REGINA v. SECRETARY OF STATE FOR THE HOME DEPARTMENT, Ex parte DOODY SAME v. SAME, Ex parte PEGG SAME v. SAME, Ex parte PIERSON SAME v. SAME, Ex parte SMART [1994] 1 A.C. 531

[HOUSE OF LORDS]

Lord Keith of Kinkel, Lord Lane, Lord Templeman, Lord Browne-Wilkinson and Lord Mustill

1993 March 10, 11, 15, 16, 17; June 24

Prisons — Prisoners' rights — Release on licence — First review date for prisoner serving mandatory life sentence — Secretary of State fixing period for retribution and deterrence after consultation with judiciary — Whether Secretary of State entitled to depart from judicial recommendation — Whether prisoner to be informed of judicial recommendation — Whether prisoner entitled to make representations to Secretary of State before period fixed — Whether prisoner entitled to know Secretary of State's reasons for fixing period — Criminal Justice Act 1967 (c. 80), s. 61(1)

The four applicants each received the mandatory sentence of life imprisonment following their separate convictions of murder. In the exercise of his power under section 61 of the Criminal Justice Act 19671 the Secretary of State for the Home Department considered the date on which each applicant might be released upon licence. In accordance with the adopted procedure the Secretary of State consulted the Lord Chief Justice and the trial judge before determining when the date of the first review should occur after each applicant had served a term of imprisonment to satisfy the requirements of retribution and deterrence. The applicants were not consulted but they were told the minimum period of imprisonment they would have to serve before their cases would be reviewed. They applied for judicial review of the Secretary of State's decisions and sought orders of certiorari to quash those decisions and declarations that the Secretary of State could not set a period for retribution and deterrence for a mandatory life sentence greater than that recommended by the judiciary, that he was required to tell the applicants the period recommended by the judiciary, and if he departed from it his reasons for so doing, and that the applicants were entitled to be given the opportunity to make representations to the Secretary of State before he determined the period and for that purpose to be told of any information upon which the Secretary of State would act which was not in the applicant's possession. The Divisional Court dismissed the applications. On appeal by the applicants, the Court of Appeal allowed the appeal in part, granting

1 Criminal Justice Act 1967, s. 61(1): "The Secretary of State may, if recommended to do so by the Parole Board, release on licence a person serving a sentence of imprisonment for life . . . but shall not do so in the case of a person

sentenced to imprisonment for life . . . except after consultation with the Lord Chief Justice of England together with the trial judge if available."

---------- *[1994] 1 A.C. 531 at 532*

declarations that the Home Secretary was required to inform the applicants of the period recommended by the judiciary and to give them an opportunity to make representations before he determined the period.

On appeal by the Secretary of State and cross-appeal by the applicants: -

Held, dismissing the appeal and allowing the cross-appeal in part, that the Secretary of State was required to afford to a prisoner serving a mandatory life sentence the opportunity to submit in writing representations as to the period that a prisoner should serve for the purposes of retribution and deterrence before the Secretary of State set the date of the first review of the prisoner's sentence; that, before giving the prisoner the opportunity to make representations, the Secretary of State was required to inform him of the period recommended by the judiciary as the period he should serve for the purposes of retribution and deterrence, and of any other opinion expressed by the judiciary which would be relevant to the Secretary of State's decision as to the appropriate period to be served for those purposes; but that the Secretary of State was not obliged to adopt that judicial view although, if he departed from it, he was required to give reasons for doing so, and that he was entitled to delegate his powers for that purpose to a junior minister within the Home Department; and that, accordingly, the decisions made by the Secretary of State as to the length of the period each of the applicants should serve before the date of the first review of their sentences should be quashed and that each applicant should be given the opportunity to make written representations after he had been informed of the judicial opinion regarding the period he should serve before review (post, pp. **549A-D**, **557H-558B**, **G-559C**, **562H-563C**, **E-564D**, **H-565A**, **D-566A**, **G**, **567F-568A**.)

Reg. v. Civil Service Appeal Board, Ex parte Cunningham [1991] 4 All E.R. 310, C.A. and *Reg. v. Parole Board, Ex parte Wilson* [1992] Q.B. 740, C.A. approved.

Reg. v. Secretary of State for the Home Department, Ex parte Handscomb (1987) 86 Cr.App.R. 59, D.C. considered.

Payne v. Lord Harris of Greenwich [1981] 1 W.L.R. 754, C.A. overruled.

Per curiam. Parliament has left the discretion on release on licence of life prisoners with the Secretary of State. Accordingly, only if it can be shown that the Secretary of State's decision relating to a prisoner's release may have been reached by a faulty process, in one of the ways amenable to judicial review, will the prisoner have any serious prospect of persuading the court to grant relief (post, pp. **549A-D**, **566C-E**).

Decision of the Court of Appeal [1993] Q.B. 157; [1992] 3 W.L.R. 956; [1993] 1 All E.R. 151 affirmed in part and order varied.

The following cases are referred to in the opinion of Lord Mustill:

Findlay, In re [1985] A.C. 318; [1984] 3 W.L.R. 1159; [1984] 3 All E.R. 801, H.L.(E.)

Kanda v. Government of Malaya [1962] A.C. 322; [1962] 2 W.L.R. 1153, P.C.

Payne v. Lord Harris of Greenwich [1981] 1 W.L.R. 754; [1981] 2 All E.R. 842, C.A.

Practice Direction (Crime: Life Sentences) [1993] 1 W.L.R. 223; [1993] 1 All E.R. 747, C.A.

Reg. v. Civil Service Appeal Board, Ex parte Cunningham [1991] 4 All E.R. 310, C.A.

Reg. v. Hodgson (1967) 52 Cr.App.R. 113, C.A.

Reg. v. Parole Board, Ex parte Wilson [1992] Q.B. 740; [1992] 2 W.L.R. 707; [1992] 2 All E.R. 576, C.A.

Reg. v. Secretary of State for the Home Department, Ex parte Handscomb (1987) 86 Cr.App.R. 59, D.C.

Reg.v. Secretary of State for the Home Department, Ex parte Oladehinde [1991] 1 A.C. 254; [1990] 3 W.L.R. 797; [1990] 3 All E.R. 393, H.L.(E.)

Reg.v. Secretary of State for the Home Department, Ex parte Walsh, The Times, 18 December 1991, D.C.

Reg. v. Wilkinson (1983) 5 Cr.App.R.(S.) 105

Thynne, Wilson and Gunnell v. United Kingdom (1990) 13 E.H.R.R. 666

The following additional cases were cited in argument:

Breen v. Amalgamated Engineering Union [1971] 2 Q.B. 175; [1971] 2 W.L.R. 742; [1971] 1 All E.R. 1148, C.A.

Campbell and Fell v. United Kingdom (1984) 7 E.H.R.R. 165

Carltona Ltd. v. Commissioners of Works [1943] 2 All E.R. 560, C.A.

Cooper v. Wandsworth Board of Works (1863) 14 C.B.(N.S.) 180

Golden Chemical Products Ltd., In re [1976] Ch. 300; [1976] 3 W.L.R. 1; [1976] 2 All E.R. 543

Lloyd v. McMahon [1987] A.C. 625; [1987] 2 W.L.R. 821; [1987] 1 All E.R. 1118, H.L.(E.)

Minister for Aboriginal Affairs v. Peko-Wallsend Ltd. (1986) 162 C.L.R. 24

O'Reilly v. Mackman [1983] 2 A.C. 237; [1982] 3 W.L.R. 1096; [1982] 3 All E.R. 1124, H.L.(E.)

Pearlberg v. Varty [1972] 1 W.L.R. 534; [1972] 2 All E.R. 6, H.L.(E.)

Public Service Board of New South Wales v. Osmond (1986) 159 C.L.R. 656

Reg. v. Baverstock [1993] 1 W.L.R. 202; [1993] 2 All E.R. 32, C.A.

Reg. v. Flemming [1973] 2 All E.R. 401, C.A.

Reg. v. Governor of Brixton Prison, Ex parte Enahoro [1963] 2 Q.B. 455; [1963] 2 W.L.R. 1260; [1963] 2 All E.R. 477, D.C.

Reg. v. Newton (1982) 77 Cr.App.R. 13, C.A.

Reg. v. Parole Board, Ex parte Bradley [1991] 1 W.L.R. 134; [1990] 3 All E.R. 828, D.C.

Reg. v. Parole Board, Ex parte Creamer and Schoey (unreported), 21 October 1992, D.C.

Reg. v. Secretary of State for the Home Department, Ex parte Benson (No. 2), The Times, 21 November 1988, D.C.

Reg. v. Secretary of State for the Home Department, Ex parte Cox (unreported), 3 September 1991, D.C.

Reg. v. Secretary of State for Trade and Industry, Ex parte Lonrho Plc. [1989] 1 W.L.R. 525; [1989] 2 All E.R. 609, H.L.(E.)

Reg. v. Solomon (1984) 6 Cr.App.R.(S.) 120

Wiseman v. Borneman [1971] A.C. 297; [1969] 3 W.L.R. 706; [1969] 3 All E.R. 275, H.L.(E.)

Wynne v. United Kingdom, 15 October 1992, European Commission of Human Rights Admissibility Decisions

Appeals and Cross-Appeals from the Court of Appeal.

These were appeals by the appellant, the Secretary of State for the Home Department, and cross-appeals by the respondents, Stephen Doody, John David Pierson, Elfed Wayne Smart and Kenneth Pegg, from the

judgment dated 6 May 1992 of the Court of Appeal (Glidewell, Staughton and Farquharson L.JJ.) allowing in part an appeal by the respondents from the judgment dated 18 January 1991 of the Divisional Court of the Queen's Bench Division (Mann L.J. and Macpherson J.) refusing the respondents' application for judicial review of decisions made in respect of each of them by the Secretary of State in exercising his power under section 61 of the Criminal Justice Act 1967 in relation to the date that a person serving a sentence of life imprisonment might be released on licence. The four respondents had, at various dates, all been convicted of murder of varying degrees of gravity and had been given different release dates pursuant to the powers granted to the Secretary of State.

The same issues arose in the appeals and cross-appeals in respect of all the respondents save that issue (6) was confined to the case of Mr. Pegg. The first two issues, which arose on the appeals, were (1) is a prisoner serving a life sentence entitled to make written representations before his tariff is set by the Secretary of State? (2) Is the Secretary of State required to tell the prisoner what period the judiciary have recommended he should serve for the purposes of retribution and deterrence, and of any other opinion expressed or reasons given by the judiciary which are or may be relevant to the Secretary of State's decision as to the appropriate period to be served for these purposes? The remaining four issues, which arose on the cross-appeals, were (3) if a prisoner is to be told the judicial view of his tariff, is the Secretary of State obliged to give reasons for departing from it if he does so? (4) Is the Secretary of State obliged to adopt the judicial view of the period to be served for retribution and deterrence by a prisoner serving a mandatory life sentence? (5) Is the Secretary of State obliged to make the decision on the period which a life sentence prisoner should serve for the purposes of retribution and deterrence personally, or may this task be performed by a minister of state of the Home Office on his behalf? (6) In relation to Mr. Pegg only, did the Secretary of State fail to take into account the contents of his petition dated 24 January 1989?

The facts are stated in the opinion of Lord Mustill and more fully in the judgment of the Court of Appeal [1993] Q.B. 157.

David Pannick Q.C. and ***Robert Jay*** for the Secretary of State. Two issues arise in the appeal. (1) Is a prisoner serving a life sentence entitled to make written representations before his tariff is set by the Secretary of State? This issue is a moot question because the evidence is uncontroverted that the Secretary of State has always been prepared to hear representations from the prisoner or his advisers at any time before the fixing of the tariff, or afterwards, if some material matter arises. It follows that there is no issue on this point and it was therefore inappropriate for the Court of Appeal to make a declaration in respect of it. There is no legal right involved in this issue.

(2) Is the Secretary of State required to tell the prisoner what period the judiciary have recommended he should serve for the purposes of retribution and deterrence? What the public law concept of fairness requires depends on the context, in particular the statutory content of what Parliament intended. Parliament may impose or authorise any procedure it chooses. The more unfair the procedure appears to be the

---------- ***[1994] 1 A.C. 531 at 535***

authorise it. Parliament did not intend to impose upon the Secretary of State an obligation to confer on mandatory life prisoners the rights the present respondents seek. Their rights are circumscribed. This is borne out by *In re Findlay* [1985] A.C. 318, where it was held that in 1967 Parliament conferred upon the Secretary of State very wide powers of discretion for good reasons of public policy. It is noteworthy that in 1991 Parliament deemed it necessary to make only limited changes to the previous regime. In any event there is no such unfairness here such as to justify the intervention of the common law.

