HOUSE OF LORDS SESSION 2005–06
[2005] UKHL 45

on appeal from: [2004] EWCA Civ 1031

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Roberts (FC) (Appellant)
v.
Parole Board (Respondents)

Appellate Committee

Lord Bingham of Cornhill
Lord Woolf
Lord Steyn
Lord Rodger of Earlsferry
Lord Carswell

Counsel

Appellants:
Tim Owen QC
Alison Macdonald
(instructed by Bhatt Murphy)

Respondents:
Michael Fordham
(instructed by Treasury Solicitor)

Interested party
The Secretary of State for the Home Department
James Eadie
Kate Gallafent
(Instructed by Treasury Solicitor)

Interveners
Keir Starmar QC
Eric Metcalfe
(Instructed by Justice)

Hearing dates:
20 and 21 April 2005

ON

THURSDAY 7 JULY 2005

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LORD BINGHAM OF CORNHILL

My Lords,

1. On 12 December 1966 the appellant, Mr Harry Roberts, was convicted on three counts of murder, having pleaded guilty to two counts and been convicted of the third. The victims in each case were police officers, killed in cold blood at Shepherd's Bush in August 1966 when, in the course of their duty, they stopped a car in which the appellant and two accomplices were travelling to commit an armed robbery. The trial judge rightly described these crimes, which aroused widespread public outrage, as heinous and suggested that the case was one in which the appellant might never be released. He formally recommended that the appellant serve a term of at least 30 years, and in due course the Home Secretary of the day fixed 30 years as the appellant's punitive or tariff term. That term expired in 1996, when the appellant was aged 60. The fifth review of his case by the Parole Board, still current, began in September 2001, and this appeal concerns the procedure to be followed in that review. The issue to be determined by the House is agreed to be whether the Parole Board, a statutory tribunal of limited jurisdiction, is able, within the powers granted by the Criminal Justice Act 1991, and compatibly with article 5 of the European Convention on Human Rights (a) to withhold material relevant to the appellant's parole review from the appellant's legal representatives and (b) instead, to disclose that material to a specially appointed advocate, who would represent the appellant, in the absence of the appellant and his legal representatives, at a closed hearing before the Parole Board.

2. Since the House is called upon to decide issues of statutory construction and legal principle, the detailed facts of the appellant's case are of minor importance. In 2000, pursuant to a recommendation of the Parole Board in December 1999, the appellant was transferred to an open prison where he was held when the current Parole Board review began in September 2001. On 1 October 2001 a parole dossier was disclosed to the appellant's solicitors containing a number of reports, all favourable to the appellant and recommending his immediate release on life licence. However, on 2 October 2001 the appellant was removed from open to closed conditions, where he has since remained. The appellant has received a general indication of the allegations against him which led to his removal, but these have not been the subject of any criminal or disciplinary charge, they have not been investigated at any adversarial hearing and they have been consistently challenged by the appellant.

3. On 11 February 2002 the Secretary of State for the Home Department, who appears in this appeal as an interested party, disclosed to the appellant further material that had been submitted by him to the Parole Board for purposes of the parole review. The material related to alleged breaches of trust committed by the appellant while held in open conditions. The appellant was notified on 22 April 2002 that further material was to be withheld from both him and his legal representatives, but would be submitted to the Parole Board (henceforward "the Board") for its consideration. It is the treatment of this further material, conveniently described as "the sensitive material", which gives rise to this appeal. The ground upon which the sensitive material has been withheld is that the safety of the source of the information or evidence would be at risk if the material were to be disclosed. It has not been suggested that there is in this case any threat to national security.

4. In August 2002 the appellant applied for judicial review of the Secretary of State's decision to withhold from the appellant and his legal representatives material which would be considered by the Board. These proceedings were compromised in October 2002 when it was, in effect, agreed that issues of disclosure should be resolved by the Board and the possible appointment of a specially appointed advocate was envisaged.

5. On 15 November 2002 Scott Baker LJ, as vice-chairman of the Board, decided that before a decision was made on the procedure to be adopted in respect of the sensitive material at the substantive hearing before the Board, that material should in the first instance be disclosed

to a specially appointed advocate agreeable to both parties, who could then make representations on the disclosure issues. The sensitive material was not to be disclosed to the appellant or his legal representatives or anyone else without the consent of the Board. Scott Baker LJ proposed that a hearing should then take place to resolve the disclosure issues. He acknowledged that the procedure for appointing special advocates was statutory in other fields but he could see no reason why it should not be used in the present circumstances.

6. With the agreement of the appellant and the Secretary of State, the Attorney General appointed Mr Nicholas Blake QC to act as "independent counsel", in effect as a special advocate. In an advice written for the Board before seeing the sensitive material Mr Blake advised that resort to the special advocate procedure infringed ordinary standards of fairness. After seeing the sensitive material he submitted to the Board that it be disclosed to the appellant's solicitor.

7. On 9 May 2003 a hearing took place before Sir Richard Tucker as chairman of the Board's mandatory lifer panel. The appellant and the Secretary of State were represented, and Mr Blake attended. The hearing consisted of an open session when the appellant's solicitor made representations on his behalf, and a closed session when submissions were made about the sensitive material by the Secretary of State's counsel and Mr Blake, in the absence of the appellant and his solicitor. A decision was made by Sir Richard the same day, but complaints about the conduct of the hearing led to a further hearing attended by counsel for the appellant and the Secretary of State on 30 May 2003. In a detailed letter dated 13 June 2003 the Board communicated its decision, which was that the sensitive material should not be disclosed to the appellant or his legal representatives, but should be disclosed to the specially appointed advocate. The Board directed that there should be a two-stage hearing, one considering the open material and the other the sensitive material, the specially appointed advocate appearing at both stages.

8. The judicial review proceedings giving rise to this appeal were initiated to challenge this decision of 13 June. It was agreed that the judge (Maurice Kay J) should read the sensitive material and hear submissions on it in closed session by counsel for the Board and the Secretary of State, and by Mr Blake. There was again a two-stage hearing, one addressed by counsel for the appellant and the other, in the absence of the appellant and his counsel, directed to the sensitive material. The judge delivered two judgments on 19 December 2003. In

the first, open, judgment he upheld the lawfulness of the proposed procedure and dismissed the appellant's application: [2003] EWHC 3120 (Admin), [2004] 2 All ER 776. The second was a closed judgment, not disclosed to the appellant or his legal representatives, but disclosed to Mr Blake who advised the appellant that there was no basis for challenging the findings in the closed judgment on appeal.

9. The appellant challenged the lawfulness of the proposed procedure in principle on appeal to the Court of Appeal. It was agreed between the parties that this challenge did not call for disclosure of the sensitive material to the Court of Appeal, and that material was not placed before the court. For reasons given by Tuckey LJ, with which Clarke LJ and Jackson J agreed, the Court of Appeal dismissed the appellant's appeal: [2004] EWCA Civ 1031, [2005] QB 410.

10. The House had the benefit of submissions on behalf of the appellant, the Board and the Secretary of State, and also on behalf of JUSTICE which was granted leave to intervene. It received no submissions by Mr Blake or any specially appointed advocate, and did not read or receive submissions on the sensitive material.

11. As a mandatory life sentence prisoner who has served the punitive or tariff term imposed upon him, the appellant has two important rights: a right to be released if and when it is judged that he can safely be released without significant risk to the safety of the public; and a right "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". The first of these rights is a product of domestic law, which now provides for the imposition of a punitive or tariff term of imprisonment on convicted murderers, on completion of which (as is now accepted by the Board and the Secretary of State: *Girling v Parole Board* [2005] EWHC 5469 (Admin), 8 April 2005, para 19) risk to life and limb provides the sole ground for continued detention: *R v Lichniak* [2002] UKHL 47, [2003] 1 AC 903, paras 8, 29. The second right derives from article 5(4) of the European Convention, which I have quoted above and to which domestic law seeks to give effect. Thus a tariff-expired mandatory life sentence prisoner such as the appellant has a right to bring proceedings to challenge the lawfulness of his continued detention and a right to be released, no matter what the enormity of the crime or crimes for which he was imprisoned, if he is judged to present no continuing threat to the safety of the public.

12. Whether or not it is safe to release a prisoner such as the appellant cannot be ascertained with scientific accuracy. It calls for an exercise of informed and experienced judgment. Under our domestic law, that judgment is entrusted to the Board, which has authority under section 28(5) of the Crime (Sentences) Act 1997 as amended to direct the release of a tariff-expired mandatory life sentence prisoner, but may not do so unless (section 28(6)(b)) it is "satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."

13. The Board is not in any ordinary sense a court. But it is accepted as being a court for purposes of article 5(4) because, and so long as, it has the essential attributes of a court in performing the function of directing release and other functions not in issue in this appeal. Thus it is independent of the Secretary of State, and the Prison Service and the prisoner: *Weeks v United Kingdom* (1987) 10 EHRR 293, para 62. It is impartial (*Weeks*, para 62), in the sense that it decides cases on the material before it without any prejudice or predilection against or for any party. In cases such as the appellant's oral hearings are now routinely held. The Board is obliged to act in a manner that is procedurally fair (*Weeks*, para 61), as it is when resolving challenges to revocation of parole licences (*R (West) v Parole Board* [2005] UKHL 1, [2005] 1 WLR 350, para 1. In contrast with the position which obtained in the past (*Weeks*, para 64), the Board now has the power to direct the release of a tariff-expired mandatory life sentence prisoner and not merely to advise or make a recommendation to the Secretary of State.

14. It was submitted on behalf of the Board (in an argument adopted and elaborated by the Secretary of State) that the requirement of procedural fairness under article 5(4) does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. This is undoubtedly so. Lord Mustill so held, in an opinion with which the other members of the House agreed, in *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531, 560. The House referred to this passage with approval in *R (West) v Parole Board* [2005] 1 WLR 350, para 27. The European Court has ruled to similar effect in cases such as *Bouamar v Belgium* (1987) 11 EHRR 1, para 60 and *Chahal v United Kingdom* (1996) 23 EHRR 413, para 127. The Board also submitted, again correctly, that decision-making procedures may, so long as they are fair, be adapted to take account of interests other than those of the defendant, prisoner or applicant. This proposition too is vouched by compelling authority. Thus in *R v Parole Board, Ex p Watson* [1996] 1 WLR 906, 916-919,

the Court of Appeal recognised the paramount duty of the Board to protect innocent members of the public against any significant risk of serious injury, while also recognising the hardship and injustice of continuing to imprison a person who is unlikely to cause serious injury to the public. In *Brown v Stott (Procurator Fiscal, Dunfermline)* [2003] 1 AC 681, 704, 707-708, the Privy Council emphasised the need for balance between the rights of the individual and the wider rights of the community, a point repeated in the House in *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45, paras 91, 94, 99. In *R v H* [2004] UKHL 3, [2004] 2 AC 134, para 23, the House acknowledged the need to reconcile an individual defendant's right to a fair trial with such secrecy as is necessary in a democratic society in the interests of national security or the prevention or investigation of crime. In *Doorson v Netherlands* (1996) 22 EHRR 330, para 70, and again in *Van Mechelen v Netherlands* (1997) 25 EHRR 647, para 53, the European Court has recognised the life, liberty and security of witnesses as an interest to be taken into consideration. In *Tinnelly & Sons Ltd and McElduff v United Kingdom* (1998) 27 EHRR 249, para 76, the Court was mindful of national security considerations. In *Jasper v United Kingdom* (2000) 30 EHRR 441, para 52, it was held that national security and the need to protect witnesses at risk of reprisals must be weighed against the rights of the accused. Thus convention rights are to be applied not in a vacuum but in the world as, for better or worse, it is.

15. In making a decision on the release of a tariff-expired mandatory life sentence prisoner such as the appellant, the Board is not determining a criminal charge: *R (West) v Parole Board*, above, paras 38-41, 56, 76, 90, 91. The criminal limb of article 6(1) of the Convention is not engaged. It follows that the Board is not bound to follow the procedure which would be required in a criminal trial. But, as was said in *R (West) v Parole Board*, above, para 35,

> "The prisoner should have the benefit of a procedure which fairly reflects, on the facts of his particular case, the importance of what is at stake for him, as for society."

What is at stake in this instance is, on the one hand, the safety and security, perhaps the life, of a witness, and, on the other, the real possibility that the appellant may remain in prison until he dies. In this case, as in *R v H*, above, para 33,

> "The overriding requirement is that the guiding principles should be respected and observed …. the touchstone is to ascertain what justice requires in the circumstances of the particular case."

16. The ordinary principle governing the conduct of judicial enquiries in this country is not, in my opinion, open to doubt. In *Re K (Infants)* [1963] Ch 381, 405-406, Upjohn LJ expressed it thus:

> "It seems to be fundamental to any judicial inquiry that a person or other properly interested party must have the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and to try to establish by contrary evidence that it is wrong. It cannot be withheld from him in whole or in part. If it is so withheld and yet the judge takes such information into account in reaching his conclusion without disclosure to those parties who are properly and naturally vitally concerned, the proceedings cannot be described as judicial."

On appeal to the House in the same case ([1965] AC 201, Lord Devlin referred at p 237 to "the fundamental principle of justice that the judge should not look at material that the parties before him have not seen", and at p 238, referring to "the ordinary principles of a judicial inquiry", he continued:

> "They include the rules that all justice shall be done openly and that it shall be done only after a fair hearing; and also the rule that is in point here, namely, that judgment shall be given only upon evidence that is made known to all parties. Some of these principles are so fundamental that they must be observed by everyone who is acting judicially, whether he is sitting in a court of law or not; and these are called the principles of natural justice. The rule in point here is undoubtedly one of those."

