A House of Lords

Regina (Anderson) *v* Secretary of State for the Home Department

[2002] UKHL 46

B On appeal from

Regina (Anderson) *v* Secretary of State for the Home Department

Regina (Taylor) *v* Secretary of State for the Home Department

C [2001] EWCA Civ 1698

2001 Oct 29, 30; Nov 13 — Lord Woolf CJ, Simon Brown and Buxton LJJ

2002 Oct 21, 22, 23; Nov 25 — Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, D Lord Steyn, Lord Hutton, Lord Hobhouse of Woodborough, Lord Scott of Foscote and Lord Rodger of Earlsferry

Prisons — Prisoners' rights — Release on licence — Mandatory life sentence prisoners — Statutory provision enabling Secretary of State to fix tariff period to be served — Whether sentencing exercise — Whether provision incompatible with right to hearing by independent and impartial tribunal — Murder (Abolition of Death Penalty) Act 1965 (c 71), s 1(1) — Crime (Sentences) Act 1997 (c 43), E *s 29 — Human Rights Act 1998 (c 42), ss 3(1), 4, Sch 1, Pt I, art 6(1)*

The claimant had been convicted of two murders for which he received mandatory life sentences under section 1(1) of the Murder (Abolition of Death Penalty) Act 1965. By his stated practice, adopted pursuant to his power to control the release of such prisoners under section 29 of the Crime (Sentences) Act 1997[1], the Secretary of State received advice from the trial judge, the Lord Chief Justice and F departmental officials prior to deciding the appropriate tariff to be served by the prisoner as the minimum period necessary to satisfy the requirements of retribution and deterrence before consideration would be given to any question of his release on licence. In fixing the claimant's tariff the Secretary of State set a longer period than that recommended by the judiciary. The claimant challenged his decision by way of judicial review on the grounds, inter alia, that in fixing the tariff the Secretary of State, as a member of the executive, had acted incompatibly with the claimant's right G to a fair hearing by an independent and impartial tribunal under article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1998[2], and that his tariff should be determined judicially as in the cases of prisoners sentenced to discretionary life sentences or detained, as juvenile murderers, during Her Majesty's pleasure. The Divisional Court dismissed his application and on his appeal the Court of Appeal concluded that, since Parliament had deliberately chosen not to interfere with the Secretary of H State's discretion to fix the tariff in the case of a mandatory life prisoner while having done so in respect of other categories of life sentence prisoners, and since the jurisprudence of the European Court of Human Rights had recognised a material

[1] Crime (Sentences) Act 1997, s 29: see post, p 873F–G para 6.
[2] Human Rights Act 1998, ss 3(1), 4: see post, p 894C–D, para 58.

distinction between a mandatory and a discretionary life sentence, the clearly expressed view of Parliament that the Secretary of State was entitled to fix the tariff of mandatory life sentence prisoners should prevail. The claimant's appeal was accordingly dismissed. Subsequently the European Court recognised that in established domestic law the mandatory life sentence did not, save exceptionally, impose lifelong imprisonment as punishment, the punitive element being reflected by the tariff, and that there was no material distinction between mandatory and discretionary life sentence prisoners with regard to the nature of tariff-fixing.

On the claimant's appeal—

Held, allowing the appeal in part, (1) that the nature of the procedure adopted by the Secretary of State for fixing the tariff, judged as a matter of reality rather than of form, involved his assessing the term of imprisonment a mandatory life sentence prisoner should serve as punishment for his offence and thereby defining the period to be served before licensed release would be considered; that accordingly the Secretary of State was performing a sentencing function closely resembling that regularly undertaken by the judiciary in imposing custodial sentences for other crimes; that the domestic court was obliged to take into account, although was not bound by, any decision of the European Court, but since that court's changed opinion rested on an accurate understanding of the tariff-fixing process and the Secretary of State's role, the House would give effect to its decision in ruling on the claimant's rights under article 6(1) (post, paras 13, 17–18, 32, 52, 54–55, 61, 73–78, 85–87).

(2) That, since the imposition of sentence was part of a trial for the purposes of the right to a fair hearing by an independent and impartial tribunal guaranteed by article 6(1), and since tariff fixing was legally indistinguishable from the imposition of a sentence, the tariff was required to be set by an independent and impartial tribunal; and that, since, as a member of the executive, the Secretary of State was neither independent of the executive nor a tribunal, it followed that he should play no part in fixing the claimant's tariff (post, paras 20–28, 32, 56, 78, 85–87).

(3) That, since section 29 of the 1997 Act expressed the deliberate legislative intent of entrusting decisions relating to the length of imprisonment and the release of prisoners serving mandatory life sentences to the Secretary of State, that provision could not be read and given effect, under section 3(1) of the 1998 Act, in a way which was compatible with the Convention; and that, accordingly, a declaration of incompatibility under section 4 of the Act was the only appropriate relief which was available to the claimant (post, paras 30–31, 32, 59–61, 81–87).

Decision of the Court of Appeal [2001] EWCA Civ 1698; post, p 841G et seq reversed.

The following cases are referred to in the opinions of their Lordships:

Attorney General for Australia v The Queen [1957] AC 288; [1957] 2 WLR 607; [1957] 2 All ER 45, PC
Benjamin and Wilson v United Kingdom (2002) 36 EHRR 1
Bromfield v United Kingdom (Application No 32003/96) (unreported) 1 July 1998, EComHR
Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1
Deaton v Attorney General and Revenue Comrs [1963] IR 170
Duport Steels Ltd v Sirs [1980] 1 WLR 142; [1980] 1 All ER 529, HL(E)
Eckle v Federal Republic of Germany (1982) 5 EHRR 1
Engel v The Netherlands (No 1) (1976) 1 EHRR 647
Findlay, In re [1985] AC 318; [1984] 3 WLR 1159; [1984] 3 All ER 801, HL(E)
Hinds v The Queen [1977] AC 195; [1976] 2 WLR 366; [1976] 1 All ER 353, PC
Hussain v United Kingdom (1996) 22 EHRR 1
Liyanage v The Queen [1967] 1 AC 259; [1966] 2 WLR 682; [1966] 1 All ER 650, PC
Millar v Dickson [2001] UKPC D4; [2002] 1 WLR 1615; [2002] 3 All ER 1041, PC

Nicholas v The Queen (1998) 193 CLR 173
Ong Ah Chuan v Public Prosecutor [1981] AC 648; [1980] 3 WLR 855, PC
Practice Statement (Crime: Life Sentences) [2002] 1 WLR 1789; [2002] 3 All ER 412, CA
Practice Statement (Juveniles: Murder Tariff) [2000] 1 WLR 1655; [2000] 4 All ER 831
R v Dudley and Stephens (1884) 14 QBD 273
R v Howe [1987] AC 417; [1987] 2 WLR 568; [1987] 1 All ER 771, HL(E)
R v Secretary of State for the Home Department, Ex p Doody [1994] 1 AC 531; [1993] 3 WLR 154; [1993] 3 All ER 92, HL(E)
R v Secretary of State for the Home Department, Ex p Handscomb (1987) 86 Cr App R 59, DC
R v Secretary of State for the Home Department, Ex p Hindley [1998] QB 751; [1998] 2 WLR 505, DC; [2000] QB 152; [1999] 2 WLR 1253, CA; [2001] 1 AC 410; [2000] 2 WLR 730; [2000] 2 All ER 385, HL(E)
R v Secretary of State for the Home Department, Ex p Pierson [1998] AC 539; [1997] 3 WLR 492; [1997] 3 All ER 577, HL(E)
R v Secretary of State for the Home Department, Ex p Stafford [1998] 1 WLR 503, CA; [1999] 2 AC 38; [1998] 3 WLR 372; [1998] 4 All ER 7, HL(E)
R v Secretary of State for the Home Department, Ex p Venables [1998] AC 407; [1997] 2 WLR 67; [1997] 1 All ER 327, CA; [1998] AC 407; [1997] 3 WLR 23; [1997] 3 All ER 97, HL(E)
R v Trade Practices Tribunal, Ex p Tasmanian Breweries Pty Ltd (1970) 123 CLR 361
R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23; [2001] 2 WLR 1389; [2001] 2 All ER 929, HL(E)
R (Lichniak) v Secretary of State for the Home Department [2001] EWHC Admin 294; [2002] QB 296; [2001] 3 WLR 933; [2001] 4 All ER 934, DC and CA
Raja v United Kingdom (Application No 39047/97) (unreported) 20 May 1998, EComHR
Ringeisen v Austria (No 1) (1971) 1 EHRR 455
S (Minors) (Care Order: Implementation of Care Plan), In re [2002] UKHL 10; [2002] 2 AC 291; [2002] 2 WLR 720; [2002] 2 All ER 192, HL(E)
Stafford v United Kingdom (2002) 35 EHRR 1121
Thynne, Wilson and Gunnell v United Kingdom (1990) 13 EHRR 666
Tracey, In re; Ex p Ryan (1989) 166 CLR 518
V v United Kingdom (1999) 30 EHRR 121
Van Droogenbroeck v Belgium (1982) 4 EHRR 443
Weeks v United Kingdom (1987) 10 EHRR 293
Welch v United Kingdom (1995) 20 EHRR 247
Wynne v United Kingdom (1994) 19 EHRR 333

The following additional cases were cited in argument in the House of Lords:

Browne v The Queen [2000] 1 AC 45; [1999] 3 WLR 1158, PC
Campbell and Fell v United Kingdom (1984) 7 EHRR 165
Ezeh and Connors v United Kingdom (2002) 35 EHRR 691
Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595; [2002] QB 48; [2001] 3 WLR 183; [2001] 4 All ER 604, CA
R v A (No 2) [2001] UKHL 25; [2002] 1 AC 45; [2001] 2 WLR 1546; [2001] 3 All ER 1, HL(E)
R v Secretary of State for the Home Department, Ex p McCartney The Times, 25 May 1994; Court of Appeal (Civil Division) Transcript No 667 of 1994, CA
R v Secretary of State for the Home Department, Ex p Walsh The Times, 18 December 1991, DC
R v Spear [2002] UKHL 31; [2003] 1 AC 734; [2002] 3 WLR 437; [2002] 3 All ER 1074, HL(E)

R (Bulger) v Secretary of State for the Home Department [2001] EWHC Admin 119; [2001] 3 All ER 449, DC
R (Wilkinson) v Inland Revenue Comrs [2002] EWHC 182 (Admin); [2002] STC 347
State, The v O'Brien [1973] IR 50
X v United Kingdom (1980) 24 DR 227, EComHR

The following cases are referred to in the judgments in the Court of Appeal:

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA
Customs and Excise Comrs v ApS Samex [1983] 1 All ER 1042
Hussain v United Kingdom (1996) 22 EHRR 1
Kaya v Haringey London Borough Council [2001] EWCA Civ 677; The Times, 14 June 2001, CA
R v Secretary of State for the Home Department, Ex p Doody [1994] 1 AC 531; [1993] 3 WLR 154; [1993] 3 All ER 92, HL(E)
R v Secretary of State for the Home Department, Ex p Handscomb (1987) 86 Cr App R 59, DC
R v Secretary of State for the Home Department, Ex p Hindley [2001] 1 AC 410; [2000] 2 WLR 730; [2000] 2 All ER 385, HL(E)
R v Secretary of State for the Home Department, Ex p Pierson [1998] AC 539; [1997] 3 WLR 492; [1997] 3 All ER 577, HL(E)
R v Secretary of State for the Home Department, Ex p Stafford [1999] 2 AC 38; [1998] 3 WLR 372; [1998] 4 All ER 7, HL(E)
R v Secretary of State for the Home Department, Ex p Venables [1998] AC 407; [1997] 3 WLR 23; [1997] 3 All ER 97, HL(E)
R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23; [2001] 2 WLR 1389; [2001] 2 All ER 929, HL(E)
R (Bright) v Central Criminal Court [2001] 1 WLR 662; [2001] 2 All ER 244, DC
R (Lichniak) v Secretary of State for the Home Department [2001] EWHC Admin 294; [2002] QB 296; [2001] 3 WLR 933; [2001] 4 All ER 934, DC and CA
Raja v United Kingdom (Application No 39047/97) (unreported) 20 May 1998, EComHR
Stafford v United Kingdom (2002) 35 EHRR 1121
Thynne, Wilson and Gunnell v United Kingdom (1990) 13 EHRR 666
V v United Kingdom (1999) 30 EHRR 121
Wynne v United Kingdom (1994) 19 EHRR 333

The following additional cases were cited in argument in the Court of Appeal:

Browne v The Queen [2000] 1 AC 45; [1999] 3 WLR 1158, PC
Campbell and Fell v United Kingdom (1984) 7 EHRR 165
Ryan v United Kingdom (Application No 32875/96) (unreported) 1 July 1998, EComHR
State, The v O'Brien [1973] IR 50
X v United Kingdom (1980) 24 DR 227, EComHR

The following additional cases, although not cited, were referred to in the skeleton arguments:

Benham v United Kingdom (1996) 22 EHRR 293
Bromfield v United Kingdom (Application No 32003/96) (unreported) 1 July 1998, EComHR
Deaton v Attorney General and Revenue Comrs [1963] IR 170
Engel v The Netherlands (No 1) (1976) 1 EHRR 647
Hinds v The Queen [1977] AC 195; [1976] 2 WLR 366; [1976] 1 All ER 353, PC
Osman v United Kingdom (1998) 29 EHRR 245

A *Öztürk v Germany* (1984) 6 EHRR 409
Pepper v Hart [1993] AC 593; [1992] 3 WLR 1032; [1993] 1 All ER 42, HL(E)
R (Bulger) v Secretary of State for the Home Department [2001] EWHC Admin 119; [2001] 3 All ER 449, DC
R (Giles) v Parole Board [2001] EWHC Admin 834; [2002] 1 WLR 654
Van Droogenbroeck v Belgium (1982) 4 EHRR 443
Weber v Switzerland (1990) 12 EHRR 508
B *Weeks v United Kingdom* (1987) 10 EHRR 293
Welch v United Kingdom (1995) 20 EHRR 247
Z v United Kingdom (2001) 34 EHRR 97

APPEALS from the Divisional Court of the Queen's Bench Division

By notices of application dated 21 February 2000, as amended on 25 October 2000, and 5 June 2000 the claimants, Anthony Anderson and
C John Hope Taylor, prisoners serving mandatory sentences of life imprisonment for murder, sought judicial review of decisions of the Secretary of State for the Home Department dated 25 November 1999 and 10 March 2000 to fix their tariffs, the minimum period of imprisonment considered necessary to satisfy the requirements of retribution and deterrence, at 20 and 22 years respectively. On 22 February 2001 the
D Divisional Court of the Queen's Bench Division (Rose LJ, Sullivan and Penry-Davey JJ) dismissed both applications.

By notices of appeal dated 7 March 2001 the claimants appealed on the ground, inter alia, that the Divisional Court erred in concluding that it was prevented by precedent authority from holding that the tariff-fixing procedure was in substance a sentencing exercise which engaged article 6(1) of the Convention for the Protection of Human Rights and
E Fundamental Freedoms, as scheduled to the Human Rights Act 1998.

By respondent's notices dated 30 March 2001 the Secretary of State sought to affirm the decision on the additional ground, inter alia, that principle, as well as authority, confirmed that the fixing of a tariff for a mandatory life sentence prisoner did not violate article 6 of the Convention.

F The facts are stated in the judgment of Lord Woolf CJ.

Edward Fitzgerald QC with *Phillippa Kaufmann* for the claimant Anderson and with *Sally Hatfield* for the claimant Taylor.

David Pannick QC and *Mark Shaw* for the Secretary of State.

Cur adv vult

G

13 November 2001. The following judgments were handed down.

LORD WOOLF CJ

1 This appeal raises a single issue. It is whether, as the Home Secretary is a member of the executive, he is entitled to fix the minimum period of imprisonment to be served by a mandatory life prisoner to meet the
H requirements of retribution and deterrence ("the tariff") or whether his performing this role breaches article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

2 The appeal is by two claimants who on separate occasions were sentenced to a mandatory life sentence having been convicted of murder.

One of the claimants is Anthony Anderson. He was convicted in 1988 of two separate murders. He had kicked his victims to death in the course of theft. Both the trial judge and the Lord Chief Justice had recommended a tariff of 15 years. The Home Secretary has on three different occasions fixed the tariff at 20 years. The other claimant, John Hope Taylor, was convicted of murder in 1989. He strangled a woman whose neck he had previously broken. In his case, the Lord Chief Justice and the trial judge had recommended a tariff of 16 years. The Home Secretary in 1994 had recommended a tariff of 30 years, but in March 2000 that was reduced to 22 years.

3 After the coming into force of the Human Rights Act 1998, the claimants applied for judicial review. On 22 February 2001, the Divisional Court (Rose LJ, Sullivan and Penry-Davey JJ) dismissed the applications which were heard together. This was the latest decision in a series of cases, in our courts and in the European Court of Human Rights, which have considered the Home Secretary's role in relation to the fixing of tariffs. There are four different situations where it is necessary to fix tariffs for prisoners. There is the situation considered on this appeal involving a mandatory life sentence for murder; there is the situation where a court imposes a discretionary life sentence, there are the cases where a life sentence is automatic and there is a situation where a court sentences an offender who has committed murder at a time when he was under the age of 18 to a mandatory sentence of detention during Her Majesty's pleasure.

The history of tariffs

4 The legislative framework and the development of the policies under which successive Home Secretaries have fixed the tariffs of prisoners in all these situations can be summarised shortly because it is already set out in the different decisions of the House of Lords to which it will be necessary to refer. The starting point is the Murder (Abolition of Death Penalty) Act 1965. Section 1(1) of that Act states: "No person shall suffer death for murder, and a person convicted of murder shall . . . be sentenced to imprisonment for life."

5 Even when the 1965 Act was passed it was appreciated that it would only be rarely that a prisoner would actually remain in prison for the rest of his life. Instead he would be released on parole when it was considered appropriate for this to happen. Section 29(1) of the Crime (Sentences) Act 1997, replacing earlier legislation to the same effect, provided:

> "If recommended to do so by the Parole Board, the Secretary of State may, after consultation with the Lord Chief Justice together with the trial judge if available, release on licence a life prisoner who is not one to whom section 28 above applies."

(Section 28 does not apply to those sentenced to a mandatory life sentence.)

6 The involvement of the Parole Board on the question of release of a prisoner on licence raised the practical problem as to when the Parole Board should become involved. Over the years the practice of the Home Office changed as to this and there have been successive statements by Home Secretaries as to the practice they intended to follow. However, in

relation to mandatory life sentences there has never been any question of the Home Secretary of the day not retaining a discretion as to when the Parole Board should become involved and as to when a prisoner was released on licence. One statement was made by Mr Leon Brittan on 30 November 1983 (Hansard (HC Debates), written answers, cols *505–507*). In it he stated:

> "At present I look to the judiciary for advice on the time to be served to satisfy the requirements of retribution and deterrence and to the Parole Board for advice on risk. I shall continue to do so."

7 *R v Secretary of State for the Home Department, Ex p Handscomb* (1987) 86 Cr App R 59 criticised the way in which the Home Secretary exercised his discretion in cases involving prisoners serving a discretionary life sentence and the then Home Secretary, Mr Douglas Hurd, in a written answer to a parliamentary question on 23 July 1987 announced the new practice which was to be followed (Hansard (HC Debates), written answers, cols *347–349*). He stated that the view of the judiciary in relation to discretionary life sentences would be sought as to "the determinate sentence that would have been passed but for the element of mental instability and/or public risk which led the judge to pass a life sentence". He added:

> "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."

So at this stage, the use of tariffs in both the case of discretionary and mandatory life sentences was clearly established. So was the distinction between the two stages of life sentences: the initial period for punishment and deterrence and the subsequent period governed by risk. In the case of a mandatory sentence, however, the Home Secretary was reserving the right to take into account other factors such as the public confidence in the criminal justice system.

8 It is now necessary to refer to a significant decision of the European Court of Human Rights. It is *Thynne, Wilson and Gunnell v United Kingdom* (1990) 13 EHRR 666. The three applicants in that case had received discretionary life sentences. Their tariff periods had expired. Relying on article 5(4) of the Convention, they complained of the lack of regular judicial scrutiny of the lawfulness of their detention. The Court of Human Rights upheld the complaint. Although the court acknowledged that the dividing line may be difficult to draw the court considered there was a distinction between mandatory and discretionary life sentences: see pp 693–694, paras 73 and 74. After the expiry of the tariff period in the case of discretionary life prisoners questions could arise as to the lawfulness of their continued detention. The court reserved the question and as to what would be the position prior to the expiry of the tariff period.

9 In response to this decision a new statutory regime was introduced for discretionary life prisoners but not mandatory life prisoners. The result was that the trial judge now fixes the tariff when he imposes a discretionary life

sentence and his decision is subject to appeal. After the tariff has expired the prisoner can, if this has not already happened, require his case to be referred to the Parole Board and the Home Secretary releases the prisoner if this is what the Parole Board decides should happen. The relevant statutory provisions were contained in section 34 of the Criminal Justice Act 1991. That section contains different provisions to those contained in section 35, which deals with mandatory life prisoners. In relation to mandatory life prisoners, the Home Secretary retained his discretion.