It is well established that the requirements of natural justice depend upon the context. But the courts will be careful not to frustrate the intentions of Parliament: see *Pearlberg v. Varty* [1972] 1 W.L.R. 534, 537C-H, 538B-C, 540B-D, 543G-544B, 545E-G, 547A-B, 549A, 550 and *Wade, Administrative Law*, 6th ed. (1988) pp. 538, 541, 542. The question is whether it is consistent with the scheme of the legislation to require the Secretary of State to afford to prisoners the information they require.

The following three factors indicate the intentions of Parliament in relation to procedural rights. (i) Where Parliament thought it appropriate so to do, it has provided for specific, but limited, rights for prisoners in relation to the life sentence and parole procedures. (ii) The purpose of the consultation procedure required by Parliament in section 61 of the Act of 1967 was not to provide the prisoner with an opportunity to make representations with knowledge of the judicial view, but to enable the Secretary of State to learn the views of the judiciary. (iii) Parliament has recently declined to make amendments to the procedure relating to mandatory life prisoners during the passage through Parliament of the Criminal Justice Act 1991 so as to provide for an open procedure for determining the tariff of such prisoners.

As to (i), these rights include a right to make representations and to be given reasons, but only in specific, circumscribed and defined circumstances: see sections 59(4)(*b*), (5)(*a*) and (*b*) and 62(3) of the Criminal Justice Act 1967. Additionally, section 59(6) authorises the Secretary of State to make rules in relation to the operation of local review committees, with section 59(6)(*b*) envisaging interviews of the prisoners: see the Local Review Committee Rules 1967 (S.I. 1967 No. 1462), rules 3 and 4. All of these provisions confer specific procedural rights on prisoners. The contrast is very clear with section 61, where Parliament has chosen not to confer any such procedural rights. Again, Parliament did not see fit to impose any specific procedural rights upon prisoners, or obligations upon the Secretary of State, in respect of the exercise of his functions under section 61(1) of the Act of 1967 or section 35(3) of the Act of 1991. The proper inference therefore is that these were deliberate omissions and that Parliament thought fit to leave such questions to the discretion of the Secretary of State. [Reference was made to *Payne v. Lord Harris of Greenwich* [1981] 1 W.L.R. 754, 757D-F, 762G-H, 763B, 767G.]

The judgment of the Court of Appeal limits the broad discretion conferred on the Secretary of State so that the discretion is fettered. The proper interpretation of section 61 is that Parliament has authorised the

---------- ***[1994] 1 A.C. 531 at 536***

Secretary of State to relax, in his discretion, the rigour of a life sentence imposed for the crime of murder after a criminal trial. Parliament could have created a procedure akin to a planning inquiry or a hearing before the income tax commissioners, but it chose not to do so. The prisoner has no legitimate expectation other than to be treated by reference to the policy of the minister at any particular time: see *In re Findlay* [1985] A.C. 318, 337D-F, 338E-G.

As to (ii), the consultation procedure required by section 61 of the Act of 1967 exists not to provide the prisoners with an opportunity to make representations but to inform the Secretary of State of what Parliament thought was relevant information held by the judiciary so as to assist the Secretary of State to make the difficult and sensitive decisions for which he has to take the responsibility. By imposing a procedure which requires him to consult the judiciary, but which says nothing about consulting the prisoner, Parliament cannot have intended that the Secretary of State be obliged to communicate the views of the judiciary to the prisoner. Parliament has provided a specific mechanism by which the trial judge may express in public his own view of the gravity of the prisoner's offence and the minimum period which the prisoner should serve for murder. It would be surprising if Parliament intended that where the trial judge merely passes the mandatory life sentence and makes no statement in open court that the prisoner has a right to know what term of imprisonment the judge has recommended to the Secretary of State in private that he should serve.

There is no implied obligation on the Secretary of State to disclose to the prisoner the judicial view concerning the length of sentence the prisoner should serve. Parliament has not laid down any procedure in relation to the fixing of the tariff. The legislature has deliberately chosen not to set down any specific rights in relation to this matter. The fact that the Secretary of State has laid down the procedure himself shows no more than that he is acting within the general powers conferred by Parliament upon him. However, the Secretary of State does not have a completely unfettered discretion. It is important to focus on the consultation procedure with the judiciary under the current provisions, namely, section 35(2) of the Act of 1991. These provisions are not intended to give rights to life prisoners to make representations but to enable the judiciary to give their views to the Secretary of State to assist him in coming to a decision.

As to (iii), it would be especially inappropriate to recognise the procedural rights for life prisoners for which the respondents contend when Parliament has recently had the opportunity to amend the provisions relating to mandatory life prisoners and has, in the Criminal Justice Act 1991, declined to make any such amendments. By contrast, extensive changes have been made in the statutory regime relating to discretionary life prisoners. In particular, judges are now obliged to state the tariff in open court and the Parole Board has the function of deciding on release after that period has been served: see section 34 of the Criminal Justice Act 1991. That Parliament declined to make any such changes in relation to mandatory life prisoners is consistent only with Parliament having concluded that in the context of such prisoners the appropriate procedure

under section 61 of the Criminal Justice Act 1967 should be left to the person who has the primary responsibility, namely, the Secretary of State. The Secretary of State is entitled, in pursuance of the procedure required by Parliament, to consult the judiciary without the contents of that consultation having to be disclosed to the prisoner: see *Reg. v. Secretary of State for the Home Department, Ex parte Handscomb* (1987) 86 Cr.App.R. 59, 75, *per* Watkins L.J.

In any event, the mandatory life prisoner does not need to see the advice of the judiciary in order to make reasoned representations to the Secretary of State as to the length of the tariff period. The prisoner knows the circumstances of the offence and what was said at his trial. Fairness does not require the provision to the prisoner of the judicial view and any comments made by the judiciary. Even if the House should dismiss this appeal, the decision should only apply to the present respondents and not to other mandatory life prisoners.

Michael Beloff Q.C. and ***Richard Gordon*** for Mr. Pegg. Issues (1) and (2) are clearly related. It was said that the first issue was academic and that the House should not accede to making a declaration. This is contested because it has been suggested that the receipt of representations is a matter of grace and not of obligation. But to be of any value to the prisoner it must be a matter of obligation. The decision as to the length of the tariff period is of great importance to the prisoner and this was recognised by the Court of Appeal: [1992] Q.B. 157, 186, 197G-H. In essence, the decision of the Secretary of State to alter the tariff period amounts to a "re-sentencing" of the prisoner.

The Secretary of State is statutorily required to consider the release of all life sentence prisoners only after consultation with the judiciary. In the exercise of the function of consideration he must axiomatically act fairly. Further, if he founds his policy to fix first review dates on the needs of retribution and deterrence, he is bound to base himself on the best possible appraisal of what these needs dictate, namely, the statutory judicial appraisal. To ensure the achievement of that end requires appropriate procedural safeguards. It was in recognition of the critical importance of the Secretary of State's decision that the Court of Appeal inferred a right to make representations in writing solely from principles of procedural fairness: see [1993] Q.B. 157, 183-187A, 196G-198G, 202B-202H. It is a fundamental rule of procedural fairness that a person is not to be condemned unheard and that a right to be heard is worthless unless the individual knows what is said about or against him: see *Kanda v. Government of the Federation of Malaya* [1962] A.C. 322, 337.

In the present case the only way to give effect to the fundamental considerations of procedural fairness is to ensure that (i) every life prisoner has the opportunity to make written representations as to the appropriate tariff period in his case and (ii) those representations are informed by a full knowledge of any relevant judicial recommendations and comments. [Reference was made to *Lloyd v. McMahon* [1987] A.C. 625, 702-703.] The reasons for the Secretary of State retreating from the basic rules of natural justice appears to be based on his reliance on the overriding will of the legislature. But a line of cases from before *Cooper v. Wandsworth Board of Works* (1863) 14 C.B.(N.S.) 180, 194 to *Wiseman v. Borneman*

[1971] A.C. 297, 308 shows that the courts have supplemented the procedure laid down in legislation where the statutory procedure was insufficient to achieve justice and where the procedure so adopted would not frustrate the apparent purpose of the legislation. The extra-statutory procedure which the Secretary of State contends for is insufficient to satisfy the rules of natural justice.

If it be correct that a prisoner has a right to make representations such right must be one to make *informed* representations since, otherwise, the right has no effective content. Accordingly, natural justice requires that a prisoner serving a mandatory life sentence be informed, prior to his making representations, of what the judges have recommended and anything that the trial judge may have said about relative culpability, especially given the importance that ought to be attached to the judicial view of the tariff by the Secretary of State: *Reg. v. Secretary of State for the Home Department, Ex parte Handscomb*, 86 Cr.App.R. 59, 82. Moreover, any additional material, such as internal reports before the Secretary of State, which the Secretary of State proposes to consider should be disclosed to the prisoner so that he may make representations in respect of them. The right to know "the case against one" may be a valueless right, if it does not include the right to know how the relevant material has been collected and/or interpreted and/or presented to the decision-maker. *In re Findlay* [1985] A.C. 318, on analysis, assists the prisoners.

As to the cross-appeal, the issues in *Mr. Pegg's case* are (5) and (6).*

As to issue (5) on delegation, the evidence shows that the tariff period is often fixed by the minister of state or a parliamentary under-secretary: see the Report of the Select Committee on Murder and Life Imprisonment (H.L. Paper 78-1 (1988-1989 Session, 24 July 1989), paras. 151, 153, 154, 155). This state of affairs is widely regarded as unsatisfactory. The determination of a tariff is a judicial function constituting a re-sentencing within the mandatory term itself. It directly affects the liberty of the subject. Whilst it is expected that the exercise of ministerial power may frequently be exercised by a junior minister or an official of the minister on the minister's behalf (*Carltona Ltd. v. Commissioners of Works* [1943] 2 All E.R. 560, 563) there are, and must be, limitations to the extent to which ministerial powers can be so delegated. [Reference was made to *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd*. (1986) 162 C.L.R. 24, 38; *Reg. v. Governor of Brixton Prison, Ex parte Enahoro* [1963] 2 Q.B. 455, 465-466 and *Reg. v. Secretary of State for the Home Department, Ex parte Oladehinde* [1991] 1 A.C. 254.]

Given the judicial nature of the tariff, and the fact that the Secretary of State has clearly indicated that his tariff policy involves a *personal* discretion, the facts of the present case do not come within the principles of *Carltona Ltd. v. Commissioners of Works* [1943] 2 All E.R. 560. The exercise here is not one of construing an Act of Parliament in isolation but is, rather, examining the basis of a policy superimposed onto a statutory framework. Thus applying the reasoning in the *Oladehinde case* [1991] 1 A.C. 254, it is prima facie irrational for the Secretary of State,

---

* Reporter's note. Issue (6) does not call for a report of argument.

---------- ***[1994] 1 A.C. 531 at 539***

having announced in the House of Commons that he intends to exercise the tariff discretion *personally*, then to seek to delegate this important function to a junior minister on his behalf. [Reference was also made to *In re Golden Chemical Products Ltd*. [1976] Ch. 300 and *O'Reilly v. Mackman* [1983] 2 A.C. 237.]

Geoffrey Robertson Q.C. and ***Edward Fitzgerald*** for Mr. Pierson. Issue (3) is: if a prisoner is to be told the judicial view of his tariff, is the Secretary of State obliged to give reasons for departing from it if he does so? The answer should be in the affirmative for the following reasons. (i) The only sure way of exposing an error of fact or law is to require reasons from the decision-maker. (ii) The prisoner's right to make representations is valueless without the decision-maker having given reasons. (iii) The reasons given will enable the prisoner and his advisers to decide whether the Secretary of State's decision is judicially reviewable. (iv) The reasons are required on grounds of simple humanity and to satisfy the psychological needs of the prisoner. (v) The duty to give reasons imposes a healthy discipline upon the decison-maker. (vi) The reasons are a safeguard against arbitrariness and inconsistency. (vii) They satisfy the informed public that justice is being seen to be done.

