's Trustees* to which I have made reference. The plea is necessarily protean and it must depend on the particular circumstances of the case whether or not its requirements are satisfied. There may be cases where the passage of time, as related to the surrounding circumstances, may be such as to yield the inference of acquiescence in the decision in question. Usually, there will have been such alteration of position on the part of one of the parties, or of third parties, as, together with the passage of time, to yield the inference of acquiescence. The petitioner may, however, be in a position to put forward an explanation for the delay sufficient to rebut the inference. The concept of detriment to good administration appears to me to have a part to play in all of this, not as an abstraction but where further administrative action has been taken in the belief that the decision in question has been acquiesced in.'

Finally, in *R (Burkett) v Hammersmith and Fulham London Borough Council and anr*, Lord Hope said (p 1613, para 63):

> 'The principal protection against undue delay in applying for judicial review in Scotland is not to be found . . . in any statutory provision but in the common law concepts of delay, acquiescence and personal bar: see Clyde and Edwards, *Judicial Review*, paragraph 13.20. The important point to note for present purposes is that there is no Scottish authority which supports the proposition that mere delay . . . will do. It has never been held that mere delay is sufficient to bar proceedings for judicial review in the absence of circumstances pointing to acquiescence or prejudice . . . As Lord Nimmo Smith said in the *Singh* case . . ., at p. 536, none of the cases in Scotland provide support for a plea of unreasonable delay, separate and distinct from a plea of mora, taciturnity and acquiescence, in answer to an application for judicial review.'

[93] On behalf of the petitioners Henderson, Blanco and Cairns, senior counsel

submitted that the Lord Ordinary had reached the correct view on the authorities, and that in the absence of averments to support it a plea of mora, taciturnity and acquiescence was bound to fail. He submitted in addition, under reference to *Penman v Fife Coal Co* (Lord Macmillan, pp 45, 46), that a nullity could not be ratified by acquiescence.

[94] In considering the submissions we remind ourselves, in the first place, of the meaning of the words of the plea. Mora, or delay, is a general term applicable to all undue delay (see Bell, *Dictionary*, sv 'Mora'). Taciturnity connotes a failure to speak out in assertion of one's right or claim. Acquiescence is silence or passive assent to what has taken place. For the plea to be sustained, all three elements must be present. In civil proceedings delay alone is not enough; the position in criminal proceedings may be otherwise (see *Robertson v Frame*, per Lord Rodger of Earlsferry, para 37). We have quoted the passage from Lord Nimmo Smith's opinion in *Singh v Secretary of State for the Home Department*, approved (albeit *obiter*) by Lord Hope in *Burkett*, because counsel were agreed that this was the fullest treatment of the subject in judicial review cases. While we are content to adopt it, we would emphasise that prejudice or reliance are not necessary elements of the plea. At most, they feature as circumstances from which acquiescence may be inferred. By its nature, acquiescence is almost always to be inferred from the whole circumstances, which must therefore be the subject of averment to support the plea. In none of the three cases in which the plea has been tabled have the Scottish Ministers made any averment of acquiescence, let alone of circumstances from which it might be inferred. Without such averments, there is no relevant basis for the plea, and the Lord Ordinary was bound to repel it.

[95] For these reasons, we reject this ground of the cross-appeal by the Scottish Ministers in these three cases. In the circumstances, it is unnecessary for us to consider senior counsel for the petitioners' submission that in any event it is not possible to ratify a nullity by acquiescence. In the absence of full argument on this submission, we prefer to reserve our opinion on it.

Carltona

[96] Rule 80(5) of the 1994 Rules provides that a prisoner who has been removed from association shall not be subject to such removal for a period in excess of 72 hours from the time of the order except where 'the Scottish Ministers' have granted written authority on the application of the governor, prior to the expiry of that period. Rule 80(6) provides that an authority granted under r 80(5) shall have effect for the period of one month but that 'the Scottish Ministers' may on any subsequent application of the governor renew the authority for further periods of one month commencing from the expiry of the previous authority.

[97] None of the orders in issue in the present petitions was signed by any Scottish Minister (or by any junior Scottish Minister). Each was signed by a civil servant within the SPS. The petitioners have no averments attacking the personal suitability or competence of any of the individual signatories but they maintain on various grounds that these grants and renewals of authority were unlawful. The Scottish Ministers submitted to the Lord Ordinary that this attack upon the validity of these orders was irrelevant. They relied on the principle described in *Carltona Ltd v Commissioners of Works* ('the *Carltona* principle'). The Lord Ordinary accepted the Scottish Ministers' contention and excluded that part of each of the petitioners' cases from probation.

[98] As part of their cross-appeal the petitioners have challenged the Lord Ordinary's decision on this aspect. A contention advanced by the petitioners in the Outer House (to the effect that the *Carltona* principle did not apply to the Scottish Ministers) was not renewed in the reclaiming motion. However, certain other contentions were insisted in.

[99] The petitioners argued in the first place that, having regard to sec 39 of the Prisons (Scotland) Act 1989 (under which the 1994 Rules were made), the terms of the 1994 Rules themselves and the interference with prisoners' rights involved in the application of r 80, it was necessarily implied that the Scottish Ministers would personally perform the functions conferred on them by r 80. The *Carltona* principle, while not expressly excluded, was thus excluded by necessary implication. Section 39 of the 1989 Act authorised the Scottish Ministers to make rules, including rules authorising the governor, or any other officer of a prison, or some other person or class of persons specified in the rules to exercise a discretion. The 1994 Rules had in r 80(5) and (6) in effect authorised the Scottish Ministers themselves to exercise the functions there conferred on them. Having made rules which conferred those functions on themselves, the Scottish Ministers could not derogate from the Rules by authorising some other person or persons to exercise them. Other provisions of the statute pointed to persons of a particular description being authorised to do certain things. The Rules themselves were very specific about who was authorised to do what. While it was not contended that at every point at which the Rules referred to 'the Scottish Ministers' the *Carltona* principle was excluded, in the context of r 80 it was. The general import of the statutory provision was to suggest that independent scrutiny by someone outside the walls of the prison was required for the purposes of extensions or renewals of extensions of segregation. In any event, if grants and renewals under r 80(5) and (6) could be granted by officials, such officials should be only those who had been named and properly authorised to perform this function. Such officials should be specialised and should have appropriate experience; they should at least be higher in grade than the governor who had made the relative r 80(1) order. Particular reliance was placed on the speeches of Lords Templeman and Griffiths in *R v Secretary of State for the Home Department, ex p Oladehinde*. Moreover, it was plain, under reference to the 'Durno memorandum' referred to by the Lord Ordinary, that grants and renewals under r 80(5) and (6) had been purportedly granted by officials who were not authorised to grant them. Purported grants by officials who were not named in the Durno memorandum would be unlawful under Art 8 of the Convention. The legislation should not be construed so as to have that effect. To comply with that Article the law must specify the framework for interference with Art 8 rights with a degree of precision. The Ministers could not simply rely on 'departmental practice' (*Re Golden Chemical Products Ltd*) because the evidence was that the practice did not sanction what took place. The *Carltona* doctrine envisaged an ordered devolution to appropriate civil servants of decision-making authority (*Oladehinde*, per Lord Griffiths, p 303C–F; *R (National Association of Health Stores) v Secretary of State for Health*, paras 24, 71).

[100] In *Carltona* manufacturers of food products whose factory had been requisitioned under the provisions of the Defence (General) Regulations 1939 contended that the relative notice of requisition was, on a number of grounds, invalid. One of the points taken in the Court of Appeal was that the notice had been signed by an official and that neither the Commissioners of Works nor the First Commissioner, in whom by statute the functions and powers of the commissioners

were vested, had applied their or his mind to the subject-matter of the notice. The First Commissioner was a Minister of the Crown. In that context Lord Greene MR (with whose observations the other members of the court agreed) said (p 563):

> 'In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them.'

In *Oladehinde* Lord Griffiths said (p 303):

> 'It is well recognised that when a statute places a duty on a minister it may generally be exercised by a member of his department for whom he accepts responsibility: this is the *Carltona* principle. Parliament can of course limit the minister's power to devolve or delegate the decision and require him to exercise it in person.'

His Lordship then went on to consider whether, under the terms of the statute there under discussion, there was any such limitation in respect of the decision in question.

[101] It is accepted that in the present case there is no express exclusion of the *Carltona* principle. We are not satisfied that the terms of either the Prisons Act 1989 or the 1994 Rules made thereunder give rise to any implication that the doctrine is excluded. The Act (as read subsequent to devolution) empowers the Scottish Ministers to make rules by which they may authorise a specific person or class of persons to discharge certain functions. In our view it does not follow that when a reference is made in the Rules made under the statute to a power or function being exercised by 'the Scottish Ministers' that that power or function must be exercised by them personally. The 1994 Rules give various powers and functions to the Scottish Ministers. It is not suggested by the petitioners that wherever these words are found in the Rules, the relative power or function or responsibility can be exercised only by the Scottish Ministers personally. Although the exercise of the powers given by r 80(5) and (6) may have important consequences for prisoners, we are not persuaded that that circumstance justifies the inference that Parliament intended to exclude the application of the principle in that context. There is no obligation on a minister to exercise his powers personally even where these powers involve a serious invasion of the freedom of the subject (*HM Advocate v Copeland*, per Lord Jauncey, p 251).