Lord Mustill, with the agreement of all other members of the House, spoke in similar vein in *Re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593, 603-604, when he described it as

> "a first principle of fairness that each party to a judicial process shall have an opportunity to answer by evidence and argument any adverse material which the tribunal may take into account when forming its opinion. This principle is lame if the party does not know the substance of what is said against him (or her), for what he does not know he cannot answer."

Later in the same opinion, at p 615, he said:

> "It is a fundamental principle of fairness that a party is entitled to the disclosure of all materials which may be taken into account by the court when reaching a decision adverse to that party."

This principle has been upheld in such domestic cases as *R v Parole Board, Ex p Wilson* [1992] QB 740, 751, per Taylor LJ (disclosure of reports to the Board), whose reasoning was adopted by the House in *Doody*, above, p 562, and *R v Secretary of State for the Home Department, Ex p Hickey (No 2)* [1995] 1 WLR 734, 746 (disclosure of evidence elicited by the Secretary of State following a conviction), where Simon Brown LJ said:

> "The guiding principle should always be that sufficient disclosure should be given to enable the petitioner properly to present his best case."

In dismissing a challenge to special measures directions for the protection of juvenile witnesses in *R (D) v Camberwell Green Youth Court* [2005] UKHL 4, [2005] 1 WLR 393, the House attached importance to the fact that the defendant was able to challenge and cross-examine the witnesses and that the evidence was produced at trial in the presence of the accused, who could see and hear it all: see para 49 of the opinion of Baroness Hale of Richmond, with which all members of the House agreed.

17. The European Court has affirmed the importance of this principle in criminal cases governed by article 6(1) of the Convention, holding that as a general rule all evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument,

giving him an adequate and proper opportunity to challenge and question witnesses against him: see, for example, *Lamy v Belgium* (1989) 11 EHRR 529, para 29; *Kostovski v Netherlands* (1989) 12 EHRR 434, para 41; *Brandstetter v Austria* (1991) 15 EHRR 378, paras 66-67; *Edwards v United Kingdom* (1992) 15 EHRR 417, para 36; *Van Mechelen v Netherlands* (1997) 25 EHRR 647, para 51; *Lucà v Italy* (2001) 36 EHRR 807, para 39; *Garcia Alva v Germany* (2001) 37 EHRR 335, para 39. In non-criminal article 5(4) cases the approach of the Court has been similar, generally requiring disclosure of adverse material and an adversarial procedure of a judicial character in which the person affected has the effective assistance of his lawyer and has the opportunity to call and question witnesses: see, for example, *Sanchez-Reisse v Switzerland* (1986) 9 EHRR 71, para 51; *Bouamar v Belgium* (1987) 11 EHRR 1, para 60; *Weeks v United Kingdom* (1987) 10 EHRR 293, para 66; *Megyeri v Germany* (1992) 15 EHRR 584, para 23; *Hussain v United Kingdom* (1996) 22 EHRR 1, paras 58-60; *Al-Nashif v Bulgaria* (2002) 36 EHRR 655, paras 90-98. It is quite true, as the Board insisted in argument, that the Court accepted that these rights were not absolute or incapable of valid qualification. But in *Tinnelly and McElduff* , above, para 72, the Court pointed out that any limitations must not "restrict or reduce the access [to the court] left to the individual in such a way or to such an extent that the very essence of the right is impaired".

18. It is in my opinion plain that the procedure which the Board propose to adopt in resolving the appellant's parole review will infringe the principles discussed in the foregoing paragraphs. The Board will receive and be free to act on material adverse to the appellant which will not, even in an anonymised or summarised form, be made available to him or his legal representatives. Both he and his legal representatives will be excluded from the hearing when such evidence is given or adduced, denying him and them the opportunity to participate in the hearing, by questioning any witness or challenging any evidence called or adduced to vouch the sensitive material, or by giving or calling evidence to contradict that material, or by addressing argument. The appellant and his legal representatives are free to instruct the specially appointed advocate (whose integrity and skill are not in question) so long as none of them knows anything of the case made against the appellant on the basis of the sensitive material, but the specially appointed advocate is forbidden to communicate with the appellant or his legal representatives once he knows the nature of the case against the appellant based on the sensitive material. It is only at that stage that meaningful instructions can be given, unless the appellant has successfully predicted the nature of the case in advance, in which case he may well have identified the source and undermined the need for

secrecy. The Parole Board assert that the specially appointed advocate may call witnesses, and in the absence of any warrant or authority to adopt the specially appointed advocate procedure that may be so. This was not, however, the understanding of the House of Commons Constitutional Affairs Committee ("The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates", Seventh Report of Session 2004-05, vol 1, HC 323-1, 3 April 2005, para 52(iii)). But even if a specially appointed advocate is free to call witnesses, it is hard to see how he can know who to call or what to ask if he cannot take instructions from the appellant or divulge any of the sensitive material to the witness. In *M v Secretary of State for the Home Department* [2004] EWCA Civ 324, [2004] 2 All ER 863, the Court of Appeal acknowledged in para 13 that a person appealing to SIAC, in much the same position as the appellant would be under the proposed procedure, was "undoubtedly under a grave disadvantage" and, in para 16, that "To be detained without being charged or tried or even knowing the evidence against you is a grave intrusion on an individual's rights". In its decision letter challenged in these proceedings the Board realistically accepted that as compared with the appellant's solicitor a specially appointed advocate would be at a "serious disadvantage" and that adoption of the special advocate procedure would result in prejudice to the appellant. I regard these observations as amply justified. In the vivid language used by Lord Hewart CJ in a very different context in *Coles v Odhams Press Ltd* [1936] 1 KB 416, 426, the specially-appointed advocate would inevitably be "taking blind shots at a hidden target".

19. In view of what the European Court in *Garcia Alva*, above, para 39, called "the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned", I would doubt whether a decision of the Board adverse to the appellant, based on evidence not disclosed even in outline to him or his legal representatives, which neither he nor they had heard and which neither he nor they had had any opportunity to challenge or rebut, could be held to meet the fundamental duty of procedural fairness required by article 5(4). "It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory": *Stafford v United Kingdom* (2002) 35 EHRR 1121, para 68. If the procedure proposed is fully adopted, the appellant's rights under article 5(4) could be all but valueless. The Secretary of State might have to make the difficult choice between not disclosing information to the Board and ensuring effective protection of its source. But I would decline the appellant's invitation to rule, at this stage, that the adoption of the proposed procedure is necessarily incompatible with article 5(4). The practice of the European Court is to consider the proceedings in

question as a whole, including the decisions of appellate courts: *Edwards v United Kingdom*, above, para 34. Thus its judgment is almost necessarily made in retrospect, when there is evidence of what actually happened. This reflects the acute sensitivity of the Court to the facts of a given case. Save where an issue of compatibility turns on a pure question of statutory construction, the House should in my opinion be similarly reluctant to rule without knowing what has actually happened. This seems to me important because there are some outcomes which would not in my opinion offend article 5(4) despite the employment of a specially appointed advocate. It might, for instance, be that the Board, having heard the sensitive material tested by the specially appointed advocate, wholly rejected it. Or having heard the material tested in that way the Board might decline to continue the review unless the sensitive material, or at least the substance of it, were disclosed at least to the appellant's legal representatives, relying on the Court's observation in *Doorson*, above, para 74, that "the Convention does not preclude identification – for the purposes of Article 6(3)(d) – of an accused with his Counsel". Or the Board might, with the assistance of the specially appointed advocate, devise a way of anonymising, redacting or summarising the sensitive material so as to enable it to be disclosed to the appellant or his legal representatives. Or the Board might, in a manner that was procedurally fair, reach a decision without relying at all on the sensitive material. If any of these possibilities were to eventuate, I do not think there would be a violation of article 5(4).

20. That conclusion makes it necessary to consider the other major question debated in argument, whether the Board has power to adopt this procedure. The Board was first established by section 59 of the Criminal Justice Act 1967, and was continued in existence by section 32 of the Criminal Justice Act 1991, which was in force when the appellant's current parole review began. Section 32, so far as material and as amended, provided:

> "(1) The Parole Board shall be, by that name, a body corporate and as such shall
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> (a) be constituted in accordance with this Part; and
>
> (b) have the functions conferred ….. by Chapter II of Part II of the Crime (Sentences) Act 1997 ('Chapter II') in respect of life prisoners within the meaning of that Chapter.
>
> (4) The Board shall deal with cases as respects which it gives directions under ….. Chapter II on

consideration of all such evidence as may be adduced before it.

(5) Without prejudice to [subsection] ….. (4) above, the Secretary of State may make rules with respect to the proceedings of the Board, including provision authorising cases to be dealt with by a prescribed number of its members or requiring cases to be dealt with at prescribed times.

(6) The Secretary of State may also give to the Board directions as to the matters to be taken into account by it in discharging any functions under ….. Chapter II; and in giving any such directions the Secretary of State shall in particular have regard to—

(a) the need to protect the public from serious harm from offenders; and

(b) the desirability of preventing the commission by them of further offences and of securing their rehabilitation.

(7) Schedule 5 to this Act shall have effect with respect to the Board."

Chapter II of the Crime (Sentences) Act 1997 includes section 28, subsection (5) of which now obliges the Secretary of State to release a tariff expired mandatory life sentence prisoner whose release the Board has directed, thus engaging section 32(4) above. Schedule 5 to the 1991 Act provided in para 1(2)(b), under the hearing "Status and capacity":

"It shall be within the capacity of the Board as a statutory corporation to do such things and enter into such transactions as are incidental to or conducive to the discharge of . . .

"(b) its functions under Chapter II of Part II of the Crime (Sentences) Act 1997 in respect of life prisoners within the meaning of that Chapter."

Section 32 of and Schedule 5 to the 1991 Act were repealed and replaced by section 239 of and Schedule 19 to the Criminal Justice Act 2003, but it was not suggested in argument that this change had any bearing on the issue to be decided by the House.

21. The House was referred to Parole Board Rules made by the Secretary of State under section 32(5) of the 1991 Act in 1992, 1997 and 2004. The 1992 and 1997 Rules were in very much the same terms, although the 1997 Rules applied to wider classes of life sentence prisoners, and neither applied to mandatory life sentence prisoners until section 28 of the 1997 Act was amended by section 275 of the Criminal Justice Act 2003, which came into force on 18 December 2003. Common to the 1992 and 1997 Rules was a requirement in rule 5(1) to serve relevant information and reports on the prisoner or his representative. But this requirement was qualified by paras (2) and (3):

> "(2) Any part of the information or reports referred to in paragraph (1) which, in the opinion of the Secretary of State, should be withheld from the prisoner on the ground that its disclosure would adversely affect the health or welfare of the prisoner or others, shall be recorded in a separate document and served only on the Board together with the reasons for believing that its disclosure would have that effect.
>
> (3) Where a document is withheld from the prisoner in accordance with paragraph (2), it shall nevertheless be served as soon as practicable on the prisoner's representative if he is –
>
> (a) a barrister or solicitor,
>
> (b) a registered medical practitioner, or
>
> (c) a person whom the chairman of the panel directs is suitable by virtue of his experience or professional qualification;
>
> provided that no information disclosed in accordance with this paragraph shall be disclosed either directly or indirectly to the prisoner or to any other person without the authority of the chairman of the panel."

A right to be represented (subject to certain exclusions) was provided in rule 6, and a right for the prisoner to call witnesses and adduce evidence, subject to certain procedural conditions, by rules 7 and 8. The chairman of the panel had power to give directions (rule 9), among them a direction (rule 9(1)(d)):

> "as regards any documents which have been received by the Board but which have been withheld from the prisoner in accordance with rule 5(2), whether the disclosure of such documents would adversely affect the health or welfare of the prisoner or others . . ."

There was to be an oral hearing of the prisoner's case unless otherwise agreed (rule 10) and the hearing was to be at the prison or other institution where the prisoner was detained (rule 12(1). It was provided in rule 13(2) that:

> "Subject to this rule, the panel shall conduct the hearing in such manner as it considers most suitable to the clarification of the issues before it and generally to the just handling of the proceedings . . ."

This paragraph was subject to paragraph (3) which provided:

> "The parties shall be entitled to appear and be heard at the hearing and take such part in the proceedings as the panel thinks proper; and the parties may hear each others' evidence, put questions to each other, call any witnesses who the Board has authorised to give evidence in accordance with rule 7, and put questions to any witness or other person appearing before the panel."

Rule 15(2) provided:

> "The decision by which the panel determines a case shall be recorded in writing with reasons, signed by the chairman of the panel, and communicated in writing to the parties not more than seven days after the end of the hearing."

22. The 2004 Rules come into force on 1 August 2004, and are accepted by the appellant as applying to his case, which was referred to the Board again by the Secretary of State on 21 February 2005. In these Rules certain changes were made. Rule 6(2) and (3) reproduce rule 5(2)

and (3) of the 1992 and 1997 Rules, but with some expansion and qualification:

> "(2) Any part of the information or reports referred to in paragraph (1) which, in the opinion of the Secretary of State, should be withheld from the prisoner on the grounds that its disclosure would adversely affect national security, the prevention of disorder or crime or the health or welfare of the prisoner or others (such withholding being a necessary and proportionate measure in all the circumstances of the case), shall be recorded in a separate document and served only on the Board together with the reasons for believing that its disclosure would have that effect.
>
> (3) Where a document is withheld from the prisoner in accordance with paragraph (2), it shall, unless the chair of the panel directs otherwise, nevertheless be served as soon as practicable on the prisoner's representative if he is –
>
> (a) a barrister of solicitor,
>
> (b) a registered medical practitioner, or
>
> (c) a person whom the chair of the panel directs is suitable by virtue of his experience or professional qualification;
>
> provided that no information disclosed in accordance with this paragraph shall be disclosed either directly or indirectly to the prisoner or to any other person without the consent/authority of the chair of the panel."

