[2001] UKHL 26

HOUSE OF LORDS

Lord Bingham of Cornhill

Lord Steyn

Lord Cooke of Thorndon

Lord Hutton

Lord Scott of Foscote

Regina
and
Secretary of **State** for the **Home Department,** Ex Parte Daly

Session 2000-01

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

IN THE CAUSE

LORD BINGHAM OF CORNHILL
My Lords,

On 31 May 1995 the **Home Secretary** introduced a new policy ("the policy") governing the searching of cells occupied by convicted and remand prisoners in closed prisons in England and Wales. The policy was expressed in the Security Manual as an instruction to prison governors in these terms:

> "17.69 Staff must accompany all searches of living accommodation in closed prisons with a strip search of the resident prisoner.
>
> .70 Staff must not allow any prisoner to be present during a search of living accommodation (although this does not apply to accommodation fabric checks).
>
> .71 Staff must inform the prisoner as soon as practicable whenever objects or containers are removed from living accommodation for searching, and will be missing from the accommodation on the prisoner's return.
>
> .72 Subject to paragraph 17.73, staff may normally read legal correspondence only if the Governor has reasonable cause to suspect that their contents endanger prison security, or the safety of others, or are otherwise of a criminal nature. In this case the prisoner

involved shall be given the opportunity to be present and informed that their correspondence is to be read.

.73 But during a cell search staff must examine legal correspondence thoroughly in the absence of the prisoner. Staff must examine the correspondence only so far as necessary to ensure that it is bona fide correspondence between the prisoner and a legal adviser and does not conceal anything else.

.74 When entering cells at other times (eg when undertaking accommodation fabric checks) staff must take care not to read legal correspondence belonging to prisoners unless the Governor has decided that the reasonable cause test in 17.72 applies."

Mr Daly is a long term prisoner. He challenges the lawfulness of the policy. He submits that section 47(1) of the Prison Act 1952, which empowers the **Secretary** of **State** to make rules for the regulation of prisons and for the discipline and control of prisoners, does not authorise the laying down and implementation of such a policy. But on this appeal to the House Mr Daly confines his challenge to a single aspect of the policy: the requirement that a prisoner may not be present when his legally privileged correspondence is examined by prison officers. He contends that a blanket policy of requiring the absence of prisoners when their legally privileged correspondence is examined infringes, to an unnecessary and impermissible extent, a basic right recognised both at common law and under the European Convention for the Protection of Human Rights and Fundamental Freedoms, and that the general terms of section 47 authorise no such infringement, either expressly or impliedly.

The origin of the policy

On 9 September 1994 six category A prisoners, classified as presenting an exceptional risk, escaped from the Special Security Unit at HMP Whitemoor. An inquiry led by Sir John Woodcock, formerly HM Chief Inspector of Constabulary, was at once set up. The report of the inquiry, presented to Parliament in December 1994 (Cm 2741), revealed extensive mismanagement and malpractice at Whitemoor. The escape had been possible only because prisoners had been able, undetected, to gather a mass of illicit property and equipment. This in turn had been possible because prisoners' cells and other areas had not been thoroughly searched at frequent but irregular intervals, partly because officers seeking to make such searches had been intimidated and obstructed by prisoners, partly because relations between officers and prisoners had in some instances become unacceptably familiar so that staff had been manipulated or "conditioned" into being less vigilant than they should have been in security matters.

In its report the inquiry team made a number of recommendations. One of these was that cells and property should be searched at frequent but irregular intervals. Following a strip search, each prisoner was to be excluded from his cell during the search, to avoid intimidation. The inquiry team gave no consideration at any stage to legal professional privilege or confidentiality. The policy was introduced to give effect to the inquiry team's recommendation on searching of cells.

The legal background

Any custodial order inevitably curtails the enjoyment, by the person confined, of rights enjoyed by other citizens. He cannot move freely and choose his associates as they are entitled to do. It is indeed an important objective of such an order to curtail such rights, whether to punish him or to

protect other members of the public or both. But the order does not wholly deprive the person confined of all rights enjoyed by other citizens. Some rights, perhaps in an attenuated or qualified form, survive the making of the order. And it may well be that the importance of such surviving rights is enhanced by the loss or partial loss of other rights. Among the rights which, in part at least, survive are three important rights, closely related but free standing, each of them calling for appropriate legal protection: the right of access to a court; the right of access to legal advice; and the right to communicate confidentially with a legal adviser under the seal of legal professional privilege. Such rights may be curtailed only by clear and express words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment.