10 The next step which is important is the decision of the House of Lords in *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531 and Lord Mustill's speech in that case. The case established that the Home Secretary was required to exercise his discretion fairly when fixing the tariff. Accordingly, the prisoner was entitled to know the recommendations as to tariff of the judiciary and the prisoner was entitled to make representations to the Home Secretary. If the Home Secretary did not adopt the judicial view as to tariff he was required to give reasons for not doing so. The significance of *Doody* to the present case is that Lord Mustill rejected the argument that the Home Secretary was not entitled, in the case of a mandatory life sentence prisoner, to fix the tariff at a higher figure than that recommended by the judiciary. He accepted that the Home Secretary was entitled to have regard to broader considerations of a public character than those which apply to an ordinary sentencing function: see p 559B. Lord Mustill added:

> "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."

Lord Mustill considered that if there was to be a further assimilation this was a task for Parliament. Lord Mustill did, however, as Mr Fitzgerald contends, recognise the reality of a mandatory life sentence: that a lifelong punitive element was not either the normal or intended usual consequence of that sentence.

11 Following *Doody*, the then Home Secretary, Mr Howard, made a further policy statement on 27 July 1993 (Hansard (HC Debates), written answer, cols *861–864*). He gave effect to the requirements of fairness as explained in *Doody*. He however made it clear that in relation to mandatory life prisoners and those prisoners detained during Her Majesty's pleasure the Home Secretary retained a wide discretion as to when prisoners should be released on licence.

12 The approach of the Home Secretary assimilating the positions of a mandatory life prisoner and a prisoner detained during Her Majesty's pleasure came under scrutiny in the House of Lords in *R v Secretary of State for the Home Department, Ex p Venables* [1998] AC 407. The majority of the House of Lords decided that a sentence of detention during Her Majesty's pleasure (which was the sentence the court was directly concerned with) was not properly to be equated with a mandatory sentence of life imprisonment. The Home Secretary in fixing a tariff in respect of the period of detention to be served by an offender by way of punishment and deterrence who was being so detained, was performing a function

A comparable to that of a sentencing judge. But as Lord Browne-Wilkinson stated, at p 498:

> "in relation to a person sentenced to be detained during Her Majesty's pleasure the Secretary of State is not dealing with a sentence of the same kind as the mandatory life sentence imposed on an adult murderer, the duration of which is determined by the sentence of the court and is for
B life. In cases of detention during Her Majesty's pleasure the duty of the Secretary of State is to decide how long that detention is to last, not to determine whether or not to release prematurely a person on whom the sentence of the court is life imprisonment."

13 *Venables* was also considered by the Court of Human Rights in *V v United Kingdom* (1999) 30 EHRR 121. The Court of Human Rights
C considered the role of the Home Secretary in fixing the tariff in connection with those detained during Her Majesty's pleasure in relation to article 6(1) of the Convention, which requires the determination of any criminal charge to be by an independent and impartial tribunal at a public hearing. The court concluded that there was a breach of the article. The issue was whether the fixing of the tariff amounted to a sentencing exercise.
D The court came to the conclusion that the fixing of the tariff did amount to a sentencing exercise. It followed that there was a breach of article 6(1): see pp 185–186, paras 109 and 111. The court said, at p 186, para 110:

> "*In contrast to the mandatory life sentence imposed on adults convicted of murder* which constitutes punishment for life, the sentence of detention during Her Majesty's pleasure is open-ended. As previously
E mentioned, a period of detention, 'the tariff', is served to satisfy the requirements of retribution and deterrence, and thereafter it is legitimate to continue to detain the offender only if this appears to be necessary for the protection of the public. Where a juvenile sentenced to detention during Her Majesty's pleasure is not perceived to be dangerous, therefore, the tariff represents the maximum period of detention which he can be
F required to serve." (Emphasis added.)

14 The result was that as in the case of offenders sentenced to a discretionary life sentence, the Home Secretary was no longer entitled to fix a tariff in relation to prisoners sentenced to be detained during Her Majesty's pleasure. It was only in relation to mandatory life prisoners that the Home Secretary could lawfully fix the tariff. Again Parliament passed legislation to
G give effect to the decision of the Court of Human Rights. By section 60 of the Criminal Justice and Court Services Act 2000 an additional section, section 82A, was inserted into the Powers of Criminal Courts (Sentencing) Act 2000 which established that the position as to offenders sentenced to be detained during Her Majesty's pleasure was broadly the same as that of prisoners who were sentenced to a discretionary life sentence.

15 It is to challenge the Home Secretary's remaining powers, which
H only relate to mandatory life sentences, that these proceedings are brought.

The argument for the claimants

16 The first step in Mr Fitzgerald's argument is that the tariff-fixing exercise in the case of a mandatory life prisoner is either a sentencing

exercise or is so closely analogous to a sentencing exercise that any difference is of no significance. As to the categorisation exercise, as a matter of domestic law I have no doubt Mr Fitzgerald is right. I did not understand Mr Pannick to argue otherwise. Indeed for reasons I will explain later he is not in a position to argue otherwise because to do so will make the mandatory life sentence itself in some cases contrary to article 3 of the Convention.

17 Why the first step in Mr Fitzgerald's argument is correct was clearly explained by Sullivan J in the court below. This was also made clear by Lord Steyn in *Ex p Venables* [1998] AC 407, 526 and again in *R v Secretary of State for the Home Department*, *Ex p Pierson* [1998] AC 539. Lord Steyn's words in *Pierson* are particularly relevant. He said, at p 585:

> "Counsel for the Home Secretary argued that the fixing of the tariff cannot be a sentencing exercise because the judge pronounces the only sentence, i e one of life imprisonment. This is far too formalistic. In public law the emphasis should be on substance rather than form. This case should also not be decided on a semantic quibble about whether the Home Secretary's function is strictly 'a sentencing exercise'. The undeniable fact is that in fixing a tariff in an individual case the Home Secretary is making a decision about the punishment of the convicted man."

Lord Steyn proceeds to point out that the matter is authoritatively decided by *Ex p Venables* [1998] AC 407.

18 The significance of article 3 in relation to the nature of the tariff in the case of a prisoner sentenced to life imprisonment for murder was made clear by the recent case of *R (Lichniak) v Secretary of State for the Home Department* [2002] QB 296. In that case two mandatory life prisoners challenged their sentences as being incompatible with articles 3 and 5. The gravity of cases involving murder can vary substantially. On the one hand you can have premeditated intentional killing; on the other hand you can have the use of excessive force by way of self-defence where there was no intention to kill, but an intention to inflict grievous bodily harm. In the latter case it could be argued that a life sentence, if it really meant a sentence for life, was inhuman or degrading punishment contrary to article 3. To meet this argument Mr Pannick relied on the tariff as indicating the true nature of the sentence.

19 The second step in Mr Fitzgerald's argument is more difficult. It is that as the fixing of the tariff in the case of a mandatory life sentence is part of the sentencing exercise, or so close to it that it is indistinguishable from it, the logic of the decisions of the Court of Human Rights should apply not only to discretionary life sentence prisoners but mandatory life sentence prisoners as well and therefore requires a judicial determination and not a determination by the Home Secretary. Before the Human Rights Act 1998 came into force such an argument would be doomed to failure because of the decisions to which I have already referred and *R v Secretary of State for the Home Department, Ex p Stafford* [1999] 2 AC 38. Like *Pierson* [1998] AC 539, *Stafford* also involved a prisoner who had been sentenced to a mandatory life sentence. However, *Stafford* involved a prisoner who had been released on licence. Referring to Mr Fitzgerald's argument on behalf of Stafford, Lord Steyn said [1999] 2 AC 38, 49–50:

A "Counsel for the applicant placed two other matters before the House. He pointed out that as a class discretionary life sentence prisoners are more dangerous than mandatory life sentence prisoners. That is so. He said that it is anomalous that the system affecting the former category is judicialised but not the system in respect of the latter category. That in my view is not an overstatement. Under the influence of judgments of the
B European Court of Human Rights, Parliament has judicialised the system applicable to offenders sentenced to discretionary life sentences and to detention during Her Majesty's pleasure. But Parliament has deliberately refrained from judicialising the system applicable to mandatory life sentence prisoners. Counsel's argument is in reality an appeal for a more rational system. The appeal to symmetry was rejected by the House of Lords in *Doody* [1994] 1 AC 531, 559D. And in *Wynne v United*
C *Kingdom* (1994) 19 EHRR 333 the European Court of Human Rights held that the post-tariff phase of the detention of a mandatory life sentence prisoner does not attract the safeguards of article 5(4) of the [Convention]. As matters stand at present the duality is embedded into our law by primary legislation."

D **20** Now that the Convention is part of our domestic law, Mr Fitzgerald argues that the position is different. However, in order to succeed in this argument Mr Fitzgerald has to explain the decisions of the Court of Human Rights involving the fixing of tariffs. These decisions and in particular *Wynne v United Kingdom* (1994) 19 EHRR 333 make it clear that "the duality is embedded" in the jurisprudence of the Court of Human Rights as clearly as it is embedded in our law. Mr Fitzgerald submits that the
E explanation for this is that the Court of Human Rights was under a misapprehension as to the true position on the English law of the tariff fixing process. He contends that the Court of Human Rights has been misled by the myth, now exposed, that a life sentence means a sentence for life; the true position being that, if this is possible at all, it is only in a very small minority of cases it may mean life. I am afraid that I find it impossible to accept that
F the Court of Human Rights was under such a misapprehension. Rightly or wrongly the Court of Human Rights did consider that there was a material difference between a mandatory and discretionary life sentence. They had the benefit of Mr Fitzgerald's arguments on behalf of the applicants and I am confident he would have ensured that the Court of Human Rights was not under any such misapprehension.

G **21** That this is the position is in fact made clear by the Court of Human Rights decision in the *Venables* case (*V v United Kingdom* 30 EHRR 121). In determining what should be the position in relation to offenders sentenced to be detained during Her Majesty's pleasure, the court stated that it appreciated that the position of such offenders was similar to mandatory life prisoners in that their sentence was also mandatory, but recognised that the sentence also had features of a discretionary life sentence as well. The court
H therefore decided that its decision should depend upon whether a sentence of detention during Her Majesty's pleasure was closer to a mandatory life sentence or a discretionary life sentence. The court decided it was more analogous to the position of a discretionary life sentence, with the result that the Home Secretary was not entitled to set the tariff.

Conclusion

22 Under section 2 of the Human Rights Act 1998 we are required to have regard to, but not compelled to follow the decisions of the Court of Human Rights. The *Stafford* case [1999] 2 AC 38 has been the subject of an application to the Court of Human Rights and should be decided by the Court of Human Rights in about a year's time. Despite the fact that the Court of Human Rights decision is likely to authoritatively decide this issue finally, Mr Fitzgerald argues that it should be decided by the courts here, as the issue is particularly suited for determination by the courts whose citizens are involved.

23 Under section 6 of the Human Rights Act 1998, we cannot act in a manner which is incompatible with the Convention. In addition the Court of Human Rights is entitled to have the benefit of the views of our courts on the effects which the Convention has on our law. On the other hand, here we are faced with a situation where Parliament has deliberately chosen not to interfere with the Home Secretary's discretion as to the length of the tariff in the case of mandatory life sentences, though it has done so in the case of other life sentences. The non-interference is despite the fact that Parliament must have been well aware of the criticisms of this role being performed by a member of the executive. In addition there is already considerable judicial input into the tariff fixing process in the form of the recommendations which the judges make, which, in the case of the great majority of prisoners, the Home Secretary adopts. There is also supervision of the process by judicial review. The recommendations of the judiciary and judicial review provide considerable protection for the majority of mandatory life prisoners. While the time may well come when the developments in the jurisprudence of the Court of Human Rights require us to come to a different decision, that stage has not been reached. Until it is reached I do not consider we should interfere with the clearly expressed views of the democratically elected Parliament as those views, up to now, are consistent with the approach adopted by the Court of Human Rights.

24 The law is not always logical and it has been the approach of both Parliament and the courts in this jurisdiction and so far of the Court of Human Rights to give a particular status to life sentence for murder. From an historical perspective, connected with the abolition of capital punishment, the attitude of Parliament is understandable. It could also well be the case that this is an area where the Court of Human Rights considered it right to show deference to the attitude so clearly adopted by Parliament. If this was the position of the Court of Human Rights, it is an approach with which we should not differ.

25 The final matter to which I should refer is the relationship between article 6 and article 5 which was mentioned in argument. I accept that article 5 can apply to the period both before and after the expiry of the tariff. I would however be resistant to a suggestion that article 6 should ever be applied to the post-tariff period. Unlike article 5, article 6 requires a public hearing. The important role of the Parole Board is not one which could be performed satisfactorily in public. In my judgment a public hearing is not required for determining whether an offender sentenced to a sentence of life imprisonment or to be detained during Her Majesty's pleasure should be released on licence. I would dismiss the appeal.

A **SIMON BROWN LJ**

26 The fundamental issue raised upon these appeals is whether the tariff-setting exercise in respect of those sentenced to mandatory life imprisonment itself amounts to the fixing of a sentence so as to engage article 6(1) of the Convention. If so, it necessarily follows that the tariff must be set by the judges and cannot be increased (although it can always be B reduced) by the Secretary of State. That is not how matters stand at present. In 6% of the 1,080 new tariffs set during the last $4\frac{1}{2}$ years, the Secretary of State's tariff exceeded the highest of those recommended by the judiciary. In the two cases before us the judicial tariffs were increased respectively by five years and six years. The claimants ask us to declare that in future the Secretary of State must not fix tariffs longer than those recommended by the judiciary.

C **27** The framework within which the Secretary of State operates at present can be simply told. Section 29 of the Crime (Sentences) Act 1997 provides:

> "(1) If recommended to do so by the Parole Board, the Secretary of State may, after consultation with the Lord Chief Justice together with the trial judge if available, release on licence a [mandatory] life prisoner . . .
>
> D "(2) The Parole Board shall not make a recommendation under subsection (1) above unless the Secretary of State has referred the particular case . . . to the Board for its advice."

28 It is common ground that, since a statement made by the Home Secretary to Parliament in 1983, a mandatory life sentence has had two E elements: the penal or tariff element for retribution and deterrence, and the post-tariff or preventative period based on dangerousness ((Hansard (HC Debates), 30 November 1983, written answers, cols *505–507*).

29 Following the Divisional Court's decision in *R v Secretary of State for the Home Department, Ex p Handscomb* (1987) 86 Cr App R 59 (although strictly it applied only to discretionary life prisoners) the Secretary F of State in all life sentence cases began to obtain the judge's recommendation upon tariff as soon as practicable after sentence was passed.

30 What is now sought in these proceedings is not a declaration that section 29 of the 1997 Act is incompatible with the Convention but rather a declaration that the Secretary of State has not been acting compatibly with the claimants' rights under article 6(1) and must accordingly henceforth exercise his discretion under the section so as not to exceed the tariff G recommended by the judiciary. The first sentence of article 6(1) provides so far as material:

> "In the determination . . . of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

H **31** Whilst, however, the responsibility for tariff-setting as between the Secretary of State and the judiciary is, as stated, the particular focus of these appeals, it is necessary, not least so as to understand the surrounding case law, to put this issue into its wider context. Scarcely less central to the argument than article 6(1) is article 5(4) of the Convention:

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

32 By the same token that the application of article 6 to tariff-setting in indeterminate sentence cases is recognised to depend on whether that exercise amounts to the fixing of a sentence—see paragraphs 107, 109 and 111 of the Court of Human Rights judgment in *V v United Kingdom* (1999) 30 EHRR 121, 185–186—so too the lawfulness of the prisoner's continuing detention in the post-tariff period under article 5(4) is recognised to depend upon essentially the same consideration: whether the passing of a mandatory life sentence of itself is to be regarded as justifying lifelong punitive detention. The critical question in both cases is whether the initial imposition of the sentence constitutes the sole sentencing exercise, the remainder of the process (whether fixing the tariff or determining the date of release in the post-tariff period) amounting merely to administrative procedures governing the implementation of the sentence.

33 If, therefore, the claimants succeed in these challenges, it seems inescapably to follow that not merely would the Secretary of State lose his present power to override the judges with regard to the penal tariff; also he would lose his present power to reject the Parole Board's recommendation for release on licence in the post-tariff period. Indeed, the consequences would go wider still. Not only would article 6 require the judges as "an independent and impartial tribunal" to fix the tariff, but the prisoner would also be "entitled to a fair and public hearing" of this process. Similarly, not only would the decision on release have to be taken by the Parole Board as "a court", but that process too would arguably attract certain further safeguards.

34 With these thoughts in mind I turn next to summarise how the Court of Human Rights has dealt with the three different types of indeterminate sentence: mandatory life sentences, discretionary life sentences and detention during Her Majesty's pleasure. It is convenient to note the cases chronologically.

(1) Thynne, Wilson and Gunnell v United Kingdom

35 These were discretionary life sentence cases considered solely under article 5(4) and decided specifically in relation to the post-tariff period. The court's judgment 13 EHRR 666, 694, para 74, expresses "the court's view . . . that the objectives of the discretionary life sentence . . . are distinct from the punitive purposes of the mandatory life sentence". Paragraph 78, p 695, states the court's conclusion that "since it is clear that the punitive period of the three applicants' life sentences has expired . . . the applicants were entitled to subsequent judicial control as guaranteed by article 5(4)".

(2) Wynne v United Kingdom

36 Wynne was a mandatory life prisoner. His case too was considered and decided solely under article 5(4). He, however, lost. The critical parts of the court's judgment 19 EHRR 333 are these, at pp 346–347:

A "33. The court recalls its judgment in *Thynne, Wilson and Gunnell v United Kingdom* where it held that discretionary life prisoners were entitled under article 5(4) to take proceedings to have the lawfulness of their continued detention decided by a court at reasonable intervals and to have the lawfulness of any re-detention determined by a court. This view was taken because of the very nature of the discretionary life sentence which, unlike the mandatory life sentence, was imposed not B because of the inherent gravity of the offence but because of the presence of factors which were susceptible to change with the passage of time, namely mental instability and dangerousness. A clear distinction was drawn between the discretionary life sentence which was considered to have a protective purpose and a mandatory life sentence which was viewed as essentially punitive in nature."

C "35. . . . the mandatory sentence belongs to a different category from the discretionary sentence in the sense that it is imposed automatically as the punishment for the offence of murder irrespective of considerations pertaining to the dangerousness of the offender. That mandatory life prisoners do not actually spend the rest of their lives in prison and that a notional tariff period is also established in such cases—facts of which the court was fully aware in *Thynne, Wilson and Gunnell*—does not alter this D essential distinction between the two types of life sentence."

"36. . . . the court sees no cogent reasons to depart from the finding in the *Thynne, Wilson and Gunnell* case that, as regards mandatory life sentences, the guarantee of article 5(4) was satisfied by the original trial and appeal proceedings and confers no additional right to challenge the lawfulness of continuing detention or re-detention following revocation E of the life licence."

(3) Hussain v United Kingdom

37 Hussain was detained during Her Majesty's pleasure. His case, just like the other two, was considered solely under article 5(4). The court, whilst noting that his sentence was mandatory and, under United Kingdom F law, treated identically to a mandatory life sentence, stated (1996) 22 EHRR 1, 24, para 50:

"the central issue in the present case is whether detention during Her Majesty's pleasure, given its nature and purpose, should be assimilated, under the case law on the Convention, to a mandatory sentence of life imprisonment or rather to a discretionary sentence of life imprisonment. G In dealing with this issue the court must therefore decide whether the substance of a sentence of detention under section 53 [of the Children and Young Persons Act 1933] is more closely related to that [of a discretionary life sentence or of a mandatory life sentence]."

38 In paragraph 53 the court recalled that the sentence was passed because of the applicant's young age and continued, at pp 24–25:

H "In the case of young persons convicted of serious crimes, the corresponding sentence undoubtedly contains a punitive element and accordingly a tariff is set to reflect the requirements of retribution and deterrence. However an indeterminate term of detention for a convicted young person, which may be as long as that person's life, can only be

justified by considerations based on the need to protect the public. These considerations, centred on an assessment of the young offender's character and mental state and of his or her resulting dangerousness to society, must of necessity take into account any developments in the young offender's personality and attitude as he or she grows older. A failure to have regard to the changes that inevitably occur with maturation would mean that young persons detained under section 53 would be treated as having forfeited their liberty for the rest of their lives, a situation which . . . might give rise to questions under article 3 of the Convention."

39 Accordingly the court concluded, at p 25, para 54, that such a sentence is "more comparable to a discretionary life sentence".

40 Although, following *Thynne, Wilson and Gunnell*, Parliament by the Criminal Justice Act 1991 had introduced a new regime for discretionary life prisoners which, in their cases, plainly satisfied the requirements of article 6 as well as those of article 5(4), after *Hussain* 22 EHRR 1 the same course was not followed for Her Majesty's pleasure cases. Rather, section 28 of the Crime (Sentences) Act 1997, merely transferred from the Home Secretary to the Parole Board the decision as to when such detainees should be released. That is why there is a fourth case in this series.