Rule 8, which in part reproduces rule 9 of the earlier rules in relation to the giving of directions, provides in (2)(d) that a direction:

> "(d) as regards any documents which have been received by the Board but which have been withheld from the prisoner in accordance with rule 6(2), whether withholding such documents is a necessary and proportionate measure in all the circumstances of the case."

The prisoner must give notice whether he wishes to attend the hearing (rule 14(3)). Rule 15 entitles him to call witnesses if he obtains leave to do so. Rule 18(1) provides that:

> "The hearing shall be held at the prison or other institution where the prisoner is detained, or such other place as the chair of the panel, with the agreement of the Secretary of State, may direct."

Rule 19(2) and (3) reproduce rules 13(2) and (3) of the earlier rules. Rule 19(6) is new and provides:

> "The chair of the panel may require the prisoner, any witness appearing for the prisoner, or any other person present, to leave the hearing where evidence is being examined which the chair of the panel, in accordance with rule 8(2)(d) (subject to any successful appeal under rule 8(2)), previously directed should be withheld from the prisoner as adversely affecting national security, the prevention of disorder or crime or the health or welfare of the prisoner or others."

Rule 20, relating to the panel's decision provides:

> "The panel's decision determining a case shall be recorded in writing with reasons, signed by the chair of the panel, and provided in writing to the parties not more than 7 days after the end of the hearing; the recorded decision with reasons shall only make reference to matters which the Secretary of State has referred to the Board."

23. A statutory tribunal has such powers as its parent statute confers upon it, whether expressly or impliedly, and no more. Where the power is express, no difficulty should arise. For purposes of implication, the test propounded by Lord Selborne LC in *Attorney-General v Great Eastern Railway Co* (1880) 5 App Cas 473, 478, has been treated as generally applicable, whether to companies, local authorities or statutory corporations. He agreed with James LJ that:

> "this doctrine [of *ultra vires*] ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequent upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*."

Section 111 of the Local Government Act 1972 empowers local authorities to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions. Paragraph 1(2) of Schedule 5 to the 1991 Act, as already noted, empowers the Board to do such things and enter into such transactions as are incidental or conducive to the discharge of its statutory functions.

24. There is nothing in the 1991 Act or the 2003 Act which expressly authorises the Board to hold an oral hearing to review a tariff-expired mandatory life sentence prisoner's application for parole in a manner that does not accord with the well-known principles of natural justice. There is in particular nothing in either Act which expressly authorises the Board to make a decision adverse to a prisoner without disclosure to the prisoner of the case against him, so that he may answer it if he can; to deny him the benefit of an adversarial hearing; to provide for the exclusion of himself or his legal representative from the hearing; or to adopt a specially appointed advocate procedure. The Board and the Secretary of State did not argue otherwise. Rules made by the Secretary of State under section 32(5) cannot enlarge the powers conferred by the Act. This is trite law, and Mr Owen was right to concentrate his argument on lack of power in the Act and not on the effect of the Rules. But in any event, the 1992 and 1997 Rules do not begin to authorise the steps listed above; nor do the 2004 Rules purport to authorise them, despite some steps in that direction. If, therefore, the taking of those steps are to be justified as within the powers of the Board it must be because they are incidental or conducive to the discharge of the Board's functions. The Board and the Secretary of State contended that power to take such steps is indeed incidental and conducive to the discharge of the Board's functions, pointing to the undoubted importance of the Board's functions in protecting the public against the risk of injury or death and protecting witnesses against the risk of retaliation.

25. There are in my opinion two reasons, each of them independently conclusive, why this argument cannot be accepted. The first depends on the presumption that Parliament does not intend to interfere with the exercise of fundamental rights. It will be understood to do so only if it

does so expressly. In *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539, 574 Lord Browne-Wilkinson said:

> "Where wide powers of decision-making are conferred by statute, it is presumed that Parliament implicitly requires the decision to be made in accordance with the rules of natural justice: *Bennion on Statutory Interpretation*, p 737. However widely the power is expressed in the statute, it does not authorise that power to be exercised otherwise than in accordance with fair procedures."

Lord Steyn spoke to similar effect: pp 587-590. In *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131, Lord Hoffmann expressed the point very clearly:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

For reasons given above, the course proposed and so far adopted in the conduct of the appellant's parole review involves a substantial departure from the standards of procedural fairness which would ordinarily be observed in conducting a review of this kind. It would in my opinion violate the principle of legality, strongly relied on in argument by Mr Owen, and undermine the rule of law itself, if such a departure were to

be justified as incidental or conducive to the discharge of the Board's functions.

26. My second reason for rejecting the implication argument is based on the historical record, which demonstrates that the presumption to which I have referred is not a lawyer's fiction but a practical reality. The procedure formerly adopted for handling deportation challenges raising sensitive questions of national security was finally condemned by the European Court in *Chahal v United Kingdom* (1996) 23 EHRR 413. In para 131 of its judgment in that case the Court referred with approval to a form of judicial control obtaining in Canada, apparently somewhat analogous to the special advocate procedure (although the Court has suspended judgment on the conformity of that procedure with the Convention: *Al-Nashif v Bulgaria* (2002) 36 EHRR 655, para 97). Parliament acted on this indication. In response to the judgment the Special Immigration Appeals Commission Act 1997 was enacted to establish the Commission. That Act conferred power on the Lord Chancellor to make rules (section 5(1)) and gave express power in section 5(3) to make rules which would:

> "(a) make provision enabling proceedings before the Commission to take place without the appellant being given full particulars of the reasons for the decision which is the subject of the appeal,
>
> (b) make provision enabling the Commission to hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him,
>
> (c) make provision about the functions in proceedings before the Commission of persons appointed under section 6 below, and
>
> (d) make provision enabling the Commission to give the appellant a summary of any evidence taken in his absence."

Such rules were to be made by statutory instrument (section 5(8)) of which a draft was to be laid before and approved by resolution of each House. Seeking the House of Lords' approval of the first rules made under the Act, the Lord Chancellor acknowledged that the Commission's procedures departed from what would ordinarily be required to satisfy natural justice: House of Lords Hansard, 29 July 1998, Col 1587. Section 6 of the Act provided for the appointment of

special advocates (not so described), who would not be responsible to the person whose interests they were appointed to represent. The Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003/1034), now in force, lay down detailed provisions governing the withholding of material from the applicant and his legal representative (e.g. rules 10(3), 16(3), 37), the appointment and role of special advocates (rules 34-36), the holding of hearings in the absence of the appellant and his legal representative (rule 43), qualification of the appellant's right to cross-examine opposing witnesses (rule 44(5)) and a qualification of the Commission's duty to give reasons for its decision (rule 47). Thus whatever the merits of these procedures (which have caused concern to the House of Commons Constitutional Affairs Committee and a number of special advocates, as evidenced by the report referred to in para 18 above, but on which the House is not required to rule in this appeal), it seems clear that they have been authorised by primary legislation and by rules approved in Parliament. Reliance has not been placed on implication to warrant so significant a departure from ordinary standards of procedural fairness.

27. Schedule 3 to the Terrorism Act 2000, governing the Proscribed Organisations Appeal Commission, contained provisions very similar to those already noted in the Special Immigration Appeals Commission Act 1997, including (in paragraph 7) provision for special advocates, and was followed by the Proscribed Organisations Appeal Commission (Procedure) Rules 2001 (S1 2001/443) similar in effect to the SIAC Rules already mentioned. The Race Relations (Amendment) Act 2000, inserted a section directed to national security into the Race Relations Act 1976, and contained express statutory authority to make rules which would exclude a claimant and his representatives from the hearing and for the appointment of a special advocate who would not be responsible to the person whose interests he was appointed to represent. Schedule 6 to the Anti-terrorism, Crime and Security Act 2001, governing the Pathogens Access Appeal Commission, was very closely modelled on that pertaining to proscribed organisations in Schedule 3 to the 2000 Act, containing almost identical provisions. The Pathogens Access Appeal Commission (Procedure) Rules 2002 (S1 2002/1845) were closely modelled on the Proscribed Organisations Rules. Section 80 of the Planning and Compulsory Purchase Act 2004 made special provision for the appointment of a person to represent the interests of any person who would be prevented from hearing or inspecting any evidence at a local inquiry on grounds of national security. Rules made under the section to regulate this procedure were to be contained in a statutory instrument subject to annulment in pursuance of a resolution of either House. The Schedule to the Prevention of Terrorism Act 2005 contains detailed provisions governing the making of procedural rules,

varying the ordinary rules of procedural fairness, in the context of control orders. Such rules are required to be laid before Parliament and are to cease to have effect if not approved by a resolution of each House within 40 days of the making of the rules. The Civil Procedure (Amendment No. 2) Rules 2005 (SI 2005/656 (L16)), made on 11 March 2005, contain detailed provisions governing the exclusion of a party and his legal representative from the hearing and the appointment of special advocates.

28. Reference was made in argument to four instances in which there had been a departure from the ordinary rules of procedural fairness in Northern Ireland:

(1) The Northern Ireland (Sentences) Act 1998 provided for prisoners serving sentences for scheduled offences to apply to Sentence Review Commissioners for early release if they were able to meet certain statutory conditions. By Schedule 2 to the Act the Secretary of State was empowered to make rules which might, among other things, provide for the withholding of evidence about a prisoner, the holding of hearings in the absence of the prisoner and his legal representative and the appointment of a person to represent the prisoner when he and his representative were excluded. Schedule 2 came into force on 28 July 1998 and on 30 July the Secretary of State, acting under the authority of Schedule 2, made the Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998 (SI 1998/1859), which contained more detailed provisions to the same effect. Information could be withheld from the prisoner and his representative as a safeguard against dangers which included not only threats to national security but also adverse effects on the health, welfare or safety of any person.

(2) Section 85(1) of the Northern Ireland Act 1998 empowered Her Majesty by Order in Council to make provision dealing with a number of reserved matters listed in Schedule 3, one of which (para 9(e)) was the treatment of offenders. It was a broad power, extending (section 85(1)(c)) to the amending or repealing of any provision made by or under any Act of Parliament or Northern Ireland legislation. But (section 85(3)) no recommendation might be made to Her Majesty to make an Order in Council under the section unless a draft of the Order had been laid before and approved by resolution of each House of Parliament. In exercise of this power, by the Life Sentences (Northern Ireland) Order 2001 (SI 2001/2564) Her Majesty in Council made provision for the appointment of Life Sentence Review Commissioners to deal with tariff and release decisions. Schedule 2 to the Order empowered the Secretary of State to make procedural rules,

subject to annulment by resolution of either House. Such rules might provide for the withholding of evidence from a prisoner (para 3(e)), the conduct of proceedings in the absence of the prisoner and his legal representative (para 6(1)) and the appointment of a person to represent the interests of the prisoner when he and his representative were excluded (para 6(2)). Pursuant to Schedule 2, the Secretary of State made the Life Sentence Review Commissioners' Rules 2001 (SR 2001/317), which provided in rule 10(8) for conducting parts of the hearing in the absence of the prisoner and his legal representative, in rule 15(2) for the withholding from the prisoner and his legal representative of any information certified by the Secretary of State to be confidential, as defined, and in rule 16(2) for the appointment of a special advocate to represent the interests of the prisoner.

(3) The Northern Ireland (Remission of Sentences) Act 1995 came into force on 17 November 1995 (SI 1995/2945) and was significantly amended by the Terrorism Act 2000. Section 1(3) of the 1995 Act empowered the Secretary of State to revoke the licence of a person released from prison in specified circumstances

> "if it appears to him that the person's continued liberty would present a risk to the safety of others or that he is likely to commit further offences; and a person whose licence is revoked shall be detained in pursuance of his sentence and, if at large, be deemed to be unlawfully at large."

A person whose licence was revoked was entitled under section 1(4) to make representations in writing to the Secretary of State about the revocation and to be informed as soon as practicable of the reasons for the revocation and of his right to make representations. There was no provision in the statute enabling the person whose licence had been revoked to seek a review of the lawfulness of his detention by any independent court or tribunal, and section 1(3) and (4) was plainly incompatible with article 5(4) of the Convention: see for example *Waite v United Kingdom* (2002) 36 EHRR 1001. This decision was made on 10 December 2002. On 13 January 2003 the Secretary of State issued a "Written Statement" in which he stated:

> "I have put in place additional safeguards for persons, whose licences are revoked. These include the appointment of independent Commissioners, who hold or have held judicial office, to consider and advise me upon any representations made by recalled prisoners. I will also make available funds to meet the reasonable legal

expenses of prisoners in connection with making such representations whether in writing or at any oral hearing the Commissioners may decide is necessary. Further details of the procedures and how they will operate will be placed in the libraries of both Houses."

Annexed to this document was a note listing the additional safeguards the Secretary of State would apply. This provided that the Commissioner would decide the procedure for dealing with any representations, subject to paragraphs 5 and 6 which read:

"5. Where the Secretary of State certifies any information as 'damaging information' (as defined in Rule 22(1) of the Northern Ireland (Sentences) Act 1998 (Sentence Review Commissioners) Rules 1998), the Commissioner shall not in any circumstances disclose it to the prisoner, his legal representative or any other person except any special advocate appointed by the Attorney General to safeguard the interests of the prisoner. A special advocate shall not disclose the damaging information to anyone.

6. The prisoner, his legal representative and any witness appearing for him shall be excluded from any oral hearing whilst evidence is being examined or argument is being heard relating to 'damaging information'.

These paragraphs were supplemented by paragraphs 7-9:

"7. A special advocate may communicate with the prisoner he has been appointed to represent at any time before the Secretary of State makes 'damaging information' available to him.

8. At any time after the Secretary of State has made 'damaging information' available to him, a special advocate may seek direction from the Commissioner authorising him to seek information in connection with the proceedings from the prisoner.

9. Where information has been certified as 'damaging information' the Secretary of State shall, within such period as the Commissioner may determine, give to the Commissioner and to the prisoner a paper setting out the gist of the damaging information insofar as he considers it

possible to do so without causing damages of the kind referred to in Rule 22(1) of the 1998 Rules."