[102] The essence of the *Carltona* principle is that the act or decision of the official

is constitutionally that of the minister; the official acts as the minister himself and the official's decision is the minister's decision (*R v Skinner*, per Widgery LJ, p 707). Although in the cases there are frequent references to an 'authorised' official or officials the doctrine does not appear to require express or specific authorisation of the official by the minister in question (*R v Skinner*; *Re Golden Chemical Products Ltd*). The point of specific authorisation did not arise in *Oladehinde*. It is, as a matter of law, sufficient that the official is a civil servant in the relative department or at least that he makes the decision or does the act as part of an 'ordered devolution to appropriate civil servants' (*R (National Association of Health Stores) v Secretary of State for Health*, per Sedley LJ, para 26). Although the word 'delegate' has on occasions been used as an alternative to 'devolve' (eg *Oladehinde*, per Lord Griffiths, p 303C), the doctrine does not involve any question of agency or of delegation as between the minister and the relative departmental official (*Metropolitan Borough and Town Clerk of Lewisham v Roberts*, per Jenkins J, p 629, cited with approval by Widgery LJ in *R v Skinner*, p 708). Prima facie, accordingly, the circumstance (which is not disputed) that all the signatories of the r 80(5) and (6) orders were civil servants in the SPS would suffice to bring the *Carltona* principle into operation.

[103] Particular challenges might be made on *Wednesbury* grounds (eg where a 'tea lady' purports to authorise an instrument of state) but no such challenge is made to any of the decisions in the present petitions (*R v Crocker*). Nor do the petitioners positively assert that any of the decisions were in fact made by a person unsuited by grading or experience to make them.

[104] In our view no relevant inference can be drawn from the Durno memorandum. It is dated some 16 months prior to the first of the orders challenged. The circumstance that some of the officials who signed the relative orders do not, on the face of the memorandum, meet the descriptions mentioned in it does not justify the inference that they were not, at the time when the orders were made, persons whose acts were those of the Scottish Ministers.

[105] For these reasons we reject this ground of appeal.

Proportionality

Pleadings

[106] In each petition the remedies sought by the petitioner (statement 3) include the following:

> '(a) declarator that the said orders and grants and renewals of authority, authorising the general segregation of the petitioner under Rule 80 of the 1994 Rules, were disproportionate *et separatim* unreasonable and therefore unlawful'.

That statement is supported, in each petition, by a plea in law in the following terms:

> '1. The segregation of the petitioner under rule 80 of the Rules being disproportionate *et separatim* unreasonable and unlawful, declarator should be pronounced as sought.'

In addition, each petition contains further averments relating to proportionality, taking the form first of a general assertion reflecting the declarator sought and the plea in law, and secondly a brief passage of averment elaborating on the circumstances in which it is alleged that the Scottish Ministers acted disproportionately.

[107] The Lord Ordinary, having heard argument as to whether the law recognised proportionality as an independent ground for judicial review of administrative action, concluded that it did not. She sought to give effect to that decision by excluding from probation the words 'disproportionate *et separatim*' in statement 3(a), the other averments about proportionality, and the references to proportionality in the first plea in law in each petition. The averments excluded in each petition are identified in detail in the Lord Ordinary's opinion (para 95). Before this court junior counsel for the Scottish Ministers, intervening in the course of junior counsel's submissions for the petitioners, accepted that, whatever view was taken of the proposition that proportionality was an independent ground for judicial review, the proportionality of the Scottish Ministers' actings might require to be addressed in the context of the petitioners' cases under Art 8 of the Convention, and that the Lord Ordinary had therefore gone too far in excluding from probation all of the averments about proportionality. Junior counsel for the Scottish Ministers suggested, however, that the question of proportionality was unlikely to be of practical significance in the determination of the cases, and therefore suggested that it was unnecessary for us to hear full argument on the point, and expressed a willingness to have the whole averments and pleas about proportionality included in the pleadings remitted to probation in the event of a proof before answer being allowed. Senior counsel for the petitioners submitted in reply that that course should not be followed, and that the court should hear the parties' full submissions on the question of proportionality. It would, he submitted, be unsatisfactory for the issue to return to the Outer House, with the Lord Ordinary's exclusion of averments from probation overturned, but with no concession by the Scottish Ministers and no decision from this court on the issue of principle. Having considered these submissions we decided to hear full argument on the proportionality issue. We accepted, however, that if we were to agree with the Lord Ordinary that proportionality is not recognised as an independent ground for judicial review, our decision to that effect would be adequately reflected by (i) excluding from probation the words 'disproportionate *et separatim*' in statement 3(a) in each petition and (ii) repelling the first plea in law in each petition so far as it referred to proportionality. The other averments could be left standing for such relevance as they might have to the Art 8 cases.

Written submissions

[108] The Lord Ordinary's record of the submissions made to her on the issue of proportionality as an independent ground for judicial review, and her reasoning in concluding that it is not recognised as constituting such a ground are to be found in paras 83 to 95 of her opinion. The petitioner's written submissions in support of their challenge to the soundness of that aspect of the Lord Ordinary's decision are set out in paras 4.1 to 4.15 of their statement of argument. The Scottish Ministers' written submissions supporting the Lord Ordinary's view are contained in paras 176 to 185 of their note of argument. The oral submissions on this issue were made by Miss Carmichael for the petitioners and Mr Ross for the Scottish Ministers.

Petitioners' submissions

[109] In opening her submissions, junior counsel for the petitioners said that there was no dispute between the parties as to what is meant by proportionality. She

referred to *De Freitas v Ministry of Agriculture* in which Lord Clyde, delivering the judgment of the Board, and quoting observations of Gubbay CJ in the High Court of Zimbabwe in *Nyambirai v National Social Security Authority* (p 75), said (p 80):

> 'In determining whether a limitation is arbitrary or excessive, he said that the court would ask itself;
>
> > ''whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'' '

[110] The first substantive question addressed by junior counsel for the petitioners was whether the case of *R v Secretary of State for the Home Department, ex p Brind and ors* stood in the way of recognition of proportionality as an independent ground for judicial review unless and until the House of Lords granted it such recognition. Her submission was that that question fell to be answered in the negative. Before analysing the speeches in *Brind* she drew our attention to the observation of Lord President Hope in *West v Secretary of State for Scotland* (p 413):

> 'The categories of what may amount to an excess or abuse of jurisdiction are not closed, and they are capable of being adapted in accordance with the development of administrative law.'

(See also Clyde and Edwards, *Judicial Review*, para 14.10.)

[111] Junior counsel for the petitioners submitted that in *Brind* only Lords Ackner and Lowrie were categorically opposed to the acceptance of proportionality as an independent ground for judicial review. Lord Bridge of Harwich, although acknowledging that 'any restriction of the right of freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it', applied the familiar test of reasonableness (pp 748G–749B). He agreed (p 749G) with Lord Roskill on the possible future development of the law. Lord Roskill, after quoting Lord Diplock's reference in *Council of Civil Service Unions v Minister for the Civil Service* (p 410) to 'the possible adoption in the future of the principle of ''proportionality'' ', and holding that that was not the case in which such adoption should begin, said (p 750E): 'But so to hold in the present case is not to exclude the possible future development of the law in this respect.' Lord Templeman (p751F) referred to the Convention and the principle of proportionality, and observed that 'applying these principles' the Secretary of State had not abused or exceeded his powers. Lord Ackner expressed the view (p 762G) that 'in order to invest the proportionality test with a higher status than the *Wednesbury* test, an inquiry into and a decision upon the merits cannot be avoided.' He went on to say (p 763A) that unless and until Parliament incorporated the Convention into domestic law, there was no basis on which English courts could apply the doctrine of proportionality. Lord Lowry (p 766G–H) perceived that proportionality was being deployed in order to move the focus of discussion into an area in which the court would feel more at liberty to interfere with the decision, and observed that there was no authority for saying that proportionality was part of English common law, and a great deal of authority the other way. Having regard to all of these expressions of opinion, the proper conclusion, junior counsel submitted, was that *Brind* left open the possibility that the law might develop in such a way as to admit

the recognition of proportionality as an independent ground for judicial review. *Brind* was in any event not binding on a Scottish court.

[112] Junior counsel for the petitioners then embarked on a review of the way in which the matter had been treated in cases since *Brind*. There was, she said, a great deal of judicial enthusiasm for departing from the test of *Wednesbury* reasonableness and adopting instead the test of proportionality. In *R v Chief Constable, Sussex, ex p International Trader's Ferry Ltd* (p 452) Lord Cooke of Thorndon criticised the 'tautologous formula' used in *Wednesbury* and expressed a preference for the 'simple test' used in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*, namely whether the decision in question was one which a reasonable authority could reach. He said:

> 'These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers.'

Junior counsel submitted that these observations indicated an inclination to get away from the language of *Wednesbury*. In *R (Daly) v Secretary of State for the Home Department* Lord Cooke went further. He said (p 549, para 32):

> 'I think that the day will come when it will be more widely recognised that [*Wednesbury*] was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd.'

In *R (Alconbury Developments Ltd and ors) v Secretary of State for the Environment, Transport and the Regions* Lord Slynn of Hadley went further still. He said (p 321A, para 51):

> 'I consider that even without reference to the Human Rights Act 1998 the time has come to recognise that this principle [proportionality] is part of English administrative law, not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law.'

[113] In *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* the position was reviewed in the Court of Appeal. In the judgment of the court delivered by Dyson LJ (p 1413C, para 34), under reference to *Alconbury* and *Daly*, it is noted that in these cases support is to be found for the recognition of proportionality as part of English domestic law in cases which do not involve Community law or the Convention. The judgment continues:

> 'It seems to us that the case for this is indeed a strong one. As Lord Slynn points out, trying to keep the *Wednesbury* principle and proportionality in separate compartments is unnecessary and confusing. … Although we did not hear argument on the point, we have difficulty in seeing what justification there now is for retaining the *Wednesbury* test.'

Nevertheless, the court went on to say (para 35):

> 'But we consider that it is not for this court to perform its burial rites. The continuing existence of the *Wednesbury* test has been acknowledged by the

> House of Lords on more than one occasion. ... [In *Brind*] all of their Lordships rejected the proportionality test ... and applied the traditional *Wednesbury* test. In other words they closed the door to proportionality in domestic law for the time being.'

The court added (para 36):

> 'The suggestion that it is open to this court to hold that the *Wednesbury* test is no longer part of English domestic law is entirely at odds with the approach of the House of Lords in the *Brind* case and in the *International Trader's Ferry* case.'