These propositions rest on a solid base of recent authority. In *R v Board of Visitors of Hull Prison, Ex p St Germain* [1979] QB 425, 455 Shaw LJ made plain that

> "despite the deprivation of his general liberty, a prisoner remains invested with residuary rights appertaining to the nature and conduct of his incarceration ... An essential characteristic of the right of a subject is that it carries with it a right of recourse to the courts unless some statute decrees otherwise."

Raymond v Honey [1983] 1 AC 1 arose from the action of a prison governor who blocked a prisoner's application to a court. The House of Lords affirmed, at p 10, that

> "under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication ..."

Section 47 was held to be quite insufficient to authorise hindrance or interference with so basic a right as that of access to a court. To the extent that rules were made fettering a prisoner's right of access to the courts and in particular his right to institute proceedings in person they were ultra vires.

In *R v* ***Secretary*** *of* ***State*** *for the* ***Home Department,*** *Ex p Anderson* [1984] QB 778 the prisoner's challenge was directed to a standing order which restricted visits by a legal adviser to a prisoner contemplating proceedings concerning his treatment in prison when he had not at the same time made any complaint to the prison authorities internally. Reiterating the principle that a prisoner remains invested with all civil rights which are not taken away expressly or by necessary implication, Robert Goff LJ, giving the judgment of the Queen's Bench Divisional Court, said, at p 790:

> "At the forefront of those civil rights is the right of unimpeded access to the courts; and the right of access to a solicitor to obtain advice and assistance with regard to the initiation of civil proceedings is inseparable from the right of access to the courts themselves."

The standing order in question was held to be ultra vires. At pp 793-794 the court observed:

> "As it seems to us, a requirement that an inmate should make ... a complaint as a prerequisite of his having access to his solicitor, however desirable it may be in the interests of good administration, goes beyond the regulation of the circumstances in which such access may take place, and does indeed constitute an impediment to his right of access to the civil court."

Campbell v United Kingdom (1992) 15 EHRR 137 concerned the compatibility with the European Convention of rule 74(4) of the Prison (Scotland) Rules 1952 (SI 1952/565) which provided

that "every letter to or from a prisoner shall be read by the Governor ... and it shall be within the discretion of the Governor to stop any letter if he considers that the contents are objectionable." This rule had earlier been upheld as valid by the Court of Session: *Leech v* ***Secretary*** *of* ***State*** *for Scotland*, 1991 SLT 910. The European Court held that the interference with the applicant's correspondence violated article 8 of the Convention. At p 161, para 48 of its judgment, the court said:

> "Admittedly, as the Government pointed out, the borderline between mail concerning contemplated litigation and that of a general nature is especially difficult to draw and correspondence with a lawyer may concern matters which have little or nothing to do with litigation. Nevertheless, the Court sees no reason to distinguish between the different categories of correspondence with lawyers which, whatever their purpose, concern matters of a private and confidential character. In principle, such letters are privileged under Article 8.
>
> This means that the prison authorities may open a letter from a lawyer to a prisoner when they have reasonable cause to believe that it contains an illicit enclosure which the normal means of detection have failed to disclose. The letter should, however, only be opened and should not be read. Suitable guarantees preventing the reading of the letter should be provided, eg opening the letter in the presence of the prisoner. The reading of a prisoner's mail to and from a lawyer, on the other hand, should only be permitted in exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature. What may be regarded as 'reasonable cause' will depend on all the circumstances but it presupposes the existence of facts or information which would satisfy an objective observer that the privileged channel of communication was being abused."