(4) V v United Kingdom

41 This Her Majesty's pleasure case was the first in the series specifically addressed to the tariff-fixing process and article 6. Despite *Hussain*, the Government was contending that article 6 was not applicable because, upon being convicted of murder, the applicant was automatically subject to the indeterminate sentence so that "the fixing of the tariff was merely an aspect of the administration of the sentence already imposed by the court": 30 EHRR 121, 185, para 108. That argument was rejected, at p 186, para 110:

"In contrast to the mandatory life sentence imposed on adults convicted of murder which constitutes punishment for life, the sentence of detention during Her Majesty's pleasure is open-ended. As previously mentioned, a period of detention, 'the tariff', is served to satisfy the requirements of retribution and deterrence, and thereafter it is legitimate to continue to detain the offender only if this appears to be necessary for the protection of the public. Where a juvenile sentenced to detention during Her Majesty's pleasure is not perceived to be dangerous, therefore, the tariff represents the maximum period of detention which he can be required to serve."

42 The court then turned to consider, and uphold, a complaint under article 5(4) and these parts of the judgment too seem to me of some importance, at p 188:

"119. The court recalls that where a national court, after convicting a person of a criminal offence, imposes a fixed sentence of imprisonment for the purposes of punishment, the supervision required by article 5(4) is incorporated in that court decision."—There is a footnoted reference to *Wynne* 19 EHRR 333, 347–348, para 36—"This is not the case, however,

A in respect of any ensuing period of detention in which new issues affecting the lawfulness of the detention may arise."—Here a footnoted reference to *Thynne, Wilson and Gunnell* 13 EHRR 666, 691, para 68—"Thus, in the *Hussain* judgment 22 EHRR 1, the court decided in respect of a young offender detained during Her Majesty's pleasure that, after the expiry of the tariff period, article 5(4) required that he should be able periodically
B to challenge the continuing legality of his detention since its only justification could be dangerousness, a characteristic subject to change. In the *Hussain* case the court was not called upon to consider the position under article 5(4) prior to the expiry of the tariff.

"120. The court has already determined that the failure to have the applicant's tariff set by an independent tribunal within the meaning of article 6(1) gives rise to a violation of that provision. Accordingly, given
C that the sentence of detention during Her Majesty's pleasure is indeterminate and that the tariff was initially set by the Home Secretary rather than the sentencing judge, it cannot be said that the supervision required by article 5(4) was incorporated in the trial court's sentence."

"122. It follows that the applicant has been deprived, since his conviction in November 1993, of the opportunity to have the lawfulness
D of his detention reviewed by a judicial body in accordance with article 5(4)."

43 Following *V*, I may note, the fixing of the tariff in Her Majesty's pleasure cases is now governed by section 82A of the Powers of Criminal Courts (Sentencing) Act 2000, as inserted by section 60 of the Criminal Justice and Court Services Act 2000.

E **44** These, then, are the four critical Strasbourg decisions in play. It is essentially these that Mr Fitzgerald for the claimants must confront. Before turning to his argument, however, I should briefly note two others. First, *Raja v United Kingdom* (Application No 39047/97) (unreported) 20 May 1998, in which the Commission declared inadmissible precisely the same article 6 complaint by a mandatory life sentence prisoner as is now advanced
F before us. The Commission said:

"While article 6(1) clearly applies to the sentencing part of the determination of a criminal charge, the Commission considers that, where life imprisonment is imposed in respect of murder, the sentencing is carried out by the trial judge after the accused has been convicted. Life
G imprisonment for murder is a mandatory sentence automatically imposed by law with regard to the severity of the offence irrespective of considerations of the dangerousness of the offender . . . It is in a distinct category from discretionary life sentences and sentences of detention during Her Majesty's pleasure which are indeterminate and whose character and purpose are identifiably different being justified primarily by considerations of the offenders' character, mental state or age and their
H resulting dangerousness, which factors may change over time . . . The tariff-fixing procedure in respect of mandatory life prisoners therefore must be regarded as an administrative procedure governing the implementation of the sentence and not as part of the determination of the sentence itself."

45 Secondly, *Stafford v United Kingdom* (2002) 35 EMRR 1121, in which the court declared admissible complaints by a mandatory life sentence prisoner under article 5(1) and, more relevantly for present purposes, under article 5(4). The court's decision includes this:

> "The applicant submits that it is obsolete under domestic law to regard a mandatory life prisoner as having forfeited his liberty for life. On analysis, the parole exercise can no longer be regarded as a matter of leniency to a post-tariff prisoner. In recent cases (*Ex p Doody* [1994] 1 AC 531, *Ex p Venables* [1998] AC 407 and *Ex p Pierson* [1998] AC 539), the House of Lords has moved to a recognition of the clear similarity of the exercise of fixing a tariff to a sentencing exercise which Buxton LJ noted in the present case was incompatible with the notion that a mandatory lifer was 'in mercy unless there is an exercise in his favour of an inscrutable executive discretion'."

46 In short, it seems clear that at some point next year the Court of Human Rights (a Grand Chamber, we are told) will be seised of the very same argument that we are now asked to decide on these appeals. The fact that it arises there in the context of an article 5(4) complaint cannot, I conclude, for the reasons already given, affect the position. Nor, I think, could the court avoid the article 5(4) complaint by deciding the article 5(1) complaint in the claimants' favour—although it should equally be noted that the article 5(4) answer is unlikely to determine the article 5(1) complaint: even if the lawfulness of a mandatory life prisoner's continued detention must be decided by the Parole Board, it does not follow that the Parole Board cannot have regard, as the Secretary of State does, to the risk of dishonesty offences.

47 Against that background Mr Fitzgerald's argument can now be briefly stated. It comes really to this. To describe a mandatory life sentence as "essentially punitive in nature" (*Wynne* 19 EHRR 333, 346, para 33), "imposed automatically as the punishment for the offence of murder" (*Wynne*, p 347, para 35), "punishment for life" (*V* 30 EHRR 121, 186, para 110), "a fixed sentence of imprisonment for the purposes of punishment" (*V*, p 188, para 119), is essentially to mis-characterise it and to elevate form over substance. Sullivan J put it admirably in the court below:

> "48. . . . Once it is recognised that the sentence of life imprisonment for murder authorises, but does not require life-long punitive detention, and is imposed regardless of the facts of the particular case and the circumstances of the individual offender, it follows that there will be a need for a further, tariff fixing stage.
>
> "49. If one looks at substance rather than form, the punishment is made to fit the crime (and the criminal) at the latter stage. The purely formal pronouncement of sentence of life imprisonment by the trial judge is merely the start of the sentencing process not the end. That this is the reality is well understood by Parliament, the public and prisoners."

48 Mr Fitzgerald submitted, indeed, that on a proper analysis of the domestic jurisprudence, this reality is shown to be no less well understood by the House of Lords. Amongst the very many passages he sought to rely on in their Lordships' speeches in, most notably, *Ex p Doody* [1994] 1 AC 531, *Ex p Venables* [1998] AC 407, *Ex p Pierson* [1998] AC 539, *Ex p Stafford*

[1999] 2 AC 38, and *Ex p Hindley* [2001] 1 AC 410 (all, save *Ex p Venables*, mandatory life sentence cases), is this from Lord Steyn's speech in *Ex p Pierson* [1998] AC 539, 585:

> "Counsel for the Home Secretary argued that the fixing of the tariff cannot be a sentencing exercise because the judge pronounces the only sentence, i e one of life imprisonment. This is far too formalistic. In public law the emphasis should be on substance rather than form. This case should also not be decided on a semantic quibble about whether the Home Secretary's function is strictly 'a sentencing exercise'. The undeniable fact is that in fixing a tariff in an individual case the Home Secretary is making a decision about the punishment of the convicted man. In any event, a majority holding in . . . *Ex p Venables* [1998] AC 407 concludes the matter. Lord Goff of Chieveley, at p 490, held that the Home Secretary is 'exercising a function which is closely analogous to a sentencing function with the effect that, when so doing, he is under a duty to act within the same constraints as a judge will act when he is exercising the same function'. Lord Hope of Craighead, at p 85G–H, agreed. So did I, at pp 74H–75C. This point is therefore settled by the binding authority of a decision of the House."

49 Mr Fitzgerald further submitted that a number of the actual decisions taken by the House of Lords in these mandatory life cases are really only explicable on the basis 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": per Lord Mustill in *Doody* [1994] 1 AC 531, 556–557.

> "the theory that the tariff sentence for murder is confinement for life, subject only to a wholly discretionary release on licence . . . is no longer the practice, and can hardly be sustained any longer as the theory": per Lord Mustill in *Doody*, at p 565.

It was on that basis that *Doody* introduced a number of natural justice safeguards with regard to the tariff-setting procedure. Similarly *Pierson* [1998] AC 539 decided that the Home Secretary has no general power to increase the tariff, and *Venables* [1998] AC 407 (in this regard making no distinction between Her Majesty's pleasure cases and mandatory life cases) decided that the Home Secretary cannot have regard to "public clamour".

50 Mr Fitzgerald relied too on the way the Crown put its case to the Court of Appeal (Criminal Division) (sitting also as a Divisional Court) in *R (Lichniak) v Secretary of State for the Home Department* [2002] QB 296 in which two mandatory life prisoners challenged their sentences as incompatible with articles 3 and 5 of the Convention. To escape the complaint under article 3 that the applicants were being subjected to "inhuman or degrading . . . punishment", Mr Pannick contended that the punishment is not that the offender must stay in prison for the rest of his life but rather that he will be detained until, having taken account of tariff and

risk, he is released on life licence. His argument is set out in paragraph 47 of the court's judgment, at pp 309–310, thus:

> "how can it be said that in the case of an adult a mandatory sentence of life imprisonment is arbitrary? Its purpose, he submits, is to punish the offender by subjecting him to an indeterminate sentence under which he will only be released when he has served the tariff part of his sentence, and when it is considered safe to release him, and even then for the rest of his life he will be liable to be recalled. That is not merely the effect of the sentence, it is the sentence."

51 There, submitted Mr Fitzgerald, one sees the reality given expression and, he argued, it is irreconcilable with the notion of a lifelong punitive sentence such as has formed the essential basis for distinguishing mandatory life sentences throughout the Court of Human Rights jurisprudence.

52 Mr Pannick in response acknowledged that tariff-setting in mandatory life cases is indeed, as Lord Goff of Chieveley put it in *Venables* [1998] AC 407, 490, "closely analogous to a sentencing function", but he submits that there are none the less material differences between the various kinds of indeterminate sentence which explain and justify the distinction made in Strasbourg.

53 I understand him to rely upon three differences in particular. First, he pointed to the very different circumstances in which the three types of indeterminate sentence are imposed: Her Majesty's pleasure detention solely because of the offender's age: discretionary life imprisonment because the offender's personal circumstances point to dangerousness and (usually) mental instability; mandatory life imprisonment because of the intrinsic gravity of the offence of murder: see particularly paragraph 33 of *Wynne* 19 EHRR 333, 346 and paragraph 119 of *V* 30 EHRR 121, 188. Only the mandatory life sentence is imposed without regard to the offender's individual characteristics; that is what makes it unique.

54 Secondly he argued that when, post-tariff, the question of releasing a mandatory life prisoner arises, the Secretary of State is not bound to observe only the tariff period and risk; he is "entitled, to have regard to broader considerations of a public character than those which apply to an ordinary sentencing function": per Lord Mustill in *Doody* [1994] 1 AC 531, 559, reiterated by Lord Steyn in *Stafford* [1999] 2 AC 38, 48B.

55 Thirdly Mr Pannick relied on a passage in Lord Steyn's speech in *Hindley* [2001] 1 AC 410, 418F–H, holding it permissible for the Secretary of State to have increased the tariff for that mandatory life prisoner to take account of facts previously unknown to him (her involvement in earlier murders to which she only confessed in 1987) which aggravated the circumstances of the murders for which she had been convicted. There is no scope, Mr Pannick pointed out, for increasing a discretionary life prisoner's tariff.

56 Let me address these three arguments in turn. I accept, of course, that the mandatory life sentence is unique. But not all the offences for which it is imposed can be regarded as uniquely grave. Rather the spectrum is a wide one with multiple sadistic murders at one end and mercy killings at the other. Lifelong punitive detention will be appropriate only exceptionally. As for "broader considerations of a public character", it is difficult to understand quite what these are. Regard must not be had to "public

clamour": see *Venables* [1998] AC 407, 490. There is, of course, "the need to maintain public confidence in the system of criminal justice" (see the Home Secretary's statement to Parliament on 10 November 1997 (Hansard (HC Debates), written answer, cols *419–420*)). To my mind, however, this can and should be catered to in the fixing of the tariff. The retributive element of the tariff should reflect the public's moral outrage at an offence. Surely the maintenance of public confidence in the system cannot require longer incarceration than that which properly reflects society's entitlement to vengeance. Sometimes, I recognise, that will require a whole life tariff. But why should not the judges determine that? The third and last point, as to retrospectively increasing the tariff, is a narrow one. The same problem could presumably arise in a discretionary life sentence case. In truth, however, it begs rather than answers the question whether the initial fixing of the tariff is properly to be regarded as an exercise in sentencing.

57 In short, I find none of Mr Pannick's arguments convincing. Neither singly nor cumulatively do they seem to me to provide a principled basis for treating tariff-fixing in mandatory life cases differently from the similar exercise required for discretionary life prisoners and Her Majesty's pleasure detainees. In all three cases the exercise is in substance the fixing of a sentence, determining the length of the first stage of an indeterminate sentence—that part of it which (subject only to the need for continuing review in Her Majesty's pleasure cases) must be served in custody before any question of release can arise.

58 Before moving to my conclusion I should say a word or two more about the body of House of Lords cases which touch upon these appeals. I can do so very shortly, principally because all the cases pre-date the coming into full force of the Human Rights Act 1998 on 2 October 2000. Indeed, Mr Fitzgerald told us, in the last of them, *Hindley* [2001] 1 AC 410, the House of Lords expressly declined to hear argument based on article 6(1) on the footing that this would be more appropriately considered once the Act came into force. Although, therefore, *Doody* [1994] 1 AC 531 resolved in the Home Secretary's favour the very question now at issue—as to whether he or the judges should finally determine the penal element of a mandatory life sentence—it did so without directly addressing the article 6 argument which is the very foundation of these appeals. Similarly, although Lord Steyn noted in *Stafford* [1999] 2 AC 38, 49–50, having referred to *Doody* and to *Wynne* 19 EHRR 333, that "the duality [between the mandatory life sentence and the discretionary life sentence] is embedded into our law by primary legislation", that was merely to recognise the constitutional impossibility under domestic law of overturning the statute, and to assume (rather than decide) the correctness of the Court of Human Rights' approach in *Wynne*. All that said, it is only right to note that nothing stated in any of the House of Lords' cases appears to cast the least doubt on the correctness of the approach adopted throughout by Strasbourg. The deep misgivings I have expressed about the cogency of the reasoning by which mandatory life sentences are singled out for exclusion from protection under articles 5(4) and 6 find no echo in any of their Lordships' speeches. The best that Mr Fitzgerald has been able to do is point to a series of dicta exposing as myth the suggestion that actual detention for life is the true tariff sentence imposed in mandatory life cases.

59 What, then, should this court now do, seised as we are of an appeal directly invoking section 6(1) of the Human Rights Act 1998 and being of the clear view, as certainly I am, that the existing mandatory life sentence regime breaches article 6(1) (and for that matter article 5(4)) of the Convention? How, in particular, should we give effect to section 2(1) of the Human Rights Act:

> "A court . . . determining a question which has arisen in connection with a Convention right must take into account any . . . judgment . . . of the European Court of Human Rights . . . [and any] opinion . . . [or] decision of the [European] Commission [of Human Rights] . . ."

60 This to my mind is much the most difficult question in the case.

61 Mr Pannick invited us to show due reticence and drew our attention to Lord Slynn of Hadley's speech in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389, 1399:

> "In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility that the case will go to that court, which is likely in the ordinary case to follow its own constant jurisprudence."

62 Here, Mr Pannick pointed out, the Strasbourg jurisprudence is indeed clear and constant and, moreover, the Court of Human Rights will itself have the opportunity to reconsider the position next year when it comes to hear *Stafford* (2002) 35 EHRR 1121. Now is no time for the domestic courts to rule inconsistently with that jurisprudence.

63 Mr Fitzgerald urged the contrary. He submitted that since the whole development of the case law depends upon a correct analysis of the nature and reality of a mandatory life sentence in domestic law, it is the domestic courts which are best placed to determine what the exact nature of the sentence is. He further submitted that there is no sufficient reason why this important issue should remain unresolved for up to a further year, or perhaps even longer given at least the possibility that the Court of Human Rights in *Stafford* will decide only the article 5(1) complaint and not that (logically critical to these appeals) under article 5(4).

64 On this part of the case, although not without considerable hesitation, I have come to prefer Mr Pannick's argument. Whilst in one sense it is true to say that the domestic courts are best placed to analyse the nature and reality of a mandatory life sentence, there is absolutely no reason to doubt that the Strasbourg court itself is fully aware of the facts. That this is so is apparent from innumerable passages in the various judgments and, indeed, given Mr Fitzgerald's continuous involvement throughout the development of the jurisprudence, it could hardly be otherwise.

65 In the end there are two factors which have persuaded me to regard the Strasbourg case law as for the present determinative. First, that whatever advantage we might enjoy through our domestic knowledge and experience of the mandatory life sentence regime could perhaps be thought balanced (or even conceivably outweighed) by the Court of Human Rights' deeper appreciation of the true ambit and reach of articles 5(4) and 6(1) of the Convention. It is, after all, not the characterisation of the mandatory life

A sentence in abstract, but rather its characterisation in the context of the application of these two articles, which lies at the heart of this case.

66 The second factor which weighs with me is that of comity. True, this court is not bound by Court of Human Rights judgments, any more than that court is bound by them. Where, however, as here, the Court of Human Rights itself is proposing to re-examine a particular line of cases, it would seem somewhat presumptuous for us, in effect, to pre-empt its decision. For B my part, I shall be surprised if the present regime for implementing mandatory life sentences survives the Court of Human Rights's re-examination of the issue in *Stafford*. The final decision, however, I am persuaded should be theirs. I would accordingly dismiss these appeals.

BUXTON LJ

C *Introduction*

67 For reasons that I will demonstrate, my own view is that the tariff-setting process by the Secretary of State in the case of a mandatory life prisoner is a sentencing exercise, and thus should be subject to the constraints of article 6. I do not, however, find myself able to act on that view by granting the relief sought by the claimants. That is because the D current jurisprudence of the Court of Human Rights does not so analyse the tariff-setting exercise, and I do not think that this court should substitute its view of the meaning and reach of the Convention for that of the Convention court. I further consider that in any event the step urged on us by the claimants is not open to this court in view of the attitude to the Court of Human Rights jurisprudence on this point that was adopted by the House of E Lords in *R v Secretary of State for the Home Department, Ex p Stafford* [1999] 2 AC 38. I shall develop these points in turn.

The mandatory life sentence and the tariff

68 The claimants invited us to undertake an extensive historical investigation of the origins and nature of the mandatory life sentence. That exercise was quite unnecessary for their purposes, because the conclusions to F which it would have led are authoritatively set out in the speech delivered by Lord Mustill, with the concurrence of the whole House, in *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531. Lord Mustill convincingly demonstrated, at pp 556–557, 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 G 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."

H **69** In reaching that conclusion, Lord Mustill disposed of two other rationalisations or explanations of the mandatory life sentence. The first, which I will call the "mercy" theory, was that a person convicted of murder forfeited the rest of his life to the state, and was only to be released as an act of grace or mercy. That was the approach argued for by the then Minister of

State in 1991, set out by Lord Mustill at p 555B, and decisively rejected by him. The second, which I will call the "unique crime" theory, is that the mandatory life sentence is to be regarded as a single sentence, imposed once and for all at the trial, because all mandatory life sentences are imposed in cases of murder, a uniformly unique crime that demands a uniformly unique sentence. It will no doubt be recalled that this was one of the arguments frequently deployed to justify the unique punishment of death, however little there was in fact uniformity amongst the cases of those who were hanged, or alternatively in the event not hanged, for committing murder. Lord Mustill, at p 549G, rejected this theory as factually unsound and concluded: "In truth the mandatory life sentence for murder is symbolic."

70 The view thus taken by the House of Lords of the reality of the Secretary of State's tariff-setting function caused it to determine, on English administrative law grounds, that a mandatory life sentence prisoner should have an opportunity to make representations to the Secretary of State in the light of knowledge of the judiciary's recommendations, and should be told the Secretary of State's reasons for departing from those recommendations.

71 For reasons that will emerge later in this judgment, it is important to note that the applicants in *Doody* also sought more extensive relief than that just mentioned. It was argued (see [1994] 1 AC 531, 545A–C) that there was no relevant distinction between mandatory and discretionary life sentences. It was therefore *Wednesbury* unreasonable for the Secretary of State not to adopt in the case of mandatory sentences the rule that had been imposed in the case of discretionary life sentences by section 34 of the Criminal Justice Act 1991 that he was bound by the recommendation of the judiciary as to the "tariff" period (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). Lord Mustill described this argument as "an appeal to symmetry", and rejected it, at p 559:

> "Whilst there is an important grain of truth in this argument, I believe it to be overstated. 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."