It is a long established principle in the Court of Appeal that a prisoner is given the reasons why a particular sentence has been imposed upon him; the same principle should apply where the Secretary of State sets a tariff. The Court of Appeal [1993] Q.B. 157, 188C-G, 203E-F suggested that although the Secretary of State did not have to give his reasons for the judicial tariff the prisoner might have recourse to judicial review where the Secretary of State's decision seemed to be irrational. There are five objections to this course. (i) It will encourage litigation. (ii) Such litigation has a number of hazards, for example: (a) the problem of obtaining legal aid; (b) there may be a suspicion that the Secretary of State may have acted irrationally but on the face of his decision this cannot be shown. (iii) It leads to "brinkmanship:" the Secretary of State may be advised that he can "get away with an increase of no more than 25 per cent. to the judicial tariff." (iv) It could lead to judicial speculation as to whether on the facts before the trial judge the Secretary of State would be entitled to say that the judge's sentence was inadequate. (v) The right to reasons should not be subject to postponement and conditions.

The weight of authority is against there being a general duty on public law bodies to state reasons for their decisions in every category of case: *Reg. v. Civil Service Appeal Board, Ex parte Cunningham* [1991] 4 All E.R. 310 and *Public Service Board of New South Wales v. Osmond* (1986) 159 C.L.R. 656. But the courts are entitled to imply a duty to give reasons even where Parliament has made no such provision: *Ex parte Cunningham* [1991] 4 All E.R. 310, 318A-H. In this context the issue of whether reasons are required is part of the overall question of what fairness and reasonableness require. A principal determinant of the duty to give reasons is the legal character and the subject matter of the decision being taken: see *Ex parte Cunningham*, at pp. 318-319, 322J-323B, 325B-H. In general, decisions of a judicial character call for the giving of reasons: *Ex parte Cunningham*, at p. 317H. In determining whether reasons are to be given, the court must have regard to the overall legal framework.

---------- ***[1994] 1 A.C. 531 at 540***

The decision and its consequences for the liberty of the subject call for the giving of reasons. In deciding how much of the life prisoner's sentence should be served in custody as punishment, the Secretary of State is determining the prisoner's fate for years, sometimes decades. As to its legal characteristics, the decision is closely akin to the sentencing function, and it is the practice now for courts empowered to make a final decision as to sentence (whether the Crown Court on appeal from the magistrates Court or the Court of Appeal on appeal from the Crown Court) to give a reasoned decision. This derives mainly from the importance attached to the liberty of the subject, and also from the need for justice to be seen to be done. The same underlying principles should dictate that the Secretary of State, as the final decision-maker on the period to be served as "tariff," should state his reasons. The Secretary of State's administrative function here is plainly of a quasi-judicial nature. This is because it involves the liberty of the subject and because the function involved can only be rationally conducted by way of a process of specific findings as to the individual life prisoner's actual role, level of culpability, motivation and mitigating circumstances which is a classic judicial function. Even although the Secretary of State may, like the judge, take his own view of the facts on sentencing (see *Reg. v. Solomon* (1984) 6 Cr.App.R.(S.) 120, 126), where there is a conflict on the facts which is unresolved by the jury's verdict, the conflict should be resolved in favour of the prisoner when it comes to sentencing.

The sentence of life imprisonment has always been recognised as an indeterminate life sentence. It is authority for the detention of a prisoner until such time as he (i) has received sufficient punishment for his crimes, (ii) is unlikely to endanger life or limb on release into the community, and it is authority (iii) for his recall to prison should his conduct upon such release require it. The practice prior to the Homicide Act 1957 was that a murderer whose sentence had been commuted rarely served a period of more than 15 years in prison and usually much less: see the Report of the Royal Commission on Capital Punishment 1949-1953 (1953) (Cmd. 8932), paras. 644-656. This practice reflected English penalogical thought that a continuous sentence of imprisonment longer than 10 years should not be served by anyone who is neither mentally ill nor reasonably believed still to constitute a really serious danger to the public if released: see *Hart, Punishment and Responsibility*, 2nd ed. (1978), p. 63 and *Cross, Punishment, Prison and the Public* (1971) p. 57.

The mandatory life sentence for murder imposed instead of death pursuant to section 1(1) of the Murder (Abolition of Death Penalty) Act 1965 was not intended or expected by Parliament to involve detention in prison for life. This is plain from the terms of section 1(2) of the Act, which empowers the trial judge to make public recommendation at the time of passing sentence, as to the period of years which should elapse before the Secretary of State exercises his discretion to order release on licence. In the context of the contemporary debate, this subsection was inserted because of concern that the requirement of deterrence of potential murders would not be met by a life sentence which meant in practice in 1964 no more time in prison than a fixed sentence for armed robbery. The new power was provided in order to give judges the opportunity to

retribution were sufficiently great to exclude operation of the usual release procedures until a more lengthy punishment period was served, hence the Court of Appeal's direction that no

recommendation under section 1(2) should be for less than 12 years: *Reg. v. Flemming* [1973] 2 All E.R. 401. By enabling the judges to signal to the Secretary of State those crimes for murder which deserve longer than the normal punitive period, section 1(2) was designed by Parliament as a means by which the judges (rather than the Secretary of State) could maintain public confidence in the administration of justice by emphasising to the public that in cases of particularly serious murders, "life" would in all probability mean that the murderer would serve an exceptionally long period, that is, more than 12 years, in prison.

Section 1(2) of the Act of 1965 reflected legislative thinking at a watershed in British penal history, shortly before the Criminal Justice Act 1967. Despite its use in only 10 per cent. of murder cases, it received no attention in the Criminal Justice Act 1991. It remains the clearest indication that Parliament believed it appropriate (a) that the new mandatory life sentence for murder would not normally involve detention in prison for life; (b) for judges to disclose publicly their recommendations to the Secretary of State in relation to the punitive period required for retribution and deterrence, when that period was significantly longer than 10 years; (c) for the judiciary to form a view, notwithstanding the mandatory sentence, as to what length of imprisonment was proper as punishment for a particular person who had committed a particular murder, such view to be based on the principles of sentencing (including retribution, deterrence and any relevant considerations of public confidence in the administration of justice); (d) for the public to be led to expect that the judge's view when expressed as to the appropriate punitive period would weigh heavily, if not decisively, in the Secretary of State's determination of the period which should elapse before he orders the release of a safe and sane prisoner.

Section 2 of the Act of 1965 required the Secretary of State to consult with the Lord Chief Justice and the trial judge (if available). In its historical context - section 2 became incorporated into section 61 of the Act of 1967 - this section may be seen to be bringing home to the Secretary of State the importance he must attach to the judicial views about punishment. The section served to ensure that the minister would have an informed judicial view as to whether the requirements of retribution and deterrence had been satisfied before he exercised his discretion to release on licence, whether or not the trial judge had a minimum recommendation.

The purpose of the provisions of the Criminal Justice Act 1967 was, as said by the Secretary of State on the Second Reading, to "keep out of prison those who need not be there": see the Carlisle Report (1988) (Cm. 532), para. 12. In keeping with this purpose section 61 applied to all indeterminate sentences and required the Secretary of State to receive a favourable recommendation from the Parole Board before granting release. The second pre-condition of judicial consultation was imported from section 2 of the Act of 1965, thus ensuring that the end stage decision was

made (a) only after a favourable expert recommendation about "dangerousness" and (b) in the informed knowledge of what the length of imprisonment the index offence deserved. Section 61 does not deal with the earlier stage, namely, the basis on which and the time at which the Secretary of State is to exercise his power to refer a case to the Parole Board (section 59(3)). Part III of the Act of 1967 makes comprehensive statutory provisions for the work of the Parole Board and the recall and the re-release of licensed prisoners but it makes no provision at all for

considerations which would govern the Secretary of State's decision as to the time at which he will refer a case to the Parole Board.

The consultation procedure established by section 61 has no relevance to the Secretary of State's decision other than as a check that the judicial recommendations which he will previously have taken into account in setting the tariff continue to be borne in mind. It also gives him the opportunity to hear the judicial view on "risk," if this is of value at such a late stage. These end stage consultations are not, as has been suggested, for the judiciary to impart information it still holds to the Secretary of State: the requirement was imposed in 1965 to deal with a specific anxiety about the abolition of the death penalty, and cannot support an inference that Parliament did not intend judicial views on tariffs to be communicated to prisoners. Section 35(2) of the Criminal Justice Act 1991 is in similar terms, and achieves a similar purpose, to section 61. Part II of the Act of 1991 provides a comprehensive framework for decision in relation to parole, re-offending, re-release and the treatment from the stage of original sentencing of "discretionary lifers." It makes no such provision for "mandatory lifers," and is silent as to the procedures which the Secretary of State should adopt before he decides their punitive tariff.

No inference can be drawn from the silence of Parliament on the subject in the Criminal Justice Act 1991, as no amendment seeking rights to reasons was put forward. The provisions of Part II of the Act of 1991 were designed to meet only the requirement of the European Court of Human Rights ruling in *Thynne, Wilson and Gunnell v. United Kingdom* (1990) 13 E.H.R.R. 666. Similar legislation on mandatory life prisoners will be brought forward only if the European Court finds the common law defective in its protections - which begs the question to be decided in the present case. In any event, the purpose and philosophy of the Act of 1991 was to ensure that convicted criminals are punished according to the seriousness of their offence: see the White Paper, "Crime, Justice and Protecting the Public" (1990) (Cm. 965), para. 2.1.

The right to make representations before the tariff is fixed is not of itself enough, given the problems which have already been mentioned. And the Secretary of State has himself recognised that it is necessary to provide for an "appeal" in the form of a right to make subsequent representations for the reduction of the tariff. But the prisoner's right to make such subsequent representations for a reduction (on which the system is, in part, premised) is of little value if he is deprived of the knowledge of what findings and conclusions dictated the decision he is appealing against.

The analysis of the legal framework has to take account of the recognised right of prisoners to seek reasons against excessive tariffs by

---------- ***[1994] 1 A.C. 531 at 543***

way of representations to the Secretary of State. This right cannot be effectively exercised without the giving of a reasoned decision. It was similar considerations as to the need for prisoners to be able to make an effective representation against over-long tariffs *after* they had been fixed which led the Divisional Court and the Court of Appeal, in *Reg. v. Secretary of State for the Home Department, Ex parte Walsh*, The Times, 18 December 1991; 8 May 1992, to hold that life sentence prisoners with tariffs of over 20 years had to have the length of their tariffs disclosed to them as a matter of fairness. The right to make effective subsequent

representations in these circumstances depends on knowing not just the decision reached as to the length of tariff but also the reason for it.

The Court of Appeal presupposed in the present case that a ministerial increase would, of itself, be sufficient evidence of prima facie irrationality to secure a grant of leave for judicial review and to call for some explanation to the court. But if this is so then, as a matter of fairness and good administration, the law should require the explanation to be given at as early a stage as possible: see *Reg. v. Civil Service Appeal Board, Ex parte Cunningham* [1991] 4 All E.R. 310.

If there is no general right to be informed of the reasons for the Secretary of State's decision as to the length of the tariff, then there is, at the least, a right to be informed of the length of tariff when he has increased the judicial tariff, for in those cases the prisoner will have been afforded an opportunity to make representations in the light of the judge's findings and conclusions that these will not have proved conclusive: the Secretary of State will instead have reached findings and conclusions of his own on which the prisoner will never have been afforded an opportunity to be heard.

Payne v. Lord Harris of Greenwich [1981] 1 W.L.R. 754 did not concern the issue of disclosure and the giving of reasons at the tariff stage since it pre-dated the present administrative procedures and concerned, if anything, the post-tariff procedures where the Parole Board was involved. Nonetheless the Court of Appeal then put forward a number of practical and public policy reasons for not disclosing adverse material or reasons for the decision on the parole process which are no longer sustainable at either stage. In particular, considerations of the supposed impracticality of disclosure are no longer persuasive. The material to be disclosed, and the reasons for decisions at the tariff stage, are readily available. Moreover, a system of open decision-making already operates in relation to the fixing of the penal phase for discretionary life prisoners. Moreover, the proposition that the prisoner "will know the case against him" in any event is no longer sustainable at the tariff stage anymore than the post-tariff stage. The mere conviction of murder leaves undecided a number of issues of fact and judgment which are relevant to the degree of punishment on which the judiciary are subsequently invited to comment and in relation to which the Secretary of State makes findings. The prisoner will not know the case against him in full merely from the opening of the case against him by the Crown. It is principally because sentencing does raise separate issues of fact and law from those determined at trial that the Court of Appeal (Criminal Division) has in recent years, in cases such as *Reg. v. Newton* (1982) 77 Cr.App.R. 13, developed a relatively sophisticated

system of procedural safeguards to ensure that the factual basis of the sentence is determined in a fair manner.