That decision was applied in *R v* ***Secretary*** *of* ***State*** *for the* ***Home Department***, *Ex p Leech* [1994] QB 198. This case concerned rule 33(3) of the Prison Rules 1964 (SI 1964/388), which was in terms similar, although not identical, to rule 74(4) of the Scottish Rules. The decision is important for several reasons. First, it re-**state**d the principles that every citizen has a right of unimpeded access to the court, that a prisoner's unimpeded access to a solicitor for the purpose of receiving advice and assistance in connection with a possible institution of proceedings in the courts forms an inseparable part of the right of access to the courts themselves and that section 47(1) of the 1952 Act did not authorise the making of any rule which created an impediment to the free flow of communication between a solicitor and a client about contemplated legal proceedings. Legal professional privilege was described as an important auxiliary principle serving to buttress the cardinal principles of unimpeded access to the court and to legal advice. Secondly, it was accepted that section 47(1) did not expressly authorise the making of a rule such as rule 33(3), and the court observed, at p 212, that a fundamental right such as the common law right to legal professional privilege would very rarely be held to be abolished by necessary implication. But the court accepted that section 47(1) should be interpreted as conferring power to make rules for the purpose of preventing escapes from prison, maintaining order in prisons, detecting and preventing offences against the criminal law and safeguarding national security. Rules could properly be made to permit the examining and reading of correspondence passing between a prisoner and his solicitor in order to ascertain whether it was in truth bona fide correspondence and to permit the stopping of letters which failed such scrutiny. The crucial question was whether rule 33(3) was drawn in terms wider than necessary to meet the legitimate objectives of such a rule. As it was put, at p 212:

> "The question is whether there is a self-evident and pressing need for an unrestricted power to read letters between a prisoner and a solicitor and a power to stop such letters on the ground of prolixity and objectionability."

The court concluded that there was nothing which established objectively that there was a need in the interests of the proper regulation of prisons for a rule of the width of rule 33(3). While section 47(1) of the 1952 Act by necessary implication authorised some screening of correspondence between a prisoner and a solicitor, such intrusion had to be the minimum necessary to ensure that the correspondence was in truth bona fide legal correspondence: since rule 33(3) created a substantial impediment to exercise by the prisoner of his right to communicate in confidence with his solicitor the rule was drawn in terms which were needlessly wide, and so was held to be ultra vires.

In the light of the decisions in Campbell and Leech, a new prison rule was made, now rule 39 of the Prison Rules 1999 (SI 1999/728). It provides, so far as material:

> "(1) A prisoner may correspond with his legal adviser and any court and such correspondence may only be opened, read or stopped by the governor in accordance with the provisions of this rule.
>
> "(2) Correspondence to which this rule applies may be opened if the governor has reasonable cause to believe that it contains an illicit enclosure and any such enclosures shall be dealt with in accordance with the other provision of these Rules.
>
> "(3) Correspondence to which this rule applies may be opened, read and stopped if the governor has reasonable cause to believe its contents endanger prison security or the safety of others or are otherwise of a criminal nature.
>
> "(4) A prisoner shall be given the opportunity to be present when any correspondence to which this rule applies is opened and shall be informed if it or any enclosure is to be read or stopped."

This rule, it is accepted, applies only to correspondence in transit from prisoner to solicitor or vice versa. The references to opening and stopping make plain that it has no application to legal correspondence or copy correspondence received or made by a prisoner and kept by him in his cell.

The Court of Appeal decision in Leech was endorsed and approved by the House of Lords in *R v* ***Secretary*** *of* ***State*** *for the* ***Home Department,*** *Ex p Simms* [2000] 2 AC 115, which arose from a prohibition on visits to serving prisoners by journalists seeking to investigate whether the prisoners had, as they claimed, been wrongly convicted, save on terms which precluded the journalists from making professional use of the material obtained during such visits. The House considered whether the **Home Secretary**'s evidence showed a pressing need for a measure which restricted prisoners' attempts to gain access to justice, and found none. The more substantial the interference with fundamental rights, the more the court would require by way of justification before it could be satisfied that the interference was reasonable in a public law sense. In this as in other cases there was applied the principle succinctly **state**d by Lord Browne-Wilkinson in *R v* ***Secretary*** *of* ***State*** *for the* ***Home Department,*** *Ex p Pierson* [1998] AC 539, 575:

> "From these authorities I think the following proposition is established. A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic

> principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament."

The argument

The ambit of the present argument is very narrow. In the face of a compelling statement by Mr Narey, the Director General of HM Prison Service, Mr Daly accepts the need for random searches of prisoners' cells for the purpose of security, preventing crime and maintaining order and discipline. He accepts that such searches may properly be carried out in the absence of the resident prisoner. He accepts the need for prison officers to examine legal correspondence held by prisoners in their cells to make sure that it is bona fide legal correspondence and that such correspondence is not used as a convenient hiding place to secrete drugs or illicit materials of any kind, or to keep escape plans or any records of illegal activity. Thus he does not claim that privileged legal correspondence is immune from all examination. He contends only that such examination should ordinarily take place in the presence of the prisoner whose correspondence it is.