(4) Section 24(1)(c) of the Northern Ireland Act 1998 provided that a minister or department of the Northern Ireland government should have no power to do anything which discriminated against a person or class of person on the ground of religious belief or political opinion. Section 76 of the Act, applying to public authorities, was to similar effect, although expressly conferring a right of action. Where a person claimed to be a victim of discrimination in contravention of section 24 or 76, it was open to the person against whom the claim was made to propose to rely (section 90(1)(b) of the Act) on a certificate purporting to be signed by or on behalf of the Secretary of State certifying

"(i) that an act specified in the certificate was done for the purpose of safeguarding national security or protecting public safety or public order; and
(ii) that the doing of the act was justified by that purpose."

A claimant might appeal against the certificate to a Tribunal established under section 91, in accordance with rules made by the Lord Chancellor (section 90(2)), which might uphold or quash the certificate (section 90(3)). Section 91(1) established the Tribunal and section 91(2)-(6) governed the Lord Chancellor's rule-making power. It was specifically enacted that rules might provide for the withholding of information from the claimant, for the conduct of proceedings in the absence of the claimant and his legal representative and for regulating the functions of persons who might be appointed to represent the interests of the claimant when he and his legal representative were excluded (subsections 4(a), 4(b) and 4(c)). Power to appoint such persons was conferred on the Attorney General for Northern Ireland by subsection (7). In exercise of his rule-making power, the Lord Chancellor made the Northern Ireland Act Tribunal (Procedure) Rules 1999 (SI 1999/2131), which were laid before and approved by resolution of each House as required by section 96(6) of the 1998 Act. These rules made provision for the appointment of special advocates (rule 9), the withholding of information from the claimant (rules 10 and 11), the exclusion of the claimant and his legal representative from the hearing (rule 18) and the issue of incomplete reasons (rule 22).

29. The first, second and fourth of these Northern Irish instances are consistent with the legislative practice adopted in Great Britain, as

briefly summarised in paras 26-27 above. The third instance is different, and the Parole Board placed strong reliance on it. But the 1995 Act provided for revocation decisions to be made by the executive, without any provision for judicial review of the revocation decision or any provision for an adversarial hearing. It was blatantly incompatible with the Convention, and the safeguards introduced by the Secretary of State were an attempt to rescue it. By providing for the possibility of oral hearings and for special advocates the Secretary of State effected an improvement on the procedure which had hitherto prevailed. But it would in my opinion be very dangerous to draw any inference from a procedure devised to meet an emergency, in the absence (unlike all the other examples considered) of any express statutory authority or rule-making power, the lawfulness of which may well be open to question (although, in the absence of argument, I express no opinion on the point).

30. The examples considered above show plainly that Parliament in practice observes the principle of legality. If it intends that a tribunal shall have power to depart from the ordinary rules of procedural fairness, it legislates to confer such power in clear and express terms and it requires that subordinate legislation regulating such departures should be the subject of Parliamentary control. It follows this practice even when the security of the nation is potentially at stake. Reference to Hansard shows that measures of this kind have repeatedly been the subject of anxious and detailed debate. It is in my opinion contrary to legal principle and good democratic practice to read such a power into a statute which contains no hint whatever that Parliament intended or even contemplated such a departure. Had it done so, as in the other cases considered, the departure would have been carefully defined and controlled. It is nothing to the point to argue that if damaging adverse evidence is withheld from a prisoner and his legal representative he is better off with the limited help given by a specially appointed advocate than without it, unless there is lawful authority to conduct the hearing while withholding such evidence from the prisoner, which in the present context there is not.

31. The Board and the Secretary of State gain no support for the contrary proposition from three cases cited in argument: *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153; *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247; and *R v H* [2004] UKHL 3, [2004] 2 AC 134. In the first of these cases, an appeal from SIAC, in which a special advocate had appeared, the Court of Appeal received written submissions from a special advocate: see paras 31-32. It was clearly within the inherent power of the court to do so to make the

appeal effective. There could scarcely have been a meaningful appeal had the Court of Appeal not been able to put itself in the same position as SIAC. In the second, the House contemplated use of a special advocate if a former member of a security service were to seek judicial review of a refusal of permission to publish. This also would be within the inherent power of the court if the object of the proceedings was not to be frustrated, and the context under consideration was far removed from one in which a tariff-expired mandatory life sentence prisoner faces the prospect of lifelong incarceration for reasons not communicated to him or his legal representative. In the third of the cases the House held that a special advocate might, exceptionally, be appointed in a criminal case to help resolve an issue whether a trial could be fairly conducted if material, favourable to the defendant, were not disclosed to him. It was not suggested or contemplated that any part of the prosecution case against the defendant could be properly withheld from the defendant and his legal representative, a consideration which distinguishes that case from the present.

32. In my opinion the procedural course proposed in the Board's decision letter of 13 June 2003 was one it had no power to adopt. I would accordingly allow the appeal and quash that decision.

LORD WOOLF

My Lords,

Background

33. I have found it especially helpful in this case to have had the opportunity to read the speeches of my noble and learned friends in draft.

34. The issue which we are required to determine is identified in the agreed statement of facts and issues in these terms:

> "Whether the Parole Board, a statutory tribunal of limited jurisdiction, is able, within the powers granted by the Criminal Justice Act 1991, and compatibly with article 5

of the European Convention on Human Rights ('the Convention'):

(a) to withhold material relevant to [the appellant's] parole review from [his legal representatives] and

(b) instead, to disclose that material to a specially appointed advocate ('SAA'), who will represent [the appellant], in [his] absence, at a closed hearing before the Board."

35. That issue is one of principle and not confined to the facts of this case; it was so treated before the Court of Appeal (as para 18 of the agreed statement of facts and issues records) and it has been so argued before us. It is therefore not necessary for me to refer to the facts of this case and I do not purport to do so. I am content to adopt the summaries which are set out in the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Carswell. However, the fact that we are dealing with the issue as a matter of principle means that our decision has wide implications for how the Board performs its functions and its ability to perform its statutory role. That statutory role is one which is already of considerable significance within the criminal justice system, a significance which will be increased because of the new sentences of life imprisonment, detention for life and detention for public protection in relation to serious offences created by Chapter 5 of the Criminal Justice Act 2003. In addition it means that while I am able to set out my views on the issues of principle I am unable to say what effect those views will have on the appellant's rights. This will probably only be able to be determined during or after the hearing on the facts by the Board, as to the merits, on whether the appellant should be released on licence.

36. In order to perform its role, to which I will refer later, the Board is dependent upon the information with which it is provided. It has no power to compel witnesses to attend its hearings but it can invoke the assistance of the High Court for this purpose. However, this residual power of compulsion does not assist in those cases where it is desirable that it receives the information, but the information will only be provided if it can be made available to the Board in circumstances in which its sources can be confident that their identity will be protected from disclosure.

37. That the Board should be able to perform its functions effectively is particularly important in the case of those who are sentenced to life imprisonment, whether the sentence of life imprisonment is

discretionary or mandatory. In these cases, a period is now identified by the sentencing judge which is the minimum period to be served by way of punishment and deterrence. The sentencing judge does not need to consider the question of future risk to the public because this is dealt with by the Parole Board when the question of the release of the prisoner on licence comes to be considered after the prisoner has served the minimum term. At the time the appellant was sentenced in September 1966 the position was very different because, although at that time the Secretary of State would take into account the views of the Chief Justice and the trial judge as to the period to be served as a punishment and by way of deterrence, the sentence was still regarded as actually one of life imprisonment and release on licence was a matter of discretion for the Secretary of State alone.

38. In the very different situation that exists to day, it is desirable for the question of risk to be considered by the Parole Board rather than the sentencing judge. The Board should be in a position to know all the relevant information about the progress that the prisoner has made during his sentence. In addition, in some situations, the risk that will exist could relate to circumstances that did not exist at the time of sentence. However, both from the point of view of the prisoner and from that of the public, whom the Board is intended to protect, it is critical that the Board, whenever possible, is aware of any relevant information before it reaches its decision to release a prisoner on licence.

39. If this appeal is allowed this could affect the ability of the Board to perform its functions in future. In addition, the decision could affect the powers of other administrative bodies that determine issues that impact upon the rights of the individual, at least where those administrative bodies are subject to procedural rules made under statute. I draw attention to this aspect of this appeal since it justifies my reiterating well established basic principles of administrative law.

40. The principles have been set out in many cases of high authority, with greater elegance, but I would summarise them as follows:

(i) An administrative body is required to act fairly when reaching a decision which could adversely affect those who are the subject of the decision.

(ii) This requirement of fairness is not fixed and its content depends upon all the circumstances and, in

particular, the nature of the decision which the body is required to make.

(iii) The obligation of fairness to which I refer can be confined by legislation and, in particular, by rules of procedure, provided that the language used makes its effect clear and, in the case of the secondary legislation, it does not contravene the provisions of the Convention (in the context of the present appeal, this means article 5(4) as it is accepted article 6 has no application).

41. A case which considers these principles in the context of a criminal trial, where the responsibility rests not upon an administrative body but a court, is *R v H* [2004] 2 AC 134. In that case, the defendants had been charged with others with conspiracy to supply a Class A drug. At a preparatory hearing the Crown sought a ruling as to whether material could be withheld from disclosure to the defence on the ground of public interest immunity ("PII"). The judge ruled that the hearing should not be conducted in open court in the presence of the defendants and that a special independent advocate ("SAA") should be appointed to introduce an adversarial element into the hearing. This was done to avoid a violation of article 6 of the Convention. It was decided that the appointment of a special counsel to represent a defendant as an advocate on such an application might, in an exceptional case, be necessary in the interests of justice, but such an appointment should not be ordered unless and until the trial judge is satisfied that no other course would adequately meet the overriding requirement of fairness to the defendant. My noble and learned friend Lord Bingham of Cornhill in giving the opinion of the Committee made the following important statements of principle which are of relevance to the different context in which the Board operates:

"11. Fairness is a constantly evolving concept…it is important to recognise that standards and perceptions of fairness may change, not only from one century to another but also, sometimes, from one decade to another.

12. … The European Court has repeatedly recognised that individual rights should not be treated as if enjoyed in a vacuum: *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, 52, para 69; *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163, 191, para 52. As Lord Hope of Craighead pointed out in *Montgomery v H M Advocate* [2003] 1 AC 641, 673:

'the rule of law lies at the heart of the Convention. It is not the purpose of article 6 to make it impracticable to bring those who are accused of crime to justice. The approach which the Strasbourg court has taken to the question whether there are sufficient safeguards recognises this fact.'

13. The institutions and procedures established to ensure that a criminal trial is fair vary almost infinitely from one jurisdiction to another, the product, no doubt of historical, cultural and legal tradition…

18. Circumstances may arise in which material held by the prosecution and tending to undermine the prosecution or assist the defence cannot be disclosed to the defence, fully or even at all, without the risk of serious prejudice to an important public interest. The public interest most regularly engaged is that in the effective investigation and prosecution of serious crime, which may involve resort to informers and undercover agents, or the use of scientific or operational techniques (such as surveillance) which cannot be disclosed without exposing individuals to the risk of personal injury or jeopardising the success of future operations. In such circumstances some derogation from the golden rule of full disclosure may be justified but such derogation must always be the minimum derogation necessary to protect the public interest in question and must never imperil the overall fairness of the trial…

22. There is as yet little express sanction in domestic legislation or domestic legal authority for the appointment of a special advocate or special counsel to represent, as an advocate in PII matters, a defendant in an ordinary criminal trial, as distinct from proceedings of the kind just considered. But novelty is not of itself an objection, and cases will arise in which the appointment of an approved advocate as special counsel is necessary, in the interests of justice, to secure protection of a criminal defendant's right to a fair trial. Such an appointment does however raise ethical problems…Defendants facing serious charges frequently have little inclination to co-operate in a process likely to culminate in their conviction, and any new procedure can offer opportunities capable of exploitation to obstruct and delay. None of these problems should deter the court from appointing special counsel where the interests of justice are shown to require it. But the need must be shown. Such an appointment will always be exceptional, never automatic; a course of last and never first resort. It should not be ordered unless and until the

trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant…

23. The problem of reconciling an individual defendant's right to a fair trial with such secrecy as is necessary in a democratic society in the interests of national security or the prevention or investigation of crime is inevitably difficult to resolve in a liberal society governed by the rule of law. It is not surprising that complaints of violation have been made against member states including the United Kingdom, some of which have exposed flaws in or malfunctioning of our domestic procedures. The European Court has however long accepted that some operations must be conducted secretly if they are to be conducted effectively: *Klass v Federal Republic of Germany* (1978) 2 EHRR 214, 232, para 48…

32. The appellants contended that, taken at its narrowest, the principle established by *Edwards and Lewis* is that it is incompatible with article 6 for a judge to rule on a claim to PII in the absence of adversarial argument on behalf of the accused where the material which the prosecution is seeking to withhold is, or may be, relevant to a disputed issue of fact which the judge has to decide in order to rule on an application which will effectively determine the outcome of the proceedings. It was argued that the *Edwards and Lewis* principle applies wherever the defence rely on entrapment to stay the proceedings or exclude evidence, but does not apply to entrapment only and is not confined to determinative rulings. It was however acknowledged that there is no absolute rule which requires the appointment of special counsel in any particular kind of case.