Payne v. Lord Harris of Greenwich [1981] 1 W.L.R. 754 was based on the mistaken assumption that there was no real distinction between the parole function in relation to life sentence prisoners and fixed term prisoners. Since then a fundamental distinction has been recognised in that, for life sentence prisoners, the term pronounced in court is not a penalty graduated to the individual circumstances of the case, rather an order conferring authority for detention which leaves until later the decision as to what term is actually merited by the individual offence, and

what subsequent term of preventative detention is necessary to protect the public from the offender. The purpose of the 1983 policy was to give certainty to the public and to prisoners: see *In re Findlay* [1985] A.C. 318, 326C, 329A-B. Moreover, the successive statements of 1983 and 1987 have recognised the special status of life sentence prisoners, and the need to refine the system for determining both "the tariff" and subsequent post-tariff review.

The fixing of the tariff has gradually taken on more of the character of a sentencing exercise by reason of the criteria of retribution and deterrence applied, the factors taken into account (that is those known at the time of trial), the importance attached to the judicial view and the time at which the decision is taken, that is, within a year of conviction.

The need for full disclosure and the giving of reasons of the post-tariff stage has been recognised by the Secretary of State in his statement on 16 December 1992: Hansard (H.C. Debates), cols. 218-219: Written answer. This was no doubt mainly in response to the trenchant criticisms on the unfairness of the existing system by Rose L.J. in *Reg. v. Parole Board, Ex parte Creamer and Schoey* (unreported), 21 October 1992, and the decision of the European Commission that the application of Wynne in *Wynne v. United Kingdom*, 15 October 1992, European Commission of Human Rights Admissibility Decisions be dismissed. It is difficult to justify a lesser degree of procedural safeguard in relation to the initial tariff decision - which for many will provide determination of their actual release date - than in relation to the post-tariff stage.

There is a developing consensus of informed expert opinion and judicial reasoning in favour of full disclosure and reasons for decisions at the key stages of the detention of a life sentence prisoner, as shown by the views of the House of Lords Select Committee on Murder and Life Imprisonment and the Carlisle Committee on the parole system. English law now states that all public law bodies must give reasons in all cases where fundamental human rights are invaded: see *Breen v. Amalgamated Engineering Union* [1971] 2 Q.B. 175, 187, *per* Lord Denning M.R.

On the issue of delegation Mr. Pierson adopts the argument of Mr. Beloff on behalf of Mr. Pegg. [Reference was made to *Reg. v. Parole Board, Ex parte Bradley* [1991] 1 W.L.R. 134; *Reg. v. Secretary of State for the Home Department, Ex parte Benson (No. 2)*, The Times, 21 November 1988; *Reg. v. Secretary of State for the Home Department, Ex parte Cox* (unreported), 3 December 1991; *Reg v. Secretary of State for Trade and Industry, Ex parte Lonrho Plc*. [1989] 1 W.L.R. 525 and "Administrative Justice," Report of the Committee of the Justice-All

Souls Review of Administrative Law in the United Kingdom (1988), chapter 3.]

Geoffrey Nice Q.C. and ***Gregory Treverton-Jones*** for Mr. Smart. Issue (4) is: in fixing the tariff should the Secretary of State be bound by the judicial view? Since *Reg. v. Secretary of State for the Home Department, Ex parte Handscomb*, 86 Cr.App.R. 59 and until the implementation of the Criminal Justice Act 1991, the Secretary of State had invariably adopted the view of the judiciary on the tariff period in the case of discretionary life sentences. The Court of Appeal was wrong to conclude that *Ex parte Handscomb* was wrongly decided on this point. The principle *Ex parte Handscomb* reflects should be applied equally to mandatory and discretionary life

sentences. The distinction between mandatory and discretionary life sentences relied on by Mann L.J. in the Divisional Court to overcome the consequences of *Handscomb* was *not* adopted by Glidewell L.J. in the present case [1993] Q.B. 157, 182D. Had he found the reasoning in *Ex parte Handscomb* compelling then the principle would have applied to cases of mandatory life sentences.

The Secretary of State's practice in relation to mandatory as opposed to discretionary life sentences must be *Wednesbury* unreasonable unless a valid logical distinction can be drawn between the two practices. No such distinction was drawn in the 1983 statement: Hansard (H.C. Debates), 30 November 1983, cols. 505-508: written answer. The fact of a death occurring does not in itself create the necessary distinction. Other offences of homicide may be more serious than many examples of murder. The difference between a murder and a manslaughter verdict can be determined on the slightest piece of evidence: for example, whether actions on the part of the deceased just succeed or just fail to qualify as provocation. It can be a matter of chance whether in some cases the offence is murder or "section 18" wounding. The mens rea of attempted murder is higher than the mens rea frequently sufficient to justify a murder verdict.

The judicial determination of tariff is appropriate for two distinct reasons: (a) the judiciary is the only body of people trained in matching the punishment appropriate for retribution and deterrence to a particular crime; (b) the judiciary is specifically trained to achieve broad consistency over time and between individuals. A minister of state in charge of the Prison Department (not the Secretary of State himself) sets the date for the first review; such a person is usually considerably younger than a High Court judge and may have no judicial experience. It cannot be reasonable to prefer the opinion of such a person to that of the judiciary on what is effectively a matter of technical expertise. The effect of the judicial recommendation is to do no more than fix a date for *review*, not *release*. *In re Findlay* [1985] A.C. 318 was concerned with the lawfulness of the policy as a whole, rather than the manner in which it was to be implemented in practice. *In re Findlay* is not in conflict with *Ex parte Handscomb*, 86 Cr.App.R. 59 on this point. The Secretary of State should be bound by the judicial recommendation save in exceptional circumstances.

Both the Divisional Court and the Court of Appeal proceeded on the basis that a *small* difference between the judicial view and the Secretary of State's view on a particular tariff is likely to reflect *rational* judgment by

the Secretary of State, whereas a large difference is more likely to reflect *irrationality* on his part in a way that may entitle a prisoner to judicial review of the Secretary of State's tariff decision. The reality may be that regular small differences are more likely to reflect irrationality by the Secretary of State.

On the issue whether, when the Secretary of State does not adopt a judicial view of the tariff, he is obliged to give his reasons for departing from it, *Reg. v. Baverstock* [1993] 1 W.L.R. 202, 206F-H shows that the Criminal Justice Act 1991 demands that there is recorded (transcript) evidence of a judge having applied appropriate reasoning to any decision to imprison. Therefore it would be surprising if in relation to a mandatory life sentence the Secretary of State was under

no obligation to give reasons for altering the tariff. [Reference was made to *Reg. v. Secretary of State for the Home Department, Ex parte Walsh*, The Times, 18 December 1991.]

Edward Fitzgerald for Mr. Doody. The policy as declared in the policy statements 1983, 1985 and 1987, and communicated to the prisoners, has been misrepresented by the Secretary of State to this extent. It has been suggested that the tariff period fixed at the outset does not represent the total requirements of retribution to be served. It was suggested that the Secretary of State can legitimately increase fixed sentences at the outset communicated to the prisoner, and served in their entirety, merely on the basis of a later change of mind as to what punishment and deterrence require. It has also been stated that, even after completion of the period necessary to satisfy the requirements of retribution and deterrence, a prisoner who represents no risk to the public can be detained on the ground that his release would cause "public concern." Both these claims are incorrect.

Under the policy in operation since 1983 life sentence prisoners have acquired certain legitimate expectations as to the criteria that will govern the two successive phases of detention under the formal authority of the life sentence. Principles of retributive proportionality will govern the first stage; preventative considerations will govern the second stage. This differentiates the parole decision-making process in the case of life sentence prisoners from that in the case of fixed term prisoners. It is not just an exercise of mercy or the grant of *privilege* and the prisoner has more than a bare *hope* of release because he is recognised to have certain legitimate expectations. These legitimate expectations attract procedural safeguards at the two successive phases of detention under a life sentence.

Since *Payne v. Lord Harris of Greenwich* [1981] 1 W.L.R. 754 the overall development of the common law has been towards the recognition that fairness does require disclosure both at the stage where the tariff is fixed and at the stage when release is considered, for both discretionary and mandatory life sentence prisoners: see *Reg. v. Parole Board, Ex parte Wilson* [1992] Q.B. 740; *Reg. v. Parole Board, Ex parte Creamer and Schoey* (unreported), 21 October 1992 and *Reg. v. Secretary of State for the Home Department, Ex parte Walsh*, The Times, 18 December 1991. To the extent that these principles of fairness are derived from the magnitude of what is at stake, the nature of the liberty at stake is no different in the case of the discretionary than in that of a mandatory life prisoner, and no less valuable at the stage when the tariff is fixed than at the stage when

---------- ***[1994] 1 A.C. 531 at 547***

eventual release is determined. To that extent the same minimum requirements of natural justice should apply in respect of all life prisoners at both stages under common law.

The main objection to the disclosure of the judicial recommendations as to tariff, that it might cause "misunderstanding" as to the length of time the prisoner actually has to serve in those cases where the Secretary of State does not reveal the tariff, only applies to mandatory life prisoners with tariffs of over 20 years. It is, in any event, invalid since they too should, as a matter of fairness, be told not only the judicial tariff but also the Secretary of State's final decision.

The Secretary of State's secondary objection to disclosure on the ground of the confidentiality of

judicial communications with the Secretary of State is ill founded. When fairness requires disclosure, the protection of confidentiality based on the class of communication involved cannot, save in well recognised categories, bar such disclosure: see *Reg. v. Parole Board, Ex parte Wilson* [1992] Q.B. 740. There is no rational basis for excepting *judicial* communications from disclosure when the disclosure of other confidential communications by contributors to the parole decision-making process has been compelled wherever fairness requires, subject only to claims of public interest immunity.

The right to make informed representations before the tariff is fixed will not be sufficient to achieve fairness in a system which depends so much for its fairness on the need to make representations to the Secretary of State *after* he has fixed the tariff. Unless he discloses *his own* findings and conclusions at some stage and affords the prisoner an opportunity to make representations about them, the principle that a prisoner should be able to make informed representations based on the matters that will weigh with the decision-maker will not have been applied.

The decision to increase the judicial tariff in the particular cases of Mr. Pierson and Mr. Doody does call for some explanation and for that reason, too, reasons should be given.

If *Wynne v. United Kingdom*, 15 October 1992, European Commission of Human Rights Admissibility Decisions, is referred to the European Court it is likely that the court will re-examine the distinction drawn in *Thynne, Wilson and Gunnell v. United Kingdom*, 13 E.H.R.R. 666 between discretionary and mandatory life prisoners. It is strongly arguable that the determination of the punitive phase of a mandatory life prisoner's detention should attract the safeguards of article 5(4) and/or article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8966), and that the preventative phase, when detention depends on the presence of a characteristic susceptible to change, should attract the same safeguards of article 5(4) as were accorded to discretionary life prisoners. [Reference was also made to *Campbell and Fell v. United Kingdom* (1984) 7 E.H.R.R. 165.]

Pannick Q.C. in reply and in response to the cross-appeals.

[LORD KEITH OF KINKEL. Their Lordships do not wish to hear argument on issues (4) and (6).]

As to issue (5), it was contended that Parliament must have intended that the Secretary of State should deal personally with the question of the period of imprisonment that a prisoner should serve because this is a

---------- ***[1994] 1 A.C. 531 at 548***

judicial decision. But Parliament has given no indication whatsoever that this matter was to be dealt with by the Secretary of State personally. The irrationality argument suggested by the Court of Appeal in *Reg. v. Secretary of State for the Home Department, Ex parte Oladehinde* [1991] 1 A.C. 254, 281D, 282A, 303C, does not advance the argument. There are practical administrative reasons why the Secretary of State cannot make all decisions. The safeguard is that he is answerable to Parliament for all decisions made by his department. It was further said that a judicial decision could not come within the *Carltona* principle [1943] 2 All E.R. 560 and reliance was placed on *Reg. v. Governor of Brixton Prison, Ex parte Enahoro* [1963] 2 Q.B. 455.