The application of article 6

72 Against this background, the argument in relation to article 6 can be shortly stated. Sentencing is a function that, like all other aspects of a criminal trial, must be conducted by a body independent of the executive. The Court of Human Rights held in *V v United Kingdom* 30 EHRR 121, 186, para 111 that the fixing of the tariff in an HMP (Her Majesty's pleasure) case "amounts to a sentencing exercise", and concluded from that, at pp 186–187, para 114, that

> "The court notes that article 6(1) guarantees, inter alia, 'a fair . . . hearing . . . by an independent and impartial tribunal . . .' 'Independent'

A in this context means independent of the parties to the case and also of the executive. The Home Secretary, who set the applicant's tariff, was clearly not independent of the executive, and it follows that there has been a violation of article 6(1)."

Mr Pannick conceded that the tariff-setting exercise in a mandatory life sentence case was analogous to a sentencing exercise. Either that B formulation, or the opinion of the House of Lords in *Doody* [1994] 1 AC 531, 557 that tariff-setting "begins to look much more like an orthodox sentencing exercise", should in my estimation suffice to attract the jurisprudence of article 6 to which the Court of Human Rights referred in *V.* That, however, has not been the view of the Court of Human Rights itself, and I must therefore now turn to the jurisprudence of that court.

C

The jurisprudence of the European Court of Human Rights

73 The Court of Human Rights held in *Thynne, Wilson and Gunnell v United Kingdom* 13 EHRR 666 that decisions as to the treatment of discretionary life sentence prisoners during the post-tariff period had to be subject to judicial control, under article 5(4). The court, at p 694, para 74, D rejected an argument on the part of the Secretary of State that judicial control was provided, as in the case of mandatory life sentences, by the original imposition of the sentence. The court said: "the objectives of the discretionary life sentence . . . are distinct from the punitive purposes of the mandatory life sentence and have been so described by the courts in the relevant cases."

74 In *Wynne v United Kingdom* 19 EHRR 333 a mandatory life E sentence prisoner argued that the application of article 5(4) to discretionary life sentences in *Thynne* should as a matter of logic be extended to the post-tariff period of a mandatory sentence. That was because, as the court set out the argument in paragraph 31, p 345, of its judgment, the distinction made by the court in *Thynne* between the two types of life sentence was no longer valid because it was based on the false assumption that a mandatory F sentence had as its object the punishment of a murderer for life. The court rejected this argument. In paragraph 35, p 347, of its judgment it set out the effect of *Doody*, as already described, and continued:

"However, the fact remains that the mandatory sentence belongs to a different category from the discretionary sentence in the sense that it is imposed automatically as the punishment for the offence of murder G irrespective of considerations pertaining to the dangerousness of the offender. That mandatory life prisoners do not actually spend the rest of their lives in prison and that a notional tariff period is also established in such cases—facts of which the court was fully aware in *Thynne, Wilson and Gunnell*—does not alter this essential distinction between the two types of life sentence. As observed by the House of Lords in *R v Secretary of State for the Home Department, Ex p Doody*, while the two types of H life sentence may now be converging there remains none the less, on the statutory framework, the underlying theory and the current practice, a substantial gap between them."

"36. Against the above background, the court sees no cogent reasons to depart from the finding in the *Thynne, Wilson and Gunnell* case that,

as regards mandatory life sentences, the guarantee of article 5(4) was satisfied by the original trial and appeal proceedings . . ." A

75 Two observations may be made at this stage about this formulation. First, it appears to analyse the mandatory life sentence in terms of a combination of the "mercy" and "unique crime" rationalisations, both of which, as indicated in paragraph 69 above, have been rejected by the House of Lords. Second, however, the court expressly follows the House of Lords B in rejecting the "appeal to symmetry" (see paragraph 71 above).

76 In *V* 30 EHRR 121, already referred to, the Court of Human Rights had to consider the application of article 6 to the case of an HMP prisoner. The court said, at p 186:

"109. . . . The court must determine whether the tariff-setting procedure in respect of young offenders detained during Her Majesty's C pleasure amounts to the fixing of a sentence and falls within the scope of article 6(1).

"110. In contrast to the mandatory life sentence imposed on adults convicted of murder which constitutes punishment for life, the sentence of detention during Her Majesty's pleasure is open-ended. As previously mentioned, a period of detention, 'the tariff', is served to satisfy the D requirements of retribution and deterrence, and thereafter it is legitimate to continue to detain the [HMP] offender only if this appears to be necessary for the protection of the public."

By a footnote the court expressly contrasted this analysis with that in paragraph 35 of its judgment in *Wynne*, already cited.

77 It is to be noted that the court expressly distinguished the case of an E HMP prisoner from that of an adult mandatory life prisoner. In so doing, it specifically maintained the view that it had previously expressed as to the particular nature of the latter case. It was, however, only able to rationalise that particular nature as "punishment for life": which is an appeal to the "mercy" rationalisation referred to in paragraph 69 above.

78 The court then considered the position in relation to article 5(4), and again distinguished the case of a mandatory life prisoner. It said, at p 188, F para 119 of its judgment:

"The court recalls that where a national court, after convicting a person of a criminal offence, imposes a fixed sentence of imprisonment for the purposes of punishment, the supervision required by article 5(4) is incorporated in that court decision."

G

It will be noted that this explanation is identical to that adopted in paragraph 36 of the judgment in *Wynne* 19 EHRR 333, quoted in paragraph 74 above. That reasoning was entirely deliberate, as the Court of Human Rights' footnote reference to *Wynne* in *V* confirms.

79 In summary, therefore, the Court of Human Rights held in *Wynne*, and confirmed in *V*, that because of the particular nature of the H mandatory life sentence the requirements of article 6 were satisfied and exhausted by the original court order imposing the sentence. Subsequently to those decisions, the Commission has on three occasions found to be manifestly ill-founded complaints, effectively identical to that made in the present case, that article 6 prohibited the fixing of the tariff

A by the Secretary of State. For instance, in *Raja v United Kingdom* 20 May 1998 the Commission followed the Court of Human Rights in holding that the mandatory life sentence "is in a distinct category from discretionary life sentences and sentences of detention during [HMP] which are indeterminate and whose character and purpose are identifiably different".

B

The claimants' submissions on the jurisprudence of the European Court of Human Rights

80 The claimants made two different submissions in relation to this jurisprudence, as encapsulated in particular in *Wynne* 19 EHRR 333. First, Mr Fitzgerald did not shrink from submitting that *Wynne* was simply wrongly decided, with the result that this court was not only free, but C obliged, to determine the applicability of article 6 unconstrained by *Wynne*. Second, that in any event *Wynne* was distinguishable from the present case.

81 As to the first of these submissions, like Sullivan and Penry-Davey JJ in the Divisional Court, I have great difficulty in supporting the reasoning of the Court of Human Rights. It is based on seeing the necessary D judicial protection required by article 6, as well as by article 5(4), as provided by the original judicial decision. But, as the House of Lords observed in *Doody* [1994] 1 AC 531, the judge's contribution is entirely formalistic: the real sentencing process takes place before the Secretary of State, which is why English law principles require him to receive submissions from the prisoner. It is also based on a view of the nature of E the mandatory life sentence, as punishment for life, which is equally rejected in *Doody*.

82 The reasoning of the Court of Human Rights is therefore based on factual or analytical premises as to the nature of the law of the contracting state concerned that have been rejected by the highest court of that state. As I have already indicated, left to myself, and basing myself on the view of that highest court that the Secretary of State's function approaches that of a F sentencer, I would find compelling the argument that that view necessarily entailed that the jurisprudence of article 6, referred to in paragraph 72 above, applied in this case.

83 Whether it follows that the Court of Human Rights judgment in *Wynne* was "wrong", or should not be applied by this court, is quite another matter, which I explore later in this judgment.

G **84** I found much less persuasive the argument that the jurisprudence of *Wynne* can be distinguished, or shown not to apply to the present case. The argument had two strands. First, the decisions of the Court of Human Rights had been about, or principally about, the applicability of article 5(4); different considerations could apply in relation to article 6. Second, the decisions had been about the "post-tariff" stage, where considerations of dangerousness, as opposed to punishment, legitimately entered the H equation.

85 As to the first of these contentions, whilst *Wynne* was complicated by the concurrent existence in that case of mandatory and discretionary life sentences, the court made distinct holdings about the position in relation to mandatory life sentences, as the citation in paragraph 74 above

demonstrates. There is no doubt at all that the Court of Human Rights was deliberately directing its mind to the nature of the mandatory sentence. That was also the position in *V* 30 EHRR 121 where, as the citation in paragraph 76 above demonstrates, the court specifically relied on *Wynne* in an article 6 case.

86 As to the second argument raised to distinguish the Court of Human Rights jurisprudence from the present case, reliance on the fact that the cases related to the post-tariff period misunderstands the basis on which the Court of Human Rights placed mandatory life prisoners in a different category from discretionary and HMP prisoners. As the citations in paragraph 78 above demonstrate, the court saw all Convention issues in relation to the mandatory sentence, at whatever stage of its working-out, as having been decided by the original "judicial" decision to impose the sentence, and by the nature of that sentence as one of imprisonment for life. It was for that reason, and not because of some perceived difference between the tariff and post-tariff stages, that article 6 did not apply at the latter stage. For the court, there was no jurisprudential distinction between the two stages, and thus decisions in this respect in relation to a post-tariff question are equally authoritative in relation to the tariff stage.

This court and the European Court of Human Rights

87 In these applications we are urged to follow our own perceptions of the nature of the mandatory life sentence and thus of the application of article 6, for instance as set out in paragraphs 81 and 82 above, and hold that article 6 does indeed apply in this case, despite the view to the contrary of the Court of Human Rights. There are in my view strong reasons why we should not take that course. Those reasons are based both on general considerations as to the relationship between the courts of this jurisdiction and the court at Strasbourg and on issues more particular to this case. I review these in turn.

88 The issue of principle will not be illuminated by seeking to give further meaning to section 2 of the Human Rights Act 1998. We will take the court's jurisprudence into account whether we determine the case in accordance with it; or on the other hand decline, on a reasoned basis, to apply that jurisprudence. Rather, we must confront more general issues of comity to which adherence to an international system such as that of the Convention gives rise.

89 The Convention is a broadly stated international treaty, applying to a wide range of countries. Not only is it the objective of the Convention to bring its benefits to all of those countries, but also fairness between the citizens of those different countries requires that its terms have a uniform and accessible meaning throughout the member countries. The principal machinery for achieving that end is to be found in the court, and in the interpretative rulings that it gives. There may well be many cases facing a national court where the jurisprudence of the Court of Human Rights is unclear, or on the particular point in issue non-existent. Then the national court has to do the best that it can. But that is not this case. Here, there is clear and consistent jurisprudence of the Strasbourg court. If we are to say that that jurisprudence is wrong, we will be

creating in England and Wales a different set of Convention rules from those that apply in other countries who are signatories to the Convention. That will be a clear departure from international comity within the Convention, and a step that should only be taken in extreme circumstances.

90 I appreciate that the United Kingdom appears to be the only country that enjoys mandatory penalties for murder, at least in the form that they take under the Murder (Abolition of Death Penalty) Act 1965; so it could be said that if we act as urged we will in practice do no damage to international comity. There are three objections to that approach. First, the issue of comity is one of principle. It is precisely not for a national court to select the issues on which it will act on the principle and the issues as to which it will not so act. Second, although the unique nature of the mandatory penalty seems clear enough, the national court should be slow in concluding that the jurisprudence of the Court of Human Rights does not impact on any other part of the laws of the 41 states that have ratified the Convention: about which laws this court knows nothing. Third, we can only say what the Convention means in England and Wales. Unless there is a decision in the same terms by the courts of Scotland and Northern Ireland, murderers in those parts of the United Kingdom will continue to be dealt with under the Convention as it is understood in Strasbourg. That is perhaps a local, but none the less a pressing, example of the dangers of deviating from an international norm.

91 The second and different reason why we should exercise restraint is that where an international court has the specific task of interpreting an international instrument it brings to that task a range of knowledge and principle that a national court cannot aspire to. I of course recognise that the relationship between the national court and, on the one hand, the Court of Human Rights and, on the other hand, the European Court of Justice is very different, in terms both of domestic and of international law. However, I would venture to refer to the observations as to the proper modesty of the national court in the face of international experience that fell from Bingham J in *Customs and Excise Comrs v ApS Samex* [1983] 1 All ER 1042, 1055–1056. I am not prepared to hold that such considerations should be set aside just because it appears to an English lawyer that the issue in this case is wholly contained within the understanding and categorisation of an English legal institution, the mandatory life sentence.

92 I fully accept that the foregoing considerations of principle are not absolute. It may be appropriate, or necessary, to depart from them in a particular case. But the present is, very clearly, not that case. The conclusions of the Court of Human Rights may appear surprising, and to depart from the now current English understanding of the nature of the mandatory life sentence. But those conclusions were not arrived at by accident or in ignorance, or for lack of instruction. As the court was at pains to point out in *Wynne* 19 EHRR 333, 347, in the passage set out in paragraph 74 above, it was well aware of what had been said in *Doody* [1994] 1 AC 531. The very argument based on *Doody* that is put to us was put to that court, and was rejected by it. And by the same token, the court was specifically urged, as we are, to abandon the position that it had taken in *Thynne, Wilson and Gunnell* 13 EHRR 666 and to adopt the appeal to

symmetry that failed in *Doody* (see paragraph 71 above): on the ground, equally urged before us, that in *Thynne* it had misunderstood the nature of the life sentence.

93 All of those submissions failed. I do not doubt that they were advanced before the Court of Human Rights in as much detail, and with as much determination, as they were advanced before us. That is a very unpromising background indeed against which to ask a national court to say that the Strasbourg court none the less went wrong. I am not prepared to take that step in this case.

English precedent

94 I am further fortified in that view by the very serious doubts that I entertain as to whether, as a matter of orthodox English precedent, the present argument is in any event open to the claimants. In *R (Bright) v Central Criminal Court* [2001] 1 WLR 662, 682D the Divisional Court held, per Judge LJ, that where a question of interpretation of the Convention has been determined within the English system of precedent by an English court, it is not open to a lower English court to revisit the question through its own interpretation of primary Convention material. That rule was approved by this court in *Kaya v Haringey London Borough Council* The Times, 14 June 2001, at paragraphs 36–37 of its judgment. The rule unavoidably forces on us consideration of the implications of the speeches in the House of Lords in *Ex p Stafford* [1999] 2 AC 38.

95 The issue in that case was as to the post-tariff discretion of the Secretary of State in mandatory life sentence cases. As part of his argument counsel for the applicant reverted to the appeal to symmetry (see paragraph 71 above), but now in the context of the Convention, rather than simply of English administrative law. He appreciated that in order to make that submission good he had to undermine *Wynne* 19 EHRR 333 which, in a Convention context, denied the equivalence of the mandatory with the discretionary life sentence on which the appeal to symmetry is based. He therefore argued, as was argued before us, that *Wynne* had been wrongly decided:

> "The distinction made by the European Court of Human Rights in *Wynne v United Kingdom* 19 EHRR 333 between mandatory and discretionary life prisoners is not supported by *Ex p Venables* and *Ex p Pierson*": [1999] 2 AC 38, 41–42.

96 Lord Steyn, for the House, dealt with that argument as follows, at pp 49–50:

> ". . . Parliament has deliberately refrained from judicialising the system applicable to mandatory life sentence prisoners. Counsel's argument is in reality an appeal for a more rational system. The appeal to symmetry was rejected by the House of Lords in *Doody* [1994] 1 AC 531, 559D. And in *Wynne v United Kingdom* 19 EHRR 333 the European Court of Human Rights held that the post-tariff phase of the detention of a mandatory life sentence prisoner does not attract the safeguards of article 5(4) of the [Convention]. As matters stand at present the duality is embedded into our law by primary legislation."

A 97 Mr Fitzgerald argued that Lord Steyn was deliberately confining himself to the post-tariff issues that arose in *Stafford* itself. Nothing that he had said impacted on the issue of determination of the tariff. I would find that contention more convincing if the argument had been put in *Stafford* in different terms. But as we have seen, the House was invited to conclude that *Wynne* 19 EHRR 333 was wrongly decided. The House declined so to find: indeed, as Lord Steyn's observations show, *Wynne* was regarded as the basis B of the distinction between mandatory and discretionary life prisoners. And, as I have demonstrated in paragraphs 84 to 85 above, *Wynne* is equally authoritative on that point in respect of the tariff as in respect of the post-tariff period.

98 I am, I think, prepared to accept that, on a narrow view of the definition of ratio, the House of Lords' observations about *Wynne* can be C said to be obiter, however much the contrary of them was regarded by counsel as a necessary step in his argument in *Stafford*. That *Wynne* was unsuccessfully attacked in the House of Lords on the very grounds advanced before us does however provide a further and very cogent reason why I am not prepared to take the step sought by the present claimants.

D

Conclusion

99 The appeal to symmetry failed on Convention grounds in *Stafford* [1999] 2 AC 38, as it had failed on English law grounds in *Doody* [1994] 1 AC 531. The criticism of *Thynne, Wilson and Gunnell* 13 EHRR 666 in terms of misunderstanding of the nature of the mandatory life sentence E failed before the Court of Human Rights in *Wynne* 19 EHRR 333. The criticism of *Wynne* was broadly that the same ground failed in the House of Lords in *Stafford*. The criticism that the Court of Human Rights had not taken proper account of the realities of English law, as set out in *Doody*, failed in *Wynne*. And the arguments that *Wynne* applies only to the post-tariff stage, and only to complaints under article 5(4), are destroyed by *V* 30 EHRR 121, and by the Commission cases that F followed it. I do not find anything in the submissions before us that has not been considered and rejected by the highest courts both in this jurisdiction and under the Convention, in most respects on more than one occasion. For that reason alone, and quite apart from the other considerations set out in this judgment, I find myself compelled to dismiss these appeals.

G

Appeals dismissed.
No order as to costs.
Permission to appeal refused.

Solicitors: Irwin Mitchell, Sheffield; Peter Ievins, Peterborough; Treasury Solicitor.

H

JBS

The claimant, Anthony Anderson, appealed, with leave of the House of Lords (Lord Steyn, Lord Hutton and Lord Millett) granted on 18 June 2002. Divisional Court of the Queen's Bench Division (Rose LJ, Sullivan and

Penry-Davey JJ) which, on 22 February 2001, had dismissed his application for judicial review of the decision of the Secretary of State for the Home Department to fix his tariff, the minimum period of imprisonment considered necessary to satisfy the requirements of retribution and deterrence, at 20 years.

The facts are stated in the opinions of their Lordships.

Edward Fitzgerald QC and *Phillippa Kaufmann* for the appellant. The Secretary of State's decision to fix a tariff in excess of the judicial recommendation was unlawful in that it contravened article 6(1) of the European Convention which (a) guarantees the right to have a sentence determined by an independent and impartial tribunal, and (b) imposes a duty not to act incompatibly with that right.

A mandatory life sentence was never intended by Parliament to order lifelong punitive detention. Given the great variety of circumstances in which murder occurs, not every murderer deserves actual lifelong imprisonment as punishment. The intention was to authorise lifelong imprisonment only if that proved to be necessary to satisfy the requirements of retribution and deterrence.

The erroneous view that "imprisonment for life" was intended to order lifelong detention (see *Wynne v United Kingdom* (1994) 19 EHRR 333; *Bromfield v United Kingdom* (Application No 32003/96) 1 July 1998 and *Raja v United Kingdom* (Application No 39047/97) 20 May 1998) underlay the retention of the Secretary of State's discretion to determine the length of the tariff: see *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531. The sentence is properly to be characterised as indeterminate with partly punitive and partly protective objectives: see the Murder (Abolition of Death Penalty) Act 1965; the Report of the Royal Commission on Capital Punishment 1949–1953 (1953) Cmd 8932) and *Stafford v United Kingdom* (2002) 35 EHRR 1121.

The power conferred on the Secretary of State, currently by section 29 of the Crime (Sentences) Act 1997 re-enacting earlier legislation applicable in the present case, to control the licensed release of prisoners subject to mandatory life sentences is distinct from the prerogative power of mercy which permits remission of the penalty. Before the Human Rights Act 1998 came into force the Secretary of State enjoyed a broad discretion under section 29 to determine when and whether to release such a prisoner. Since 1983 the Secretary of State has established separate phases in the administration of the system: see Hansard (HC Debates), 30 November 1983, written answers, cols *505–507*. The first phase is identified by the tariff-fixing process by which the individual punishment appropriate to the offence and the offender is selected. The effect of fixing the tariff is to predetermine the minimum period of detention that has to be served by way of punishment, and to exclude any realistic possibility of release until the conclusion of that period. The tariff operates as a punishment within a punishment and, where future risk is not in issue, effectively determines the actual length of custody.