The Home Secretary for his part accepts that prison officers may not read a prisoner's privileged legal correspondence during a cell search carried out in the absence of the prisoner. But he relies on the statement of Mr Narey, who regards the right to examine such correspondence as necessary and regards the absence of the prisoner during the examination as a necessary feature of the policy. Mr Narey states:

> "The aim of the search procedure is to prevent the concealment of material likely to endanger prison security, or the safety of others or which would contribute to criminal activity within the prison. These searches must be carried out in the absence of the prisoner in order to discourage prisoners from using intimidatory or conditioning tactics to prevent officers carrying out a full search of possessions. By 'conditioning tactics' I mean action by which prisoners seek to influence the future behaviour of prison officers. For example, a prisoner might create a scene whenever a particular item was searched, intending to cause prison officers not to search it in future on the ground that searching it was more trouble than it was worth. The policy also prevents prisoners from becoming familiar with searching techniques generally and those of individual officers."

Mr Narey goes on to state that alternative procedures have been considered within the prison service and rejected and states:

> "The difficulty is that the prisoner's presence would compromise the policy's aims of preventing prisoners from intimidating or conditioning officers and from gaining familiarity with general and individual search techniques."

He goes on to say:

> "The respondent [Secretary of State], the Prison Service and its staff, are mindful that the distinction between the examination of legal documents to confirm that they are bona fide and do not conceal anything illicit and the reading of legal documents (which current instructions expressly preclude other than by authority of a governor acting on received intelligence), is a fine one. However, anything of an illicit nature such as records of key codes or drug dealing can with ease be disguised as brief notations on what in every other respect is a legitimate legal document. It is the considered opinion of the respondent, of the Prison Service generally, and my own view, that the unreliability of current

> intelligence systems in prisons makes it unavoidable that we maintain the current position in an effort to deter concealments of this nature and the resultant threat to security and good order and discipline."

A record of illicit property found during cell searches year by year since 1993, appended to Mr Narey's statement, shows that the number of finds per year has very greatly increased since 1995, although the number of items which could be concealed in legal correspondence is relatively very small.

It is necessary, first, to ask whether the policy infringes in a significant way Mr Daly's common law right that the confidentiality of privileged legal correspondence be maintained. He submits that it does for two related reasons: first, because knowledge that such correspondence may be looked at by prison officers in the absence of the prisoner inhibits the prisoner's willingness to communicate with his legal adviser in terms of unreserved candour; and secondly, because there must be a risk, if the prisoner is not present, that the officers will stray beyond their limited role in examining legal correspondence, particularly if, for instance, they see some name or reference familiar to them, as would be the case if the prisoner were bringing or contemplating bringing proceedings against officers in the prison. For the Home Secretary it is argued that the policy involves no infringement of a prisoner's common law right since his privileged correspondence is not read in his absence but only examined.

I have no doubt that the policy infringes Mr Daly's common law right to legal professional privilege. This was the view of two very experienced judges in *R v Governor of Whitemoor Prison, Ex p Main* [1999] QB 349, against which decision the present appeal is effectively brought. At p 366 Kennedy LJ said:

> "In my judgment legal professional privilege does attach to correspondence with legal advisers which is stored by a prisoner in his cell, and accordingly such correspondence is to be protected from any unnecessary interference by prison staff. Even if the correspondence is only inspected to see that it is what it purports to be that is likely to impair the free flow of communication between a convicted or remand prisoner on the one hand and his legal adviser on the other, and therefore it constitutes an impairment of the privilege."

Judge LJ was of the same opinion. At p 373, he said:

> "Prisoners whose cells are searched in their absence will find it difficult to believe that their correspondence has been searched but not read. The governor's order will sometimes be disobeyed. Accordingly I am prepared to accept the potential 'chilling effect' of such searches."

In an imperfect world there will necessarily be occasions when prison officers will do more than merely examine prisoners' legal documents, and apprehension that they may do so is bound to inhibit a prisoner's willingness to communicate freely with his legal adviser.

The next question is whether there can be any ground for infringing in any way a prisoner's right to maintain the confidentiality of his privileged legal correspondence. Plainly there can. Some examination may well be necessary to establish that privileged legal correspondence is what it appears to be and is not a hiding place for illicit materials or information prejudicial to security or good order.