Junior counsel submitted that the Court of Appeal was in error in reaching that conclusion.

[114] While maintaining the submission that it was open to us to recognise proportionality as an independent ground for judicial review generally, junior counsel for the petitioners also advanced a narrower submission to the effect that, in cases concerned with fundamental rights at common law, the courts had already used the proportionality test. She sought to support that proposition by reference to *R v Lord Chancellor, ex p Witham* (per Laws J, p 585), although that case is more readily understood as an example of the proposition that the right of access to the courts cannot be abrogated by implication. She also referred to *R v Secretary of State for the Home Department, ex p Leech* (Steyn LJ, p 217G), *R v Secretary of State for the Home Department, ex p Simms* (Lord Steyn, p 130B) and *R (Daly) v Secretary of State for the Home Department*. These cases demonstrated, it was submitted, that it was recognised that there should, at common law, be the minimum interference with fundamental rights necessary to attain a legitimate objective. That reflected the principle of proportionality. There was a clear category of common law fundamental rights cases where the appropriate measure of scrutiny was in accordance with the principle of proportionality.

[115] In order to bring the petitioners within the scope of that narrower submission, junior counsel submitted that their segregation infringed their fundamental rights at common law. She submitted that a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication (*R v Board of Visitors of Hull Prison, ex p St Germain*; *Raymond v Honey*, per Lord Wilberforce, p 10G, Lord Bridge of Harwich, p 14F; *Simms*, per Lord Steyn, p 120G). Junior recognised that the case of *R v Deputy Governor of HMP Parkhurst, ex p Hague* might be said to constitute an obstacle to the adoption of that approach in the context of the segregation of prisoners. In that case the appellant claimed private law damages for the tort of false imprisonment. Lord Bridge of Harwich said (p 160H):

> 'But where the power [to segregate] has been exercised in good faith, albeit that the procedure followed in authorising its exercise was not in conformity with [the rules], it is inconceivable that the legislature intended to confer a cause of action on the segregated prisoner.'

He added (p 163B):

> '[T]he concept of a prisoner's ''residual liberty'' as a species of freedom of movement within the prison enjoyed as a legal right which the prison authorities cannot lawfully restrain seems to me quite illusory. The prisoner is at all times lawfully restrained within closely defined bounds and if he is kept in a segregated cell, at a time when, if the rules had not been misapplied, he would have been in the company of other prisoners ... elsewhere, this is not

> the deprivation of his liberty of movement, which is the essence of the tort of false imprisonment, it is the substitution of one form of restraint for another.'

(See also Lord Jauncey of Tullichettle, p 176H). Junior counsel sought to distinguish that case on the basis that it related to a private law cause of action, and suggested that it did not apply where what was in issue was a public law remedy. She cited *Miller v The Queen*, a Canadian case in which it was held that habeas corpus lay to challenge a particular form of detention within the penitentiary system. Le Dain J, giving the judgment of the court, said (p 30) that the particular form of detention 'involves a significant reduction in the residual liberty of the inmate', and held that there was no sound reason in principle why habeas corpus should not be available to challenge it. Junior counsel also cited *R (Munjaz) v Mersey Care NHS Trust*, a case concerned with detention in a mental hospital. Lord Bingham of Cornhill (p 192B, para 30), in the context of dealing with a claim under Art 5 of the Convention, observed that the Canadian approach of residual liberty does not form part of Convention jurisprudence. Lord Steyn, however, in his dissenting judgment, described the concept as a 'logical and useful one' (p 194H, para 42), and suggested that *Hague* should no longer be treated as authoritative (p 195E). In the public law context of the present petitions, junior counsel submitted, segregation should be seen as a restriction imposed on such residual right to liberty as was not taken away by the fact of imprisonment, and should therefore be tested by reference to proportionality.

Respondents' submissions

[116] Junior counsel for the Scottish Ministers opened his submissions by setting out a number of propositions which the Scottish Ministers do not dispute. First, proportionality is a key concept in determining, when Convention rights are engaged, whether there has been a breach of such rights. Secondly, proportionality is a general principle of Community law. Thirdly, where interference with common law fundamental rights is asserted, scrutiny under the flexible concept of reasonableness will be more intense than in other cases; in such cases the result will frequently be the same whether the test used is reasonableness or proportionality. Fourthly, use of the concept and language of proportionality is to be found in some cases dealing with common law fundamental rights. What the Scottish Ministers do dispute in this chapter of the reclaiming motion is (1) whether proportionality is recognised as a free-standing ground of judicial review available generally at common law; and (2) whether common law fundamental rights are in issue in these petitions.

[117] With that introduction, junior counsel for the Scottish Ministers turned to discuss the implications of *R v Secretary of State for the Home Department, ex p Brind and ors*. The key point about that case, he said, was that it was not merely a case in which various judges had made observations about the concept of proportionality. The availability of proportionality as an independent ground of judicial review was specifically put before the House of Lords for decision (p 736F). Notwithstanding the *dicta* which contemplated the possibility of the future development of the law in that direction, the House of Lords declined to adopt proportionality as a general ground of judicial review and applied the test of *Wednesbury* reasonableness. The rejection of proportionality as a common law ground of judicial review was part of the ratio of the case. Although *Brind*, as a decision of the House of Lords in an

English appeal, is not formally binding on this court, it was submitted that we should not depart from it. The grounds for judicial review are generally regarded as the same in Scotland as in England. There was no reason to suppose that *Brind* would have been differently decided if it had been a Scottish case.

[118] Dealing with developments since *Brind*, junior counsel for the Scottish Ministers accepted that there was a substantial body of opinion that would welcome the adoption of proportionality as an independent ground of judicial review. It was, however, implicit in the passages cited by junior counsel for the petitioners that such adoption had not yet taken place. It was accepted that proportionality was not ruled out for the future. But junior counsel for the petitioners had cited nothing which suggested that, as a general ground of review, proportionality had already achieved recognition. The *dicta* favouring proportionality did not overrule *Brind*; they did not change the law. Junior counsel for the Scottish Ministers reviewed the cases founded on by junior counsel for the petitioners. It is unnecessary to record all his comments here, but the thrust of his submissions was that the decisions in those cases, as distinct from the individual *dicta* relied upon by junior counsel for the petitioners, afforded no support for the propositions (1) that proportionality had already been recognised as an independent ground for judicial review which was of general application, or (2) that it could be so recognised by this court in the present cases. Junior counsel for the Scottish Ministers pointed out that in *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence*, the Court of Appeal was asked to do what the petitioners ask this court to do in these petitions. At paras 35 and 36 the Court of Appeal declined the invitation to make the innovation of substituting proportionality for *Wednesbury* reasonableness. Although the *British Civilian Internees* case was not binding on this court, it should be treated as highly persuasive. As was the case with *Brind*, the *British Civilian Internees* case was concerned with an area in which the law in Scotland was broadly the same as the law in England and Wales (Clyde and Edwards, *Judicial Review*, para 14.02). It was desirable that that should continue to be so. Many government decisions might be reviewed in either jurisdiction, and there were therefore sound practical reasons for ensuring that the grounds for review were the same in both. In any event, junior counsel for the Scottish Ministers submitted, this was not a suitable case in which to effect a substantial development of the law of general application. The introduction of proportionality in the contexts of the Convention and Community law was a matter of legislation. If it was to be introduced as a general common law ground of judicial review, that too should be left to Parliament, or at least to the House of Lords.

[119] Accepting, as he did, that the language and concept of proportionality were to be found applied in certain cases, junior counsel for the Scottish Ministers pointed out that they were all concerned with rights that were recognised at common law as fundamental. Those cases therefore were of assistance to the petitioners in the present cases only if they were able to show that segregation potentially involved infringement of rights of theirs which were recognised as fundamental at common law. The petitioners asserted that it did. To do so they relied on the concept of residual liberty. Although that concept had been adopted in Canada (*Miller v The Queen*), it had not found favour in the United Kingdom (*R v Deputy Governor of HMP Parkhurst, ex p Hague*, per Lord Bridge of Harwich, p 163B, Lord Ackner, p 166H, Lord Jauncey of Tullichettle, p 176F–H; see also *R (Munjaz) v Mersey Care NHS Trust*, per Lord Bingham of Cornhill, para 30). In *Munjaz*, Lord Steyn in his dissenting opinion, appeared to accept that the House of Lords

in *Hague* 'rules out this concept' (p 811A, para 42), although he argued strongly that *Hague* should no longer be regarded as authoritative (p 811E).

[120] Assuming for the purpose of argument that the concept of residual liberty was one which might properly be deployed, junior counsel for the Scottish Ministers went on to argue that it did not follow that anything that could be described as an aspect of residual liberty should be regarded as a fundamental right, and so susceptible to review by the test of proportionality. For a prisoner lawfully deprived of his liberty, segregation did not engage any fundamental right. It was perfectly consistent to accept that a prisoner retained such of his civil rights as were not taken away expressly or by necessary implication, yet to maintain that certain of those retained rights were not of the same fundamental character as the right to liberty which they would have had if they had not been convicted and sentenced to imprisonment. The use of the phrase 'residual liberty' should not be allowed to obscure that distinction. The petitioners had no authority to support the proposition that segregation engaged a fundamental common law right. Accordingly, even if, contrary to the primary submission, the concept of residual liberty should be accepted, it did not follow that the petitioners' cases fell within the category of fundamental common law rights to which it had been accepted that the test of proportionality properly applied.

Discussion

[121] The concept of proportionality has an established, albeit recently attained, place in our law. First, it is one of the general principles of Community law. Secondly, it plays an important part in determining whether, when a Convention right is engaged, it has been infringed. It has not, however, yet been recognised as a generally-available common law test of the validity of administrative action. In these petitions, the petitioners invite us to innovate upon the law, and accept proportionality as such a general test of validity. Alternatively, they invite us to hold that their complaints relate to infringement of fundamental rights, and that, in that context at least, proportionality is a recognised test of validity.