While the Home Office theory of lifelong custody for punitive purposes has persisted (see Hansard (HC Debates), 16 July 1991, cols 309–310 and 27 July 1993, written answers, cols *861–864*), tariff-fixing in practice has been progressively assimilated to a sentencing exercise. The procedural and

substantive guarantees reflecting such a function have been incorporated into the tariff-fixing process by way of judicial decision prior to implementation of the 1998 Act: see *R v Secretary of State for the Home Department, Ex p Handscomb* (1987) 87 Cr App R 59 and *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531. Therefore although the Secretary of State cannot be required to fix the tariff in line with the judicial recommendation, the tariff-fixing process is recognised in substance, if not in form, as equivalent to a sentencing function: see *R v Secretary of State for the Home Department, Ex p Venables* [1998] AC 407; *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539; *R v Secretary of State for the Home Department, Ex p Stafford* [1999] 2 AC 38; *R v Secretary of State for the Home Department, Ex p Hindley* [2001] 1 AC 410; *R (Anderson) v Secretary of State for the Home Department*, ante p 841G; *R (Lichniak) v Secretary of State for the Home Department* and *R (Pyrah) v Secretary of State for the Home Department* [2002] QB 296. Since implementation the domestic courts are required to address the constitutional anomaly created by the present legislation.

Article 6(1) requires the courts to look at substance not form in deciding whether particular proceedings involve determination of a criminal charge: see *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165 and *Ezeh and Connors v United Kingdom* (2002) 35 EHRR 691. The article applies to the entire process in which a charge is determined, including imposition of sentence: see *Engel v Netherlands (No 1)* (1976) 1 EHRR 647.

The Secretary of State can no longer characterise a mandatory life sentence as wholly punitive: see *Stafford v United Kingdom* 35 EHRR 1121. Such a sentence is no different in purpose from the discretionary life sentence or detention during Her Majesty's pleasure: all three being characterised by the dual objectives of punishment and public protection. The tariff-fixing exercise, not pronouncement of the mandatory life sentence, is the recognised procedure by which the individual quantum of punishment is determined.

Once the life sentence is understood as not ordering lifelong punitive detention in all cases, there is no longer any justification for the Secretary of State to determine the tariff element or increase the period recommended by the judiciary. It is a fundamental constitutional principle that the punishment to be imposed on an individual offender is a matter for the courts, not for a member of the executive: see the Scotland Act 1998, the Convention (Compliance) (Scotland) Act 2001 and the Life Sentences (Northern Ireland) Order 2001 (SI 2001/2564 (NI 2)).

The European Court has held that the tariff-fixing of a mandatory life sentence is a sentencing exercise: see *Stafford v United Kingdom* 35 EHRR 1121. Since article 6 applies to the imposition of sentence, the tariff-fixing process should be undertaken by an independent and impartial tribunal. The fixing of punishment is a judicial not an executive function: see *The State v O'Brien* [1973] IR 50; *Browne v The Queen* [2000] 1 AC 45; *Deaton v Attorney General* [1963] IR 170; *Hinds v The Queen* [1977] AC 195; *Stafford v United Kingdom* 35 EHRR 1121, 1143, para 78; *V v United Kingdom* 30 EHRR 121 and *R v Secretary of State for the Home Department, Ex p Venables* [1998] AC 407.

Although it can decline to do so (see *R v Spear* [2003] 1 AC 734), the domestic court will, as a general principle, follow a decision of the European Court where there has been clear and constant exposition of that court's jurisprudence: see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389; *Thynne, Wilson and Gunnell v United Kingdom* (1990) 13 EHRR 666; *Hussain v United Kingdom* (1996) 22 EHRR 1; and *V v United Kingdom* (1999) 30 EHRR 30. However previous decisions based on an erroneous understanding of domestic law are no longer to be relied on and should not be followed: see *Wynne v United Kingdom* (1994) 19 EHRR 333 and *X v United Kingdom* (1980) 24 DR 227.

The Secretary of State must exercise his discretion so as not to fix a longer period than the judicial recommendation: see *R v Secretary of State for the Home Department, Ex p Handscomb*, 87 Cr App R 59; *R v Secretary of State for the Home Department, Ex p Walsh* The Times, 18 December 1991;*Thynne, Wilson and Gunnell v United Kingdom* 13 EHRR 666; *R v Secretary of State for the Home Department, Ex p McCartney The Times,* 25 May 1994; Court of Appeal (Civil Division) Transcript No 667 of 1994, CA; *V v United Kingdom* 30 EHRR 121 and *R (Bulger) v Secretary of State for the Home Department* [2001] 3 All ER 449. However, to set the tariff at less than that recommendation would not necessarily violate article 6(1).

Acceptance of the judicial tariff would not be incompatible with the Secretary of State's duty under section 29 of the 1997 Act, since the authority to fix the tariff derives, not from section 29, but from the rationale of the sentence itself. In any event section 29,if read in the light of section 3 of the 1998 Act, can be understood as subject to a requirement that the maximum period to be served should not exceed the judicial recommendation (see *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 *; R v A (No 2)* [2002] 1 AC 45 and *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291); European authority to the contrary (see *Benjamin and Wilson v United Kingdom* (2002) 36 EHRR 1) need not be followed; and the statutory power contained in section 29 need not therefore be extinguished (see *R (Wilkinson) v Inland Revenue Comrs* [2002] STC 347 and *Benjamin and Wilson v United Kingdom* 26 EHRR 1).

However, if the interpretative process sanctioned by section 3 cannot be applied, the appellant is entitled to a declaration of incompatibility under section 4 of the 1998 Act.

David Pannick QC and *Mark Shaw QC* for the Secretary of State. A mandatory life sentence is imposed as punishment to mark the gravity of the offence of murder, irrespective of the characteristics of the offender, unless the necessary punishment is lifelong custody, or the risk of dangerousness dictates that the offender is not to be released. The mandatory life sentence is not therefore an actual life imprisonment but requires the prisoner to remain in custody unless and until it is considered appropriate to release him on licence subject to recall.

The mandatory life sentence is to be distinguished from a discretionary life sentence, which is imposed because concern as to the dangerousness of

A the offender requires his detention for an indefinite period; and from detention of juvenile murderers during Her Majesty's pleasure because of the youth of the offender. In contrast to the other sentences the mandatory life sentence is imposed as punishment, covering the whole of the offender's life but subject to the Secretary of State's discretionary power of release under section 29 of the Crime (Sentences) Act 1997. Setting the tariff is thus
B an administrative procedure which implements the punishment pronounced on conviction: see Hansard (HC Debates) 27 July 1993, cols *861–864* and 25 June 1991, cols 868–869; *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531; *R v Secretary of State for the Home Department, Ex p Hindley* [2001] 1 AC 410; *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539 and *R v Secretary of State for the Home Department, Ex p Venables* [1998] AC 407.

C The European Court of Human Rights correctly recognised the distinction between the mandatory and discretionary life sentence: see *Thynne, Wilson and Gunnell v United Kingdom* 13 EHRR 666 and *Wynne v United Kingdom* 19 EHRR 333; *Raja v United Kingdom* 20 May 1998; *Bromfield v United Kingdom* 1 July 1998 and *V v United Kingdom* 30 EHRR 121. Those distinctions remain unchanged as do the administrative
D arrangements relating to mandatory life prisoners: see *R v Secretary of State for the Home Department, Ex p Stafford* [1999] 2 AC 38 and Hansard (HC Debates) 10 November 1997, written answers, cols *419–420*. The European Court's decision in *Stafford v United Kingdom* 35 EHRR 1121 was wrong and the domestic court is not obliged to follow it: see *R v Spear* [2003] 1 AC 734 and section 2(1) of the Human Rights Act 1998.

E The 1998 Act was designed to preserve Parliamentary sovereignty; the courts must give effect to unambiguous legislative provisions; such provisions continue to have effect, even if incompatible with Convention rights: see sections 3, 4, 6(2), (3) and (6). To construe section 29 of the 1997 Act, which is in plain contrast to section 28, so as to impose a duty on the Secretary of State to follow judicial advice as to tariff and to surrender
F his decision-making to the judiciary would frustrate Parliamentary sovereignty. By forming his own view on whether to follow judicial advice and on when to refer a case to the Parole Board the Secretary of State carries out the function which Parliament intended him to have. He is therefore acting so as to give effect to or enforce section 29 (see section 6(2)(b) of the 1998 Act) which is a provision of primary legislation which cannot be read down under the interpretative process envisaged by
G section 3: see *In re S (Minors) (Care Order: Implementation of Care Plan* [2002] 2 AC 291. Any relief which the appellant might obtain would accordingly be limited to a declaration of incompatibility under section 4 of the 1998 Act.

Fitzgerald QC in reply. The Secretary of State's explanation of the rationale of the mandatory life sentence has shifted fundamentally from
H purposes which are purely retributive to those which are partly punitive and partly preventative: see *R (Lichniak) v Secretary of State for the Home Department* [2002] QB 296. In consequence the basis on which the *Wynne* case was decided has been critically undermined. There has been a steady erosion of the Secretary of State's powers, discernible in the jurisprudence of

the European Court and in the growing concern for the doctrine of separation of powers to which the section 29 power is contrary: see *Hussain v United Kingdom* 22 EHRR 1; *V v United Kingdom* 30 EHRR 121 and *Browne v The Queen* [2000] 1 AC 45.

Their Lordships took time for consideration.

25 November. **LORD BINGHAM OF CORNHILL**

1 My Lords, this appeal concerns the sentencing, punishment and detention of adults convicted of murder in England and Wales and, in particular, the power now exercised by the Home Secretary to decide how long they should spend in prison for purposes of punishment. The question arises, as one of law not policy, whether that is a power which, compatibly with the European Convention on Human Rights ("the Convention"), the Home Secretary may properly exercise, and the answer must turn on how, on a proper legal analysis, exercise of that power is properly to be regarded. This opinion is concerned only with adults convicted of murder in England and Wales (whom I shall call "convicted murderers") save where express reference is made to other classes of offender or other jurisdictions.

2 I preface this opinion by recording three propositions, none of which is controversial. First, a convicted murderer is a person who has taken a life or lives with the intention either of doing so or of causing serious physical injury. Contrary to widespread public belief, such a person need not have intended to kill and may have intended not to kill. It is enough that he intended to cause serious physical injury if death resulted. Secondly, the crime of murder so defined embraces acts of widely varying culpability, including horrific and brutally sadistic conduct at one end of the spectrum and "almost venial, if objectively immoral" conduct at the other: *R v Howe* [1987] AC 417, 433G, per Lord Hailsham of St Marylebone LC; *Ong Ah Chuan v Public Prosecutor* [1981] AC 648, 674 per Lord Diplock; Report of the Royal Commission on Capital Punishment 1949–53 (1953, Cmd 8932, p 6, para 21); House of Lords Select Committee on Murder and Life Imprisonment (1989, HL Paper 78-I, p 13 para 27); Report of the Committee on the Penalty for Homicide chaired by Lord Lane (Prison Reform Trust, 1993, p 21). Thirdly, judges have never in modern times enjoyed any discretion in passing sentence on a convicted murderer. Until 1957 the sentence was one of death. Under the Homicide Act 1957 death continued to be the sentence mandatorily passed on those convicted of capital or multiple murders (sections 5 and 6), while other convicted murderers were mandatorily sentenced to imprisonment for life (sections 7 and 9(1)). By the Murder (Abolition of Death Penalty) Act 1965 it was provided that convicted murderers should be sentenced to imprisonment for life (section 1(1)).

3 For the past century at least there has been some divergence between the sentence passed and the sentence carried out, perhaps because of the inclusive definition of murder and the broad range of conduct it covers. Statistics published by the Royal Commission on Capital Punishment show that of murderers convicted and sentenced to death between 1900 and 1949 (when no defence of diminished responsibility was available) 91% of women and 39% of men were reprieved (Report, p 326). Of those reprieved, twice as many served terms of imprisonment of under five years (in some cases terms

of less than a year) as served terms of over 15 years (Report, pp 316–317). Since 1965 only a small minority of convicted murderers have spent the remainder of their lives in prison: that minority has included some whose crimes have been held to be so heinous as to merit lifelong imprisonment; it has also included some who have served such terms of imprisonment as their crimes have been held to merit for purposes of punishment but whom it has not been thought safe to release.

4 So long as courts were required to pass sentence of death on convicted murderers or convicted capital murderers, it was natural to regard those reprieved as saving their lives at the price of forfeiting their liberty to the state for life (although the terms of imprisonment to which capital sentences were commuted were on occasion very short indeed: the death sentences passed on the defendants in *R v Dudley and Stephens* (1884) 14 QBD 273 were commuted to sentences of six months' imprisonment). It was also natural to regard release, if ordered, as an act of executive indulgence. It seems clear that a similar view was taken of the mandatory life sentence passed on all convicted murderers following effective abolition of the death penalty in 1965.

5 Section 61(1) of the Criminal Justice Act 1967 conferred a discretion on the Home Secretary to release on licence a convicted murderer serving a sentence of life imprisonment if recommended to do so by the newly created Parole Board. In a written answer given in the House of Commons on 30 November 1983 the then Home Secretary (Mr Leon Brittan QC) made a statement concerning his exercise of this discretion (Hansard (HC Debates), 30 November 1983, cols *505–507*). In this he made two announcements relevant for present purposes: first, that he would continue to look to the judiciary for advice on the time to be served to satisfy the requirements of retribution and deterrence and to the Parole Board for advice on risk; and secondly, that the new procedures he was announcing would separate consideration of the requirements of retribution and deterrence from consideration of risk to the public. Over the years since 1983 the procedures then introduced have been clarified, refined and formalised.

6 A power to release convicted murderers was again conferred on the Home Secretary by section 35(2) and (3) of the Criminal Justice Act 1991, and is now conferred (in terms substantially identical to those of the 1991 Act) in section 29 of the Crime (Sentences) Act 1997, which provides:

> "(1) If recommended to do so by the Parole Board, the Secretary of State may, after consultation with the Lord Chief Justice together with the trial judge if available, release on licence a life prisoner who is not [a discretionary life prisoner].
>
> "(2) The Parole Board shall not make a recommendation under subsection (1) above unless the Secretary of State has referred the particular case, or the class of case to which that case belongs, to the Board for its advice."

This section, no doubt deliberately, gives little indication of the procedures which in practice follow imposition of a mandatory life sentence on a convicted murderer, although for some years now those procedures have been well understood and routinely followed in practice.

7 The first stage is directed to deciding how long the convicted murderer should remain in prison as punishment for the murder or murders he has committed. This is what Mr Brittan meant when he referred to "retribution and deterrence", although deterrence should be understood as meaning general deterrence; deterrence of the particular convicted murderer is embraced in the notion of retribution. In determining the appropriate measure of punishment in a particular case all the traditional factors may, and should so far as appropriate, be taken into account: pure retribution, expiation, expression of the moral outrage of society, maintenance of public confidence in the administration of justice, deterrence, the interests of victims, rehabilitation and so on. The term of imprisonment appropriate in a particular case is subject to no minimum, and no maximum; it may in a case of sufficient gravity extend to the whole life of the convicted murderer (*R v Secretary of State for the Home Department, Ex p Hindley* [1998] QB 751, 769; [2001] 1 AC 410, 416).

8 In the first instance, advice on the appropriate punitive term of imprisonment, which has become known as "the tariff", is given by the trial judge, who will have a detailed knowledge of the facts of the case and of the offender and, if the charge was contested, will have had an opportunity to assess the conduct of the convicted murderer, albeit in the artificial context of a criminal trial. The trial judge, in giving his advice, will review the factors which in his expert judgment go to mitigate and aggravate the offence and will approach his task in very much the same way as if he were sentencing a defendant other than a convicted murderer. The trial judge's advice is passed to the Lord Chief Justice of the day, who does not enjoy the trial judge's immediacy of exposure to the facts of the case or the offender but who does, through the frequency with which he is consulted, obtain an overall view denied to any individual trial judge and who thus has the opportunity to give advice reflecting some uniformity of approach to classes of case and particular considerations. As is plain from the language I have used, the role of the trial judge and the Lord Chief Justice is that of advisers or makers of recommendations. The power of decision rests with the Home Secretary (or a junior Home Office minister) who, having received the written advice of officials in his department, will decide how long the particular convicted murderer should remain in prison to meet the requirements of retribution and general deterrence. In recent years the Home Secretary has set a period in line with the judicial recommendations in a large majority of cases, but in a small minority of cases the period set has been either longer or shorter than the judges have recommended. This is the process, colloquially known as "fixing the tariff", with which this appeal is centrally concerned, and I shall return to it.

9 This procedure was followed in the case of the appellant, Mr Anthony Anderson. In September 1986 the appellant murdered a 60-year-old man in obviously poor health who had allowed the appellant into his house. Once in the house the appellant punched and kicked the victim who suffered a cardiac arrest and died. The appellant stole some of the victim's property. In May 1987 the appellant murdered a 35-year-old homosexual who had invited the appellant back to his house after a chance meeting. The appellant attacked and kicked his victim, who died from his injuries, and stole his property. The appellant denied both murders but was convicted before Kenneth Jones J and a jury at the Central Criminal Court. The trial judge

considered that the appellant had deliberately picked on vulnerable victims and recommended that he serve a minimum term of 15 years for both murders. The Lord Chief Justice made the same recommendation. The Home Secretary set the term at 20 years. The appellant sought judicial review of the Home Secretary's decision to increase the judicially recommended tariff, but was unsuccessful in the Queen's Bench Divisional Court [2001] EWHC Admin 181 (Rose LJ, Sullivan and Penry-Davey JJ) on 22 February 2001 and his appeal against this decision was rejected by the Court of Appeal, ante, p 841G (Lord Woolf CJ, Simon Brown and Buxton LJJ) on 13 November 2001. He now appeals to the House.

10 It is necessary to allude to two further features of the mandatory life sentence imposed on convicted murderers, each of them very important. Both are safeguards directed towards securing the protection of the public. The first safeguard becomes operative when (as happens sooner or later in all but a few cases) the convicted murderer approaches the end of his punitive or tariff term. His case will then be referred to the Parole Board which will consider whether it is necessary for the protection of the public that the convicted murderer should continue to be confined. If the board concludes that it is necessary, the Home Secretary has no power under section 29 to release that convicted murderer. If the board recommends that the convicted murderer be released on licence the Home Secretary may (after consultation with the Lord Chief Justice) order his release, and will ordinarily do so, although the statute does not even then oblige him to do so.

11 In a written answer given on 27 July 1993 (Hansard (HC Debates), 27 July 1993, cols *861–864*) the then Home Secretary (Mr Michael Howard QC), referring to the release of convicted murderers, stated:

> "Accordingly, before any such prisoner is released on licence, I will consider not only (a) whether the period served by the prisoner is adequate to satisfy the requirements of retribution and deterrence and (b) whether it is safe to release the prisoner, but also (c) the public acceptability of early release. This means that I will exercise my discretion to release only if I am satisfied that to do so will not threaten the maintenance of public confidence in the system of criminal justice."

In a written answer on 10 November 1997 (Hansard (HC Debates), 10 November 1997, cols *419–420*) the Home Secretary (Mr Jack Straw) addressing the same subject, stated:

> "I take the opportunity to confirm that my approach on the release of adults convicted of murder once tariff has expired will reflect the policy set out in the answer given 27 July 1993. In particular, the release of such a person will continue to depend not only on the expiry of tariff and on my being satisfied that the level of risk of his committing further imprisonable offences presented by his release is acceptably low, but also on the need to maintain public confidence in the system of criminal justice."

As already indicated, the need to maintain public confidence in the administration of criminal justice is a matter of which account is routinely taken when deciding how long a convicted murderer should remain in prison, as it is in the case of other serious offences. No issue arises in this

appeal on Mr Howard's head (c) (the public acceptability of early release) upon which, the House was told, reliance has never in practice been placed. One must however question whether it could ever be lawful to continue to detain a convicted murderer who had served the punitive term judged necessary to meet the requirements of retribution and general deterrence and whose release was not judged by the Parole Board to present any significant risk of danger to the public.

12 The mandatory life sentence imposed on a convicted murderer provides a second safeguard applicable after he has served his tariff term and after he has been released by the Home Secretary on the recommendation of the Parole Board following consultation with the Lord Chief Justice. His release is not unconditional but is subject to a licence which, unless revoked, endures for the remainder of his life. But his licence may be revoked and he may be recalled to prison if his continued release is thought to threaten the safety of the public: section 32 of the Crime (Sentences) Act 1997 entrusts the final decision on revocation and recall to the Parole Board.

13 I return to the fixing of the convicted murderer's tariff term by the Home Secretary, described in paragraph 8 above. The true nature of that procedure must be judged as one of substance, not of form or description. It is what happens in practice that matters: *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443, 456, para 38. What happens in practice is that, having taken advice from the trial judge, the Lord Chief Justice and departmental officials, the Home Secretary assesses the term of imprisonment which the convicted murderer should serve as punishment for his crime or crimes. That decision defines the period to be served before release on licence is considered. This is a classical sentencing function. It is what, in the case of other crimes, judges and magistrates do every day. In arguing on behalf of the Home Secretary that his fixing of a convicted murderer's tariff was not a sentencing function, Mr David Pannick drew attention to two options open to the Home Secretary but not, as was rightly said, to a sentencing judge. He may shorten the convicted murderer's tariff term if he makes exceptional progress in prison. He may increase the convicted murderer's tariff term if fresh facts come to light, not known when the tariff term was fixed and revealing his conduct as graver than previously appreciated. There are obvious difficulties about this latter course if the length of the tariff term has already been disclosed to the convicted murderer (as in *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539) and if the fresh facts are not admitted, but it may be accepted for present purposes that these differences exist. They are however minor differences and do not begin to outweigh the very striking similarities between the fixing of a tariff term and the imposition of an ordinary custodial sentence.