33. These submissions, in our opinion, seek to place the trial judge in a straitjacket. The consistent practice of the court, in this and other fields, has been to declare principles, and apply those principles on a case-by-case basis according to the particular facts of the case before it, but to avoid laying down rigid or inflexible rules. There is no doubt as to the principles to be applied – the more important have been identified in earlier paragraphs of this opinion – and there is no dissonance between the principles of domestic law and those recognised in the Convention jurisprudence. It is entirely contrary to the trend of Strasbourg decision-making to hold that in a certain class of case or when a certain kind of decision has to be made a prescribed procedure must always be

> followed. The overriding requirement is that the guiding principles should be respected and observed, in the infinitely diverse situations with which trial judges have to deal, in all of which the touchstone is to ascertain what justice requires in the circumstances of the particular case."

42. The position of a person who is being considered for release on licence, as I have indicated, is not identical to that of a defendant in a criminal trial which was being considered in *H.* However, these statements could be even more apposite in the case of the Board. I have already indicated that article 6 does not apply to the Board's role. Furthermore, although the decision of the Board is of the greatest importance to a prisoner, the prisoner has inevitably already been found or pleaded guilty, and in the case of a prisoner sentenced to life imprisonment, the offence would have been a grave crime. Furthermore, any decision to find an offender guilty is a once and for all decision, but in the case of a decision of the Board, the decision can always be changed with the passage of time. Finally, the task of the court is to determine the guilt or innocence of a defendant, while the task of the Board is to determine whether it is safe for the prisoner to be released.

43. Based on Lord Bingham's approach it can therefore be accepted when determining the outcome of the issue that fairness is a "constantly evolving concept". Provision has to be made when it is necessary for derogation from the golden rule of full disclosure but the derogation must be the minimum necessary to protect the public interest. When there has to be derogation there can be cases in which the appointment of a SAA is, in the interests of justice, advantageous. The European Court of Human Rights ("ECtHR") has accepted that some operations "must be conducted secretly if they are to be conducted effectively". Finally, there is the fact that the trial judge should not be placed in a straitjacket. Instead the decision sets out principles and indicates those principles should be applied on a case by case basis: "in the infinitely diverse situations with which trial judges have to deal,…the touchstone is to ascertain what justice requires in the circumstances of the particular case". These points are all highly relevant to the determination of the issue.

44. The other point to which it is worth drawing attention from the different context of the criminal trial is that the evolving practice of the criminal courts with regard to non-disclosure because of PII, was, as in

the case of the Board, until relatively recently, not dealt with specifically in legislation or the subject of rules. It arose out of the decisions of courts. It was not dependent on the inherent jurisdiction of the courts. Instead it existed because it is a characteristic of courts (shared by tribunals) whether created by statute or by common law that they are masters of their own procedure subject to any limitation imposed by legislation. For courts, there is now a legislative framework. This is provided by the Crown Court (Criminal Procedure and Investigations Act 1996 (Disclosure)) Rules 1997 (SI 1997/698 (L4))which came into force in April 1997. There is also a legislative framework for the Board.

The Board's Statutory Framework

45. The changed statutory context in which the Board now decides the date on which a life sentence prisoner is released is provided by the Crime (Sentences) Act 1997 ("the 1997 Act"). The 1997 Act provides the regime under which both mandatory and discretionary prisoners are released. Section 28 contains the duty to release. It provides, so far as relevant:

> "(1A) This section applies to a life prisoner in respect of whom a minimum term order has been made; and any reference in this section to the relevant part of such a prisoner's sentence is a reference to the part of the sentence specified in the order.
>
> (5) As soon as-
>
> (a) a life prisoner to whom this section applies has served the relevant part of his sentence; and
>
> (b) the Parole Board has directed his release under this section,
>
> it shall be the duty of the Secretary of State to release him on licence.
>
> (6) The Parole Board shall not give a direction under subsection (5) above with respect to a life prisoner to whom this section applies unless –
>
> (a) the Secretary of State has referred the prisoner's case to the Board; and
>
> (b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.

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

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

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

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

46. Section 28(6) sets out clearly the nature of the Board's "responsibility". In exercising that responsibility, the Board is required to make a practical judgment, "balancing the hardship and injustice of continuing to imprison a man who is unlikely to cause serious injury to the public" (if this is the case) "against the need to protect the public…In other than a clear case this is bound to be a difficult and very anxious judgment. But in the final balance, the board is bound to give preponderant weight to the need to protect innocent members of the public against any significant risk of serious injury" (*R v Parole Board, Ex p Watson* [1996] 1 WLR 906, 916-917 per Sir Thomas Bingham MR). Obviously, as emphasised in *R (West) v Parole Board* [2005] 1WLR 350, the prisoner should, therefore, "have the benefit of a procedure which fairly reflects, on the facts of his particular case, the importance of what is at stake for him, as for society".

47. This is particularly important because so far as the Board is concerned, the position is clear: a prisoner can only be released on licence if the Board is satisfied that it is no longer necessary for him to be confined. In expressing the matter in that way, I am not intending to depart from Lord Bingham's statement in *R v Lichniak* [2003] 1 AC 903, 913 para 16 that he doubted "whether there is in truth a burden on the prisoner to persuade the Parole Board that it is safe to recommend release, since this is an administrative process requiring the board to consider all the available material and form a judgment". While that is correct, the Board has still to decide whether "it is no longer necessary… that the prisoner should be confined".

48. It is next necessary to refer to the power, not of the Board but of the Home Secretary, to make rules relating to the procedure to be employed by the Board when conducting a hearing. However, before

considering the rules, it is important to emphasise that even if there were no rules, made either by the Home Secretary or the Board, the Board would undoubtedly have the responsibility to reconcile so far as it can, what Lord Carswell rightly describes as a triangulation of interests: the Board's obligations to the prisoner and its obligation to protect society and, as part of the latter obligation, its obligation to protect third parties so far as it is practical to do so having regard to the Board's other responsibilities. Procedural rules cannot be devised that anticipate all the situations that can arise where a tribunal has to exercise its discretion to determine its own procedure in order to reconcile conflicting interests of the nature to which I have just referred.

49. My Lords, in determining the point of principle we are asked to decide, we cannot ignore the reality of certain criminal activity today. For example, the lives of the sources of the essential information which the Board requires, if it is to safeguard society can, in some cases, be at grave risk if their identities are revealed. Not all legal advisors can be trusted. A legal advisor may not only be acting for the prisoner but also for other parties who could be equally antagonistic to the source. The category of prisoners the Board has to consider who are serving a mandatory life sentence may, even after very long terms of imprisonment, remain extremely dangerous individuals. So, while this, fortunately, only occurs on rare occasions, it is inevitable that situations will arise where the Board is faced with the predicament of deciding to significantly curtail the protection of what is normally provided for a prisoner in order to perform its statutory duty. The circumstances in which this can happen are demonstrated by the decisions of the Board and the Administrative Court in this case.

50. While we do not know the contents of the closed evidence in this case, we have to accept that a case could well occur where a witness would be able to satisfy the Board that there would be a real danger of a prisoner killing someone if he is released, but the witness who could provide the evidence of this is not prepared to make available the evidence if it may be disclosed to the prisoner or his representatives. In such a situation it appears that there can be no alternative but for the Board to weigh up the conflicting interests of the prisoner and society. It would conflict with the Board's statutory duty for the Board to ignore the evidence unless this is what article 5(4) or domestic law require.

51. The fact that the prisoner has been convicted of the most serious of crimes and been sentenced to life imprisonment makes his position significantly different from that of someone who has not been convicted

and who is awaiting trial. In the latter situation, the predicament has, if necessary, to be resolved in the accused's favour. If necessary, the prosecution may have to be discontinued if disclosure is essential for the proper conduct of the prosecution. (See *Edwards v United Kingdom* (2003) 15 BHRC 189). In *Stafford v United Kingdom* (2002) 35 EHRR 1121, the ECtHR, while condemning the approach of the executive at that time, was careful to restrict its criticisms to "perceived fears of future *non-violent* criminal conduct unrelated to his original murder conviction" (emphasis added) (para 82). This does not however mean that the prisoner has no rights that have to be respected. As I will explain later both under article 5(4) and domestic law his fundamental right to have a hearing that in all the circumstances at least meets the minimum standards that for reasons of fairness have to be respected.

52. The Rules are made under Part 2 of the Criminal Justice Act 1991 ("the 1991 Act") (now repealed by the Criminal Justice Act 2003). Section 32 of the 1991 Act deals with the Parole Board. The section provides so far as relevant;

> "(3) The Board shall deal with cases as respects which it makes recommendations under this Part or Chapter II on consideration of –
>
> (a) any documents given to it by the Secretary of State; and
>
> (b) any other oral or written information obtained by it,
>
> and if in any particular case the Board thinks it necessary to interview the person to whom the case relates before reaching a decision, the Board may authorise one of its members to interview him and shall consider the report of the interview made by that member.
>
> (4) The Board shall deal with cases as respects which it gives directions under this Part or Chapter II on consideration of all such evidence as may be adduced before it.
>
> (5) Without prejudice to subsections (3) and (4) above, the Secretary of State may make rules with respect to the proceedings of the Board, including provision authorising cases to be dealt with by a prescribed number of its members or requiring cases to be dealt with at prescribed times.

(6) The Secretary of State may also give to the Board directions as to the matters to be taken into account by it in discharging any functions under this Part or Chapter II; and in giving any such directions the Secretary of State shall in particular have regard to –

(a) the need to protect the public from serious harm from offenders; and

(b) the desirability of preventing the commission by them of further offences and of securing their rehabilitation…."

53. The only other relevant provision of the 1991 Act is paragraph 1(2)(b) of Schedule 5. This is the commonly found "sweep up" jurisdictional provision. It gives the Board power to do "such things and enter into such transactions as are incidental to or conducive to the discharge of …its functions…".

54. There have been three sets of rules made under the 1991 Act, the Parole Board Rules 1992, the Parole Board Rules 1997 and the Parole Board Rules 2004. As the 2004 Rules are now in force, we should concentrate primarily on those Rules. However, it is to be noted that the 1992 Rules already required relevant information to be served on the prisoner or his representative subject to the information being withheld from the prisoner if disclosure would affect adversely the health or welfare of the prisoner or others. Then it is to be served on the prisoner's representative if the representative is a lawyer, a medical practitioner or a person that the chairman of the panel identifies as suitable. The prisoner can be represented by any person whom he has authorised for this purpose, who is not ineligible because (a) he is liable to be detained under the Mental Health Act 1983 or (b) he is serving a sentence of imprisonment or is on licence or with a previous conviction that is not spent. The Rules also require the hearing to be oral, unless both parties and the chairman agree otherwise. As to procedure at the hearing, this is prescribed by the 1992 Rules in terms that give the panel considerable discretion. The relevant provisions are:

"9.(1) Subject to paragraph (3), the chairman of the panel may give, vary or revoke directions for the conduct of the case, including directions in respect of –

(a) the timetable for the proceedings,

(b) the varying of the time within which or by which an act is required, by these Rules, to be done,

(c) the service of documents,

(d) as regards any documents which have been received by the Board but which have been withheld from the prisoner in accordance with rule 5(2), whether the disclosure of such documents would adversely affect the health or welfare of the prisoner or others, and

(e) the submission of evidence;

and following his appointment under rule 3, the chairman of the panel shall consider whether such directions need to be given at any time.

(2) Within 14 days of being notified of a direction under paragraph (1)(d), either party may appeal against it to the chairman, who shall notify the other party of the appeal; the other party may make representations on the appeal to the chairman whose decision shall be final.

(3) Directions under paragraph (1) may be given, varied or revoked either –

(a) of the chairman of the panel's own motion, or

(b) on the written application of a party to the Board which has been served on the other party and which specifies the direction which is sought;

but in either case, both parties shall be given an opportunity to make written representations or, where the chairman of the panel thinks it necessary, and subject to paragraph (6)(b), to make oral submissions at a preliminary hearing fixed in accordance with paragraph (4)…

13. (2) Subject to this rule, the panel shall conduct the hearing in such manner as it considers most suitable to the clarification of the issues before it and generally to the just handling of the proceedings; it shall so far as appears to it appropriate, seek to avoid formality in the proceedings…

(4) The chairman of the panel may require any person present at the hearing who is, in his opinion, behaving in a disruptive manner to

leave and may permit him to return, if at all, only on such conditions as he may specify.

(5) The panel may receive in evidence any document or information notwithstanding that such document or information would be inadmissible in a court of law but no person shall be compelled to give any evidence or produce any document which he could not be compelled to give or produce on the trial of an action.

(6) The chairman of the panel may require the prisoner, or any witness appearing for the prisoner, to leave the hearing where evidence is being examined which the chairman of the panel, in accordance with rule 9(1)(d) (subject to any successful appeal under rule 9(2)), previously directed should be withheld from the prisoner as being injurious to the health or welfare of the prisoner or another person.

(7) After all the evidence has been given, the prisoner shall be given a further opportunity to address the panel. ”

55. The 1997 Rules and the 2004 Rules are in similar terms. There is, however, a significant difference between rule 6 of the 2004 Rules and its predecessor. Rule 6 provides:

“6. (1) Within 8 weeks of the case being listed, the Secretary of State shall serve on the Board and, subject to paragraph (2), the prisoner or his representative –

(a) the information specified in Part A of Schedule 1 to these Rules,

(b) the reports specified in Part B of that Schedule, and

(c) such further information as the Secretary of State considers to be relevant to the case.

(2) Any part of the information or reports referred to in paragraph (1) which, in the opinion of the Secretary of State, should be withheld from the prisoner on the grounds that its disclosure would adversely affect national security, the prevention of disorder

or crime or the health or welfare of the prisoner or others (such withholding being a necessary and proportionate measure in all the circumstances of the case), shall be recorded in a separate document and served only on the Board together with the reasons for believing that its disclosure would have that effect.