But the *Enahoro case* was not concerned with the *Carltona* doctrine. What is required here is not a delegation but devolution. Unless Parliament has indicated that the Secretary of State must make a particular decision personally, it is a matter for him to arrange the business of his department. Decisions as to the tariff are important decisions. But they do not require the personal attention of the Secretary of State.

On issues (1) and (2), the House has to be satisfied that the procedure adopted by the Secretary of State was so unfair that it justified judicial intervention. It is a pertinent observation that, if the present system was so unfair to prisoners, judges would not have co-operated with the Secretary of State in operating it. The system is not part of any statutory scheme. If the judiciary thought that it was only right that their advice should be communicated to the prisoners they could have refused to co-operate if the Secretary of State refused to disclose his reasons to the prisoners. As to the future, there is no difficulty, for the judges in giving their views will know that these will be disclosed by the Secretary of State.

The problems which will arise in the future if the Secretary of State's appeal is dismissed are indicative that fairness does not require disclosure. Great practical difficulties will arise if all mandatory life sentences are open to judicial review since there are some 2,500 mandatory life prisoners. The Secretary of State is not minded to re-open the question of the tariff imposed in 2,500 cases.

On issue (3), it was said that it was incumbent upon the Secretary of State to give reasons if he departed from the judicial tariff. But administrative law does not impose a general rule that a person holding public office has to give reasons for his decision: see *Reg. v. Civil Service Appeal Board, Ex parte Cunningham* [1991] 4 All E.R. 310, 317E and *Public Service Board of New South Wales v. Osmond*, 159 C.L.R. 656, 659, 662, 665, 666.

Both under the Act of 1967 and the Act of 1991, where Parliament considered it necessary that reasons should be given for a decision, it has so provided: see section 39(3) of the Act of 1991. There is no such specific provision made in respect of the circumstances relating to the present applications. Were the House to allow the cross-appeals in respect of issue (3) the House should not make a general declaration.

Beloff Q.C., ***Robertson Q.C.***, ***Nice Q.C.*** and ***Fitzgerald*** replied on the cross-appeals.

Their Lordships took time for consideration.

---------- ***[1994] 1 A.C. 531 at 549***

24 June. Lord Keith of Kinkel. My Lords, for the reasons given in the speech to be delivered by my noble and learned friend, Lord Mustill, which I have read in draft and with which I agree, I would dismiss the appeal, and the cross-appeal save as to issue (3) which I would allow and make the declarations he proposes.

Lord Lane. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Mustill. I agree with his reasoning and conclusions. I would accordingly dismiss the appeal and cross-appeal, save that I would allow the cross-appeal on issue (3) as defined by Lord Mustill and make the declarations which he proposes.

Lord Templeman. My Lords, for the reasons given by my noble and learned friend, Lord Mustill, I would dismiss the appeal and cross- appeal, save that I would allow the cross-appeal on issue (3) defined by Lord Mustill and make the declarations he proposes.

Lord Browne-Wilkinson. My Lords, for the reasons given by my noble and learned friend, Lord Mustill, I would dismiss the appeal and dismiss the cross-appeal save as to issue (3) which I would allow and make the declarations which are proposed by Lord Mustill.

Lord Mustill. My Lords, the sentencing of a convicted murderer according to English law is a unique formality. Although it is a very grave occasion it is a formality in this sense, that the task of the judge is entirely mechanical. Once a verdict of guilty is returned the outcome is preordained. No matter what the opinion of the judge on the moral quality of the act, no matter what circumstances there may be of mitigation or aggravation, there is only one course for him to take, namely to pass a sentence of life imprisonment.

This purely formal character of the sentencing process is unique in more than one respect. Thus, whilst it is true that there are other, comparatively unimportant, offences where a particular sentence, or component of a sentence, is prescribed by law there is in practice no other offence besides murder for which a custodial sentence is mandatory. This singularity is not to be accounted for by the fact that the crime has resulted in the death of the victim, since although the offence of manslaughter carries a maximum penalty of life imprisonment the sentence is discretionary and the maximum is rarely imposed; and other offences in which the death of the victim is an element are subject to maximum fixed terms. Nor can the uniqueness of the mandatory sentence of murder be ascribed to the uniquely wicked quality of the intent which accompanies the fatal act, since as every law student knows, although many who speak in public on the subject appear to overlook it, it is possible to commit murder without intending to kill, and many of those convicted of murder have intended to do no more than commit grievous bodily harm. In truth the mandatory life sentence for murder is symbolic.

The sentence of life imprisonment is also unique in that the words which the judge is required to pronounce do not mean what they say.

---------- ***[1994] 1 A.C. 531 at 550***

Whilst in a very small minority of cases the prisoner is in the event confined for the rest of his natural life, this is not the usual or the intended effect of a sentence of life imprisonment, as a judge faced with a hard case will take pains to explain to the offender before sentence is passed. But although everyone knows what the words do not mean, nobody knows what they do mean, since the duration of the prisoner's detention depends on a series of recommendations to, and executive decisions by, the Home Secretary, some made at an early stage and others much later, none of which can be accurately forecast at the time when the offender is sent to prison. There is, however, another form of life sentence, of which the philosophy, statutory framework and executive practice are quite different even though the words pronounced by the judge are the same. This is the discretionary life sentence. The imposition of this sentence is severely constrained by section 2(1) of the Criminal Justice Act 1991, read with section 1(2), and by decisions of the Court of Appeal (Criminal Division), notably *Reg. v. Hodgson* (1967) 52 Cr.App.R. 113 and *Reg. v. Wilkinson* (1983) 5 Cr.App.R.(S) 105. Where the criteria so

established are satisfied the judge has a choice between two very different procedures. He may decide to focus on the offence, passing a sentence appropriate to its gravity by the familiar process of identifying the range of sentences established through decisions of the Court of Appeal as being in general apposite to an offence of the kind in question, and then placing the individual offence within (or exceptionally outside) the range by reference to circumstances of mitigation or aggravation. The judge may however think it right to adopt a different approach, and to concentrate on the offender rather than the offence, imposing a sentence of life imprisonment to reflect his appraisal that even a long fixed term of years may not adequately protect the public against the risk that when the term has been served the prisoner will continue to be a danger to the public. Such a sentence ensures that the prisoner will be kept in custody until it is thought safe to release him.

The discretionary life sentence may thus be regarded as the sum of two sentences, to be served consecutively. First, a determinate number of years appropriate to the nature and gravity of the offence. This is often called the "tariff" element of the sentence. For my part, although I recognise that this is not inappropriate in the context of a discretionary life sentence, I consider that for reasons which I will later develop it is illogical and misleading when the usage is transferred to a mandatory sentence. I therefore prefer to avoid this terminology and will instead call the first component of the life sentence the "penal element." The second component is an indeterminate period, which the offender begins to serve when the penal element is exhausted. I will call this the "risk element."

In the past there was no need for the sentencer to give separate attention to these two components. Having once decided that a determinate sentence at the general level suggested by the nature of the offence would not adequately reflect the degree of risk, he would proceed directly to the imposition of a life sentence, and would have no reason to identify with precision, or to publish, the fixed term which he would have passed if he had chosen the alternative course. As will appear, the law and practice have more recently developed in a way which attaches great

importance to the composite nature of the discretionary life sentence, and now requires that in the great majority of cases the judge will quantify and announce the penal element and will thereby fix directly the minimum period in custody which the offender must serve, before the question whether it is safe to release him becomes decisive. Although it is a comparative novelty this regime conforms very well with the rationale of the discretionary life sentence and, as it appears to me, is fair, practical in operation and easy to comprehend.

The same cannot I believe be said of the situation created by the ministerial decision, some 10 years ago, to import the concept of a penal element into the theory and practice governing the release on licence of prisoners serving mandatory life sentences for murder. I must develop this later. For the present it is sufficient to state that the current practice, established by executive changes of policy rather than by Act of Parliament, now requires the division of the sentence into penal and risk elements, and entails that the ascertainment by the Home Secretary of the penal element fixes, at one remove, the minimum period for which the convicted murderer will be detained. It is to this element that the present appeal is directed.

The respondents to the appeal, S. Doody, J. D. Pierson, E. W. Smart and K. Pegg were each convicted of murder and sentenced to life imprisonment on various occasions between 1985 and 1987. It is possible to deduce from the dates fixed by the Secretary of State for the Home Department for the first review of their cases by the Parole Board (and in the case of Pierson from correspondence with the Home Office) that the penal elements of these life sentences fixed by Secretary of State were respectively 15 years; not more than 20 years; 12 years; and 11 years. So much each prisoner knows, but what he does not know is why the particular term was selected, and he is now trying to find out: partly from an obvious human desire to be told the reason for a decision so gravely affecting his future, and partly because he hopes that once the information is obtained he may be able to point out errors of fact or reasoning and thereby persuade the Secretary of State to change his mind, or if he fails in this to challenge the decision in the courts. Since the Secretary of State has declined to furnish the information the respondents have set out to obtain it by applications for judicial review. The relief claimed is not the same in each case, but the applications have sufficient in common to enable the parties to identify six issues for decision. In the Court of Appeal the respondents succeeded on the first two issues, on which the Secretary of State now appeals. The respondents failed, and cross-appeal, on the remaining four issues. As the argument developed it came to appear that the issues as agreed were not entirely in focus, but they form a useful framework for decision and I will set them out. First however it is essential to describe, not only the current law and practice, but also the steps by which they reached their present form.

I.History

1.Chronology

(1) Until the enactment of the Homicide Act 1957 the mandatory sentence for murder was death. This was mitigated by an executive power

---------- ***[1994] 1 A.C. 531 at 552***

to commute the sentence to one of penal servitude (later imprisonment) for life, which in turn was subject to an executive power to release the prisoner on licence. There was a long-established practice whereby the trial judge wrote privately to the Home Secretary drawing attention to any features of the case which he considered relevant to the anxious decision on whether or not to commute.

(2) When the Act of 1957 created the category of non-capital murder it prescribed a mandatory sentence of imprisonment for life. Eight years later, at the time when the abolition of the death penalty for murder was before Parliament it was proposed that the previous mandatory sentences of death and life imprisonment should be replaced by a discretionary sentence of life imprisonment, but Parliament did not agree and a sentence of life imprisonment was made mandatory for all murders: Murder (Abolition of Death Penalty) Act 1965, section 1(1). At the same time two statutory concessions were made to those who feared excessive leniency by the executive in the treatment of convicted murderers. First, by section 1(2) the trial judge was given power to recommend to the Home Secretary the minimum period which should elapse before the release of the prisoner under the statutory power to release on licence which had been created by the

Prison Act 1952. Second, it was stipulated that no person convicted of murder would be released on licence unless the Home Secretary had previously consulted the Lord Chief Justice and the trial judge, if available: section 2.

(3) Two years later, the Parole Board was created by the Criminal Justice Act 1967. As part of the new scheme the provision for consultation with the Lord Chief Justice and the trial judge was repealed and replaced by a similar requirement, on this occasion made applicable to discretionary as well as mandatory life sentences, and coupled with a condition that the Home Secretary should not release the prisoner unless he was recommended to do so by the Parole Board. In practice the advice of the Parole Board was not obtained (in the absence of exceptional mitigating circumstances) until the Board conducted a first review of the prisoner's sentence after seven years of custody; and the opinion of the Lord Chief Justice and the trial judge (whom I will hereafter call "the judges") was not at this stage sought unless a recommendation by the Board for release was seriously in prospect.

(4) Because it was found that in the majority of cases a first review after seven years was too early to set a release date, a new procedure was devised in 1973 whereby a joint working group of the Parole Board and the Home Office scrutinised the case of each life prisoner after the first three years in order to recommend a date of the first review by the Parole Board. We see here the origins of the crucial practical distinction between setting a date for release and setting a date of the first consideration of release. Throughout this period trial judges continued to write privately to the Home Secretary expressing their opinions on the offence and the offender, although the practice of making recommendations as to minimum sentence, permitted by section 1(2) of the Act of 1965, steadily diminished.