[122] As counsel pointed out in their submissions, the possibility that proportionality might be adopted as a general test of the validity of administrative action has been the subject of judicial observation in England since 1985 (*CCSU v Minister for the Civil Service*, per Lord Diplock, p 410). These observations have, however, all been *obiter*. When the House of Lords was invited to adopt proportionality in *R v Secretary of State for the Home Department, ex p Brind and ors* (p 736F) it declined to do so. Twelve years later, in *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence*, the Court of Appeal held that it was not open to it to accept proportionality in place of *Wednesbury* reasonableness as the general test of validity of administrative action.

[123] We accept, of course, that the grounds for review of administrative action are not closed for all time (*CCSU*, per Lord Diplock, p 410; *West v Secretary of State for Scotland*, per Lord President Hope, p 413). Moreover, we are not technically bound by *Brind* or the *British Civilian Internees* case. On the other hand, the submissions made by junior counsel for the Scottish Ministers as to the desirability of maintaining the situation that the grounds for review are broadly the same in all the jurisdictions in the United Kingdom are, in our view, compelling. Much of the *obiter* discussion on the subject has been prompted by dissatisfaction with the test of *Wednesbury* unreasonableness. It would be possible in theory to recognise

proportionality alongside *Wednesbury* unreasonableness as an alternative test of the validity of administrative action, although it would be unsatisfactory and confusing to have in simultaneous operation two tests which in many cases would overlap. The more extreme step of rejecting the *Wednesbury* test and adopting proportionality in its place is not one which we consider it appropriate for us to take. To do so would involve a failure to recognise the view taken of the matter in the House of Lords in *Brind* and the Court of Appeal in the *British Civilian Internees* case, and introduce an undesirable dichotomy between the approach to judicial review in Scotland and in England.

[124] We therefore reject the primary proposition advanced on the petitioners' behalf that the law recognises proportionality as the (or a) criterion by which to test the validity of administrative action generally.

[125] It was not disputed by the Scottish Ministers that authority can be found, in cases dealing with alleged infringement of common law fundamental rights, for testing the validity of the actions complained of by asking whether the interference complained of was the minimum necessary to achieve a legitimate objective, a formulation closely akin to proportionality. In order to rely on those authorities, however, the petitioners had to maintain that the segregation of which they complain amounted to infringement of a fundamental right at common law. The starting point for the argument in support of that contention was that a convicted prisoner retains all civil rights which are not taken away expressly or by necessary implication (*R v Board of Visitors of Hull Prison, ex p St Germain*; *Raymond v Honey*). That much we accept. We do not regard *R v Deputy Governor of HMP Parkhurst, ex p Hague* as necessarily standing in the way of such an argument, since the decision in that case turned on the nature of the (English) common law tort of false imprisonment (Lord Bridge of Harwich, p 163B). However, in so far as the argument proceeds to rely on the concept of 'residual liberty' derived from the Canadian case of *Miller v The Queen*, it is on uncertain ground. The concept has not been generally accepted in England. However, Lord Steyn (in his dissenting speech in *R (Munjaz) v Mersey Care NHS Trust*, p 810H, para 42) regarded the concept as a 'logical and useful one'. We see no objection to it in principle, provided it is used as no more than a label for those civil rights not lost on lawful imprisonment, and contains no implication that what is left is of the same character and importance as that which has been taken away. It does not follow from the fact that the incarcerated prisoner retains certain rights that, if segregation infringes a residual right, that right is a fundamental one. We accept the submission made by junior counsel for the Scottish Ministers that it is quite consistent with the principle that a convicted prisoner retains those civil rights that have not been taken away, to hold that the retained rights are not of the same fundamental character as the right to liberty which he possessed before being lawfully imprisoned. We are of opinion that such rights as the petitioners retained in relation to the manner and circumstances of their detention were not common law rights of a fundamental nature. The present petitions therefore do not fall within the class of cases to which the test akin to proportionality has been applied.

Decision

[126] We therefore reject both of the bases on which the petitioners seek to rely on proportionality as a test of the validity of the decisions to segregate them. We shall therefore in each petition (a) exclude from probation the words 'disproportionate

et separatim' where they appear in statement 3(a), and (b) repel the first plea in law so far as relating to proportionality.

Adequacy of reasons

Pleadings

[127] In statement 3(b) of each petition (as amended), the petitioner seeks

> 'declarator that the said orders under Rule 80(1) of the 1994 Rules [of specified dates] were unlawful by virtue of non-compliance with Rule 80(4)(c), for failure to specify adequate and comprehensible reasons for the making thereof'.

Before this court it was common ground between the parties that the issue which would ultimately fall to be determined was whether, for want of adequate and comprehensible reasons, the orders were not 'in accordance with the law' in terms of Art 8.2 of the Convention, so as to found a claim of the sort which the petitioners seek to make. It was also common ground that that issue was one which should be determined only after proof. We were therefore invited to confine our attention at this stage to the narrower question whether the orders complied with r 80(4)(c).

Rule 80

[128] It is convenient at the outset of the discussion of this issue to set out again the relevant parts of r 80. Rule 80 is contained in Pt 9 of the Prisons and Young Offenders Institutions (Scotland) Rules 1994. That Part is headed 'Security and control', and begins with r 78, which places on the governor responsibility for the supervision of the whole prison and the control of prisoners confined therein. Rule 80 is headed 'Removal from association', and is in, *inter alia*, the following terms:

> '(1) Where it appears to the Governor desirable for the purpose of–
>
> (a) maintaining good order or discipline;
> (b) protecting the interests of any prisoner; or
> (c) ensuring the safety of other persons,
>
> he may order in writing that a prisoner shall be removed from association with other prisoners, either generally or during any period the prisoner is engaged or taking part in a prescribed activity. ...
>
> (4) If the Governor makes an order under paragraph (1), he shall–
>
> (a) specify in the order whether the removal from association is–
>
> (i) in general; or
> (ii) in relation to a prescribed activity;
>
> (b) if the removal is in relation to a prescribed activity, specify which activity the order relates to;
> (c) specify in the order the reasons why he is making it;
> (d) record in the order the date and time it is made; and
> (e) explain to the prisoner the reasons why the order is made and provide him with a copy of the written order.'

Petitioners' submissions

[129] Of the 25 r 80 orders that are before the court, the petitioners contended that in respect of all but two the governor had failed to state adequate and

comprehensible reasons. The two against which no complaint was made were the orders dated 23 and 24 December 2003 in respect of the petitioner Henderson (App, II, pp 1129, 1130, 1133). Nothing more need be said about those two orders. The submission was that the remaining orders fell into two categories. The first comprised the four orders in respect of the petitioner Somerville (dated 5 April, 15 May, 12 June and 18 July 2002, App, II, 1026, 1031, 1034, 1039) and the two orders (only the latter of which is mentioned in statement 3 of his petition) in respect of the petitioner Blanco (dated 1 and 8 August 2002, App, II, 1084, 1087). A determination in respect of these orders could, it was submitted, be made at this stage. Declarator should be granted *de plano* that for want of adequate and comprehensible reasons they did not comply with r 80(4)(c). The second category comprised the orders made in respect of the petitioners Cairns and Ralston, and those orders in respect of the petitioner Henderson that were the subject of challenge. In respect of all of these, the submission was that the question of their compliance with r 80(4)(c) should be reserved at this stage and only decided after proof.

[130] Having thus set out the scope of his submissions, junior counsel for the petitioners was at pains, by way of preamble to his substantive submissions, to emphasise that segregation of prisoners was a very serious matter indeed. That was acknowledged in the SPS document (2003) giving procedural guidance on r 80 (App, I, pp 9, 14). As was noted there, it was for that reason that r 80 contained such detailed procedures. The provisions of the rule were not made for the administrative convenience of prison officers, or merely to ensure good record-keeping. They were a vital protection for the prisoner, who by virtue of his imprisonment had been deprived of his liberty, but not of his right of association with fellow prisoners (eg rr 69(4) and 75(2)). The importance of such surviving rights might be enhanced by the loss or partial loss of other rights (*R (Daly) v Secretary of State for the Home Department*, per Lord Bingham of Cornhill, p 537H). The Rules were part of the law, to be strictly interpreted and observed. They set out the limited circumstances in which, and the procedures subject to which, the right of association might be interfered with. The importance of the rules regulating interference with the right of association was further emphasised by the fact that the practical effect of segregation was indistinguishable from punishment.

[131] Subject to that emphasis on the seriousness of segregation, the real starting point for the petitioners' submissions was r 80(4)(c). It is one of a series of mandatory requirements. It obliges the governor, when making a r 80(1) order, to 'specify in the order the reasons why he is making it'. The governor's reasons required to be adequate and comprehensible, and to deal with the substantial questions in a proper and intelligible way. They were required not to leave the informed reader and the court in any real doubt as to what the reasons for the decision were and what were the material considerations which were taken into account in reaching it. A statutory obligation to give reasons is designed not merely to inform the person who is the subject of the decision what the result of the decision is, but to make clear the basis on which the decision was reached and that it has been reached in conformity with the statutory requirements. In support of those propositions, reference was made to *Safeway Stores plc v National Appeal Panel* (pp 40, 41), *Wordie Property Co Ltd v Secretary of State for Scotland* and *Albyn Properties Ltd v Knox*.