(3) Where a document is withheld from the prisoner in accordance with paragraph (2), it shall, *unless the chair of the panel directs otherwise*, nevertheless be served as soon as practicable on the prisoner's representatives if he is –

(a) a barrister or solicitor,

(b) a registered medical practitioner, or

(c) a person whom the chair of the panel directs is suitable by virtue of his experience or professional qualification;

provided that no information disclosed in accordance with this paragraph shall be disclosed either directly or indirectly to the prisoner or to any other person without the consent/authority of the chair of the panel." (Emphasis added)

56. Although the earlier Rules did not contain the qualification that is now contained in rule 6(3) as to the chair of the panel being able to direct otherwise, if there was power to make rule 6 of the 2004 Rules, I would regard the wide unqualified power to give directions contained in the earlier Rules (for example rule 9 of the 1992 Rules) as creating a similar power. That is a power of the Board to direct non-disclosure if the Board is satisfied, in an exceptional situation, that there is no alternative, if the public interest is to be protected. It would be extraordinary if there should be no such power bearing in mind that it should have been obvious that such a power could be necessary on hearings before the Board as it is, and has been, in criminal proceedings. Even if the position were otherwise, such a power would have to be implied as a matter of necessity to enable the Board to perform its statutory duty to protect the public. It is to be noted that there is no *express* statutory obligation for the Board to hold an oral hearing. The procedural requirements are a product of the Rules. None the less section 28 implicitly requires the Board to act fairly and as part of that fundamental requirement of fairness the Board normally would be required to hold a hearing. In relation to such a right to a hearing, the approach which Lord Bingham identified as being applicable in *R v H* as to the Strasbourg approach could equally be applied to our approach in

this jurisdiction to the responsibilities of an administrative body that is required to exercise a decision of the nature entrusted to the Board by section 28.

Specially Appointed Advocates

57. Understandably, the use of SAAs has attracted adverse criticism. This adverse criticism is particularly linked with their use before bodies such as the Special Immigration Appeals Commission (SIAC), in conjunction with the detention or other restrictions that may be imposed on those whom it is suspected may commit terrorist offences. However, if, in the present context, the use of a SAA is confined to situations where the SAA can provide additional protection for the prisoner, this is surely a safeguard for the prisoner.

58. It was in relation to such a situation that the use of a SAA was encouraged by the ECtHR in *Chahal v United Kingdom* (1996) 23 EHRR 413. It was this initiative by the ECtHR that resulted in their use in this jurisdiction. *Chahal* was a case where a Sikh separatist leader had been detained in custody pending deportation for a substantial period after the Home Secretary had decided that he was a threat to national security. The ECtHR decided *inter alia*, that there had been violation of article 5 (4) of the Convention. Mr Chahal had not been informed of the sources of the evidence relied on by the Home Office in support of its allegations which were put to an advisory panel. The ECtHR recognised that the use of confidential material could be unavoidable where national security is at stake (para 131). The ECtHR went on to point out that in Canada, a more effective form of judicial control had been developed, referring to the use of SAAs. As the ECtHR said in *Chahal*: "this example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice".

59. This was no more than a suggestion. However, the reasoning of the ECtHR is to be supported as long as the use of SAAs is confined to situations where their involvement is not used to justify a reduction in the protection available to the person affected by the non disclosure. For example, the use of a SAA would not be justified if, in the absence of a SAA, the material would have been disclosed. The protection provided by the SAA may be limited but, in some situations, it may

make the critical difference. This is illustrated by *M v Secretary of State for the Home Department* [2004] 2 All ER 863.

60. The use of a SAA is, however, never a panacea for the grave disadvantages of a person affected not being aware of the case against him. The use of a SAA can be, however, a way of mitigating those disadvantages. For example, the SAA can persuade the tribunal that there could perfectly properly be disclosure subject to no restrictions or less stringent restrictions than the tribunal was minded to impose. The SAA may be able to destroy the credibility of a witness whose evidence is not disclosed. Although, the SAA may not be allowed to communicate with the person affected, in appropriate circumstances the SAA can be authorised to communicate with those who do represent the person affected or the SAA may, before he has been instructed, receive useful information. In addition, as this case illustrates, the SAA can ensure that the decision as to non disclosure is challenged on judicial review.

61. The appellant relies on the fact that there is no statutory authority, whether in primary legislation or rules, that authorises the use of a SAA for hearings before the Board. This is in contrast with the position in relation to some other bodies. However, this is not in my view surprising. Other bodies such as the SIAC can be expected to have to consider the use of a SAA on a regular basis, whereas the use of a SAA before the Board is wholly exceptional, as is illustrated by this being one of the only two cases where a SAA has been instructed to appear before the Board. In many tribunals there may be no rules that deal expressly with PII, but the tribunal would require a residual discretion to prevent the disclosure of information, if its disclosure would damage the public interest. It is of interest that the "Guide to drafting Tribunal rules" published by the Council on Tribunals in November 2003 which contains their model rules makes no mention of SAAs or procedures for witness protection. However, rule 22(2) provides that, if any document on which a party intends to rely contains any matter which… "Consists of information communicated or obtained in confidence, or concerns national security, and for that reason a party seeks to restrict its disclosure", the Registrar must send copies of that evidence to the parties only in accordance with the directions of the tribunal. This implies that the tribunal has the power to give directions in such cases. Rule 27A gives the tribunal power to give directions regarding disclosure of information and requires the tribunal to take account of factors, including the fact that the information was obtained in confidence or concerned national security (27A(3)).

62. In fact, the absence of rules may not be a disadvantage. It enables the use of SAAs to be totally flexible. There should, however, be two principles applied to their use. The first I have already identified: namely, that they should only be appointed to assist the prisoner by providing a degree of protection that would otherwise be unavailable. The second principle is that their role in any particular dispute should be tailored so that their use is no more than that which is necessary in that case to mitigate the adverse position of the prisoner who is affected. In addition it is critical to recognise that the use of a SAA does not affect the overriding obligation for a hearing to meet the requirements of article 5(4) and of appropriate standards of fairness required by domestic law.

63. Before turning to the specific arguments advanced by Mr Owen as to why the SAA cannot be used before the Board, irrespective of the circumstances, it is right to stress that, if Mr Owen is correct in his contentions on behalf of the appellant, in the exceptional case where a SAA would otherwise be used to provide some protection, the prisoner may be deprived of very real assistance.

The Appellant's Core Submissions

64. In the course of his argument Mr Owen helpfully identified four core submissions. I will deal with each in turn.

65. *The First Core Submission*

> "As a matter of domestic law, the Parole Board is a statutory corporation, not a court of law possessed of an inherent jurisdiction, and as such it is limited and circumscribed by the statute which regulates it. What the statute does not expressly or impliedly authorise is to be taken to be prohibited."

As a submission of law, this is correct. The issue here is whether there is an express or implied authorisation. In my view, there is an express authorisation to withhold information contained in the current Rules but if this is wrong, the authorisation is to be implied from the duty of the Board to conduct hearings which will enable it to reconcile the triangulation of interests to which I have referred. In the case of the

appointment of a SAA, authorisation is implied from the undoubted implicit duty of the Board under section 28 of the 1997 Act to conduct its decision-making process in a manner which so far as is practical and appropriate in the circumstances ensures that the prisoner is fairly treated. The appointment of the SAA should only be made in the circumstances I have already identified. If this approach is adhered to and the possible appointment of a SAA is not used as an excuse to lower the standards of fairness, the presence of the SAA can only mitigate the disadvantage to which the prisoner would otherwise be subject. In these circumstances, I cannot see any objection to a SAA being appointed. The legislation and Rules should not be interpreted as preventing the use of a SAA. This is despite the decision of the Administrative Court in *R (S) v Waltham Forest Youth Court* [2004] EWHC 715 (Admin); [2004] 2 Cr App R 335. In *R (D) v Camberwell Green Youth Court* [2005] 1 WLR 393, Baroness Hale of Richmond expressed reservations about that decision with which I would respectfully agree. Courts should be slow to restrict the implied power of an administrative body to enhance the fairness available to a person who otherwise would be adversely affected by the lack of that power.

66. *The Second Submission*

> "Merely because the Board satisfies the requirements of the 'court' for the purposes of article 5(4) ECHR does not alter its domestic law status or the controlling principles of administrative law which apply to limit the Board's procedural vires."

Again, I have no quarrel with the legal accuracy of this submission. But the submission does not advance the appellant's case. Bodies such as the Board have an implied power under domestic administrative law to control their own procedure so as to deal with a person in the position of the appellant as fairly as the circumstances permit. The use of a SAA, in an exceptional case, can assist the achievement of this. The SAA was able to advance his contentions in favour of the appellant before the Administrative Court and Maurice Kay J was able to evaluate the appellant's arguments taking into account the "closed facts" and give a "closed judgment" on those facts to which we have not been invited to refer. The result may have been adverse to the appellant, but the fact that this action could be taken confirms that the process is of value. In another case the result could be different and the prisoner could establish that evidence is unjustifiably being withheld from him.

67. *The Third Submission*

> "Whether approached as a straightforward question of vires or via the principle of legality, the Parole Board has no power to create and apply, to the detriment of a life sentence prisoner's legal right to an adversarial hearing, a special advocate procedure absent express legislative authority. This is because the use of the special advocate indefinitely to determine a prisoner's liberty is not a necessary implication of the Board's statutory functions."

On what I regard as being the proper approach, this submission fails to advance the appellant's case because the appointment of a SAA is not detrimental to any legal right of the prisoner. This is because, as I have already explained above, the appointment of a SAA should not be used as a justification for reducing the rights that the prisoner would otherwise have but only as a way of mitigating the disadvantage he would otherwise suffer if his rights were going to be reduced with or without a SAA. The submission refers to a special advocate "procedure" but I here refer, as does the issue, to the appointment of a SAA. A SAA can be used in a variety of situations. It can only enhance the rights of a life sentence prisoner. Any complaint of the appellant should not be directed at the SAA but at the non-disclosure to the prisoner. If there is no right not to make disclosure to the prisoner or his legal representative, then the SAA procedure cannot correct the failure to make disclosure. It is only if there can be non-disclosure in the appropriate circumstances that the special advocate can have any role. That the SAA can have a role in appropriate circumstances is inherent in the flexible nature of the requirement that the prisoner is treated with fairness that is the source of the right to an oral hearing.

68. *The Fourth Submission*

> "Both at common law and article 5(4) ECHR, there is a core, irreducible, minimum entitlement for any life sentence prisoner to be able effectively to test/challenge any evidence which decisively bears on the legality of his detention. By proceeding to determine the appellant's parole review by use of a special advocate, the Board is proposing to act unlawfully (section 6, Human Rights Act 1998)."

I accept the contention that there is, as contended, "a core, irreducible, minimum entitlement". But what the Board does, if the need exists, to protect the safety of the public interest in, for example, a life threatening situation, is not necessarily inconsistent with achieving the minimum in question. There is an issue as to what is that minimum. The difficulty here is that we are only able to approach this case as a matter of principle. We cannot approach it upon the facts because we do not know the facts. There is a balancing exercise to be performed in order to determine whether the minimum is crossed. We are just not in a position to perform that balancing exercise. In order, therefore, to determine the agreed issue in the appellant's favour, we would first have to decide that there are no circumstances in which there can be no disclosure of "any evidence which decisively bears on the legality of his detention" which would then justify the appointment of a SAA. We do not know, for example, whether the inhibition on disclosure is temporary or likely to be permanent. We cannot even properly hazard a guess as to the scale of the danger to the public interest which the decision of the Board is intended to protect.

69. In this situation, the facts are critical and the only safe guide that we have as to those facts is that the decision of the Board was by a former High Court Judge who is a Vice-President of the Board, and it has been upheld by the Administrative Court. The decision of the Board was in respect of three agreed issues:

"(a) whether material to be relied on by the Secretary of State… should be disclosed;
(b) the form of disclosure of any such material; and
(c) whether some other process should be applied in relation to any such material..."

It was agreed these three issues should be decided by the Board. It was further agreed:

> "In the event that the Parole Board considers that disclosure should not be made to [Mr Roberts'] legal representative but should be made to a special advocate acting in the interests of [Mr Roberts] in a similar manner to special advocates appearing before the Special Immigration Appeals Commission, the Secretary of State will fund the costs of the appointment of and representation by the special advocate."

This is what precisely has happened, but this does not affect the appellant's right to appeal.

70. The nature of the panel who makes the decision, as illustrated by this case, perhaps provides the greatest protection for the prisoner because of the need to balance carefully the conflicting interests involved before deciding whether non disclosure is justified. An experienced judge is able to make some appropriate allowance for the fact that evidence or information is not tested as well as would normally be the case in an adversarial hearing. In addition there are usually steps which the judge can take which will minimise the scale of non disclosure and its effect. It is here that the SAA can assist. However, this is not to suggest that the prisoner will not remain at a significant disadvantage if he is not in a position to instruct his representative on the matters relied on against him in the usual manner. It is because of this that non disclosure is a last resort and the question can still arise as to whether in the particular case there has been a breach of the irreducible minimum standard of fairness.

71. In addition, the position as to disclosure is not static. The balance can change and, therefore, it is possible that the balance can move in favour of the prisoner. (See *R v Davis, Rowe and Johnson* [1993] 1 WLR 613, in which Lord Taylor CJ set out the procedure to be adopted in the case of a claim for PII in the absence of any formal rules). If the position does change, the prisoner should be informed and provided with any information that was previously concealed from him.

72. Concerns have been expressed about the manner in which SAAs are used. No doubt it is possible to improve upon the manner in which they are used. In the case of SIAC there have been expressions of concern by the special advocates themselves. However, the Attorney General has indicated that positive responses can be made to those concerns. In any event, the Board who decides that a SAA should be used can impose conditions as to how they should be used.

73. Mr Owen submits that the situations involving national security come in a separate category. However, the need for protection is not limited to situations involving national security though national security concerns are likely to be especially compelling. The situations which can give rise to issues as to whether there should be non disclosure are illustrated by the categories of case that have resulted in claims for public interest immunity which are not confined to national security.