14 The Home Secretary also relied on a more general argument concerning the nature of the mandatory life sentence. A convicted murderer, it was said, had committed a crime of such gravity that he forfeited his life to the state, giving rise to a presumption that he would remain in prison until and unless the Home Secretary concluded that the public interest would be better served by the convicted murderer's release than by his continued detention. In fixing the tariff the Home Secretary was administering a sentence already imposed, not imposing a sentence. This view of the mandatory life sentence was advanced by the Minister of State (Mrs Angela Rumbold) on 16 July 1991 (Hansard (HC Debates), 16 July 1991, cols 309–

A 310), and was endorsed by Mr Howard in his written answer of 27 July 1993 already referred to. In *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531 however, the House (in an opinion of Lord Mustill, with the concurrence of Lord Keith of Kinkel, Lord Lane, Lord Templeman and Lord Browne-Wilkinson) recognised this theory of the sentence as inconsistent with the practice followed since the statement
B of Mr Brittan in 1983 and left it entirely out of account in resolving the issues in the case (p 557).

15 Since 1983 the Home Secretary's role in the administration of life sentences has been the subject of repeated challenges, both in our domestic courts and before the European Commission and the European Court of Human Rights. Some of these challenges have concerned defendants sentenced to imprisonment for life in the exercise of the sentencing judge's
C discretion for offences other than murder: *R v Secretary of State for the Home Department, Ex p Handscomb* (1987) 86 Cr App R 59; *Weeks v United Kingdom* (1987) 10 EHRR 293; *Thynne, Wilson and Gunnell v United Kingdom* (1990) 13 EHRR 666. Such sentences are now governed by section 28 of the Crime (Sentences) Act 1997: in short, the sentencing judge decides how long a defendant shall serve in prison for punitive
D purposes; on expiry of that period, the defendant may require the Home Secretary to refer his case to the Parole Board; if the board is satisfied that it is no longer necessary for the protection of the public that the defendant should be confined, the Home Secretary must release him on licence. Some of the challenges have concerned youthful murderers sentenced to be detained during Her Majesty's pleasure: *Hussain v United Kingdom* (1996) 22 EHRR 1; *R v Secretary of State for the Home Department, Ex p Venables*
E [1998] AC 407; *V v United Kingdom* (1999) 30 EHRR 121. The third of these cases held that the Home Secretary had acted in breach of article 6(1) of the Convention in setting the applicant's tariff, since this was a sentencing exercise which was required to be carried out by an independent and impartial tribunal and the Home Secretary, as a member of the executive, was not an independent and impartial tribunal. Some of the challenges have
F concerned convicted murderers serving (or recalled to serve) mandatory life sentences: *In re Findlay* [1985] AC 318; *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531; *Wynne v United Kingdom* (1994) 19 EHRR 333; *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539; *Raja v United Kingdom* (Application No 39047/97) (unreported) 20 May 1998; *R v Secretary of State for the Home Department, Ex p Stafford* [1999] 2 AC 38; *R v Secretary of State for*
G *the Home Department, Ex p Hindley* [1998] QB 751; [2000] QB 152; [2001] 1 AC 410; *Stafford v United Kingdom* (2002) 35 EHRR 1121. Among these cases are those most directly germane to the present appeal.

16 In *Ex p Doody* [1994] 1 AC 531, 558 the House accepted that mandatory life sentences were "very different" from discretionary life sentences and regarded the fixing of a convicted murderer's tariff as
H appropriately carried out by the Home Secretary and his junior ministers. Not surprisingly, the European Court relied heavily on this authoritative ruling in *Wynne*, holding that as a convicted murderer Wynne was not entitled to the protection which would have been appropriate had he been a discretionary life prisoner. The application in *Raja* was rejected by the European Commission as manifestly ill-founded on the ground that tariff-

fixing was an administrative procedure governing the implementation, not the determination, of the sentence, with the result that article 6(1) of the Convention did not apply to it. This decision reflected Strasbourg jurisprudence as it then stood. The House of Lords' decision in *Ex p Stafford*, rejecting an appeal for symmetry between the treatment of convicted murderers and discretionary life sentence prisoners in reliance on *Ex p Doody* [1994] 1 AC 531, 559 and *Wynne* 19 EHRR 333, regarded the dichotomy as embedded in our domestic law by primary legislation [1999] 2 AC 38, 49–50. In *Ex p Hindley* the House of Lords understood the sentence of life imprisonment to authorise the detention of the person sentenced for an indeterminate period brought to an end by the death of the prisoner or the Home Secretary's decision (if and when made) to release him [2001] 1 AC 410, 416.

17 There was material in these judgments to support the Home Secretary's view of the mandatory life sentence as involving the forfeiture of the convicted murderer's life to the state and his view of his own role as involving not the imposition of a sentence but the administrative implementation of a sentence already passed. But these views were inconsistent with the steadily growing recognition of the tariff-fixing exercise as involving the imposition of a sentence and with the procedures followed in the fixing of the tariff. In the present case, both Sullivan and Penry-Davey JJ in the Queen's Bench Divisional Court [2001] EWHC Admin 181 would, if unconstrained by authority, have held that the fixing of a tariff amounts to the imposition of a sentence and is accordingly governed by article 6(1) of the Convention: paras 42, 48–49, 54. Similar views were expressed in the Court of Appeal by Simon Brown and Buxton LJJ, ante, pp 857C–D, 863E–F, paras 57, 82. The stage was thus set for reconsideration by the European Court of its own case law on mandatory life sentences, particularly its decision in *Wynne* 19 EHRR 333. This task it undertook in a careful and comprehensive way in *Stafford v United Kingdom* 35 EHRR 1121, expressing its conclusions at pp 1143–1144, of the judgment:

> "78. The above developments demonstrate an evolving analysis, in terms of the right to liberty and its underlying values, of the role of the Secretary of State concerning life sentences. The abolition of the death penalty in 1965 and the conferring on the Secretary of State of the power to release convicted murderers represented, at that time, a major and progressive reform. However, with the wider recognition of the need to develop and apply, in relation to mandatory life prisoners, judicial procedures reflecting standards of independence, fairness and openness, the continuing role of the Secretary of State in fixing the tariff and in deciding on a prisoner's release following its expiry, has become increasingly difficult to reconcile with the notion of separation of powers between the executive and the judiciary, a notion which has assumed growing importance in the case law of the court (mutatis mutandis, *Incal v Turkey* (2000) 29 EHRR 449).
>
> "79. The court considers that it may now be regarded as established in domestic law that there is no distinction between mandatory life prisoners, discretionary life prisoners and juvenile murderers as regards the nature of tariff-fixing. It is a sentencing exercise. The mandatory life

A sentence does not impose imprisonment for life as a punishment. The tariff, which reflects the individual circumstances of the offence and the offender, represents the element of punishment. The court concludes that the finding in *Wynne* that the mandatory life sentence constituted punishment for life can no longer be regarded as reflecting the real position in the domestic criminal justice system of the mandatory life B prisoner. This conclusion is reinforced by the fact that a whole life tariff may, in exceptional cases, be imposed where justified by the gravity of the particular offence. It is correct that the court in its more recent judgments in *T* and *V*, citing the *Wynne* judgment as authority, reiterated that an adult mandatory life sentence constituted punishment for life (*T v United Kingdom,* cited above, para 109, and *V v United Kingdom,* cited above, para 110). In doing so it had, however, merely sought to draw attention C to the difference between such a life sentence and a sentence to detention during Her Majesty's pleasure, which was the category of sentence under review in the cases concerned. The purpose of the statement had therefore been to distinguish previous case law rather than to confirm an analysis deriving from that case law.

"80. The Government maintained that the mandatory life sentence was D none the less an indeterminate sentence which was not based on any individual characteristic of the offender, such as youth and dangerousness and therefore there was no question of any change in the relevant circumstances of the offender that might raise lawfulness issues concerning the basis for his continued detention. However, the court is not convinced by this argument. Once the punishment element of the sentence (as reflected in the tariff) has been satisfied, the grounds for the E continued detention, as in discretionary life and juvenile murderer cases, must be considerations of risk and dangerousness. Reference has been made by Secretaries of State to a third element—public acceptability of release—yet this has never in fact been relied upon. As Simon Brown LJ forcefully commented in the case of *Anderson and Taylor* (paragraph 46), it is not apparent how public confidence in the system of criminal justice F could legitimately require the continued incarceration of a prisoner who had served the term required for punishment for the offence and was no longer a risk to the public. It may also be noted that recent reforms in Scotland and Northern Ireland equate the position of mandatory life prisoners in those jurisdictions to that of discretionary life prisoners in England and Wales in respect of whom continued detention after expiry of tariff is solely based on assessment of risk of harm to the public from G future violent or sexual offending."

18 It was argued for the Home Secretary that the House should not follow this judgment, which was criticised as erroneous and lacking in reasoning to justify and explain the court's departure from its previous ruling. I cannot accept this argument. While the duty of the House under section 2(1)(a) of the Human Rights Act 1998 is to take into account any H judgment of the European Court, whose judgments are not strictly binding, the House will not without good reason depart from the principles laid down in a carefully considered judgment of the court sitting as a Grand Chamber: *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389, 1399,

para 26. Here, there is very strong reason to support the decision, since it rests on a clear and accurate understanding of the tariff-fixing process and the Home Secretary's role in it. The court advanced ample grounds for its change of opinion: among them were the judgments already referred to in the present case; and the court noted that in *R (Lichniak) v Secretary of State for the Home Department* [2002] QB 296 the Home Secretary had sought to resist an attack on the mandatory life sentence as arbitrary by contending that an individualised tariff was set and that after the expiry of that tariff the prisoner could expect to be released once it was safe to release him, a departure from the contention that a mandatory life sentence represented a punishment whereby a prisoner forfeited his liberty for life (35 EHRR 1121, 1143, para 77). In ruling on the rights of the appellant under article 6(1) of the Convention, I am satisfied that the House should, in accordance with the will of Parliament expressed in the Human Rights Act 1998, seek to give effect to the decision of the European Court in *Stafford*.

19 In the agreed issue formulated for decision by the House attention was focused on the conduct of the Home Secretary in this case in setting the appellant's tariff substantially higher than that recommended by the trial judge and the Lord Chief Justice, and Mr Edward Fitzgerald devoted part of his argument to this aspect. He had good forensic reason for doing so. The appellant has served almost 15 years in prison. Were the judicial recommendations to be effective, he would be approaching the stage at which the Parole Board would consider whether it was safe to release him on licence. As it is, because of the higher tariff set by the Home Secretary, he has five years to serve before reaching that stage. So it would best serve the appellant's interest if the Home Secretary's increase were invalidated and the judicial recommendations stood. But the principles which Mr Fitzgerald must invoke to attack the setting of the tariff by the Home Secretary at a level higher than that recommended by the judges preclude consideration of the issues on so narrow a basis. As became clear in argument, the decision of the House must rest on a broader basis of principle.

20 Mr Fitzgerald's argument for the appellant involved the following steps. (1) Under article 6(1) of the Convention a criminal defendant has a right to a fair trial by an independent and impartial tribunal. (2) The imposition of sentence is part of the trial. (3) Therefore sentence should be imposed by an independent and impartial tribunal. (4) The fixing of the tariff of a convicted murderer is legally indistinguishable from the imposition of sentence. (5) Therefore the tariff should be fixed by an independent and impartial tribunal. (6) The Home Secretary is not an independent and impartial tribunal. (7) Therefore the Home Secretary should not fix the tariff of a convicted murderer. I must review these steps in turn.

21 Step (1) is correct. The right to a fair trial by an independent and impartial tribunal is guaranteed by article 6(1) of the Convention. It is one of the rights which the United Kingdom committed itself to protect when it ratified the Convention and it is one of the most important rights to which domestic effect was given by the Human Rights Act 1998.

22 Step (2) is also correct. Strasbourg authority supporting the proposition is to be found in *Ringeisen v Austria (No 1)* (1971) 1 EHRR 455; *Eckle v Germany* (1983) 5 EHRR 1, 28–29, paras 76–77; *Bromfield v United Kingdom* (Application No 32003/96) (unreported) 1 July 1998, p 10;

V v United Kingdom 30 EHRR 121, 185–186, para 109. It makes good sense that the same procedural protections should apply to the imposition of sentence as to the determination of guilt.

23 Step (3) is a logical consequence of steps (1) and (2). But the point was clearly expressed by the Supreme Court of Ireland in *Deaton v Attorney General and Revenue Comrs* [1963] IR 170, 182–183:

> "There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case . . . The legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the courts . . . the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the executive . . ."

24 Examination of the facts has already led me to accept the correctness of step (4): see paragraphs 17–18 above. The clearest authoritative statement of this proposition is at pp 1143–1144, para 79 of the European Court's judgment in *Stafford*, quoted in paragraph 17 above. But earlier authorities had laid the foundations for that conclusion: *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531, 557; *R v Secretary of State for the Home Department, Ex p Venables* [1998] AC 407, 490, 526, 537; *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539, 585; *R (Anderson) v Secretary of State for the Home Department*, ante, p 837, 857C–D, 859C–E, paras 57, 67 (the present case in the Court of Appeal). It is clear beyond doubt that the fixing of a convicted murderer's tariff, whether it be for the remainder of his days or for a relatively short time only, involves an assessment of the quantum of punishment he should undergo.

25 If it be assumed that steps (1) to (4) are correct, step (5) necessarily follows from them.

26 The correctness of step (6) was accepted on behalf of the Home Secretary, and rightly so. The European Court has interpreted "independent" in the context of article 6(1) of the Convention to mean "independent of the parties to the case and also of the executive": *V v United Kingdom* 30 EHRR 121, 186–187, para 114. Far from being independent of the executive, the Home Secretary and his junior ministers are important members of it. I need not linger on this point, since it is not controversial. Plainly, the Home Secretary is not independent of the executive and is not a tribunal.

27 Step (7) follows logically from the preceding steps and must be accepted. In *R v Secretary of State for the Home Department, Ex p Stafford* [1998] 1 WLR 503, 518, the Court of Appeal expressed concern at the imposition of what was in effect a substantial term of imprisonment by the exercise of executive discretion, which in its view lay uneasily with ordinary concepts of the rule of law. This concern was echoed in the House of Lords [1999] 2 AC 38, 51, and again by the European Court (*Stafford v United Kingdom* 35 EHRR 1121) at p 1143, para 78 of its judgment quoted in paragraph 17 above. In *Benjamin and Wilson v United Kingdom* (2002) 36 EHRR 1 the European Court took a step further: it held that the Home

Secretary's role in the release of two "technical lifers" was objectionable because he was not independent of the executive and he could not save the day by showing that he always acted in accordance with the recommendation of the mental health review tribunal: paragraph 36. The European Court observed, at p 9, para 36: "This is not a matter of form but impinges on the fundamental principle of separation of powers and detracts from a necessary guarantee against the possibility of abuse . . ." The European Court was right to describe the complete functional separation of the judiciary from the executive as "fundamental", since the rule of law depends on it.

28 Thus I accept each of Mr Fitzgerald's steps (1) to (7) save that, in the light of *Benjamin and Wilson v United Kingdom*, it must now be held that the Home Secretary should play no part in fixing the tariff of a convicted murderer, even if he does no more than confirm what the judges have recommended. To that extent the appeal succeeds.

29 The conclusion that the Home Secretary should play no part in the fixing of convicted murderers' tariffs makes for much greater uniformity of treatment than now exists. The tariff term to be served by a discretionary life sentence prisoner is already determined by the trial judge in open court (subject to the accused's right of appeal under section 9 of the Criminal Appeal Act 1968 and the Attorney General's right to apply to refer a sentence to the court as unduly lenient under section 36 of the Criminal Justice Act 1988) and the Parole Board decide whether it is safe to release the prisoner at the end of that tariff term. The Home Secretary has no role. The result of *V v United Kingdom* 30 EHRR 121 was to make plain that the Home Secretary should not fix the tariff of a young murderer ordered to be detained during Her Majesty's pleasure. In Scotland, following an audit conducted by the Scottish Executive to identify procedures operating there which might fall foul of the Convention, the Convention Rights (Compliance) (Scotland) Act 2001 was enacted: this provides that those convicted of murder in Scotland should be treated in very much the same way as discretionary life sentence prisoners, with no intervention by the executive. Similar arrangements have been adopted in Northern Ireland, doubtless with the same object of complying with the Convention. It is the Home Secretary's role in relation to convicted murderers which has become anomalous.

30 The question of relief therefore arises. Section 29 of the Crime (Sentences) Act 1997, quoted in paragraph 6 above, appears to stand in the way of the appellant. It is unrepealed primary legislation. Mr Fitzgerald contended that it was possible to read and give effect to section 29 in a manner compatible with the Convention, and that the House should do so in exercise of the interpretative power conferred by section 3(1) of the Human Rights Act 1998. Mr Pannick contended that, even if the House were to accept Mr Fitzgerald's argument summarised in paragraph 20 above, the only relief which the appellant could obtain would be a declaration of incompatibility under section 4 of the 1998 Act. On this point I am satisfied that Mr Pannick is right. As observed in paragraph 6 above, Parliament did not attempt to prescribe the procedures to be followed in fixing the tariff of a convicted murderer. But some things emerge clearly from this not very perspicuous section. The power to release a convicted murderer is conferred on the Home Secretary. He may not exercise that power unless

A recommended to do so by the Parole Board. But the Parole Board may not make such a recommendation unless the Home Secretary has referred the case to it. And the section imposes no duty on the Home Secretary either to refer a case to the board or to release a prisoner if the board recommends release. Since, therefore, the section leaves it to the Home Secretary to decide whether or when to refer a case to the board, and he is free to ignore its recommendation if it is favourable to the prisoner, the decision on how B long the convicted murderer should remain in prison for punitive purposes is his alone. It cannot be doubted that Parliament intended this result when enacting section 29 and its predecessor sections. An entirely different regime was established, in the case of discretionary life sentence prisoners, in section 28. The contrast was plainly deliberate. In section 1(2) of the Murder (Abolition of Death Penalty) Act 1965, Parliament was at pains to C give judges a power to recommend minimum periods of detention, but not to rule. That was for the Home Secretary. To read section 29 as precluding participation by the Home Secretary, if it were possible to do so, would not be judicial interpretation but judicial vandalism: it would give the section an effect quite different from that which Parliament intended and would go well beyond any interpretative process sanctioned by section 3 of the 1998 Act D (*In re S (Minors) (Care Order: Implementation of Care Plan*) [2002] 2 AC 291, 313–314, para 41).

31 For these reasons and also for the reasons given by my noble and learned friends Lord Steyn and Lord Hutton I would accordingly allow the appeal to the extent already indicated with costs in the House and below and make a declaration of incompatibility in terms which have been agreed E between the parties:

> "Section 29 of the Crime (Sentences) Act 1997 is incompatible with a Convention right (that is the right under article 6 of the European Convention on Human Rights to have a sentence imposed by an independent and impartial tribunal) in that the Secretary of State for the Home Department is acting so as to give effect to section 29 when he F himself decides on the minimum period which must be served by a mandatory life sentence prisoner before he is considered for release on life licence."

LORD NICHOLLS OF BIRKENHEAD

32 My Lords, I have had the advantage of reading in draft the speeches G of my noble and learned friends Lord Bingham of Cornhill, Lord Steyn and Lord Hutton. For the reasons they give, with which I agree, I too would allow this appeal.

LORD STEYN

I. The question

H **33** My Lords, the question is whether decisions about the term of imprisonment to be served by convicted murderers, sentenced to mandatory life imprisonment, should be made by the Secretary of State for the Home Department, a member of the executive, or by independent courts or tribunals.

34 The House has before it the appeal of Anthony Anderson, who was convicted in 1988 of two unrelated murders committed in 1986 and 1987. The appellant committed the two murders in the same way, that is by kicking his victims to death in the course of theft. In accordance with section 1(1) of the Murder (Abolition of Death Penalty) Act 1965 the trial judge imposed, as the law required and still requires, sentences of life imprisonment.

35 Since the abolition of the death penalty in 1965 successive statutes have entrusted to the Home Secretary the power to decide when a mandatory life sentence prisoner may be released. From 1983 successive Home Secretaries have applied a policy of fixing by way of a tariff the part of a mandatory sentence of life imprisonment which must be served by a prisoner to satisfy the requirements of retribution and deterrence before the risk of releasing him can be considered. Throughout this period Home Secretaries have looked to the trial judge and the Lord Chief Justice for advice on the tariffs to be served in individual cases, reserving to themselves the power to fix the tariff.