[132] It was clear from the terms of r 80(1) that the order had to be 'in writing', and from the terms of r 80(4)(c) that the reasons had to be specified 'in the order'. It followed that the adequacy and comprehensibility of the reasons had to be judged

by reference exclusively to what was written in the order. That proposition was unaffected by r 80(4)(e), which contains a separate obligation to explain the reasons to the prisoner. It was clear that that separate obligation followed on the formulation of written reasons in the order, and that the obligation to explain the reasons was an obligation to explain the already written reasons, and not an opportunity to provide further or different reasons over and above those written in the order. An absence of adequate written reasons in the order therefore could not be cured by showing that, as a result of what purported to be a r 80(4)(e) explanation or otherwise, the prisoner was in fact aware of the reasons for the order. The Lord Ordinary (para 124) was wrong to regard r 80(4)(c) as concerned with record keeping, and not with the interests of the segregated prisoner. Nor did a contention that the reason was obvious excuse a failure to state it in the order (*R v London Borough of Lambeth, ex p Walters*, Sir Louis Blom-Cooper QC, p 175). There might be circumstances in which the reasons given would be inadequate or incomprehensible if attention were confined to the words of the order, but be capable of being understood as adequate if the words were read in the context of surrounding circumstances. That was what was contemplated on the petitioners' behalf in the acceptance that the issue of whether the orders in question in the cases of the petitioners Henderson, Cairns and Ralston complied with the requirements of r 80(4)(c) should be reserved until after proof. On the other hand, there was no scope for proof that the actual reasons for the order were other than those, if any, expressed in the body of it. The language of r 80(4)(c) excluded any possibility of a remit to the decision-maker for a re-statement of reasons, such as occurred in *Chief Constable, Lothian and Borders Police v Lothian and Borders Police Board*. The Lord Ordinary had erred in attempting to distinguish the leading English authority in this field (*R v Westminster City Council, ex p Ermakov*).

[133] It was accepted on the petitioners' behalf that the Rules did not require detailed or elaborate reasons. It was accepted that there might be overriding considerations, such as the need to avoid disclosure of sensitive intelligence, that would stand in the way of disclosure of full details of the reasons. It was not accepted, however, that that meant that all that was required was that the 'gist' of the reasons be given. The cases in which observations to that effect had been made (*R v Governor of HMP Long Lartin, ex p Ross*; *Re Conlon's Application*; *Re Henry's Application*; *Re Kemp's Application*) were concerned with different contexts and different statutory regimes; in particular, the Northern Irish cases concerned a regime which imposed no statutory obligation to give written reasons.

[134] It was necessary, counsel submitted, to bear in mind why reasons are required. The giving of reasons is 'one of the fundamentals of good administration' (*Breen v Amalgamated Engineering Union*, per Lord Denning MR, p 191). Reasons serve to improve the quality of decision making; improve the machinery of government; satisfy the parties affected by the decision, enabling them to assess its soundness; promote fairness; and encourage decision-makers to apply their minds with due concentration to the relevant issues (Clyde and Edwards, *Judicial Review*, para 18.54, cited with approval by Lord Reed in *Chief Constable, Lothian and Borders Police v Lothian and Borders Police Board*, p 333A–C). The reasons given in the r 80 orders should be read in the light of those purposes underlying the requirement for reasons.

[135] Junior counsel for the petitioners proceeded to advance a number of separate grounds on which the reasons given in a r 80(1) order might be held to be inadequate or unintelligible. These grounds are summarised in para 5.3 of the

petitioners' statement of argument as points (a) to (e), and for ease of cross-reference we shall refer to them in that way here.

[136] (Point (a)). First, a statement that an order was desirable 'for the good order of the prison' (or for that matter in words which repeated or paraphrased any subparagraph of r 80(1)) could not by itself amount to an adequate or comprehensible reason. It was no more than a reiteration of the substance or purpose of the order, not a statement of the reasons for it (Clyde and Edwards, *Judicial Review*, para 17.24). Reasons were to be distinguished from purpose. Rule 80(1) set out the limited purposes for which it was legitimate to impose segregation. Reasons required to state why an order was necessary to attain one of the r 80(1) purposes. In para 124 of her opinion the Lord Ordinary fell into error in treating the purposes for which an order could in terms of r 80(1)(a), (b) and (c) be made as the 'three basic reasons [*sic*] which can be relied on as justification for segregating a prisoner'. That was to fail to distinguish between purposes and reasons. The Lord Ordinary thus erred in going on to decline to rule out the possibility that r 80(4)(c) was intended to do no more than ensure that the order identified 'the category of reason' (by which she appears to mean the r 80(1) purpose) into which the individual case falls. On the contrary, on a sound view of r 80(4)(c), it required more than the reiteration of the language of r 80(1) (*R v Northamptonshire County Council, ex p W*, per Laws J, p 296E) or a statement of the purpose sought to be attained, and required reference to circumstances relied on as showing that the attainment of that purpose required the making of the order.

[137] (Point (b)). Next, counsel submitted that given (a) the severity of the infringement of the prisoner's rights involved in general segregation, and (b) the possibility of more limited interference in the form of segregation in respect of a prescribed activity, reasons for an order for general segregation required to demonstrate that the governor had addressed his mind to the possibility of more limited segregation, in respect only of a prescribed activity, and express reasons for his not utilising that possibility.

[138] (Point (c)). Counsel's next submission related to the relationship between the governor's power to order segregation under r 80 and the procedures relating to discipline contained in Pt 10 of the 1994 Rules. Rule 95 lays down a procedure requiring officers to report breaches of discipline to the governor. The range of activities that may constitute a breach of discipline is set out in sch 3 to the Rules. The activities include many that are in any event criminal offences, but also others that are not. Rule 96 provides for the bringing of disciplinary charges, r 97 for inquiry into disciplinary charges and r 98 for adjudication of such charges. Rule 100 regulates the punishments that the governor may impose on a prisoner found guilty of a breach of discipline. Rule 95(2) provides that:

> 'Subject to paragraphs (3) and (4), where any officer has reasonable grounds for suspecting that a prisoner has committed a breach of discipline he may, if he considers it appropriate to do so, remove the prisoner from association with other prisoners in general pending the making of a report ... and the adjudication of the charge of breach of discipline.'

Counsel's submission was that in so far as the reason stated for segregation under r 80 was the occurrence of conduct which could give rise to disciplinary procedures (and segregation) under r 95, reasons for the making of the r 80 order might, in order to be adequate and comprehensible, require to make it plain that the possibility of disciplinary proceedings (instead of a r 80 order) had been considered, and address

why in the particular circumstances of the case that course had not been considered appropriate. It was accepted that there might be good reason for proceeding under r 80 rather than r 95, but if there was, that reason should be disclosed.

[139] (Point (d)). Rule 80(9) provides that:

> 'If a prisoner is moved by the Scottish Ministers from any prison to any other prison in terms of section 10 of the Act, any order under paragraph (1) . . . made . . . in relation to the prisoner whilst confined in the former prison shall cease to have effect, but without prejudice to the power of the Governor of the prison to which the prisoner is moved to make a new order under paragraph (1).'

Counsel submitted that the power of the governor of the prison to which a prisoner was moved was to make a wholly new order, if the prisoner was to be segregated in that prison. That required him to consider of new the need for such an order, and if it was needed, the scope of it. He required to apply his own mind to those questions, and not merely to make a new order because the prisoner had been segregated in the prison from which he had been moved. The circumstances bearing on what was required for the maintenance of good order and discipline in the receiving prison might be quite different. Thus the reasons for any new post-transfer r 80 order must demonstrate that the governor of the receiving prison had had regard to all the circumstances. In so far as the reasons yielded the inference that he had acted simply so as to 'continue' the previous order made in the prison from which the prisoner had been moved, that disclosed irrationality or a fettering of his discretion.

[140] (Point (e)). Finally, counsel submitted that the reasons for a r 80 order must be adequately and comprehensibly related to the purpose of the order. Thus, if it was said that there was a desire to 'assess' the prisoner, it required to be apparent from the reason why assessment necessitated segregation, and could not be carried out in non-segregated conditions. In the absence of reasons linking the desire for assessment to the necessity for segregation, a reference to assessment was not an adequate reason for segregation.

[141] One other ground of attack on the adequacy of the reasons stated in certain of the orders emerged in the course of submissions directed at individual orders. An example of the phenomenon is to be found in the order of 18 July 2002 (App, II, 1039) in relation to the petitioner Somerville. The language of the reasons given in that order coincides with the language of the letter of the same date seeking r 80(5) authority for the extension of the period of segregation (App, II, 1040). It was submitted, and seems reasonably clear from the language used, that the letter seeking r 80(5) authority had been drafted first, and its text then 'cut and pasted' into the r 80(1) order. That was described in oral submissions as a 'sloppy approach', but the petitioners' written submissions go further, and suggest that in such circumstances the reasons given are for seeking r 80(5) authority, and therefore cannot be reasons for making the antecedent r 80(1) order.

Respondents' submissions

[142] On behalf of the Scottish Ministers, junior counsel confirmed their acceptance that we should at this stage address only a narrower question than that raised in statement 3(b) of the petitions. That statement sought declarator that the orders were 'unlawful' by virtue of want of adequate and comprehensible reasons. At this stage, however, we should determine only whether it could be said, without evidence, that the challenged reasons failed to comply with r 80(4)(c). If any order

did so fail, it was a separate question whether the consequence was that it was invalid. It was yet another question whether, if invalid, the order was not 'in accordance with the law' for the purposes of Art 8 of the Convention. Although junior counsel for the Scottish Ministers, in the course of his submissions, made some observations on the first of those two subsequent topics, it is not necessary for us to deal with them in any detail, since it was accepted on the respondents' behalf that only the first question, whether there was compliance with r 80(4)(c), should be addressed at this stage, and that the two subsequent questions should be reserved until after proof.

[143] In two respects, junior counsel for the Scottish Ministers did not seek to support the reasoning of the Lord Ordinary. First, he did not support the Lord Ordinary's observation that r 80(4)(c) is concerned with record keeping, and not with the interests of the segregated prisoner. Secondly, he did not support the Lord Ordinary in keeping open the possibility that the mere identification in the order of the r 80(1) purpose which it was designed to attain might be sufficient to amount to adequate reasons for the making of the order.