74. Though not included in his core submissions there is a different and I believe more persuasive manner in which Mr Owen could advance his argument on behalf of the appellant. It is alluded to in the case for the appellant (para 31(4)). The argument is clearly set out in a different but parallel context in the speech of Lord Bingham commencing at para 25. It turns on the need for any significant departure from the normal requirements of a fundamental common law right, such as the right to natural justice, if it is to be lawful, to be authorised expressly by primary legislation or something equivalent thereto. This is so as to give the departure the necessary democratic seal of approval. This is a requirement of domestic law but the existence of the seal of democratic approval is also relevant as to whether there has been compliance with article 5(4).

75. The interpretation of current rule 6 is not totally clear, but I take the view that it is intended to enable the chair of the panel to authorise in *appropriate circumstances* the withholding of information from the prisoner and his representatives. However this does not mean that the rule should be interpreted in a manner that would be wholly inconsistent with the prisoner's right to a fair hearing before the Board. The statutory power of the Secretary of State to make rules contained in section 32(5) of the 1991 Act cannot properly be construed as authorising the creation of a rule which had such an effect without expressly stating that this was the position. Accordingly to give any broader interpretation to rule 6 would mean the rule would at least in part be ultra vires. It would also inevitably result in conflict with article 5(4) if it was applied in a manner that involved a fundamental breach of a prisoner's rights to a fair hearing.

76. The fact that information is withheld from a prisoner does not mean that there is automatically such a fundamental breach of the prisoner's rights either under article 5(4) or under domestic law. There can be an infinite variety of circumstances as to the degree of information that is withheld completely or partially without any significant unfairness being caused. The responsibility of the panel is to ensure that any unfairness is kept to a minimum while balancing the triumvirate of interests to which I have already referred. There may need initially to be a total withholding of information, but at an early stage of the hearing the prisoner may be able to be informed of the gist of what is relied on against him. Documents can be edited. There has to be detailed management of the hearing to ensure that the prisoner has the widest information possible. In relation to this management the SAA can have a critical role to play on the prisoner's behalf.

77. There are two extreme positions so far as the prisoner is concerned. On the one hand there is full disclosure and on the other hand there is no knowledge of the case against him being made available to the prisoner, so that even with a SAA he cannot defend himself. In between the two there is a grey area and within that grey area is the border which is the parameter between what is acceptable and what is not acceptable. Where that border is situated is fact specific, depending on the all circumstances that have to be balanced. So far as article 5(4) is concerned the need to examine the facts as a whole, including any appellate process, before coming to a decision is critical as Lord Bingham points out in his speech (at para 19). The same is true in domestic law. To make rulings in advance of the actual hearing would be to introduce a rigidity that would make the task of the Board extraordinarily difficult. The position has to be looked at in the round examining the proceedings as a whole with hindsight and taking into account the task of the Board. The Board's existing statutory framework, including the Rules, do not entitle the Board to conduct its hearing in a manner that results in a significant injustice to a prisoner and in view of article 5(4) I do not anticipate that primary legislation can now be introduced that expressly authorises such a result without contravening the Human Rights Act 1998 even if express legislative authority was thought to be desirable.

78. For support for this approach I would gratefully adopt the authorities relied on by Lord Bingham and the series of statutory precedents to which he refers in paras 25 et seq of his speech. In particular I refer to the citations he makes from *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 Simms* [2000] 2 AC 115. If a case arises where it is impossible for the Board both to make use of information that has not been disclosed to the prisoner and, at the same time, protect the prisoner from a denial of his fundamental right to a fair hearing then the rights of the prisoner have to take precedence, but we have not in my view reached the stage in this case where we can say this has happened. Certainly we cannot say it has happened without considering at least the closed as well as the open judgment of Maurice Kay J. The appellant has chosen to make the issue that which I identified at the outset. He is saying in no circumstances can a SAA be engaged at a hearing and this is putting the case too high.

79. Having had the advantage of reading my noble and learned friend Lord Steyn's speech in draft, I have been acutely concerned that his conclusions about the outcome of this case are so dramatically different from my own. As far as I have been able to ascertain, the explanation

for our differences of opinion appears to be due to our adopting different approaches. Lord Steyn considers it right to focus primarily on the position of the prisoner. In his opinion the use of a SAA inevitably involves a significant curtailment of the prisoner's rights and for that reason the issue must be determined now in the appellant's favour. On the other hand I consider that it is essential to focus, in addition, on the problem the Board faces in having to protect both the safety of the public and the rights of the prisoner.

80. The members of the public who could be affected by a decision of the Board have human rights as well as the appellant. If the Board releases a prisoner when it is unsafe to do so, the public's individual rights can be grievously affected. In addition in a situation where the Board has to consider whether to withhold evidence from a prisoner, for example to protect an individual whose life could be threatened if his identity were revealed, the Board is under a duty to protect this individual's interests. Not to do so could involve the breach of article 2 or 3 of the ECHR. The Board can refuse to pay any attention to the information that the individual could provide. This would mean, however, that the Board could be in breach of its express statutory duty. So it is my view that the information should only be disregarded if there is no other way in which the prisoner's fundamental right to be treated fairly can be protected.

81. A situation in which the Board is faced with this dilemma requires most anxious consideration. The Board in my opinion must be able to reconcile the interests involved wherever this is possible. I cannot conceive that when Parliament entrusted the protection of the public to the Board, Parliament could have had any other intention. It was an essential part of the Board's role.

82. The Board when confronted with a situation where a SAA may have to be appointed must balance carefully the conflicting interests involved. If it does not do so in a way which in the end protects a prisoner's rights to be treated fairly then the Administrative Court can quash its decision. In this way the rule of law is upheld.

Summary and Conclusion

83. I would therefore dismiss this appeal for the reasons which I have sought to explain as well as the reasons set out in the speeches of Lord

Rodger of Earlsferry and Lord Carswell which I have seen in draft. My reasons can be summarised as follows:

(i) The Board has ample express and implied powers to enable the Board in the great majority of situations to give such directions as are needed to ensure that the proceedings before it are conducted fairly and justly having regard to the interests of the prisoner, the public and those who provide it with information to enable it to perform its role.

(ii) The Board has also, under the Rules made since 1992, an express power to give directions and those directions could relate to the non disclosure of information to the prisoner when this is necessary in the public interest. That is as long as those directions together with any mitigating steps, such as the appointment of a SAA, do not mean that there is a fundamental denial of the prisoner's rights to a fair hearing.

(iii) Where there should be, for public interest reasons that satisfy the Board, non disclosure not only to the prisoner but also his representatives, and the Board concludes that the nature of the proceedings and the extent of the non disclosure does not mean that the prisoner's right to a fair hearing will necessarily be abrogated, the Board has either an implicit or express power to give directions as to withholding of information and, if it would assist the prisoner, to the use of a SAA.

(iv) In the situation just described, if the Board comes to a decision in favour of the prisoner or reveals at least the gist of the case against the offender, then there may be no injustice to the prisoner, but if this is not what happens at the end of the proceedings the Board will have to consider whether there has been compliance with article 5(4) and the minimum requirements of fairness which are to be implied from the nature of the Board's duty under the 1991 Act. If there has not been compliance then either necessary steps must be taken to ensure compliance or the non disclosed material cannot be relied on.

(v) The answer to the issue identified at the outset of this judgment is that there can be situations where it is permissible and other situations where it is not permissible for the Board within the powers granted by the 1991 Act and compatibly with article 5(4); (a) to withhold material relevant to the appellant's parole review from his legal

representatives, and (b) instead, disclose the material to a SAA.

(vi) Into which category a case falls can only be identified after examining all the circumstances and cannot be decided in advance as a matter of principle.

(vii) What will be determinative in a particular case is whether looking at the process as a whole a decision has been taken by the Board using a procedure that involves significant injustice to the prisoner. If there has been, the decision should be quashed. The procedure may not be ideal procedure but it may be the only or the best method of balancing the triangulation of interests involved in the very small number of cases where a SAA may be instructed.

LORD STEYN

My Lords,

84. In *United States v Rabinowitz,* 339 U S 56 (1950) at p 69 Justice Frankfurter observed: "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." Even the most wicked of men are entitled to justice at the hands of the State. In the comparative league of grave crimes those of Roberts rank at the very top. Thirty eight years ago he was convicted of the murder in cold blood of three policemen who were on duty and serving the public. Roberts had two accomplices in a planned armed robbery. Many will think, as I do, that Roberts is morally not entitled to any sympathy for the fact that after all these long years he is still in prison. It is an entirely reasonable point of view that for such crimes life imprisonment means exactly that.

85. But individual views about the continued detention of Roberts are irrelevant. His position must be considered objectively and in accordance with settled legal principles. In accordance with the law at the time when Roberts was sentenced it fell to the Home Secretary to decide on the tariff to be served by him. The Home Secretary decided that it would be 30 years. Subject to the issue of the risk of physical harm to others posed by the release of Roberts, the decision of the Home Secretary is determinative. The issue of risk is squarely within the province of the Parole Board as an independent body. If the Parole

Board determines, in accordance with fair procedures, that because of the risk Roberts poses he ought not to be released his continued detention is inevitable. On the other hand, if the Parole Board determines in accordance with fair procedures, that if Roberts is released he would not pose a risk, he is entitled to be released as a matter of right not discretion.

86. Roberts can, of course, not challenge the sentence imposed upon him. His case is that he has served his tariff term determined in accordance with due process of law and that he no longer poses a risk if released. As a matter of legal principle this claim, if it can be established on the facts, is sustainable under both domestic law and under article 5(4) of the European Convention on Human Rights. It is sufficient to say that the Convention right contained in article 5(4) is directly engaged. It provides for a right "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." It is common ground that for the purposes of article 5(4) the Parole Board is a court.

87. The Parole Board must act wholly independently and impartially. In considering the release of a prisoner it must act in a procedurally fair way: compare *R (West) v Parole Board* [2005] 1 WLR 350, para 1. It is common ground that Roberts is entitled to an oral hearing.

88. The Parole Board decided to attenuate Roberts' right to a hearing in a drastic manner by imposing upon him, in place of an advocate, who would be able to represent him in the ordinary way, a special advocate. What this entails is described in careful and measured terms by my noble and learned friend Lord Bingham of Cornhill in para 18 of his opinion. Under this procedure the prisoner and his legal representatives are not allowed to know anything of the case made against the prisoner. Once the special advocate becomes aware of the case against the prisoner he may not divulge that information to the prisoner. It is not to the point to say that the special advocate procedure is "better than nothing". Taken as a whole, the procedure completely lacks the essential characteristics of a fair hearing. It is important not to pussyfoot about such a fundamental matter: the special advocate procedure undermines the very essence of elementary justice. It involves a phantom hearing only.

89. The primary question is whether the particular evisceration of the right to a fair hearing directed by the Parole Board was within its

powers. The Parole Board has no inherent jurisdiction. It is a statutory corporation. It only has the powers conferred upon it by the Criminal Justice Act 1991. The 1991 Act contains no express power authorising the special advocate procedure. It is common ground that if there is a statutory warrant for this procedure it must be found in paragraph 1(2)(b) of Schedule 5 to the Act. It provides:

> "It shall be within the capacity of the Board as a statutory corporation to do such things and enter into such transactions as are incidental to or conducive to the discharge of
>
> "(a) its functions under this Part in respect of long-term and short-term prisoners; and
>
> (b) its functions under Chapter II of Part II of the Crime (Sentences) Act 1997 in respect of life prisoners within the meaning of that Chapter."

The question is therefore whether the power contained in the words "to do such things . . . as are incidental to or conducive to the discharge of [the relevant functions of the Board]," properly construed in its setting, is wide enough to cover the Parole Board's decision to take away a prisoner's right to a fair hearing. If the words of the statute do not authorise the power which the Board exercised, the decision is ultra vires. In examining this question the starting point is that the persuasive burden rests on the Parole Board to demonstrate that its departure from ordinary fair procedures is authorised by the statute.

90. The operative words - to do such things as are incidental to or conducive to the discharge of its functions - are familiar words in the context of conferring implied powers on public authorities, corporations or companies. Examples include section 3A of the Companies Act 1985 which relates to the statement of the objects of a company and section 111(1) and (3) of the Local Government Act 1972; and compare *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1; *R v Richmond Upon Thames London Borough Council, Ex p McCarthy & Stone (Developments) Ltd* [1992] 2 AC 48. The issue involves a point of construction. The relevant statutory words are of extreme generality, intended to serve multiple administrative purposes. As a matter of first impression one would not expect to find in them a Parliamentary intent to take away fundamental principles of due process.

91. The vital question is the meaning of the relevant words in their particular textual setting in the 1991 Act. It is essential to concentrate on the particular power which must be justified. For example, a generous approach to the power of the Parole Board to buy stationery, in order to carry on correspondence with interested parties, would be justified. On the other hand, a less indulgent approach becomes necessary when the power under examination involves a radical interference with fair hearing procedures which may result in the unjust outcome of the prisoner having to remain in custody indefinitely. In the latter case the test to be applied must of necessity be rigorous.

92. The Parole Board was aware that (except in the case of Northern Ireland) the procedure of appointing special advocates had so far only been introduced by primary legislation of the Westminster Parliament. That fact alone ought to have suggested caution before such a radical power was introduced by the Parole Board. Moreover, it is important to bear in mind that the procedure of using the special advocate system was first introduced in the field of national security. The present case does not involve issues of national security. It is also not analogous to such cases. In a careful and balanced statement dated 24 September 2003 Mr Simon Creighton (a solicitor acting for Roberts) drew attention to the difference between the circumstances of this case and national security cases. He said, at para 17:

> "The situation is vastly different from the need for Special Advocates in the context for which they were originally created, as the evidence in national security cases will inevitably be provided by sources who are working in the field of state security and therefore their identities have to remain secret in the interests of national security."