(5) So matters continued until 1983, when in response to pressure of public opinion the Home Secretary (Mr. Leon Brittan) announced a series

---------- *[1994] 1 A.C. 531 at 553*

of radical changes in the existing policies relating to the release of prisoners on parole and licence (Hansard (H.C. Debates), 30 November 1983, cols. 505-508: written answer). These included the creation of a completely new philosophy and practice for the release of life prisoners on licence, some aspects of which had been discussed with the Lord Chief Justice, and which had been foreshadowed in a speech to the Conservative Party conference. This practice was to have the following features. (i) The joint Home Office/Parole Board committee, which had been established to recommend the date for the first review by the Parole Board was disbanded. (ii) Instead, the Home Secretary would himself, after consulting the judges "on the requirements of retribution and deterrence," fix the date for the first review. (iii) The review would normally take place three years before the expiry of the "period necessary to meet the requirements of retribution and deterrence." This would give sufficient time for preparations for release, if the Parole Board were to recommend it. (iv) Subject to exceptional circumstances the first review would in fact take place on the date so fixed. (v) Meanwhile the progress of

the prisoner would be kept under regular review by the Home Office. (vi) The consultation with the judges required by section 61 of the Criminal Justice Act 1967 would take place when release was an actual possibility. (vii) In the case of certain types of murder the prisoner would not normally be released until 20 years or even longer had been served.

Equally important were the changes in philosophy underlying the new practice. The first was tacit, but obvious. Whereas at the outset the power of the trial judge to recommend a minimum term, and the duty of the Home Secretary to consult the judges before release had been a protection against a foreseen risk of excessive leniency by the Executive, the new regime was intended to forestall excessive leniency by the judges, or the Parole Board, or both. The second change in philosophy was made explicit in the following passage from the Home Secretary's announcement:

"These new procedures will separate consideration of the requirements of retribution and deterrence from consideration of risk to the public, which always has been, and will continue to be, the pre-eminent factor determining release. **. . .** They will enable the prison and other staff responsible for considering and reporting on life sentence cases, the local review committees and the Parole Board, to concentrate on risk. The judiciary will properly advise on retribution and deterrence. But the ultimate discretion whether to release will remain with me."

Thenceforth the separation between risk to the public and the penal element, applied to mandatory and discretionary life sentences alike (Hansard (H.L. Debates), 16 October 1986, col. 904: written answer), was firmly embedded in the theory and practice of the release of life prisoners. The advice of the judges, previously expressed in the round by reference to all the features of the offence and the offender which the judges considered to be relevant, was now to be confined to the penal element.

(6) This regime was soon modified. In the first place, special provision was made for prisoners, the penal element of whose sentences exceeded 20 years. Here, the first Parole Board review was to take place, not three years before the expiry of the penal element, but after 17 years in custody.

---------- ***[1994] 1 A.C. 531 at 554***

The second modification was prompted by the decisions of the Divisional Court in *Reg. v. Secretary of State for the Home Department, Ex parte Handscomb* (1987) 86 Cr.App.R. 59, to the effect that the Home Secretary was acting unlawfully by delaying until three years after sentencing his consultation with the judiciary for the purpose of fixing the first review date, and also that he was bound to set the first review date strictly in accordance with the penal element recommended by the judges. In response to this decision the Home Secretary (Mr. Douglas Hurd), in agreement with the Lord Chief Justice, decided (Hansard (H.C. Debates), 23 July 1987, cols. 347-349: written answer) that in future the trial judge's view on the penal element of a discretionary life sentence should be obtained (through the Lord Chief Justice) as soon as practicable after the imposition of sentence, and that the first Parole Board review would be fixed in accordance with the judicial view. As regards mandatory life sentences the practice would also be changed so as to eliminate the waiting period of three years, but the Home Secretary went on to add:

"In cases of prisoners serving life sentences for murder, where the sentence is not at the discretion of the court, the question of the notional equivalent determinate sentence does not arise. I shall continue to take into account the view of the judiciary on the requirements of retribution and deterrence in such cases as a factor amongst others (including the need to maintain public confidence in the system of justice) to be weighed in the balance in setting the first review date. I shall ensure that the timing of the first formal review in such cases is fixed in accordance with my overall policy for ensuring that the time served by prisoners serving life sentences for the worst offences of violence fully reflects public concern about violent crime."

(7) The next development was the judgment of the European Court of Human Rights in *Thynne, Wilson and Gunnell v. United Kingdom* (1990) 13 E.H.R.R. 666 concerning discretionary life sentences. Here, the court recognised the theoretical distinction between mandatory and discretionary sentences, and went on to hold (inter alia) that in the case of a discretionary sentence once the penal element had been served the prisoner was entitled to "judicial control" of his continued detention.

(8) Just as it had reacted to criticisms in *Ex parte Handscomb* the Government responded to *Thynne, Wilson and Gunnell* with a modification of the existing practice governing discretionary life sentences, which was subsequently embodied in section 34 of the Criminal Justice Act 1991. The gist of the new statutory regime is that the judge has power to make an order specifying the penal element of the sentence and at the same time to order that section 34 shall apply to the prisoner as soon as he has served that element. Where the section does apply the Home Secretary, if he has not already done so of his own accord, can be required by the prisoner to refer his case to the Parole Board once the penal element has expired. The Board then considers whether it is any longer necessary for the protection of the public that the prisoner should be confined, and if it answers in the negative it has power to direct the prisoner's release, whereupon it is the duty of the Home Secretary to release him. This

section came into force on 1 October 1992 (after the decision of the Court of Appeal in the present case), and the Lord Chief Justice has subsequently directed that save in the very exceptional case the judge should make an order under section 34: *Practice Direction* (*Crime: Life Sentences*) [1993] 1 W.L.R. 223. The trial judge will also, as in the past, make a written report to the Home Secretary, through the Lord Chief Justice.

(9) At the time when the Criminal Justice Bill was under consideration it was proposed in the House of Lords that similar provision should be made in the case of mandatory life sentences, but this view was rejected. The Minister of State (Mrs. Angela Rumbold) stated:

"Mandatory life sentence cases, however, raise quite different issues and the Government do not agree that it is appropriate to extend a similar procedure to these cases. In a discretionary case, the decision on release is based purely on whether the offender continues to be a risk to the public. The presumption is that once the period that is appropriate to punishment has passed, the prisoner should be released if it is safe to do so. The nature of the mandatory sentence is different. The element of risk is not the decisive factor in handing down a life sentence. According to the judicial process, the offender has committed a crime of such gravity that he forfeits his liberty to the state for the rest of his days. If necessary, he can be detained for life without the necessity for subsequent judicial intervention. The presumption is, therefore, that the offender should remain in custody until and unless the Home Secretary concludes that the public interest

would be better served by the prisoner's release than by his continued detention. In exercising his continued discretion in that respect, the Home Secretary must take account not just of the question of risk, but of how society as a whole would view the prisoner's release at that juncture. The Home Secretary takes account of the judicial recommendation, but the final decision is his:" Hansard (H.C. Debates), 16 July 1991, cols. 309-310.

(10) Reflecting this policy, the Criminal Justice Act 1991 provides differently in section 35 for mandatory life prisoners from the new regime established by section 34 for discretionary life prisoners. Under section 35 the discretion to refer the case to the Parole Board is left with the Home Secretary. It is only if (a) the Home Secretary has chosen to refer, (b) the Parole Board has recommended release, and (c) the Home Secretary has consulted the judges, that he has power to release the prisoner; but this is not a power which he is bound to exercise. The existing practice whereby the Home Secretary fixes the date of first review by reference to the penal element, after consultation with the judges, remains in place.

(11) Most recently, there have been important developments in the practice governing the review by the Parole Board. It appears that by the time the Minister of State made her announcement on 16 July 1991 the Government had already decided that a discretionary life prisoner should be entitled to full disclosure of the materials to be placed before the Board. Indeed, before this practice was put into effect it was held by the Court of Appeal in *Reg. v. Parole Board, Ex parte Wilson* [1992] Q.B. 740 that this is what the law required. Subsequently, on 16 December 1992

---------- ***[1994] 1 A.C. 531 at 556***

the Home Secretary has announced that the practice for mandatory life prisoners will be brought into line with these changes, so that the prisoner will now be provided in advance with all papers to be considered by the Parole Board for the review of his case (subject to public interest immunity), and afterwards with the reasons for the Parole Board recommendations and ministerial decisions regarding release: Hansard (H.C. Debates), 16 December 1992, cols. 218-219: written answer.

2.The current law and practice

My Lords, I believe that this summary has shown how, in contrast with the position as regards discretionary life sentences, the theory and the practice for convicted murderers are out of tune. The theory - and it is the only theory which can justify the retention of the mandatory life sentence - was restated by Mrs. Rumbold less than two years ago. It posits that murder is an offence so grave that the proper "tariff" sentence is invariably detention for life, although as a measure of leniency it may be mitigated by release on licence. Yet the practice established by Mr. Brittan in 1983 and still in force founds on the proposition that there is concealed within the life term a fixed period of years, apt to reflect not only the requirements of deterrence, but also the moral quality of the individual act ("retribution"). These two philosophies of sentencing are inconsistent. Either may be defensible, but they cannot both be applied at the same time.

I make this point, not to argue for one regime rather than another, nor to suggest that each of them is unsatisfactory. This is a question for Parliament and we must take the law as it stands. The importance of the inconsistency for present purposes is that the choice of the theory goes a

long way towards determining the requirements of fairness with which the practice should conform. The judgment of Shaw L.J. in *Payne v. Lord Harris of Greenwich* [1981] 1 W.L.R. 754, a case on the right of a mandatory life prisoner to know the Parole Board's reasons for declining to recommend his release, illustrates this well. In a crucial passage, concerned with the grant of parole in general but particularly germane in the present context, Shaw L.J. stated, at p. 763:

> "A person sentenced to imprisonment could not *expect* to be released before the expiry of his sentence. Since the introduction of parole he may *hope* that part of his sentence may be served outside prison. If his offence was of a heinous kind, even that hope will be a frail one."

If the matter is approached in this way the Home Secretary can be regarded as exercising a very broad general discretion, in which all the relevant factors are weighed together when deciding whether the public interest permits release, in very much the same way as the discretion had been exercised before the Parole Board came on the scene; and from this it is not a long step to hold that since the prisoner is essentially in mercy there was no ground to ascribe to him the rights which fairness might otherwise demand. This reasoning is however much weakened now that the indeterminate sentence is at a very early stage formally broken down into penal and risk elements. The prisoner no longer has to hope for

mercy but instead knows that once he has served the "tariff" the penal consequences of his crime have been exhausted. Even if the Home Secretary still retains his controlling discretion as regards the assessment of culpability the fixing of the penal element begins to look much more like an orthodox sentencing exercise, and less like a general power exercised completely at large.

For this reason I believe it impossible to proceed any distance towards determining the present appeal without deciding which of the two competing philosophies is to form the starting-point. As it seems to me, the only possible choice is the regime installed by Mr. Brittan, as later modified. This is the regime by which successive Home Secretaries have chosen to exercise the wide powers conferred by Parliament, and the arguments have throughout assumed that the regime is firmly in place, and that the task of the courts is to decide what the elements of fairness demand as to the working-out of that regime, in the light of the sentencing philosophy which is expressed to underlie it. This being so I think it essential not to cloud the discussion by introducing the inconsistent theory enunciated by the Minister of State, and I shall leave this entirely out of account.

In this long introduction I have anticipated much of what needs to be said about the six individual issues identified by the parties. For reasons which I will shortly explain, it is convenient to deal with these in a different order from that chosen by the parties, but I will first set them out.

II. The issues

> (1) Is a prisoner serving a life sentence entitled to make written representations before his tariff is set by the Secretary of State? (2) Is the Secretary of State required to tell the prisoner what period the judiciary have recommended he should serve for the purposes of retribution and deterrence, and of any other opinion expressed or reasons given by the judiciary which are or may be relevant to the Secretary of State's decision as to the appropriate period to be served for these purposes? (3) If a prisoner is to be told the judicial view of his tariff, is the Secretary of State obliged to give reasons for departing from it if he does so? (4) Is the Secretary of State obliged to adopt the judicial view of the

period to be served for retribution and deterrence by a prisoner serving a mandatory life sentence? (5) Is the Secretary of State obliged to make the decision on the period which a life sentence prisoner should serve for the purposes of retribution and deterrence personally, or may this task be performed by a Minister of State of the Home Office on his behalf? (6) In relation to Mr. Pegg only, did the Secretary of State fail to take into account the contents of his petition dated 24 January 1989.

III. Issue (4): the effect of the judges' advice

Although the fourth of these questions arises under the cross-appeals, logically it comes first. All the judges of the Divisional Court and the Court of Appeal have returned a negative answer, and I have no doubt that they are right.