[144] It was accepted that there was no question, in the present context, of returning to the decision-maker for a restatement of reasons, if the reasons stated in the r 80(1) order were inadequate (cf *Chief Constable, Lothian and Borders Police v Lothian and Borders Police Board*). Moreover, it was accepted in principle that it was not open to the respondents to state one reason in the r 80(1) order, then seek to support the order by reference to a quite different reason or reasons given to the prisoner by way of purported explanation under r 80(4)(e) or otherwise. However, it was submitted that a distinction fell to be drawn between the giving of different reasons and the elaboration of the reasons stated in the order. There was no reason why explanation, given pursuant to r 80(4)(e), should not expand on what was contained in the order, if that seemed necessary or appropriate. Indeed, the obligation to explain might be thought to be meaningless if it were restricted to repetition of what was in the order, and did not permit expansion or elaboration.

[145] Evidence of the context in which a r 80(1) order was made was, it was submitted, relevant in three ways. First, the context in which a r 80(1) order fell to be made had a bearing on the proper interpretation of the requirements of the rule. Secondly, the context was relevant to the standard of adequacy reasonably to be expected of the reasons given under r 80(4)(c), and the proper approach to scrutiny of the reasons (*Safeway Stores plc v National Appeal Panel*, p 40G). Thirdly, the context bore on the subsequent issue of whether the rule should be construed as rendering invalid an order that did not contain adequate and comprehensible reasons (*R v Soneji*).

[146] Prisons, it was submitted, are institutions that contain in close proximity significant numbers of individuals, some of whom may be volatile, unpredictable or violent. Prison authorities have responsibility to keep all prisoners safe and secure, as well as obligations to staff. An error of judgment in management could have very serious consequences. There was a risk of injury to prisoners and staff. Fulfilment of the aims of caring for prisoners with humanity and offering them opportunities of preparing for release would be prejudiced if good order were not maintained. The maintenance of good order and discipline was therefore paramount. In terms of r 78 the governor has a responsibility for maintaining control. Rule 80 forms part of Pt 9 of the Rules, which is concerned with security and control. The decision whether to make a r 80(1) order is thus a matter of judgment where misjudgment could have serious consequences. That judgment has to be exercised by experienced staff in all

the relevant circumstances prevailing at the time. That the making of a r 80(1) order requires an exercise of discretionary judgment is reflected in the language of the rule: 'Where it appears to the Governor desirable for the purpose'. In all these circumstances, when judging the adequacy of the reasons given for a decision to make a r 80(1) order, the governor should be allowed a wide margin of judgment.

[147] Junior counsel for the Scottish Ministers dealt in turn with each of the points identified in para 5.3 of the petitioners' statement of argument. In respect of point (a), counsel accepted in principle that a mere restatement of the decision could not amount to adequate or comprehensible reasons for the decision. Purported reasons that amounted to no more than an assertion that segregation was desirable for one or more of the purposes listed in r 80(1) could not be regarded as satisfying the requirement for adequate and comprehensible reasons. Purported reasons that merely stated that segregation was desirable, with or without identification of the purpose which segregation would serve, could not satisfy the requirement of r 80(4)(c).

[148] In respect of point (b), counsel submitted that there was no automatic need for the reasons for an order for general segregation to state why segregation in relation to a prescribed activity would not suffice. What the rule required was a statement of the reasons why the governor was making the order that he was making, not a statement of the reasons why he was not making some other more limited order. Of course, there could be circumstances in which reasons given for an order for general segregation could be seen on examination to justify segregation only in relation to a prescribed activity and not general segregation. If that were the case the reasons would be inadequate as reasons for an order for general segregation. There was, however, no mechanistic rule requiring every order for general segregation to explain why segregation in relation to a prescribed activity would not suffice.

[149] In respect of point (c), counsel submitted that there was no express or implied requirement that the governor state why a r 80 order was considered appropriate rather than disciplinary proceedings under r 95. The r 80 and r 95 powers were distinct, and directed at different purposes (*R v Deputy Governor of HMP Parkhurst, ex p Hague*, per Taylor LJ, p 110). Rule 80(1), so far as concerned with matters of discipline, is concerned with the future maintenance of discipline; whereas r 95 is concerned with the punishment of past breaches of discipline. Provided the decision to segregate was taken for the genuine purpose of r 80(1), it was only reviewable on grounds of *Wednesbury* unreasonableness (*Re Taggart's Application for Judicial Review*, per Kerr J).

[150] In respect of point (d), counsel accepted that the governor of the prison to which a prisoner was transferred had to make his own decision as to whether there were adequate reasons for segregation in the receiving prison. He did not accept, however, that the receiving governor was obliged to shut his mind to the fact that the prisoner had been in segregation in the transferring prison, and to the conduct or history that had led to that segregation. These were circumstances that could well have a relevant bearing on the need for segregation in the receiving prison, and could therefore form part of the reasons for a fresh r 80(1) order.

[151] In relation to point (e), it was accepted that the reasons for a r 80(1) order should relate to the purpose for which the order was thought desirable. It was not accepted, however, that on that account a reason referring to a need to assess the prisoner was not an adequate reason for a r 80(1) order. Where a prisoner had been transferred after a period of segregation, returning him to association in the prison

to which he was transferred might well require careful evaluation of the effect that such return might have on good order or discipline in the receiving prison. It could not be said that a perceived need for assessment before return to association could not be a legitimate reason for a r 80(1) order in the receiving prison.

Discussion

[152] Rule 80(4)(c) of the 1994 Rules places on the governor, when he orders that a prisoner be removed from association, an express obligation to specify in the order, which must be in writing, the reasons why he is making it. No doubt the imposition of that obligation reflects a recognition of the seriousness of restricting the prisoner's right of association, especially in the context in which, by virtue of the sentence of imprisonment, his liberty has already been severely restricted. No doubt, too, the obligation has been placed on the governor in the interests of good administration (*Breen v Amalgamated Engineering Union*, per Lord Denning MR, p 191); and with a view to securing, *inter alia*, that the governor has properly applied his mind to the grounds for making the order, and that the prisoner knows why his rights are being temporarily further reduced, and to facilitate scrutiny of the order (cf Clyde and Edwards, *Judicial Review*, para 18.54). These considerations, however, merely lie behind the imposition of the express statutory obligation. It is well settled that a statutory obligation to give reasons requires the reasons given to be proper, adequate and intelligible; the decision must 'leave the informed reader and the court in no real and substantial doubt as to what the reasons for it were' (*Wordie Property Co Ltd v Secretary of State for Scotland*, per Lord President Emslie, p 348). It is, of course, accepted that the reasons do not require to be elaborate, but we do not find it helpful to embark on an abstract discussion of whether it is sufficient that the 'gist' of the reasons be given. What will be sufficient is a matter of circumstance, and it is preferable to test the adequacy of the stated reasons by the familiar criterion formulated in *Wordie Property*.

[153] It is important to take account of the structure of r 80 as a whole. Rule 80(1) authorises the governor to order a prisoner's removal from association with other prisoners only for certain limited purposes. The three purposes that it is legitimate to seek to attain by a segregation order are the maintenance of good order or discipline, the protection of the interests of any prisoner and ensuring the safety of other persons. Segregation under r 80 for any other purpose is not permissible. It is in the context of that power to order segregation only if it is desirable for certain specified purposes that r 80(4)(c) imposes the obligation to specify the reasons for making the order. It is to be noted that it is the reasons for making the order, not the purpose of the order, that must be specified. The question: 'What was the purpose of the order?' may be answered satisfactorily by the identification of one or more of the purposes listed in r 80(1). The question: 'What were the reasons for making the order?' requires more. It requires the identification of considerations which justify the conclusion that the order is in the circumstances desirable for one or more of the r 80(1) purposes. The mere identification of one or other of the prescribed purposes will therefore not serve as a statement of the reasons for making the order.

[154] Rule 80(4)(e) serves a different purpose. It is not a second opportunity to state reasons for the order. It proceeds on the basis that the reasons have already been stated in the order in terms of r 80(4)(c). It then requires that the prisoner be given a copy of the written order, and that the reasons why the order is made be explained to him. The reasons of which the prisoner is entitled to an explanation are

the reasons stated in writing in the order. It is not difficult to figure why it was thought appropriate to require explanation of the reasons to the prisoner. Prisoners differ in their literacy and their intellectual capacity. Some may have greater difficulty in understanding the written reasons than others. Rule 80(4)(e) is an important safeguard to ensure that the prisoner not only sees, but also understands the reasons given in the order. To an extent, explanation may no doubt involve expansion or elaboration of the formal written reason, but r 80(4)(e) affords no basis for putting forward reasons different from or additional to those set out in the order.

[155] The question whether a particular r 80(1) order complies with the requirement of r 80(4)(c) must be answered by reference to the terms of the reasons set out in the order. The inquiry is not as to whether adequate and comprehensible reasons for the making of the order exist, but as to whether the reasons stated in writing in the order are adequate and comprehensible. It follows that there is no scope for extrinsic evidence of reasons not mentioned in the order. Reasons not expressed in the order cannot be put forward as constituting compliance with r 80(4)(c), whether on the basis that they were part of a purported r 80(4)(e) explanation given to the prisoner or otherwise.

[156] That is not to say, however, that there is no scope for reliance on extrinsic evidence in determining whether the reasons stated in the order are adequate and comprehensible. For that purpose evidence of background circumstances may be all-important in placing the stated reasons in context so as to enable them to be understood and evaluated. That is a corollary of the fact that the test of adequacy is whether the 'informed reader' is left in no real or substantial doubt as to the reasons for the decision. Proof of background circumstances may be necessary in order to place the court in the position of the 'informed reader'. That may include evidence designed to give the court a proper understanding of the prison context, as well as evidence about the background circumstances of events giving rise to the need for the segregation order in question.