It is then necessary to ask whether, to the extent that it infringes a prisoner's common law right to privilege, the policy can be justified as a necessary and proper response to the acknowledged need to maintain security, order and discipline in prisons and to prevent crime. Mr Daly's challenge at this point is directed to the blanket nature of the policy, applicable as it is to all prisoners of whatever category in all closed prisons in England and Wales, irrespective of a prisoner's past or present conduct and of any operational emergency or urgent intelligence. The Home Secretary's justification rests firmly on the points already mentioned: the risk of intimidation, the risk that staff may be conditioned by prisoners to relax security and the danger of disclosing searching methods.

In considering these justifications, based as they are on the extensive experience of the prison service, it must be recognised that the prison population includes a core of dangerous, disruptive and manipulative prisoners, hostile to authority and ready to exploit for their own advantage any concession granted to them. Any search policy must accommodate this inescapable fact. I cannot however accept that the reasons put forward justify the policy in its present blanket form. Any prisoner who attempts to intimidate or disrupt a search of his cell, or whose past conduct shows that he is likely to do so, may properly be excluded even while his privileged correspondence is examined so as to ensure the efficacy of the search, but no justification is shown for routinely excluding all prisoners, whether intimidatory or disruptive or not, while that part of the search is conducted. Save in the extraordinary conditions prevailing at Whitemoor before September 1994, it is hard to regard the conditioning of staff as a problem which could not be met by employing dedicated search teams. It is not suggested that prison officers when examining legal correspondence employ any sophisticated technique which would be revealed to the prisoner if he were present, although he might no doubt be encouraged to secrete illicit materials among his legal papers if the examination were obviously very cursory. The policy cannot in my opinion be justified in its present blanket form. The infringement of prisoners' rights to maintain the confidentiality of their privileged legal correspondence is greater than is shown to be necessary to serve the legitimate public objectives already identified. I accept Mr Daly's submission on this point.

I am fortified in reaching this view by four considerations, all of some importance in my opinion:

(1) Following a complaint to him about the policy by a prisoner other than Mr Daly in November 1995, the Prisons Ombudsman carried out a full inquiry and reported in November 1996. In his report the Ombudsman said:

> "I entirely support the main thrust of Woodcock's recommendations regarding cell searching. It is apparent that prisoner intimidation was precluding the effective searching of prisoner accommodation in many establishments, and that this searching, which is essential for the safety and security of both staff and prisoners, is carried out far more effectively when the prisoner is absent. This procedure has also been assisted by the introduction of the volumetric control of prisoners' in-possession property. However, the legal privilege which must protect the confidentiality of correspondence between a solicitor and his client is too important to be sacrificed for the sake of expediency; whilst it would undoubtedly be easier for staff to search a prisoner's legal documents in his absence, this allows legal privilege to be compromised to an unacceptable degree.
>
> "It is clear that, in complaining about the Prison Service's cell searching policy, [the prisoner] has raised a matter which has far-reaching consequences. I believe that his complaint is a valid one and that, in searching prisoners' legal papers in their absence, the Prison Service is compromising the legal privilege which ensures that correspondence between a solicitor and his client will remain confidential. I therefore uphold [the prisoner's] complaint. Security Group has previously drafted a revised version of section

> 68.3 of the Security Manual. This revised version allows the prisoner to remain in the cell while his legal documents are being searched, after which the documents are sealed in a box or bag, thus avoiding any possible compromise of legal privilege. I consider that the Security Manual should be amended to incorporate this revised method of cell searching."

(2) The Ombudsman's investigations revealed that, following a complaint by a prisoner confined in HMP Full Sutton, a procedure had been developed in that prison to meet the wishes of prisoners who objected to the searching of their legal documents in their absence. The procedure was that

> "if the prisoner objects to his legal documents being searched in his absence DST [dedicated search team] staff place the documents in a bag, seal the bag using a numbered reception seal and give the prisoner a copy of the seal number. The bag is left in the prisoner's cell while the search is being carried out. When the prisoner returns, he checks the seal on the bag to ensure that it has not been tampered with and the documents are searched in his presence."

It does not appear that this procedure gave rise to difficulty in practice.

(3) The current standing order covering cell searches in Scotland provides that

> "When a cell is searched, this should be done by at least two officers, in the prisoner's presence."

It is pointed out that the prison population in Scotland is small compared with that of England and Wales, there are very few high risk prisoners and escape is rare. No doubt the problem of control is less acute in Scotland than in England and Wales. But the Scottish experience does suggest that a policy which generally permits a prisoner to be present during the examination of his privileged legal correspondence, unless there are, or are reasonably believed to be, good reasons for excluding him, is not unworkable in practice.