---------- ***[1994] 1 A.C. 531 at 558***

Under the current practice the opinion of the trial judge on the penal element plays a very different part in the two regimes. For the discretionary sentence an order under section 34 is decisive. The opinion of the Lord Chief Justice is not required, and the Home Secretary has no choice but to initiate a Parole Board review once the term fixed by the judge has expired. With a mandatory sentence the trial judge and the Lord Chief Justice are no more than advisers. Not only have successive ministers made it plain to Parliament that they regard themselves as free to depart from the advice but they have put their words into practice, for statistics furnished to the Select Committee on Murder and Life Imprisonment showed that during specimen periods of six months between 1984 and 1988 the Home Secretary fixed the penal element at a longer term than recommended by the trial judge in between 30 and 60 per cent. of the cases. The respondents maintain that this practice is unlawful. They put their argument in two ways.

First, they assert that the judges are uniquely skilled and experienced in matching punishment to the needs of retribution and deterrence, and in the establishment and operation of tariffs for particular types of offence. This being so, the Home Secretary who ex hypothesi is less well equipped cannot sensibly reject the advice of the judges, so that any fixing of the penal element otherwise in an accordance with their opinions (or, presumably, of the Lord Chief Justice if the judges differ) must necessarily be irrational. In support, the respondents rely on the decision of the Divisional Court in *Ex parte Handscomb*, 86 Cr.App.R. 59. In the judgments now under appeal much attention was given to identifying the ratio decidendi of that case, in the light of pronouncements by the Divisional Court and by Lloyd L.J. in *Reg. v. Secretary of State for the Home Department, Ex parte Walsh*, The Times, 18 December 1991. I believe that your Lordships are free to pass by this dispute and to tackle the question afresh. So doing, I would reject the respondents' argument on two grounds. In the first place, I question the proposition that the judges are specially qualified to assess the penal element of a mandatory life sentence: I emphasise mandatory, because there are grounds for saying that in fixing the penal element of the discretionary sentence (with which *Ex parte Handscomb* was concerned) the judge is simply pronouncing the tariff sentence which he would have imposed but for the element of risk, and that this is the kind of function in which the judiciary has unrivalled experience. But the position as to mandatory sentences is very different. Until Mr. Brittan completely changed the rules in 1983 the idea of a separate determinate penal element co-existing with the life sentence would have been meaningless. It is true that for the past 10 years the judges have been asked to advise upon it, and it may be that some consistent judicial practice now exists. Nevertheless, it

is the Home Secretary who decides, and who has developed (with his predecessors) his own ministerial ideas on what the public interest demands. I can see no reason why the anomalous task of fixing a "tariff" penal element for an offence in respect of which the true tariff sentence is life imprisonment is one for which the Home Secretary and his junior ministers, informed by his officials about the existing departmental practice, are any less experienced and capable than are the judges.

---------- ***[1994] 1 A.C. 531 at 559***

In any event, however, even if the respondents' argument is correct so far, it must in my opinion fail because Parliament has not by statute conferred on the judges any role, even as advisers, at the time when the penal element of a mandatory sentence is fixed. But for the fact that the Home Secretary decided, when formulating the new scheme, to retain in a modified shape the existing practice of inviting the opinion of the judges, they would never enter the picture at all. The Secretary of State is compelled, or at least entitled, to have regard to broader considerations of a public character than those which apply to an ordinary sentencing function. It is he, and not the judges, who is entrusted with the task of deciding upon the prisoner's release, and it is he who has decided, within the general powers conferred upon him by the statute, to divide his task into two stages. It is not, and could not be, suggested that he acted unlawfully in this respect and I can see no ground whatever for suggesting that by doing so he deprived himself entirely of his discretion at the first stage, and delivered it into the hands of the judges. If the decision in *Ex parte Handscomb* is to a contrary effect, then with due respect to a very experienced court, I must disagree.

The respondents' second argument is an appeal to symmetry. Mandatory and discretionary sentences are now each divided into the two elements. Under both regimes the judges play a part in fixing the penal element, and the Parole Board in fixing the risk element. At the stage of the Parole Board Review the practice as to the disclosure of materials and reasons is now the same under the two regimes. Given that the post-*Handscomb* practice, embodied in section 34 of the Act of 1991, now gives a direct effect to the trial judge's opinion, it is irrational (so the argument runs) for the Home Secretary not to have brought into alignment the two methods of fixing the penal element.

Whilst there is an important grain of truth in this argument, I believe it to be over-stated. The discretionary and mandatory life sentences, having in the past grown apart, may now be converging. Nevertheless, on the statutory framework, the underlying theory and the current practice there remains a substantial gap between them. It may be - I express no opinion - that the time is approaching when the effect of the two types of life sentence should be further assimilated. But this is a task for Parliament, and I think it quite impossible for the courts to introduce a fundamental change in the relationship between the convicted murderer and the state, through the medium of judicial review.

IV. Issues (1) Representations by the prisoner; (2) the judge's tariff and (3) the Home Secretary's reasons

I take these issues together, partly because they lie at the heart of the appeal, and partly because if they are considered individually attention may be distracted from the real point of the case. Naturally enough, in the light of *Ex parte Handscomb*, the judicial opinion on the penal element has loomed large in these proceedings, for if the court were to adopt in relation to

mandatory life sentences the same approach as in *Ex parte Handscomb* the prisoner would achieve a large part of what he seeks. But once it is concluded that the judicial opinion is not conclusive, and that it is the decision of the Secretary of State that matters, the opinion of the

judges becomes no more than a component of the entire body of material in the light of which that decision is made.

Thus, although it is tempting to approach the question of disclosure and reasons as if it were the judges' opinions to which the applications for judicial review are directed this is mistaken. It is the decision of the Home Secretary which vitally affects the future of the prisoner, and it is the openness of this decision which is essentially in dispute. Although the shape of the arguments presented in the courts below led those courts to begin the inquiry with the judges' opinions, and hence to progress to the reasons for those opinions, and finally to a consideration of whether the reasons of the Home Secretary for departing from the judges' opinions should be disclosed, I prefer to go directly to the opposite end of the process to consider the prisoner's rights in relation to the decision by the Home Secretary. I emphasise once again that the court is not being asked to review and could not with any hope of success be asked to review this scheme in its entirety, the more so since the judges have themselves being playing an important part in it for the past 10 years. Nor of course is it the task of the court to say how it would choose to operate the scheme if given a free hand. The only issue is whether the way in which the scheme is administered falls below the minimum standard of fairness.

What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.

My Lords, the Secretary of State properly accepts that whatever the position may have been in the past these principles apply in their generality to prisoners, including persons serving life sentences for murder, although their particular situation and the particular statutory regime under which they are detained may require the principles to be applied in a special way. Conversely, the respondents acknowledge that it is not enough for them to persuade the court that some procedure other than the one

adopted by the decision-maker would be better or more fair. Rather, they must show that the procedure is actually unfair. The court must constantly bear in mind that it is to the decision maker, not the court, that Parliament has entrusted not only the making of the decision but also the choice as to how the decision is made.

I return to the three issues, and to my suggestion that they concentrate attention too much on the judges' opinion on the penal element at the expense of the Home Secretary's decision upon it. The third issue illustrates this well, for the premise of the respondents' argument is that the decision of the Home Secretary which attracts the demands of fairness and which is potentially the subject of review is a decision to depart from the opinion of the judges. This is not so. The decision is simply to fix the penal element. On occasions this will involve a divergence from the judges; on others, not. In each case the requirements of fairness and rationality will be the same. So also are the familiar requirements that the decision-maker should take into account all relevant considerations, amongst which are the opinions of the judges; that he should not take into account irrelevant considerations; and that his decision should be rational. A departure from the opinion of the judges may be relevant as tending to show either that the Home Secretary has failed to take their opinion into account, or that the discrepancy is so wide as to suggest that the decision may have been irrational - although of course the court would not make the mistake of assuming that the judges were necessarily "right," and that accordingly the Home Secretary must necessarily be "wrong," and so wrong that the court can properly interfere.

Accordingly, I prefer to begin by looking at the question in the round, and inquiring what requirements of fairness, germane to the present appeal, attach to the Home Secretary's fixing of the penal element. As general background to this task, I find in the more recent cases on judicial review a perceptible trend towards an insistence on greater openness, or if one prefers the contemporary jargon "transparency," in the making of administrative decisions. This tendency has been accompanied by an increasing recognition, both in the requirements of statute (cf. section 1(4) of the Act of 1991) and in the decisions of the Criminal Division of the Court of Appeal, that a convicted offender should be aware what the court has in mind for his disposal. Whilst the current law and practice concerning discretionary life sentences conform entirely with this trend, the regime for mandatory life prisoners conspicuously does not. Should this distinction be maintained in its entirety? Contending on behalf of the Secretary of State that matters should be left as they are, Mr. Pannick first points to the creation by Parliament of express statutory rights, similar to those which might otherwise have come into existence through an implied obligation of fairness, and maintains that these leave no room to imply any further rights. Thus, the prisoner was entitled under section 59 of the Act of 1967 (now obsolete and repealed) to make representations to the Parole Board in relation to his release on parole, either orally through the medium of an interview with a member of the local review board or in writing. Furthermore, in relation to his recall from licence the prisoner is still enabled to make representations and to know the

reasons for the revocation of his licence: see section 39(3) of the Act of 1991, re-enacting provisions of the Act of 1967.

The logic of this argument appears to demand that the prisoner's right to make representations is excluded in all cases except those just mentioned, an extravagant proposition for which the Secretary of State does not contend. But in any event I find it impossible to accept that these limited and fragmentary statutory rights demonstrate a Parliamentary intention to exclude all other aspects of fair treatment, the more so since the provisions originate in an Act passed 16 years before the formal separation of the penal and risk elements, and the ascription to the former of such a decisive influence on the future of the prisoner.

A similar argument is advanced on the broader ground that since Parliament has by section 34 established a regime which assures discretionary life prisoners of important rights, whilst leaving untouched the Home Secretary's much more general powers in relation to mandatory prisoners, no new rights in this field should be created by judicial implication. The Secretary of State calls up the decision of the House of Lords in *In re Findlay* [1985] A.C. 318, which was concerned with another aspect of Mr. Brittan's change in policy, to emphasise how careful the courts must be not to impose on a statutory general discretion constraints which Parliament has chosen not to create. Whilst I bear this warning carefully in mind, I cannot accept the argument. Even in relation to discretionary life prisoners, section 34 does not exhaust the rights stemming from the general principle of fairness: as witness *Reg. v. Parole Board, Ex parte Wilson* [1992] Q.B. 740 the reasoning of which I adopt in full.

One further argument for the Secretary of State must be mentioned: namely that since the prisoner already knows all the circumstances of his offence, in the light of which the trial judge made his recommendation on the penal element, he can deduce without the need for any more information both the factual basis of the Secretary of State's decision, and the intellectual reasons why the penal element was fixed at a particular term of years. Although something akin to this argument has found favour in other cases, I am quite unable to accept it here. The prisoner does indeed know what primary materials were before the court, but he does not know what the judge and the Home Secretary made of them, nor does he know what other materials, not brought out at the trial, may have formed an element in the decision. That the choice of the penal element is not self evident appears quite clearly from the number of occasions on which the Home Secretary's appraisal differs from that of the judges. Either there is something in the material before the Home Secretary which was not known to the judges, or the Home Secretary approaches his task in a way which is different from that adopted by the judiciary when passing sentence. In either event, the missing factor is hidden from view, and the prisoner can do no more than guess what it might be.

My Lords, thus to reject the arguments advanced by the Secretary of State does not in itself mean that the respondents are entitled to succeed on the first three issues: it merely leaves the ground clear to consider what fairness demands. Starting with the first issue, we encounter no problems. It would be impossible nowadays to imagine that a prisoner

---------- ***[1994] 1 A.C. 531 at 563***

has no right to address to the Home Secretary reasons why the penal term should be fixed at a lower rather than a higher level, and it is now accepted that the prisoner does have this right. Indeed, the Secretary of State has gone further, by very properly undertaking through counsel that a statement of this effect will be included in the next edition of "*Life Sentence: Your*

Questions Answered," the excellent booklet issued to persons serving life sentences. The only issue is whether the court should make a declaration to this effect. The Secretary of State may be technically right in saying that the point has never been in dispute, and is therefore inapt for a formal ruling. But this controversy is arid. I am unable to understand what objection the Secretary of State could have to the grant of relief, so long as it is made clear (as I have just made clear) that he has not unworthily argued against an obvious right. In a rapidly developing area of the law I think it useful for each new area to be formally marked-out, even if in the event it proves uncontroversial. I would therefore uphold the decision of the Court of Appeal on the first issue.