[157] We turn now to the points summarised in para 5.3 of the petitioners' statement of argument. Point (a) can be dealt with briefly. We have already expressed the view that, on an analysis of the terms of r 80, the reasons required by r 80(4)(c) are to be distinguished from the purposes listed in r 80(1)(a), (b) and (c). A statement of purpose is not a statement of reasons. An order which contained no more than a statement that the order was made because it was desirable for the purpose of maintaining discipline (or otherwise merely reiterated or paraphrased one of the r 80(1) purposes) would thus not comply with the requirement for specification of the reasons for making the order. Such an order would contain no reasons, and would not be capable of being made to comply with r 80(4)(c) by the introduction of extrinsic evidence of reasons not expressed in the order.

[158] Point (b) is not, in our opinion, well founded. Rule 80(1) contemplates that the governor may order segregation generally, or in respect of a prescribed activity. What r 80(4)(c) requires, however, is reasons for the order that is made, not reasons for not making a different order. There is, therefore, in our opinion no general requirement that the reasons for an order for general segregation must demonstrate that segregation in respect of a prescribed activity was considered, and explain why it was regarded as insufficient. If, of course, the reason given for general segregation can be shown on examination to justify only segregation in respect of a particular prescribed activity, the reason will on that account be inadequate to justify general segregation. There is, however, no general rule that adequate reasons for a general segregation order must explain why a more limited order has not been made.

[159] So far as point (c) is concerned, we recognise that there is some overlap between the language of r 80 and that of r 95. The maintenance of discipline is one of the purposes for which a r 80(1) order may be made. Breach of discipline may be addressed under r 95. Rule 95(2) also permits segregation pending disciplinary proceedings. It is thus possible to envisage circumstances in which the governor would, on the occurrence of a breach of discipline, have the option of proceeding under either rule. But these points of similarity should not obscure the fact that the two rules have very different focuses. Rule 80 is forward-looking, concerned with the future maintenance of discipline. Rule 95 is concerned primarily with the imposition of punishment for a past breach of discipline. Provided the governor gives reasons for making a r 80(1) order, the compliance of the order with r 80(4)(c) will depend on the reasons given. There is no obligation on the governor to include in his reasons for making a r 80(1) order, reasons for proceeding under that power rather than taking disciplinary proceedings.

[160] There is some force, in our opinion, in point (d), but the petitioners' counsel pressed it too far. In terms of r 80(8), on a prisoner being moved from one prison to another, any sec 80(1) order made by the governor of the former prison ceases to have effect. That cessation of effect is, however, stated to be without prejudice to the power of the governor of the latter prison to make a new r 80(1) order. We accept that the governor of the receiving prison must make his own decision as to whether segregation is desirable in his prison, and must formulate his reasons for making the order if he decides to make one. We accept that in taking that decision, the governor must apply his mind to all the relevant circumstances. We accept that the maintenance of good order and discipline in the receiving prison may require attention to be given to quite different considerations from those which justified the order made by the governor of the transferring prison. The fact that the order made by the governor of the receiving prison in effect 'continues' the previous order does not, however, in our view demonstrate that the receiving governor has acted irrationally or has improperly fettered his discretion. While the circumstances prevailing in the receiving prison will almost always be relevant to the governor's decision to make a fresh order there, it does not follow that the fact of the previous order, or the circumstances which were regarded as justifying the making of that order, are irrelevant to the making of the new order. It seems to us that, in most cases where a prisoner is transferred from a prison in which he was segregated to a new prison, the circumstances that led to that segregation, and the duration and circumstances of the period of segregation, will be of relevance to the decision whether or not to make a new order. Indeed, it would in our view in most cases be irrational to leave those considerations out of account.

[161] In point (e) the introductory proposition is sound, but its application to cases where the reasons refer to the assessment of the prisoner is not. Of course the reasons for a r 80(1) order must be adequately and comprehensibly related to the purpose of the order. It does not follow that a reason expressed in terms of assessment of the prisoner before returning to association needs expressly to explain why such assessment needs to be carried out with the prisoner in continuing segregation. It is, to our mind, readily understandable that, where a prisoner has been in segregation for a period of time, his return to association requires assessment in order to provide material for a properly informed judgment as to whether a return to association is consistent with continued attainment of the purpose for which the order was made. It seems to us to be obvious that *prima facie* such assessment requires to be carried out before the prisoner's status is changed.

We therefore do not consider that such a reason for continued segregation requires to spell out expressly that the assessment requires to be made while the prisoner is still in segregation.

[162] Finally, we are of opinion that the criticism of certain orders on the basis that the reasons have been 'cut and pasted' from the immediately following application for r 80(5) authority is completely without merit. It is scarcely surprising that, where a r 80(1) order is to be made, and it is considered necessary to continue the segregation for longer than the 72 hours permitted by that paragraph, the grounds for seeking authority to extend the period of segregation will be the same as the reasons for making the r 80(1) order. In these circumstances we can see no valid objection to preparing one document and cutting and pasting the relevant portion into the other document. It is of no moment that the text is written as part of the r 80(5) application and cut and pasted into the r 80(1) order. The only relevant question is whether the reasons given in the r 80(1) order are adequate to justify the decision to segregate.

Decision

[163] We turn now to consider the application of the views which we have expressed to the individual r 80(1) orders. We should make it clear that we are concerned only with the submission that the orders do not comply with the requirement of r 80(4)(c) that they should contain a statement of the reasons for making the order, which reasons are adequate and comprehensible. In the course of his submissions, both written and oral, junior counsel for the petitioners mixed in with his submissions about the adequacy of the reasons stated in the orders observations about other formal deficiencies of the orders. We are not concerned at this stage with those other complaints.

[164] As we have already noted, two of the orders are not challenged for want of adequate reasons. These are the orders of 23 and 24 December 2003 in respect of the petitioner, Henderson (App, II, 1129, 1130, 1133). Nothing need be done in respect of them, other than to note that their compliance with r 80(4)(c) is not challenged.

[165] There is one order in respect of which it is accepted by the respondents that the reasons stated are not adequate. That is the order of 15 May 2002 in respect of the petitioner, Somerville (App, II, 1031). The stated reasons are: 'Transfer in from Barlinnie Segregation Unit. For the good order of the prison.' The second sentence is no more than a reiteration of the purpose of the order. The first sentence by itself cannot amount to an adequate reason for the making of the order. We shall therefore grant declarator that that order does not comply with the requirement of r 80(4)(c).

[166] A number of orders are challenged only on grounds that we have held not to be relevant, namely, failure to explain why the order is for general segregation rather than segregation in respect of a prescribed activity (point (b)), or failure to explain why a r 80(1) order was made in preference to disciplinary proceedings (point (c)) or the 'cutting and pasting' of reasons from a r 80(5) application. In respect of these orders we find that no relevant ground of challenge to their compliance with r 80(4)(c) has been put forward. The orders in question are (1) in respect of the petitioner Somerville the order dated 18 July 2002 (App, II, 1039); (2) in respect of the petitioner Blanco the order dated 8 August 2002 (App, II, 1087); (3) in respect of the petitioner Ralston the order dated 7 November 2002 (App, II, 1066); (4) in respect of the petitioner Cairns the orders

dated 9 October 2002, 21 November 2002 and 27 December 2002 (App, II, 1046, 1056, 1062); and (5) in respect of the petitioner Henderson the orders dated 8 October 2002, 9 January 2003, 14 June 2003 and 29 October 2003 (App, II, 1098, 1106, 1116, 1122).

[167] It is appropriate, in our view, that the decision as to the compliance of the other orders with r 80(4)(c) should be reserved until after proof. This group includes those where the ground of challenge relates to an order made after transfer from one prison to another, or to an order said to be required for the purpose of 'assessment' of the prisoner. While these grounds of challenge may not necessarily be relevant, we do not consider that the decision should be taken without the benefit of such evidence as may be properly admissible to cast light on the stated reasons.

Procedural and pleading issues

[168] In terms of her interlocutor dated 8 February 2005 in each petition the Lord Ordinary, *inter alia*, excluded certain of the petitioner's averments from probation and *quoad ultra* allowed parties a proof of their respective averments. One of the petitioners' grounds of appeal is directed to the manner in which the Lord Ordinary proceeded in respect of some of the averments which she excluded from probation. Before saying more about these averments, we propose to discuss the procedural context.

[169] Each of these petitions is an application for judicial review, and accordingly the relevant procedure is regulated by Ch 58 of the Rules of the Court of Session 1994 ('RC'). This procedure was introduced in response to remarks by Lord Fraser of Tullybelton in *Brown v Hamilton District Council* (p 49). One of its main features is flexibility, so that a procedure may be followed which is best suited to the requirements of a particular case. As Lord Hope of Craighead said in *Davidson v Scottish Ministers (No 2)* (para 73), '[t]he whole point of judicial review procedure is that it is intended to eliminate the procedural timetable which applies in the case of an ordinary action.' The main provisions which are relevant for present purposes are as follows. By RC 58.4 the court, in exercising its supervisory jurisdiction on a petition for judicial review, may, *inter alia*, subject to the provisions of Ch 58, make such order in relation to procedure as it thinks fit. By RC 58.7 the Lord Ordinary to whom the petition is presented on being lodged may make a first order specifying, *inter alia*, such intimation, service and advertisement as may be necessary, and a date for the first hearing. RC 58.9 makes provision for the first hearing. Paragraph (2) thereof provides, *inter alia*:

> 'After hearing the parties, the Lord Ordinary may ... (b) make such order for further procedure as he thinks fit, and in particular may ... (i) adjourn or continue the first hearing to another date; ... (v) order further specification in the petition or answers in relation to such matters as he shall specify; ... (vii) order any party who appears to lodge such documents relating to the petition within such period as the Lord Ordinary shall specify; ... or (ix) order a second hearing on such issues as he shall specify.'