(4) While cell searches in recent years have led to the finding of very many more items of illicit property than in earlier years, only two such items have been identified as having been found among legal documents and the great majority of items found could not have been concealed in that way. It does not appear that legal files or bundles have been regarded by prisoners as a highly favoured hiding place for materials they are not permitted to hold.

In Ex p Main [1999] QB 349 and again in the present case, the Court of Appeal held that the policy represented the minimum intrusion into the rights of prisoners consistent with the need to maintain security, order and discipline in prisons. That is a conclusion which I respect but cannot share. In my opinion the policy provides for a degree of intrusion into the privileged legal correspondence of prisoners which is greater than is justified by the objectives the policy is intended to serve, and so violates the common law rights of prisoners. Section 47(1) of the 1952 Act does not authorise such excessive intrusion, and the Home Secretary accordingly had no power to lay down or implement the policy in its present form. I would accordingly declare paragraphs 17.69 to 17.74 of the Security Manual to be unlawful and void in so far as they provide that prisoners must always be absent when privileged legal correspondence held by them in their cells is examined by prison officers.

Although, in response to a request by the House during argument, counsel for Mr Daly proffered a draft rule which might be adopted to govern the searching of privileged legal correspondence, it would be inappropriate for the House to attempt to formulate or approve the terms of such a rule,

which would call for careful consideration and consultation before it was finalised. It is enough to indicate that any rule should provide for a general right for prisoners to be present when privileged legal correspondence is examined, and in practice this will probably mean any legal documentation to avoid time-wasting debate about which documents are privileged and which are not. But the rule must provide for the exclusion of the prisoner while the examination takes place if there is or is reasonably believed to be good cause for excluding him to safeguard the efficacy of the search, and the rule must permit the prison authorities to respond to sudden operational emergencies or urgent intelligence.

I have reached the conclusions so far expressed on an orthodox application of common law principles derived from the authorities and an orthodox domestic approach to judicial review. But the same result is achieved by reliance on the European Convention. Article 8.1 gives Mr Daly a right to respect for his correspondence. While interference with that right by a public authority may be permitted if in accordance with the law and necessary in a democratic society in the interests of national security, public safety, the prevention of disorder or crime or for protection of the rights and freedoms of others, the policy interferes with Mr Daly's exercise of his right under article 8.1 to an extent much greater than necessity requires. In this instance, therefore, the common law and the convention yield the same result. But this need not always be so. In *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, the European Court held that the orthodox domestic approach of the English courts had not given the applicants an effective remedy for the breach of their rights under article 8 of the convention because the threshold of review had been set too high. Now, following the incorporation of the convention by the Human Rights Act 1998 and the bringing of that Act fully into force, domestic courts must themselves form a judgment whether a convention right has been breached (conducting such inquiry as is necessary to form that judgment) and, so far as permissible under the Act, grant an effective remedy. On this aspect of the case, I agree with and adopt the observations of my noble and learned friend Lord Steyn which I have had the opportunity of reading in draft.

LORD STEYN
My Lords,

I am in complete agreement with the reasons given by Lord Bingham of Cornhill in his speech. For the reasons he gives I would also allow the appeal. Except on one narrow but important point I have nothing to add.

There was written and oral argument on the question whether certain observations of Lord Phillips of Worth Matravers MR in *R (Mahmood) v Secretary of State for the Home* Department [2001] 1 WLR 840 were correct. The context was an immigration case involving a decision of the Secretary of State made before the Human Rights Act 1998 came into effect. The Master of the Rolls nevertheless approached the case as if the Act had been in force when the Secretary of State reached his decision. He explained the new approach to be adopted. The Master of the Rolls concluded, at p 857, para 40:

> "When anxiously scrutinising an executive decision that interferes with human rights, the court will ask the question, applying an objective test, whether the decision-maker could reasonably have concluded that the interference was necessary to achieve one or more of the legitimate aims recognised by the Convention. When considering the test of necessity in the relevant context, the court must take into account the European jurisprudence in accordance with section 2 of the 1998 Act."

These observations have been followed by the Court of Appeal in *R v Secretary of State for the Home Department, Ex p Isiko* (unreported), 20 December 2000 and by Thomas J in *R v Secretary of State for the Home Department, Ex p Samaroo* (unreported), 20 December 2000.