My Lords, I consider that the second and third issues are both aspects of the same question, and that the focus of both is too narrow. The central question is whether the prisoner is entitled to know what materials the Secretary of State will found upon when making his decision and (after the event) how that decision was arrived at. The opinion of the judges and the reasons for the opinion are important, not because they have any direct effect but because they form part of the corpus of material on which the Home Secretary bases his decision. Similarly, if there is a divergence between the opinion of the judges and the decision of the Secretary of State, the reasons for this divergence are no more than part of the entire reasons which led the Home Secretary to fix a particular term as the penal element.

Approaching the matter in this way, it must be asked whether the prisoner is entitled to be informed of that part of the material before the Home Secretary which consists of the judges' opinion and their reasons for it. It has frequently been stated that the right to make representations is of little value unless the maker has knowledge in advance of the considerations which, unless effectively challenged, will or may lead to an adverse decision. The opinion of the Privy Council in *Kanda v. Government of Malaya* [1962] A.C. 322, 337 is often quoted to this effect. This proposition of common sense will in many instances require an explicit disclosure of the substance of the matters on which the decision-maker intends to proceed. Whether such a duty exists, how far it goes and how it should be performed depend so entirely on the circumstances of the individual case that I prefer not to reason from any general proposition on the subject. Rather, I would simply ask whether a life prisoner whose future depends vitally on the decision of the Home Secretary as to the penal element and who has a right to make representations upon it should know what factors the Home Secretary will take into account. In my view he does possess this right, for without it there is a risk that some supposed fact which he could controvert, some opinion which he could challenge, some policy which he could argue against, might wrongly go unanswered.

---------- ***[1994] 1 A.C. 531 at 564***

In the present instance, the opinion of the judges (or opinions, if the Lord Chief Justice differs from the charge judge) are weighed in the balance when the Secretary of State makes his decision. Beyond the fact that the opinion is not invariably decisive (as witness the statistics previously cited) there is no means of knowing how it figures in the Home Secretary's reasoning. That it does so figure is quite plain from the statements by successive ministers from which I have quoted. This being so, I think it clear that the prisoner needs to know the substance of the judges' advice, comprising not only the term of years which they recommended as the penal element, but also their reasons: for the prisoner cannot rationalise his objections to the penal element without knowing how it was rationalised by the judges themselves.

This does not mean that the document(s) in which the judges state their opinion need be disclosed in their entirety. Those parts of the judges' opinions which are concerned with matters other than the penal element (for example any observation by the judges on risk) need not be disclosed in any form, and even in respect of the relevant material the requirement is only that the prisoner shall learn the gist of what the judges have said. This will not necessarily involve verbatim quotation from the advice, although this may often be convenient. If the Home Secretary's duty is approached in this way I doubt whether the fact that in the past the advice has been given in documents intended to be confidential will often prove to be troublesome; and in the few cases where problems do arise it may well be that, upon request, the judges are prepared to waive the confidentiality of the documents.

In these circumstances I agree with the Court of Appeal on the second as well as the first of the issues. I do, however, have the misfortune to differ on the third.

I accept without hesitation, and mention it only to avoid misunderstanding, that the law does not at present recognise a general duty to give reasons for an administrative decision. Nevertheless, it is equally beyond question that such a duty may in appropriate circumstances be implied, and I agree with the analyses by the Court of Appeal in *Reg. v. Civil Service Appeal Board, Ex parte Cunningham* [1991] 4 All E.R. 310 of the factors which will often be material to such an implication.

Turning to the present dispute I doubt the wisdom of discussing the problem in the contemporary vocabulary of "prisoner's rights," given that as a result of his own act the position of the prisoner is so forcibly distanced from that of the ordinary citizen, nor is it very helpful to say that the Home Secretary should out of simple humanity provide reasons for the prisoner, since any society which operates a penal system is bound to treat some of its citizens in a way which would, in the general, be thought inhumane. I prefer simply to assert that within the inevitable constraints imposed by the statutory framework, the general shape of the administrative regime which ministers have lawfully built around it, and the imperatives of the public interest, the Secretary of State ought to implement the scheme as fairly as he can. The giving of reasons may be inconvenient, but I can see no ground at all why it should be against the public interest: indeed, rather the reverse. This being so, I would ask simply: Is refusal to give reasons fair? I would answer without hesitation

---------- ***[1994] 1 A.C. 531 at 565***

that it is not. As soon as the jury returns its verdict the offender knows that he will be locked up for a very long time. For just how long immediately becomes the most important thing in the prisoner's life. When looking at statistics it is easy to fall into the way of thinking that there is not really very much difference between one extremely long sentence and another: and there may not be, in percentage terms. But the percentage reflects a difference of a year or years: a long time for anybody, and longer still for a prisoner. Where a defendant is convicted of, say, several armed robberies he knows that he faces a stiff sentence: he can be advised by reference to a public tariff of the range of sentences he must expect; he hears counsel address the judge on the relationship between his offences and the tariff; he will often hear the judge give an indication during exchanges with counsel of how his mind is working; and when sentence is pronounced he will always be told the reasons for it. So also when a discretionary life sentence

is imposed, coupled with an order under section 34. Contrast this with the position of the prisoner sentenced for murder. He never sees the Home Secretary; he has no dialogue with him: he cannot fathom how his mind is working. There is no true tariff, or at least no tariff exposed to public view which might give the prisoner an idea of what to expect. The announcement of his first review date arrives out of thin air, wholly without explanation. The distant oracle has spoken, and that is that.

My Lords, I am not aware that there still exists anywhere else in the penal system a procedure remotely resembling this. The beginnings of an explanation for its unique character might perhaps be found if the executive had still been putting into practice the theory that the tariff sentence for murder is confinement for life, subject only to a wholly discretionary release on licence: although even in such a case I doubt whether in the modern climate of administrative law such an entirely secret process could be justified. As I hope to have shown, however, this is no longer the practice, and can hardly be sustained any longer as the theory. I therefore simply ask, is it fair that the mandatory life prisoner should be wholly deprived of the information which all other prisoners receive as a matter of course. I am clearly of the opinion that it is not.

My Lords, I can moreover arrive at the same conclusion by a different and more familiar route, of which *Ex parte Cunningham* [1991] 4 All E.R. 310 provides a recent example. It is not, as I understand it, questioned that the decision of the Home Secretary on the penal element is susceptible to judicial review. To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray. I think it important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed. If there is any difference between the penal element recommended by the judges and actually imposed by the Home Secretary, this reasoning is bound to include, either explicitly or implicitly, a reason why the Home Secretary has taken a different view.

---------- ***[1994] 1 A.C. 531 at 566***

Accordingly, I consider that the respondents are entitled to an affirmative answer on the third issue.

It remains to comment briefly on the decision of the Court of Appeal in *Payne v. Lord Harris of Greenwich* [1981] 1 W.L.R. 754, on the duties of disclosure in relation to the recommendations of the Parole Board. In practical terms this is obsolete, having been overtaken by the changes in law and practice of recent years. The decision is also distinguishable, since it was not, and could not have been, concerned with the penal element. Nevertheless, the reasoning remains intact. With proper respect, I would depart from it for three reasons. First, and most important, because the case was decided before the Home Secretary created a wholly new explanation of the life sentence. The traditional theory, exemplified in the passage already quoted from the judgment of Shaw L.J., no longer corresponds with the practice. Second, because even in such a short time as 13 years the perception of society's obligation towards persons serving prison sentences has perceptibly changed. Finally, because of the continuing momentum in administrative law towards openness of decision-making. Sound as it may well have been at the time, the reasoning of *Payne v. Lord Harris of Greenwich* cannot be sustained today.

Before leaving this question, I wish to make it absolutely clear that if your Lordships are in agreement with this conclusion this will not be a signal for a flood of successful applications for judicial review. I repeat for the last time that Parliament has left the discretion on release with the Home Secretary, and that he has done nothing to yield it up. So long as this remains the case, prisoners should not deceive themselves into believing that they can obtain leave to move for judicial review simply by pointing to a difference between the opinion of the judges and the decision of the Home Secretary. Only if it can be shown that the decision may have been arrived at through a faulty process, in one of the ways now so familiar to practitioners of judicial review, will they have any serious prospect of persuading the court to grant relief.

V. Issue (5): discretion

On this I have little to add to the judgment of Staughton L.J., the reasoning of which I adopt. That the question whether statutory discretion is capable of delegation, and if so to what degree, principally depends upon the interpretation of the statute is beyond question. Whether there is another constraint as regards the degree of delegation, in the shape of a possible exposure to attack on the ground of irrationality, as suggested by the Court of Appeal in *Reg. v. Secretary of State for the Home Department, Ex parte Oladehinde* [1991] 1 A.C. 254 need not be examined here, since it is obvious that if delegation is possible at all, the power to fix the penal element can properly be entrusted to a junior minister. On the question whether the statute contemplates that the Home Secretary, with all his multifarious public duties, is required to exercise his particular discretion personally in every case, I agree with the reasons given by Staughton L.J., and wish to add nothing.

There is one further point. The statutory powers and the administrative regime contemplate that the Lord Chief Justice as well as the Home Secretary has a part to play. It may safely be assumed that in the past

---------- ***[1994] 1 A.C. 531 at 567***

the Lord Chief Justice has always considered that he is obliged to act in person. It might be asked why the position of the Home Secretary should be different. In my judgment this argument is out of place. Throughout the statute book there are innumerable instances where powers are conferred on a minister, and where it is perfectly obvious that Parliament contemplated a delegation. By contrast, there are very few instances in which a statute, or delegated legislation, refers to the Lord Chief Justice and in these instances it is equally obvious that the office-holder alone is to act. The two terms are therefore drawn from quite different vocabularies, and I find nothing inconsistent in holding that the one office-holder may delegate, whereas the other may not.

VI. Issue (6): Mr. Pegg's special question

Mr. Pegg pursues through counsel an appeal advanced on very narrow grounds particular to his own case. It involves no question of general principle and is therefore inapt for decision by this House. I will only say that on the material presently before the House I can see no ground for holding either that the Home Secretary misdirected himself as to the nature and purpose of the representations made to him on behalf of Mr. Pegg, or that his decision not to accede to them was irrational. Whether when Mr. Pegg obtains the reasons for the Home Secretary's decision in

fixing and maintaining the tariff at the level which he did he may appear to have some ground for complaint which might call for the intervention of the court is not a matter on which your Lordships can at present express any opinion.

My Lords, as will have appeared I have adopted an approach to the problems of this case rather wider than the issues identified for argument, and set out above, would suggest. Logically, this should lead to declarations expressed in equally broad terms. The respondents have not however sought relief in such terms, and I suggest it would be inappropriate for your Lordships now to make orders which have never been claimed. Accordingly, I propose that your Lordships should simply uphold the two declarations already made by the Court of Appeal and add a third, to reflect the decision in favour of the respondents on the third issue. This will result in an order in the following form:

It is declared that:

1. The Secretary of State is required to afford to a prisoner serving a mandatory life sentence the opportunity to submit in writing representations as to the period he should serve for the purposes of retribution and deterrence before the Secretary of State sets the date of the first review of the prisoner's sentence.

2. Before giving the prisoner the opportunity to make such representations, the Secretary of State is required to inform him of the period recommended by the judiciary as the period he should serve for the purposes of retribution and deterrence, and of any other opinion expressed by the judiciary which is relevant to the Secretary of State's decision as to the appropriate period to be served for these purposes.

---------- ***[1994] 1 A.C. 531 at 568***

3. The Secretary of State is obliged to give reasons for departing from the period recommended by the judiciary as the period which he should serve for the purposes of retribution and deterrence.

It is however imperative that these declarations should be read in the context of the reasons for them which I have endeavoured to express.

Appeal dismissed.

Cross-appeal allowed in part.

Orders for legal aid taxation.

Solicitors: Treasury Solicitor; Birnberg & Co.; Bindman & Partners; Graham Withers & Co., Shrewsbury; Cartwrights Adams & Black, Cardiff.

J. A. G.

End of Document