36 The trial judges and the Lord Chief Justice recommended a tariff of 15 years to be served by the appellant. The Home Secretary rejected the judicial advice and fixed the tariff at 20 years. For the appellant the challenge to the Home Secretary's decision is important. The judicially recommended tariff is about to lapse. If the tariff set by the Home Secretary is lawful the process of the Parole Board considering whether, from a point of view of risk, the appellant can be released must be postponed for at least another five years.

II. The framework

37 The Home Secretary's power to control the release of mandatory life sentence prisoners derives from section 29 of the Crime (Sentences) Act 1997. It reads:

> "(1) If recommended to do so by the Parole Board, the Secretary of State may, after consultation with the Lord Chief Justice together with the trial judge if available, release on licence a life prisoner who is not one to whom section 28 above applies.
>
> "(2) The Parole Board shall not make a recommendation under subsection (1) above unless the Secretary of State has referred the particular case, or the class of case to which that case belongs, to the Board for its advice."

Since 1965 the statutory precursors of this provision have been section 61 of the Criminal Justice Act 1967 and section 35(2) and (3) of the Criminal Justice Act 1991. In *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531, 559 Lord Mustill, speaking for a unanimous House, observed about this regime:

> "It is [the Home Secretary], 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 . . ."

A The two stages to which Lord Mustill referred were, of course, the fixing of the tariff and, after the lapse of the tariff period, a decision on whether from the point of view of risk the prisoner could be released.

38 Given that the primary focus of this case is the Home Secretary's power of fixing the tariff, it is of some relevance to set out how the system worked and still works. On 17 July 1995 the Home Secretary explained the B position to the House of Commons (Hansard (HC Debates), col 1353). He said:

> "In every case where an offender is convicted of murder, the trial judge completes a detailed report on the background to the case. Whether or not he has made a formal recommendation in open court, the judge sets out his advice on the minimum period that should be served for C retribution and deterrence. This report goes first to the Lord Chief Justice, who adds his own comments and then forwards the report to me. All this normally happens within two or three weeks of the conviction. The whole of the report, apart from opinions about the risk, is disclosed to the prisoner, together with any other relevant papers, such as details of previous convictions, which will be put to ministers in due course. This means that in practice, the prisoner sees everything that is relevant to the D setting of the tariff. The prisoner is given the opportunity to make any representations he wishes on the judicial recommendations and the other contents of the report. It is, however, made clear to him that the judicial views are advisory and that the tariff will be set by the Secretary of State. The prisoner's representations, along with the judicial report, are then submitted to ministers, who make the decision on tariff. This is E communicated to the prisoner. If, after considering the judicial advice and the prisoner's representations, I decide that a tariff higher than that recommended by the trial judge is required for deterrence and retribution, the prisoner is given detailed reasons for that decision and these reasons are, of course, open to scrutiny by the courts by way of judicial review. To summarise, the prisoner is aware of the judicial view and has the F opportunity to make representations. He is then told of the tariff set. If there is any departure from the judicial advice, he is given detailed reasons. Once the prisoner has been informed of the tariff, we are prepared to disclose both the tariff and the judicial recommendation in individual cases to anyone who asks. The process cannot therefore be described as secretive—it could hardly be more open."

G There have been subsequent ministerial statements on this subject but as far as the executive is concerned the 1995 statement is still controlling. It is to be noted that within the institutional constraints of a decision taken by a member of the executive, a concerted attempt was made to model the fixing of the tariff on a quasi judicial procedure. The procedure highlights the analogy between the role of the Home Secretary, when he fixes a tariff representing the punitive element of the sentence, and the role of a H sentencing judge. Not surprisingly the Home Office described the duty of the Home Secretary as follows: "[The Home Secretary] must ensure that, at all times, he acts with the same dispassionate sense of fairness as a sentencing judge": *R v Secretary of State for the Home Department, Ex p Venables* [1998] AC 407, 526B.

39 In a series of decisions since *Doody* in 1993 to which I will refer later, the House of Lords has described the Home Secretary's role in determining the tariff period to be served by a convicted murderer as punishment akin to a sentencing exercise. In our system of law the sentencing of persons convicted of crimes is classically regarded as a judicial rather than executive task. Our constitution has, however, never embraced a rigid doctrine of separation of powers. The relationship between the legislature and the executive is close. On the other hand, the separation of powers between the judiciary and the legislative and executive branches of government is a strong principle of our system of government. The House of Lords and the Privy Council have so stated: *Attorney General for Australia v The Queen* [1957] AC 288, 315; *Liyanage v The Queen* [1967] 1 AC 259, 291; *Hinds v The Queen* [1977] AC 195; *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, 157B. It is reinforced by constitutional principles of judicial independence, access to justice, and the rule of law. But the supremacy of Parliament is the paramount principle of our constitution. Whatever arguments there were about the precise nature of the Home Secretary's role in controlling the release of convicted murderers, Parliament had the power to entrust this particular role to the Home Secretary. It did so unambiguously by enacting section 29 of the 1997 Act and its precursors. While a series of House of Lords' decisions have revealed concerns about the compatibility of the operation of the system with the rule of law, the lawfulness in principle of the Home Secretary's role was not in doubt.

40 The question is now whether the Home Secretary's decision-making power over the terms to be served by mandatory life sentence prisoners is compatible with a later statute enacted by Parliament, namely the Human Rights Act 1998 by which Parliament incorporated the European Convention on Human Rights into the law of the United Kingdom. Article 6(1) of the Convention, so far as it is material, provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Article 6(1) requires effective separation between the courts and the executive, and further requires that what can in shorthand be called judicial functions may only be discharged by the courts: *Ringeisen v Austria (No 1)* (1971) 1 EHRR 455, 490, para 95; *V v United Kingdom* (1999) 30 EHRR 121, 186–187, para 114. In *Millar v Dickson* [2002] 1 WLR 1615, 1633, para 41, Lord Hope of Craighead captured the flavour of the European jurisprudence by holding: "Central to the rule of law in a modern democratic society is the principle that the judiciary must be, and must be seen to be, independent of the executive." Even in advance of the formal incorporation of the Convention the interpretation and application of article 6(1) has brought about substantial changes in our law. Since the coming into operation of the Human Rights Act on 2 October 2000 this process has accelerated. Thus the judicial systems of Scotland and England and Wales had to be reorganised to take into account a decision of a Scottish court which held that temporary sheriffs were not sufficiently independent: *Millar v Dickson* [2002] 1 WLR 1615.

A **41** The relevant developments for present purposes include the following. First, as a result of a decision of the European Court of Human Rights in *Thynne, Wilson and Gunnell v United Kingdom* (1990) 13 EHRR 666 Parliament made the judiciary and the Parole Board alone responsible for decisions about the release of discretionary life sentence prisoners. The Home Secretary was not perceived to be independent. Parliament reformed the law by enacting section 34 of the Criminal Justice Act 1991. In the result B the Home Secretary no longer controls release of a category of life sentence prisoners which includes some of the most dangerous prisoners in our prisons. Secondly, a parallel development followed in respect of young persons sentenced to detention during Her Majesty's pleasure. As a result of the decision of the European Court of Human Rights in *V v United Kingdom* 30 EHRR 121, the tariff system in respect of juveniles had to be reorganised. C Ministers lost their power to set the tariff: *Practice Statement (Juveniles: Murder Tariff)* [2000] 1 WLR 1655; see further *Practice Statement (Crime: Life Sentences)* [2002] 1 WLR 1789. Again, the reason for this development was that the Home Secretary could no longer be regarded as independent for the purposes of performing this function.

42 Thirdly, the coming into force in 1999 of the Scotland Act 1998, to D which was scheduled the Human Rights Act 1998, led to legislation by the Scottish Parliament effectively to eliminate the role of the executive in Scotland in fixing terms to be served by mandatory life sentence prisoners: Convention Rights (Compliance) (Scotland) Act 2001. The reason for this legislation was the apprehension that the executive's role would be in conflict with article 6(1): Policy Memorandum relating to the Bill introduced in the Scottish Parliament on 10 January 2001. For the same reason the role E of the executive in controlling the periods to be served by mandatory life sentence prisoners in Northern Ireland was brought to an end: the Life Sentences (Northern Ireland) Order 2001 (SI 2001/2564). These developments have increased the doubts about the Home Secretary's remaining role in England and Wales about the one class of life sentence prisoners over whom he still exercises control.

F **43** Until recently, however, there was a justification in European jurisprudence for the Home Secretary's retention of the power to fix the tariff in respect of mandatory life sentence prisoners. It derived from the ruling in *Wynne v United Kingdom* (1994) 19 EHRR 333, 347, para 35 to the following effect:

> "the fact remains that the mandatory sentence belongs to a different G category from the discretionary sentence in the sense that it is imposed automatically as the punishment for the offence of murder irrespective of considerations pertaining to the dangerousness of the offender."

As a result of two recent decisions of the European Court of Human Rights this prop of the Home Secretary's position has now, in terms of European jurisprudence, been knocked out.

H **44** In *Stafford v United Kingdom* (2002) 35 EHRR 1121 the Grand Chamber of the ECHR reviewed developments which in its view led to the conclusion that, at p 20, para 78:

> "the continuing role of the Secretary of State in fixing the tariff and in deciding on a prisoner's release following its expiry, has become

increasingly difficult to reconcile with the notion of separation of powers between the executive and the judiciary, a notion which has assumed growing importance in the case law of the court (see mutatis mutandis, *Incal v Turkey* (2000) 29 EHRR 449)." A

Referring to the *Wynne* judgment the court observed, at pp 1143–1144, para 79:

"The court considers that it may now be regarded as established in domestic law that there is no distinction between mandatory life prisoners, discretionary life prisoners and juvenile murderers as regards the nature of tariff-fixing. It is a sentencing exercise. The mandatory life sentence does not impose imprisonment for life as a punishment. The tariff, which reflects the individual circumstances of the offence and the offender, represents the element of punishment. The court concludes that the finding in *Wynne* that the mandatory life sentence constituted punishment for life can no longer be regarded as reflecting the real position in the domestic criminal justice system of the mandatory life prisoner." B C

The decision in *Stafford* has recently been reinforced by a Chamber of the European Court of Human Rights in *Benjamin and Wilson v United Kingdom* (2002) 36 EHRR 1. The applicants were discretionary life sentence prisoners who were detained in a mental hospital. The case concerned the applicants' right to a review of their detention in hospital as required by article 5(4) of the Convention. The power to order release lay with the Secretary of State who asserted that he adopted a practice of following the recommendation of the mental health review tribunal. The court ruled, at p 9, para 36: D E

"although both parties appear to agree that the Secretary of State, following entry into force of the Human Rights Act 1998, would not be able lawfully to depart from the tribunal's recommendation, this does not alter the fact that the decision to release would be taken by a member of the executive and not by the tribunal. This is not a matter of form but impinges on the fundamental principle of separation of powers and detracts from a necessary guarantee against the possibility of abuse (see, mutatis mutandis, *Stafford v United Kingdom,* [GC] No 46295/99, 28 May 2002, ECHR 2002 . . . para 78)." F

In other words, a member of the executive may not play any part in such a decision. G

III. A ministerial statement

45 Following the decision in *Stafford* the following statement was made in the House of Commons on behalf of the Home Secretary on 17 October 2002 (Hansard (HC Debates), written answers, cols *915W–916W*):

"As an interim measure, the Home Secretary has decided to change the administrative arrangements for the review and release of mandatory life sentence prisoners. These administrative arrangements will apply to all such prisoners whose next Parole Board review begins on or after 1 January 2003. The changes will mean that in most instances these H

prisoners' cases will be heard initially, as now, by the Parole Board on the papers which will make a provisional recommendation. If prisoners wish to make representations about provisional recommendations it will then be open to them to request an oral hearing before the Parole Board at which they may have legal representation. They will normally receive full disclosure of all material relevant to the question of whether they should be released. They will also be able to examine and cross-examine witnesses. Similarly, the Secretary of State may also require an oral hearing of the Board in cases where he believes further examination of the evidence is required. If, at the end of the review process, the Parole Board favours the release of a mandatory life sentence prisoner once the minimum period has been served the Home Secretary will normally accept such a recommendation. The *Stafford* judgment affects only the process by which the decision is made on whether to release mandatory life sentence prisoners. It does not relate to the period of detention which such prisoners must serve to satisfy the requirements of retribution and deterrence, or Parole Board reviews that take place before the end of that period. There will usually be no change to the dates set for Parole Board reviews of prisoners who have served that period. Those prisoners serving whole life tariffs do not have their cases referred to the Parole Board."

It will be observed that in part at least the Home Secretary has already given effect to the *Stafford* judgment.

IV. The proceedings below

46 The appellant, and another mandatory life sentence prisoner, challenged decisions of the Home Secretary fixing tariffs in their cases. These cases were heard and determined before the decisions of the European Court of Human Rights in *Stafford* and *Benjamin*. The Divisional Court [2001] EWHC Admin 181 unanimously dismissed the application. Two members of the court (Sullivan and Penry-Davey JJ) reached their decisions with reluctance but felt constrained by the then extant *Wynne* decision to reach this result. The Court of Appeal dismissed an appeal. Again, the *Wynne* decision was decisive. Simon Brown and Buxton LJJ were highly critical of that decision and dismissed the appeal with great reluctance: *R (Anderson) v Secretary of State for the Home Department*, ante, p 841G. The appellant (Anderson), but not Taylor, now appeals to the House of Lords.

V. A cautionary note

47 This appeal raises the question whether the period of imprisonment to be served by a mandatory life sentence prisoner as punishment should be determined by the executive or the judiciary. It does not concern the question how individual cases should be approached. On the hypothesis, however, that the appeal in *Anderson* succeeds, it is important to guard against misunderstanding in one respect. If the role of the executive in setting the tariff should cease it does not follow that life imprisonment for murder may never, even in the worst cases imaginable, literally mean detention for life. In the Divisional Court in *R v Secretary of State for the Home Department, Ex p Hindley* [1998] QB 751, 769, Lord Bingham of

Cornhill CJ observed that he could "see no reason, *in principle*, why a crime or crimes, if sufficiently heinous, should not be regarded as deserving lifelong incarceration for purposes of pure punishment". On appeal to the House of Lords, and with the agreement of Lord Browne-Wilkinson, Lord Nicholls of Birkenhead and Lord Hutton, I expressed myself in similar terms: *R v Secretary of State for the Home Department, Ex p Hindley* [2001] 1 AC 410, 416H. The following passage is part of the ratio of that case, at p 417:

> "The last submission is that the policy of imposing whole life tariffs is inconsistent with the notion of a tariff which requires expression in a term of years. This is an appeal to legal logic. But there is nothing logically inconsistent with the concept of a tariff by saying that there are cases where the crimes are so wicked that even if the prisoner is detained until he or she dies it will not exhaust the requirements of retribution and deterrence."

In *Stafford* 35 EHRR 1121, 1144, para 79 the European Court of Human Rights observed "that a whole life tariff may, in exceptional cases, be imposed where justified by the gravity of the particular offence". If in future the judiciary and the Parole Board are given the sole responsibility for the system there may still be cases where the requirements of retribution and deterrence will require life long detention.

VI. The issues on the appeal

48 It is manifest, and conceded by the Home Secretary, that if the fixing of tariff is appropriately to be classified as a judicial function under article 6(1), it follows that the existing system is in breach of article 6(1) since the Home Secretary, as a member of the executive, is undoubtedly not independent within the meaning of article 6(1). There are therefore two principal issues, namely: (1) whether the fixing of the tariff is to be classified as a "determination of . . . [a] criminal charge" within the meaning of article 6(1); (2) if so, what the appropriate remedy under the Human Rights Act 1998 is.

VII. Is tariff fixing a judicial function?

49 The language of article 6(1) is general. It simply provides that the determination of a criminal charge must be made by an independent tribunal. Its purpose is however not in doubt. First only a court or an independent tribunal may decide on the guilt or otherwise of an accused person. The executive have no role to play in the determination of guilt. Secondly, only a court or independent tribunal may decide on the punishment of a convicted person. Again, the executive have no role to play in the determination of punishment.

50 One can readily accept that it is sometimes difficult to categorise a particular function as judicial or non-judicial. The Australian experience, admittedly in a federal system, is instructive. It is recognised that there are functions which, by their very nature, may be exercised only by courts and, on the other hand, there are other functions which by their very nature are inappropriate for such exercise. Between these functions there lies a "borderland" in which functions may be exercised either by the executive or the courts: Allan N Hall, "Judicial Power, The Duality of Functions and the

A Administrative Appeals Tribunal" (1994) 22 Fed L Rev 13, 21; see also Enid Campbell, "The Choice Between Judicial and Administrative Tribunals and The Separation of Powers" (1981) 12 Fed L Rev 24. In *R v Trade Practices Tribunal, Ex p Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 394 Windeyer J explained the difficulty of defining the judicial function as follows:

B > "The concept seems to me to defy, perhaps it were better to say transcend, purely abstract conceptual analysis. It inevitably attracts consideration of predominant characteristics and also invites comparison with the historic functions and processes of courts of law."

Nevertheless it has long been settled in Australia that the power to determine responsibility for a crime, and punishment for its commission, is a function C which belongs exclusively to the courts: G F K Santow, "Mandatory Sentencing: A Matter For The High Court?" (2000) 74 ALJ 298, 300 and footnotes 17 and 18. It has been said that "the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the executive": *Deaton v Attorney General and Revenue Comrs* [1963] IR 170, 183; see also *In re Tracey; Ex p Ryan* (1989) 166 CLR 518, 580; D *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27; *Nicholas v The Queen* (1998) 193 CLR 173, 186–187, per Brennan CJ. The underlying idea, based on the rule of law, is a characteristic feature of democracies. It is the context in which article 6(1) should be construed.

51 The power of the Home Secretary in England and Wales to decide on the tariff to be served by mandatory life sentence prisoners is a striking E anomaly in our legal system. It is true that Parliament has the power to punish contemnors by imprisonment. This power derives from the medieval concept of Parliament being, amongst other things, a court of justice: see *Erskine May, Parliamentary Practice,* 22nd ed (1997), p 131 et seq. Subject to this qualification, there is in our system of law no exception to the proposition that a decision to punish an offender by ordering him to serve a F period of imprisonment may only be made by a court of law: *Blackstone's Commentaries on the Laws of England*, republished by Cavendish Publishing Ltd (2000), vol 1, para 137. It is a decision which may only be made by the courts. Historically, this has been the position in our legal system since at least 1688. And this idea is a principal feature of the rule of law on which our unwritten constitution is based. It was overridden by Parliament by virtue of section 29 of the 1997 Act. Now the duty to decide G on the compatibility of that statutory provision with article 6(1) has been placed by Parliament on the courts under the Human Rights Act 1998.

52 One then asks how a decision of the Home Secretary on the tariff should be classified. Counsel for the Home Secretary submits that the mandatory life sentence is imposed as punishment, which covers the whole of the offender's life subject only to the discretionary power of the Home H Secretary to release him. He argues that the setting of a tariff by the Home Secretary is "an administrative procedure" relating to the implementation of the sentence. He contends that it is not the imposition of a sentence for the purposes of article 6(1). This argument sits uneasily, as the European Court of Human Rights pointed out in *Stafford* 35 EHRR 1121, 1132–1133, para 45, with a description of a mandatory life sentence given by counsel for

the Home Secretary in the Court of Appeal in *R (Lichniak) v Secretary of State for the Home Department* [2002] QB 296. He submitted that the purpose was:

> "to punish the offender by subjecting him to an indeterminate sentence under which he will only be released when he has served the tariff part of his sentence, and when it is considered safe to release him . . . That is not merely the effect of the sentence, it is the sentence."

The persuasiveness of the advocacy of counsel for the Home Secretary cannot hide the fragility of the argument presented. Under the existing practice the views of the trial judge and Lord Chief Justice on tariff have no effect on the term to be served. On the other hand, the tariff fixed by the Home Secretary has, subject to article 6(1), definitive legal consequences. It is conclusive as to the minimum period to be served before the question of release in the light of considerations of risk can be considered. For example, when the Home Secretary rejected in the case of the appellant the judicial advice of a tariff of 15 years and fixed a tariff of 20 years he took a dispositive decision as to the level of punishment by way of imprisonment, which is required, and notified the prisoner accordingly. A decision fixing the tariff in an individual case is unquestionably a decision about the level of punishment which is appropriate. Mellifluous words cannot hide this reality.

53 Counsel for the Home Secretary relied on statements in House of Lords decisions over the last nine years. One must keep in the forefront of one's mind that these cases were decided at a time when article 6(1) was not part of domestic law. Primary legislation entrusted the decision as to the release of mandatory life sentence prisoners to the Home Secretary. This factor shaped the debates. Thus in the last of those cases, *Ex p Hindley* [2001] 1 AC 410, the House declined to hear argument on article 6(1) which was due to become part of our law on 2 October 2000. On the other hand, in *Ex p Doody* [1994] 1 AC 531 and *Ex p Venables* [1998] AC 407 (by a majority decision) it was held that the Home Secretary's decision on the tariff to be applied was closely analogous to an ordinary sentencing exercise. These decisions were important since in *Ex p Doody* they led to fairness requirements being imposed on the Home Secretary's role and in *Ex p Venables* to the restraint that the Home Secretary, who had yielded to public clamour about sentencing, must attempt to act like a judge. In both cases the House of Lords concluded that legal consequences flow from the categorisation of the Home Secretary's function as akin to that of a sentencing judge. The decision in *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539 is an important stepping stone in the evolution of this branch of the law. But it yields no clear ratio decidendi. The decision of the House of Lords in *R v Secretary of State for the Home Department, Ex p Stafford* [1999] 2 AC 38 was again predicated on the existing law and practice. It is, however, noteworthy that the House, at p 51, unanimously endorsed an observation by the Court of Appeal to the following effect [1998] 1 WLR 503, 518: "The imposition of what is in effect a substantial term of imprisonment by the exercise of executive discretion, without trial, lies uneasily with ordinary concepts of the rule of law." On balance the logical force to be derived from the earlier dicta in House of Lords in favour of the Home Secretary's present position is minimal.