The explanation of the Master of the Rolls in the first sentence of the cited passage requires clarification. It is couched in language reminiscent of the traditional Wednesbury ground of review (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223), and in particular the adaptation of that test in terms of heightened scrutiny in cases involving fundamental rights as formulated in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554E-G per Sir Thomas Bingham MR. There is a material difference between the Wednesbury and Smith grounds of review and the approach of proportionality applicable in respect of review where convention rights are at stake.

The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 the Privy Council adopted a three stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:

> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases? Academic public lawyers have in remarkably similar terms elucidated the difference between the traditional grounds of review and the proportionality approach: see Professor Jeffrey Jowell QC, "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] PL 671; Craig, Administrative Law, 4th ed (1999), 561-563; Professor David Feldman, "Proportionality and the Human Rights Act 1998", essay in The Principle of Proportionality in the Laws of Europe (1999), pp 117, 127 et seq. The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights. It will be recalled that in Smith the Court of Appeal reluctantly felt compelled to reject a limitation on homosexuals in the army. The challenge based on article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the right to respect for private and family life) foundered on the threshold required even by the anxious scrutiny test. The European Court of Human Rights came to the opposite conclusion: *Smith and Grady v United Kingdom* (1999) 29 EHRR 493. The court concluded, at p 543, para 138:

> "the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and

> public order aims pursued, principles which lie at the heart of the court's analysis of complaints under article 8 of the Convention."

In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.

The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review. On the contrary, as Professor Jowell [2000] PL 671, 681 has pointed out the respective roles of judges and administrators are fundamentally distinct and will remain so. To this extent the general tenor of the observations in Mahmood [2001] 1 WLR 840 are correct. And Laws LJ rightly emphasised in Mahmood, at p 847, para 18, "that the intensity of review in a public law case will depend on the subject matter in hand". That is so even in cases involving Convention rights. In law context is everything.

LORD COOKE OF THORNDON
My Lords,

Having had the advantage of reading in draft the speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Steyn, I am in full agreement with them. I add some brief observations on two matters, less to supplement what they have said than to underline its importance.

First, while this case has arisen in a jurisdiction where the European Convention for the Protection of Human Rights and Fundamental Freedoms applies, and while the case is one in which the Convention and the common law produce the same result, it is of great importance, in my opinion, that the common law by itself is being recognised as a sufficient source of the fundamental right to confidential communication with a legal adviser for the purpose of obtaining legal advice. Thus the decision may prove to be in point in common law jurisdictions not affected by the Convention. Rights similar to those in the Convention are of course to be found in constitutional documents and other formal affirmations of rights elsewhere. The truth is, I think, that some rights are inherent and fundamental to democratic civilised society. Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them.

To essay any list of these fundamental, perhaps ultimately universal, rights is far beyond anything required for the purpose of deciding the present case. It is enough to take the three identified by Lord Bingham: in his words, access to a court; access to legal advice; and the right to communicate confidentially with a legal adviser under the seal of legal professional privilege. As he says authoritatively from the woolsack, such rights may be curtailed only by clear and express words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment. The point that I am emphasising is that the common law goes so deep.

The other matter concerns degrees of judicial review. Lord Steyn illuminates the distinctions between "traditional" (that is to say in terms of English case law, Wednesbury) standards of judicial review and higher standards under the European Convention or the common law of human rights. As he indicates, often the results are the same. But the view that the standards are substantially the same appears to have received its quietus in *Smith and Grady v United*

Kingdom (1999) 29 EHRR 493 and *Lustig-Prean and Beckett v United Kingdom* (1999) 29 EHRR 548. And I think that the day will come when it will be more widely recognised that *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 was an unfortunately retrogressive decision in English administrative law, insofar as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd.

I, too, would therefore allow the present appeal.

LORD HUTTON
My Lords,

I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Steyn. I am in full agreement with the speech of Lord Bingham of Cornhill and for the reasons which he gives I would also allow this appeal.

I am also in agreement with the general observations made by Lord Steyn on *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840.

LORD SCOTT OF FOSCOTE
My Lords,

I have had the advantage of reading in draft the opinion prepared by my noble and learned friend, Lord Bingham of Cornhill. I am in complete agreement with the reasons he has given for allowing the appeal.

I am also in agreement with the remarks made by my noble and learned friend, Lord Steyn about *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840. I, too, would allow the appeal