If evidence is to be led, this will be at the second hearing, for which provision is made by RC 58.10. Reference is also made in the Lord Ordinary's opinion to RC 27.1, which, so far as applicable to petitions generally, provides that any document founded on by a party, or adopted as incorporated, in his pleadings shall, so far as in his possession or within his control, be lodged in process as a production by him, when founded on or adopted in a petition, at the time of lodging

the petition, and when founded on or adopted in an adjustment to the petition, at the time when such adjustment is intimated to any other party. (It is not necessary for present purposes to discuss the extent to which a document, such as a report, which has been lodged as a production, may relevantly be adopted as incorporated in pleadings: see *Eadie Cairns v Programmed Maintenance Painting*; *Royal Bank of Scotland plc v Holmes*, p 570 G–I.)

[170] When the provisions of Ch 58 are borne in mind, the procedure which has been followed in the present cases has some unusual features. The petitions were lodged and first orders pronounced on various dates from 30 August 2002 (Somerville) to 9 June 2004 (Henderson). The first order in each case assigned a date for a first hearing. Initially, in Somerville's petition, after sundry procedure, by interlocutor dated 19 February 2003, it was appointed that there be a continued first hearing for a debate on the parties' pleas in law, excluding only the question of quantification of damages. That did not, however, take place. By interlocutor dated 10 February 2004, on joint motion the diet of continued first hearing which had been set down for 9 March 2004 was discharged, and of consent the parties were allowed a proof before answer of their respective averments. It is not apparent from the interlocutor why a proof before answer, rather than a second hearing, as provided by RC 58.9(2)(ix), was thought appropriate. What is clear is that from that point onwards two things were happening: a proof before answer having been allowed, preparations were being made for the lodging of productions and the leading of evidence; but at the same time it was recognised that the pleadings were not yet in final form, and that further adjustment would be required. On 12 March 2004 various interlocutors were pronounced. In Somerville's petition, parties were allowed a period to adjust their pleadings. Meanwhile, there had been sundry procedure in Ralston's, Blanco's and Cairns's petitions, the first orders in which were pronounced on 17 April 2003, 4 November 2003 and 11 November 2003 respectively. On 12 March 2004, in each of these three petitions, parties were allowed a period to adjust their pleadings, and were also allowed a proof before answer of their respective averments. Finally, the first order in Henderson's petition was pronounced on 9 June 2004, and at a first hearing on 30 June 2004, when answers had only just been lodged, a period for adjustment and a proof before answer were both allowed. By the latter date, accordingly, the procedure in all five petitions was more or less in step. On that date also, a diet of proof before answer was assigned for 26 October 2004 and the following five weeks. Much remained to be done before then, however, as can be seen from the large number of interlocutors pronounced in each petition after 30 June 2004, including those relating to the recovery of documents by the petitioners. The point was reached that on 15 October 2004 the parties had reached agreement that the proof should not proceed; on joint motion the diet of proof was discharged and instead the parties were allowed 'a debate on the relevancy of their respective averments and on any issues that arise from the granting of any public interest immunity certificate'.

[171] In each petition a statement of fact is devoted to the 'special or small units', as they are termed, which were operated at HMP Barlinnie, HMP Perth, HMP Shotts and HMP Peterhead between 1973 and 2001, which are said to have been 'designed specifically for the therapeutic management of long term ''difficult prisoners'' who had a consistent history of being unable to exist in full-time association with other prisoners within the mainstream.' Since these units were closed, it is averred, the Scottish prison system has had no provision for the proper

management, control and support of 'difficult prisoners' other than to place them on r 80 segregation in cell blocks and on a regime which is indistinguishable from that imposed for punishment. This 'punishment regime' is alleged, *inter alia*, to have 'involved a disproportionate interference with the petitioner's rights under Article 8 [of the Convention] to respect for his ''psychological integrity'', ''personal development'' and ''autonomy and self-determination'' and to his ''physical and moral security''.' Reference is made in the course of this statement to a 'report of Professor Andrew Coyle of October 2004, the terms of which are held incorporated herein for the sake of brevity'. In another statement of fact in each petition it is averred that 'segregation involves four aspects which are potentially harmful to psychological wellbeing, namely sensory deprivation, physical constraint, social isolation and coercive control.' After development of these averments, reference is made (except in Henderson's petition) to 'the report by Prof David Canter environmental psychologist dated October 2004, the terms of which are held incorporated herein for the sake of brevity'. Finally, elsewhere in each petition (except Henderson's), in a passage relating to prison conditions, reference is made to 'the Report by Professor Michael Corcoran on Conditions of Confinement in Seven Scottish Prisons, and in particular the observations relative to HMP Glenochil, which are held as incorporated herein brevitatis causa.'

[172] At the debate, counsel for the Scottish Ministers took the opportunity to attack these passages. In due course, in her interlocutor of 8 February 2005, the Lord Ordinary, *inter alia*, excluded them from probation. Her reasons for doing so were, in brief: that the averments relating to the closure of the special or small units were irrelevant to the issues raised, did not relate to any of the declarators sought and were not reflected in any of the pleas in law; that the averments regarding the effects of segregation were irrelevant because there were no averments that any of the petitioners suffered any such harm; and that since none of the three reports had been lodged as a production, there had been a complete failure to comply with RC 27.1 and the relative averments did not give fair notice of a relevant case. She noted that there was scope for amendment of the petitioners' pleadings at a later date 'in the usual way'.

[173] It is not clear how much the Lord Ordinary was told about the reasons for the state of affairs as it existed at the time of the debate. What we have been told, however, is that Dr Erica Robb, a clinical psychologist, had been instructed to prepare reports on the five petitioners, assessing the degree to which they had each been psychologically damaged by the segregation conditions complained of, and whether good psychological practice would, in the circumstances of the individual petitioners, have dictated an alternative way of treating them, other than by placing them in segregation units. The pleadings could not be finalised, and the other reports could not be finalised and lodged, until Dr Robb's reports were available. She was, however, for personal reasons which were explained to us but we need not repeat, unable to prepare the reports in time for this to be done. This was the main reason for the discharge of the diet of proof before answer.

[174] It is alleged in the grounds of appeal for the petitioners that in excluding the above averments from probation in each case the Lord Ordinary erred in law: she appeared, it is said, to be proceeding under the misapprehension that she was dealing with an action under ordinary procedure rather than an application for judicial review. Before us, senior counsel for the petitioners did not suggest that, if these had been ordinary actions, the Lord Ordinary would not have been justified in

doing as she did. But, he submitted, since these were applications for judicial review, there should have been further opportunity for adjustment and a continued first hearing. Junior counsel for the Scottish Ministers did not appear to us ultimately to take issue with this. He submitted that, with hindsight, the point at which there should have been judicial management to resolve the problem was before a proof before answer was allowed.

[175] While we are prepared to accept that the Lord Ordinary misdirected herself by failing to exercise a discretion appropriate to the procedural context of applications for judicial review, as set out above, we have much sympathy for her. She acceded to the parties' motions to allow a proof before answer, rather than a second hearing, and thereafter a debate, rather than a continued first hearing, at a time when it was perfectly clear to those representing the petitioners that the reports, and consequently the pleadings, were incomplete. The better course, and one consistent with Ch 58, would have been to continue the first hearing, as many times as seemed necessary, until the parties were both in a position to say that their pleadings were complete. At that stage an informed discussion could have taken place to identify the issues which could be disposed of without further inquiry, and those in respect of which a second hearing would be appropriate, and to make orders accordingly. By seeking a proof before answer, or more properly a second hearing, when they did, the petitioners' representatives fashioned a rod for their own backs.

[176] For these reasons, this ground of appeal is in our opinion well-founded.

Result

[177] For the foregoing reasons, we shall: (1) in relation to statutory time-bar, recall head 1 of the Lord Ordinary's interlocutor dated 8 February 2005 in the petition at the instance of Henderson in so far as she repelled the Scottish Ministers' first plea in law and sustain said plea in so far as directed towards Henderson's first four periods of segregation and exclude from probation Henderson's averments in respect of said periods; (2) in relation to proportionality, recall head 4 of the Lord Ordinary's interlocutor dated 8 February 2005 in each of the five petitions, and in lieu thereof exclude from probation the words 'disproportionate *et separatim*' where they appear in statement 3(a) in each petition, and repel the first plea in law for each petitioner so far as relating to proportionality; (3) in relation to the adequacy of reasons, (a) grant declarator in the petition at the instance of Somerville that the r 80 (1) order in respect of him dated 15 May 2002 does not comply with the requirement of r 80(4)(c), and (b) exclude from probation (i) in the petition at the instance of Somerville the averments relating to the order dated 18 July 2002, (ii) in the petition at the instance of Blanco the averments relating to the order dated 8 August 2002, (iii) in the petition at the instance of Ralston the averments relating to the order dated 7 November 2002, (iv) in the petition at the instance of Cairns the averments relating to the orders dated 9 October 2002, 21 November 2002 and 27 December 2002, and (v) in the petition at the instance of Henderson the averments relating to the orders dated 8 October 2002, 9 January 2003, 14 June 2003 and 29 October 2003; and (4) in relation to procedural and pleading issues, recall heads 8, 9 and 10 of the Lord Ordinary's interlocutor dated 8 February 2005 in each of the petitions at the instance of Somerville and Blanco and heads 10, 11 and 12 thereof in each of the petitions at the instance of Ralston, Cairns and Henderson. *Quoad ultra* we shall adhere to the Lord Ordinary's interlocutor in each of the five

petitions. We shall remit each petition back to the Lord Ordinary with a direction to hold a continued first hearing in accordance with RC 58.9, and *quoad ultra* to proceed as accords.

THE COURT allowed the reclaiming motion in part and allowed the cross-appeal in part and remitted the petitions to the Lord Ordinary with a direction to hold a continued first hearing and *quoad ultra* to proceed as accords.

Balfour & Manson (for Taylor & Kelly, Coatbridge) – Office of the Solicitor to the Scottish Executive