A **54** In any event, the dicta in the House of Lords have been overtaken by the comprehensive and closely reasoned decision of the European Court of Human Rights in *Stafford* 35 EHRR 1121, which is reinforced by the decision of the European Court of Human Rights in *Benjamin* 36 EHRR 1. Counsel for the Home Secretary submitted that there have been no relevant changes in domestic law and practice which justified the decision in *Stafford*.
B He argued that the European Court of Human Rights misunderstood the effect of a mandatory life sentence. He said that the reasoning in *Wynne* remains intact. I would reject these arguments. The decision of the European Court of Human Rights is, if I may say so, a coherent and inescapable one. The European Court of Human Rights rightly attached importance to the similarities between the position of discretionary life sentences, detention during Her Majesty's pleasure, and mandatory life
C sentences. With evident approval the European Court of Human Rights quoted, at p 1134, para 46, from the judgment of Simon Brown LJ in the Court of Appeal, ante, p 857C–D:

> "In all three cases the exercise is in substance the fixing of a sentence, determining the length of the first stage of an indeterminate sentence—that part of it which (subject only to the need for continuing review in Her
D Majesty's pleasure cases) must be served in custody before any question of release can arise."

The European Court of Human Rights carefully took account of criticisms of the reasoning in *Wynne* in the judgments in the Court of Appeal in *Anderson*. The conclusion that the reasoning in *Wynne* is no longer supportable was inevitable. Moreover, the effective elimination by
E legislation in Scotland and Northern Ireland of the role of the executive in mandatory life sentence cases was regarded as important. And the European Court of Human Rights was rightly influenced by the evolution and strengthening of the principle of separation of powers between the executive and judiciary which underlies article 6(1).

55 I would therefore reject the criticisms directed at the *Stafford*
F decision.

56 It follows that section 29 of the 1997 Act and the Home Secretary's practice in setting the tariff is incompatible with article 6(1).

57 Once this position has been reached the question arises what the impact is on the Home Secretary's remaining powers. In the Court of Appeal Simon Brown LJ answered this question as follows, ante, p 850C–D,
G para 33:

> "If, therefore, the claimants succeed in these challenges, it seems inescapably to follow that not merely would the Secretary of State lose his present power to override the judges with regard to the penal tariff; also he would lose his present power to reject the Parole Board's recommendation for release on licence in the post-tariff period."

H I too regard these conclusions as unavoidable.

VIII. The remedy

58 The question of what remedy is appropriate must be considered under the framework of the Human Rights Act 1998. So far as material the

relevant provisions are the following. Section 6 of the Human Rights Act 1998 states:

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

"(2) Subsection (1) does not apply to an act if—(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."

Section 1(1) of the 1998 Act defines "the Convention rights" as including article 6 of the European Convention on Human Rights. Section 3(1) of the 1998 Act states: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." Section 4 so far as material provides:

"(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

"(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility."

"(6) A declaration under this section ('a declaration of incompatibility')—(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made."

In this way Parliamentary sovereignty was preserved.

59 Counsel for the appellant invited the House to use the interpretative obligation under section 3 to read into section 29 alleged Convention rights, viz to provide that the tariff set by the Home Secretary may not exceed the judicial recommendation. It is impossible to follow this course. It would not be interpretation but interpolation inconsistent with the plain legislative intent to entrust the decision to the Home Secretary, who was intended to be free to follow or reject judicial advice. Section 3(1) is not available where the suggested interpretation is contrary to express statutory words or is by implication necessarily contradicted by the statute: *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, 313–314, para 41, per Lord Nicholls of Birkenhead. It is therefore impossible to imply the suggested words into the statute or to secure the same result by a process of construction.

60 It follows that there must be a declaration of incompatibility. Counsel for the Home Secretary submitted the following draft declaration to the House:

"Section 29 of the Crime (Sentences) Act 1997 is incompatible with a Convention right (that is the right under article 6 of the European Convention on Human Rights to have a sentence imposed by an independent and impartial tribunal) in that the Secretary of State for the Home Department is acting so as to give effect to section 29 when he himself decides on the minimum period which must be served by a

A mandatory life sentence prisoner before he is considered for release on life licence."

Counsel for the appellant accepted, on the hypothesis that his argument on interpretation was rejected, that such a declaration would be appropriate. I am content to make a declaration in these terms.

B *IX. Conclusion*

61 For the reasons given by Lord Bingham of Cornhill and Lord Hutton, as well as the reasons I have given, I would make the order which Lord Bingham proposes.

LORD HUTTON

C **62** My Lords, there is much public interest in the length of time which a person convicted of murder should serve in prison and in the parts which the Home Secretary and the judiciary should play in deciding on the duration of that period, and the public interest is particularly intense in respect of very heinous murders which give rise to great public anger and concern. It is therefore important to observe that under the system which has operated in the past, whereby the Home Secretary decides when a prisoner sentenced to D life imprisonment for murder will be released, the vast majority of convicted murderers are released from prison by the Home Secretary after a period of years and, in many cases, long before the end of their lives. It is only in very exceptional cases that a murderer is so wicked and evil or remains such a danger to the public that there are grounds for deciding that he or she should never be released and should remain in prison until death. Therefore, as E Lord Mustill stated in *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531, 549H, in the great majority of cases when a judge sentences a person to imprisonment for life, the sentence does not mean what it says. Everyone who has any knowledge of the penal system knows that most convicted murderers will be released from prison before, and perhaps long before, the end of their lives.

F **63** In considering the issue of the release of prisoners convicted of murder it is also relevant to observe that in enacting the Human Rights Act 1998 Parliament has provided, in effect, that the rights given by the European Convention on Human Rights ("the Convention") are to be incorporated into the domestic law of the United Kingdom. But Parliament has also made it clear in that Act that it remains supreme and that if a statute cannot be read so as to be compatible with the Convention, a court has no G power to override or set aside the statute. All that the court may do, pursuant to section 4 of the 1998 Act, is to declare that the statute is incompatible with the Convention. It will then be for Parliament itself to decide whether it will amend the statute so that it will be compatible with the Convention. Therefore if a court declares that an Act is incompatible with the Convention, there is no question of the court being in conflict with Parliament or of seeking or purporting to override the will of Parliament. H The court is doing what Parliament has instructed it to do in section 4 of the 1998 Act.

64 The facts in this appeal and the proceedings in the Queen's Bench Divisional Court and the Court of Appeal have been fully set out in the opinion of my noble and learned friend Lord Bingham of Cornhill. Lord

Bingham has, in addition, described the system which has evolved whereby the trial judge and the Lord Chief Justice each makes a recommendation to the Home Secretary as to the length of time which a convicted murderer should serve in prison in order to satisfy the requirements of retribution and deterrence (which has been termed "the tariff"), and how the Parole Board then considers whether the prisoner should remain in prison after he has served the tariff period in order to protect the public from risk or whether it should recommend his release. But under the provisions of section 29 of the Crime (Sentences) Act 1997 the power to decide on the length of the tariff and when a prisoner should be released is vested in the Home Secretary. Section 29 provides:

> "(1) If recommended to do so by the Parole Board, the Secretary of State may, after consultation with the Lord Chief Justice together with the trial judge if available, release on licence a life prisoner who is not one to whom section 28 above applies.
>
> "(2) The Parole Board shall not make a recommendation under subsection (1) above unless the Secretary of State has referred the particular case, or the class of case to which that case belongs, to the Board for its advice."

65 Therefore the Home Secretary has power to disregard the recommendations of the trial judge and the Lord Chief Justice and to decide himself on the length of the tariff. This has happened in the present case. The trial judge and the Lord Chief Justice recommended a tariff of 15 years as the period which the appellant should serve to meet the requirements of retribution and deterrence, but the Home Secretary fixed the tariff at 20 years.

66 The appellant challenges the decision of the Home Secretary on the ground that a member of the executive, a government minister, should not decide the length of the period which he should serve in prison for the purposes of retribution and deterrence. He submits that for the Home Secretary, and not a judge or a judicial body, to decide on the length of the tariff period is to violate his rights under article 6(1) of the Convention, which provides:

> "In the determination of . . . any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

67 Two matters are clear and are not in dispute. One is that "the determination of . . . any criminal charge" against a person includes the fixing of the term of imprisonment which he will serve after he has been convicted of the charge: see *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, 678–679, paras 82 and 83. The other is that the Home Secretary, being a member of the executive, is not "an independent and impartial tribunal established by law".

68 The argument of Mr Fitzgerald on behalf of the appellant can be summarised as follows. (1) The fixing of the tariff in respect of the appellant is the fixing of a sentence, it is a sentencing exercise. (2) Therefore the fixing of the tariff in respect of the appellant is part of the determination of the criminal charge against him. (3) Under article 6(1) the fixing of the tariff must be done by an independent and impartial tribunal established by law,

A and the fixing of the tariff in respect of the appellant by the Home Secretary and not by an independent tribunal constituted a violation of the rights given to him by article 6(1).

69 In his reply to Mr Fitzgerald's argument Mr Pannick, for the Home Secretary, relied on the express provisions of section 1(1) of the Murder (Abolition of Death Penalty) Act 1965, which provides: "No person shall B suffer death for murder, and a person convicted of murder shall . . . be sentenced to imprisonment for life." Mr Pannick submitted that the sentence of imprisonment for life made mandatory by section 1(1) of the 1965 Act is the punishment for the murder committed by the defendant, it is the sole sentencing exercise and the setting of the tariff is not a sentencing exercise but an administrative procedure carried out for the implementation of the punishment and therefore does not constitute a breach of article 6(1).

C 70 Before turning to consider the judgments of the European Court in which similar arguments have been considered, it is relevant to refer to the speech of Lord Mustill (in which the other members of the House concurred) in *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531. In that case, which was heard before the enactment of the Human Rights Act 1998, Lord Mustill recognised the force of the argument that the D fixing of the tariff element (which he described as "the penal element") was a sentencing exercise and he stated, at p 557:

> "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."

E However Lord Mustill declined to hold that the practice whereby the Home Secretary fixed the tariff period was unlawful and, in considering the difference between a mandatory life sentence and a discretionary life sentence for a serious crime (other than murder) such as rape, he stated, at p 559:

F > "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-
> G *Handscomb* practice, embodied in section 34 of the 1991 Act, 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
> H 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." A

71 In *Wynne v United Kingdom* (1994) 19 EHRR 333 the European Court considered a complaint by a prisoner that there had been a breach of article 5(4) of the Convention, which provides:

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

In that case the prisoner had received a mandatory life sentence for murder and after his release on licence he killed another person and was convicted of manslaughter and received a discretionary life sentence. His licence was also revoked so that he was detained in prison pursuant to both life sentences. C The court referred, at p 346, para 33, to its judgment in *Thynne, Wilson and Gunnell v United Kingdom* (1990) 13 EHRR 666 where it had drawn a clear distinction between a discretionary life sentence which was considered to have a protective purpose and a mandatory life sentence which was viewed as essentially punitive in nature and stated, at p 347:

"35. . . . the fact remains that the mandatory sentence belongs to a different category from the discretionary sentence in the sense that it is imposed automatically as the punishment for the offence of murder irrespective of considerations pertaining to the dangerousness of the offender. That mandatory life prisoners do not actually spend the rest of their lives in prison and that a notional tariff period is also established in such cases—facts of which the court was fully aware in *Thynne, Wilson and Gunnell*—does not alter this essential distinction between the two types of life sentence." D E

"36. . . . the court sees no cogent reasons to depart from the finding in the *Thynne, Wilson and Gunnell* case that, as regards mandatory life sentences, the guarantee of article 5(4) was satisfied by the original trial and appeal proceedings and confers no additional right to challenge the lawfulness of continuing detention or redetention following revocation of the life licence." F

72 However in *Stafford v United Kingdom* (2002) 35 EHRR 1121 when considering allegations of breaches of articles 5(1) and 5(4) of the Convention, the court departed from its judgment in *Wynne* and held that the mandatory life sentence does not impose imprisonment for life as a punishment and that the fixing of the tariff by the Secretary of State was a sentencing exercise. G The court stated, at pp 1143–1144, para 79 of its judgment:

"The court considers that it may now be regarded as established in domestic law that there is no distinction between mandatory life prisoners, discretionary life prisoners and juvenile murderers as regards the nature of tariff-fixing. It is a sentencing exercise. The mandatory life sentence does not impose imprisonment for life as a punishment. The tariff, which reflects the individual circumstances of the offence and the offender, represents the element of punishment. The court concludes that the finding in *Wynne* that the mandatory life sentence constituted H

A punishment for life can no longer be regarded as reflecting the real position in the domestic criminal justice system of the mandatory life prisoner."

73 Under section 2(1) of the Human Rights Act 1998 a United Kingdom court is required to take a decision of the European Court into account, but it is not obliged to follow it. Mr Pannick submitted that the House should B not follow the judgment of the European Court in *Stafford* but rather should follow the judgment in *Wynne*. He submitted that the Court in *Stafford* had misunderstood the law in England and that there was, in truth, no development whereby the English courts had moved away from the position taken by the House of Lords in *Ex p Doody* [1994] 1 AC 531 and that, notwithstanding that the fixing of the penal element was looking much more C like an orthodox sentencing exercise, the English courts still recognised that section 1(1) of the 1965 Act required them to hold that the entire life sentence was the punishment imposed for the crime of murder.

74 I am unable to accept that submission and I consider that the European Court was right to hold in *Stafford* that the mandatory life sentence pronounced by a judge when a defendant is convicted of murder does not impose imprisonment for life as a punishment and that the fixing of D the tariff for punishment and deterrence is a sentencing exercise. I would so hold for the following reasons.

75 First, in considering whether there has been a violation of a Convention right the European Court looks at the substance of the action which has been taken and not at its formal categorisation in domestic law, it looks behind appearances at the realities of the situation: see *Welch v United* E *Kingdom* (1995) 20 EHRR 247, 263, para 34. Viewing the issue in this way it is clear that the reality is that when the Home Secretary fixes the tariff he is deciding the punishment which the murderer should receive for his crime.

76 Secondly, I consider the European Court was right to observe at p 1143, paragraph 78 of its judgment that, whilst the abolition of the death penalty in 1965 and the giving of power to the Home Secretary to release a F convicted murderer sentenced to life imprisonment was a major and progressive reform at the time, the Home Secretary's continuing role in fixing the tariff has become increasingly difficult to reconcile with the concept of the separation of powers between the executive and the judiciary, which is an essential element of a democracy.

77 Thirdly, the correctness of the view that the fixing of the tariff is a sentencing exercise which should be carried out by a judge or judicial G tribunal and not an administrative exercise to be carried out by a government minister is shown by the recent legislation in Scotland and Northern Ireland which provides that a judge will fix the tariff element of the sentence where a defendant is convicted of murder. Thus article 5 of the Life Sentences (Northern Ireland) Order 2001 (SI 2001/2564) under the heading "Determination of tariffs" provides:

H "(1) Where a court passes a life sentence, the court shall, unless it makes an order under paragraph (3), order that the release provisions shall apply to the offender in relation to whom the sentence has been passed as soon as he has served the part of his sentence which is specified in the order.

"(2) The part of a sentence specified in an order under paragraph (1) shall be such part as the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence, or of the combination of the offence and one or more offences associated with it."

Article 6 of the Order provides that it shall be the duty of the Secretary of State to release a life prisoner on licence as soon as he has served the tariff element of his sentence and the Life Sentence Review Commissioners have directed his release. Part 1 of the Convention Rights (Compliance) (Scotland) Act 2001 contains similar provisions relating to life sentence prisoners and the long title of the Scottish Act states that it is an Act "to amend certain enactments relating to the sentencing and release of life prisoners . . . which are or may be incompatible with the European Convention on Human Rights". This legislation in Scotland and Northern Ireland shows the manner in which similar changes could be made in England.

78 Therefore I am of opinion that this House should follow the judgment of the European Court in *Stafford* 35 EHRR 1121 and hold that the fixing of the tariff by the Home Secretary is a sentencing exercise so that the performance of that function by him constituted a breach of the appellant's rights under article 6(1) of the Convention. It is relevant to observe that all three members of the Court of Appeal, who delivered their judgments, ante, p 837, 841G before the European Court gave judgment in *Stafford*, would also have held that the fixing of the tariff is a sentencing exercise (see per Lord Woolf CJ, at p 837, 845H–846A, para 16, Simon Brown LJ, at p 837, 857C–D, para 57, and Buxton LJ, at p 837, 859C–E, para 67) if they had not considered that they should follow the earlier jurisprudence of the European Court in cases such as *Wynne v United Kingdom* 19 EHRR 333.

79 The question then arises as to the relief to which the appellant is entitled. Section 3 of the Human Rights Act 1998 provides: "(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." Section 4 provides:

"(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

"(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility."

"(6) A declaration under this section ('a declaration of incompatibility')—(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made."

80 It is clear from the wording of section 29 of the Crime (Sentences) Act 1997 that Parliament intended that the decisions as to the length of the tariff period and as to when a prisoner serving a mandatory life sentence should be released from prison were to be taken by the Home Secretary and not by the judiciary or by the Parole Board. The Home Secretary is not obliged to accept the recommendation of the judiciary as to tariff. The

Parole Board may recommend to the Home Secretary that a life prisoner should be released on licence, but it cannot make such a recommendation unless the Home Secretary has referred the particular case to it. Moreover even if it makes such a recommendation the Home Secretary is not obliged to accept it; Parliament has given him the power to decide that the prisoner should not be released.

81 Therefore having regard to the clear provisions of section 29, I do not consider that it is possible, pursuant to section 3 of the 1998 Act, to interpret section 29 so as to take away from the Home Secretary the power to decide on the length of the tariff period and to give it to the judiciary. For this House to do so would be for it to engage in the amendment of a statute and not in its interpretation, and section 3 does not permit the House to engage in the amendment of legislation: see per my noble and learned friend Lord Nicholls of Birkenhead in *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, 313, 731, para 39.

82 Section 6 of the Human Rights Act 1998 provides:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> "(2) Subsection (1) does not apply to an act if—(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."

Mr Fitzgerald submitted that the House should not make a declaration of incompatibility but rather should make a declaration that in accordance with his duty under section 6(1) of the 1998 Act not to act incompatibly with the appellant's rights under article 6(1), the Home Secretary must not fix as his tariff a term of years longer than that recommended by the judiciary. I am satisfied that this submission must be rejected because in forming his own view whether to accept the recommendation of the judiciary as to tariff or to fix a longer tariff period and when to refer a case to the Parole Board, the Home Secretary is acting in accordance with the intention of Parliament expressed in section 29. In deciding for himself when to release a prisoner the Home Secretary is, for the purposes of section 6(2)(b) "acting so as to give effect to" section 29.

83 Therefore I consider that the House should make a declaration of incompatibility pursuant to section 4(2) of the 1998 Act in the terms proposed by Lord Bingham.

84 Accordingly for the reasons which I have given, and also for the reasons given by Lord Bingham and Lord Steyn, I would allow the appeal and make the declaration of incompatibility.

LORD HOBHOUSE OF WOODBOROUGH

85 My Lords, for the reasons given by my noble and learned friends Lord Bingham of Cornhill and Lord Hutton, I too would make the declaration proposed.

LORD SCOTT OF FOSCOTE

86 My Lords, I have had the opportunity of reading in advance the opinions of my noble and learned friends Lord Bingham of Cornhill, Lord Steyn and Lord Hutton and for the reasons they give, with which I agree, I would make the order proposed by Lord Bingham.

LORD RODGER OF EARLSFERRY

87 My Lords, I have had the privilege of reading the speeches of my noble and learned friends Lord Bingham of Cornhill, Lord Steyn and Lord Hutton in draft. For the reasons they give I too would allow the appeal and make the declaration which Lord Bingham proposes.

Appeal allowed in part with costs.

Orders of Court of Appeal and Divisional Court dated 13 November and 22 February 2001 respectively to be set aside.

Declaration that section 29 of Crime (Sentences) Act 1997 incompatible with a Convention right (the right under article 6 of the European Convention on Human Rights to have a sentence imposed by an independent and impartial tribunal) in that the Secretary of State for the Home Department is acting so as to give effect to section 29 when he himself decides on the minimum period which must be served by a mandatory life sentence prisoner before he is considered for release on life licence.

Solicitors: Irwin Mitchell, Sheffield; Treasury Solicitor.

D E C P