This difference cannot be brushed aside. After debate Parliament may well have decided that an extension of the special advocate system to cases such as the present would not be justified. But Parliament has never been given the opportunity to consider the matter. This fact also suggests that the Parole Board's decision to depart from elementary fair procedures in the present case was precipitate. If the decision of the Parole Board is upheld in the present case, it may well augur an open-ended process of piling exception upon exception by judicial decision outflanking Parliamentary scrutiny.

93. The special advocate procedure strikes at the root of the prisoner's fundamental right to a basically fair procedure. If such departures are to be introduced it must be done by Parliament. It would be quite wrong to make an assumption that, if Parliament had been faced with the question whether it should authorise, in this particular field, the special advocate procedure, it would have sanctioned it. After all, in our system the working assumption is that Parliament legislates for a European liberal democracy which respects fundamental rights. Even before the Human Rights Act 1998 came into force, and *a fortiori* since then, the courts have been entitled to assume that Parliament does not lightly override fundamental rights. That is the context in which the observations of the House in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, are of great importance. Lord Hoffmann trenchantly stated, at p 131E-G:

> "Parliament sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. *Fundamental rights cannot be overridden by general* or ambiguous *words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.* In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."
>
> (My emphasis)

This citation is directly in point because the authority upon which the Parole Board relies is a classic example of general words invoked to override a most fundamental right of due process. The courts must act on the basis that Parliament would always consider with great care whether it should override fundamental rights. And that must be particularly the case in circumstances in which the denial of the fair procedure may result in the indefinite detention of a prisoner whose tariff has long ago expired.

94. I accept, of course, that the Parole Board is bound to give preponderant weight to the need to protect innocent members of the

public against any significant risk of serious injury: *R v Parole Board, Ex p Watson* [1996] 1 WLR 906. Nobody questions this position. But in my view Scott Baker LJ (as vice chairman of the Parole Board) acted ultra vires in approving without primary legislation the special advocate procedure in this case. In my view the decision of the Court of Appeal to the same effect was wrong: *R (Roberts) v Parole Board* [2005] QB 410.

95. My noble and learned friend Lord Carswell commented that a prisoner against whom unfounded allegations have been made is in a Kafkaesque situation. That was an apposite reference to *The Trial* (1925), the masterpiece of Franz Kafka. A passage in *The Trial* has a striking resonance for the present case. Joseph K was informed ". . . the legal records of the case, and above all the actual charge-sheets, were inaccessible to the accused and his counsel, consequently one did not know in general, or at least did not know with any precision, what charges to meet in the first plea; accordingly it could be only by pure chance that it contained really relevant matter. . . . In such circumstances the Defence was naturally in a very ticklish and difficult position. Yet that, too, was intentional. For the Defence was not actually countenanced by the Law, but only tolerated, and there were differences of opinion even on that point, whether the Law could be interpreted to admit such tolerance at all. Strictly speaking, therefore, none of the Advocates was recognized by the Court, all who appeared before the Court as Advocates being in reality merely in the position of hole-and-corner Advocates".

96. In its decision of 13 June 2003 the Parole Board observed:

> ". . . Miss Kaufmann [the counsel of Roberts] sets out two respects in which she argues that Mr Roberts would be prejudiced by the special advocate procedure being adopted:
>
> (a) The Board has already found that there can be no disclosure of even a gist to Mr Roberts. Mr Roberts cannot therefore in any sense whatever answer the case against him.
>
> (b) It is fair to assume that the material is being placed before the Board because it has an important bearing on Mr Roberts' alleged dangerousness. If the Board accepts the source's evidence and does not direct Mr Roberts' release as a result, the prejudice to Mr Roberts will not

> end there. Just as the Board cannot disclose the gist to him now, it will not be in a position to do so when it comes to provide reasons for its decision. Mr Roberts will continue to be detained on the basis of allegations about which he remains completely ignorant. He will not therefore be able to address the concerns underlying his continued detention or take any steps to reduce the risk.
>
> It is true that it will be the task of the Specially Appointed Advocate to represent the interests of Mr Roberts, but he is in that respect at a serious disadvantage to [Mr Creighton], who have acted for Mr Roberts for a very long period.
>
> Mr Eadie on behalf of the Secretary of State pointed out on 30 May that although there would be constraints upon the Specially Appointed Advocate in communicating with Mr Roberts or his representatives, there was no objection to Mr Roberts' representatives supplying information to the Specially Appointed Advocate on the basis of their having acted for him for many years.
>
> There is some merit in Mr Eadie's point, but the Board accepts that there is very considerable force in Ms Kaufmann's arguments and that if the special advocate procedure is adopted this will result in prejudice to Mr Roberts in the respects identified by Ms Kaufmann."

My noble and learned friend Lord Woolf, the Lord Chief Justice, has observed inter alia that if the Board reveals at least the gist of the case against the prisoner then there will be no injustice. But the Board affirmatively found in the present case that there can be no disclosure of even a gist to the prisoner. I note that the Lord Chief Justice observes that "both under article 5(4) and domestic law [the prisoner's] fundamental right to have a hearing that in all the circumstances at least meets the minimum standards that for reasons of fairness have to be respected". In my view it is a formalistic outcome to describe a phantom hearing involving a special advocate (as directed by the Board) as meeting minimum standards of fairness. In truth the special advocate procedure empties the prisoner's fundamental right to an oral hearing of all meaningful content.

97. In my view the outcome of this case is deeply austere. It encroaches on the prerogatives of the legislature in our system of Parliamentary democracy. It is contrary to the rule of law. It is not likely to survive scrutiny in Strasbourg.

98. Since preparing this opinion I have noted a comment on it at para 79 of the opinion of the Lord Chief Justice. He states:

> "Lord Steyn considers it right to focus primarily on the position of the prisoner. In his opinion the use of a SAA inevitably involves a significant curtailment of the prisoner's rights and for that reason the issue must be determined now in the appellant's favour. On the other hand I consider that it is essential to focus, in addition, on the problem the Board faces in having to protect both the safety of the public and the rights of the prisoner."

This statement does not correctly reflect my position. In para 94 of my opinion I state:

> "I accept, of course, that the Parole Board is bound to give preponderant weight to the need to protect innocent members of the public against any significant risk of serious injury: *R v Parole Board, Ex p Watson* [1996] 1 WLR 906. Nobody questions this position."

This is a clear statement of the primacy of the need to protect innocent members of the public. My opinion speaks for itself and in the interests of economy I will not repeat my reasoning.

99. I am in full agreement with the reasons given by my noble and learned friend Lord Bingham of Cornhill for his conclusion that the decision of the Parole Board in this case was ultra vires. I would allow the appeal.

LORD RODGER OF EARLSFERRY

My Lords,

100. On 12 August 1966 the appellant, Harry Roberts, murdered three unarmed police officers. In December of the same year he was sentenced to life imprisonment, with a recommendation that he should serve at least 30 years in custody – a recommendation that might well be

regarded as lenient by today's standards when Parliament has fixed 30 years as the appropriate starting point for the murder of one police officer in the course of his duty. Mr Roberts has been in prison ever since. Now the Parole Board have to consider, in terms of section 28 of the Crime (Sentences) Act 1997, whether to direct that he should be released on licence. By section 28(6) they are not to do so unless they are "satisfied that it is no longer necessary for the protection of the public that [Mr Roberts] should be confined." The protection of the public is the paramount consideration.

101. The Board's proceedings in Mr Roberts' case have been protracted - due, in large measure, to the present litigation. To begin with, since Mr Roberts is a mandatory life prisoner, the proceedings were not covered by any rules. Then, as from 18 December 2003, they were governed by the Parole Board Rules 1997 made by the Secretary of State under section 32(5) of the Criminal Justice Act 1991 ("the 1991 Act"). On 1 August 2004, however, just after the Court of Appeal's decision, the Parole Board Rules 2004 came into force. They will apply to the hearing in this case. So, even though the decisions of the Board and of the courts below were taken before the 2004 Rules came into force, it is common ground that the House should consider the position in terms of these Rules. This is only common sense since the Board could, in any event, make fresh directions under the 2004 Rules. One effect of the new Rules is to spell out certain matters that were not mentioned in previous versions. So, in that respect, the context of some of the arguments has changed.

102. By virtue of rule 6(1), when deciding whether a prisoner should be released, the Board have to consider, inter alia, relevant information and reports served on them by the Secretary of State. Paras (2) and (3) of rule 6 provide:

> "(2) Any part of the information or reports referred to in paragraph (1) which, in the opinion of the Secretary of State, should be withheld from the prisoner on the grounds that its disclosure would adversely affect national security, the prevention of disorder or crime or the health or welfare of the prisoner or others (such withholding being a necessary and proportionate measure in all the circumstances of the case), shall be recorded in a separate document and served only on the Board together with the reasons for believing that its disclosure would have that effect.

(3) Where a document is withheld from the prisoner in accordance with paragraph (2), it shall, unless the chair of the panel directs otherwise, nevertheless be served as soon as practicable on the prisoner's representative if he is –

(a) a barrister or solicitor,

(b) a registered medical practitioner, or

(c) a person whom the chair of the panel directs is suitable by virtue of his experience or professional qualification;

provided that no information disclosed in accordance with this paragraph shall be disclosed either directly or indirectly to the prisoner or to any other person without the consent/authority of the chair of the panel."

103. As rule 6(2) envisages may happen, in preparation for the hearing in the present case, the Secretary of State included in the information that he supplied to the Board certain sensitive material which, in his opinion, should be withheld from Mr Roberts. This information was to be withheld because there were fears for the safety of the informant if his or her identity should become known, and the informant was unwilling to give evidence unless he or she had an assurance that the information would not be given to Mr Roberts – or, importantly, to his representatives.

104. Previous versions of the Rules made provision for withholding information from a prisoner on the ground that its disclosure would adversely affect the health or welfare of the prisoner or of others. But in all such cases the information was to be served on the prisoner's representative, provided that it was not to be disclosed either directly or indirectly to the prisoner or to any other person without the authority of the chairman of the panel.

105. Rule 6(2) in the 2004 Rules adds to the reasons for withholding information: it may also be withheld if its disclosure would adversely affect national security or in order to prevent disorder or crime. But withholding the information must be a necessary and proportionate measure in all the circumstances of the case. Rule 6(3) contains a further innovation which is of importance in the present case. While the sensitive information should generally be served on the prisoner's representative, rule 6(3) provides that the chairman of the panel may direct otherwise. In other words, as here, the chairman of the panel may direct that the information should be withheld not only from the prisoner

but from his representative. Presumably in the light of experience, when making the 2004 Rules the Secretary of State anticipated that this was a power which could be needed to enable the Board to perform their functions properly in certain situations. So he included this clause which gives the chairman this express power. Although the rule does not spell out the grounds on which the chairman is to make the direction, it is implicit in the scheme of paras (2) and (3) that such a direction must be necessary and proportionate on grounds of national security, the prevention of disorder or crime, or the health or welfare of the prisoner or others. It is the giving of this type of direction which must always be a course of last, never of first, resort.

106. Rule 6(3) expressly contemplates a situation where, in coming to their decision on whether to release a prisoner, the Board may take into account information about the prisoner which has been supplied by the Secretary of State but which the prisoner and his representative cannot see. In reality, it is this rule which gives rise to the procedure that Mr Roberts says is unfair. But, despite this, as his counsel specifically acknowledged in the hearing before the House, Mr Roberts does not challenge the validity of rule 6(3) in our domestic law. In particular, he does not suggest that the Secretary of State lacked the power under section 32(5) of the 1991 Act to make this provision. Rather, his complaint is that the Board, being a statutory tribunal of limited jurisdiction, lack the power to adopt the special advocate procedure. Therefore the question at issue in these proceedings, and on which the House heard argument, concerns the powers of the Board under the 1991 Act and the 2004 Rules to adopt the special advocate procedure, not the powers of the Secretary of State under section 32(5) to make rule 6(3). My noble and learned friend, Lord Woolf, suggests that Mr Owen QC might have advanced his argument on behalf of the appellant in a more persuasive manner by focussing on the power of the Secretary of State under section 32(5) to make rule 6(3) and adopting the argument in paras 24 et seq of the speech of my noble and learned friend, Lord Bingham of Cornhill. But such an argument would have been irrelevant in these proceedings where the remedy sought is the quashing of the Board's decision, not the quashing of the Secretary of State's rule.

107. Even although rule 6(3) invests the chairman with the power to give a direction to withhold information from the prisoner and his representative, in any case where he exercises the power the Board must be under an obligation to do everything they can to mitigate the potentially serious adverse consequences for the prisoner. Here, with that aim in mind, and following precedents in other kinds of proceedings, on 13 June 2003 the Board directed an advocate appointed

by the Attorney General to receive the information and to represent the interests of the prisoner, Mr Roberts, at the hearing. Since the advocate cannot discuss the information with the prisoner or his representative, no-one suggests that such an appointment eliminates all the disadvantages which flow from the direction. Far from it. But, as Lord Woolf observes, it is a step which can only help the prisoner and it is, moreover, one which accords him "a substantial measure of procedural justice": *Chahal v United Kingdom* (1996) 23 EHRR 413, 469, para 131. Appointing such an advocate can accordingly be regarded as incidental to, and conducive to, the discharge of the Board's functions in accordance with rule 6(3). Therefore, in purely domestic law terms, in making such an appointment the Board act within their powers under section 32(7) of, and para 1(2)(b) of Schedule 5 to, the 1991 Act.

108. Of course, the use of the specially appointed advocate procedure will not be appropriate unless the chairman of the panel has, in the first place, properly exercised the power under rule 6(3) to direct that the sensitive material should not be disclosed to the prisoner's representative. In the present case the appellant is represented by an experienced solicitor who has acted for him for many years. Nor is there a hint of criticism of the solicitor's professional propriety. Therefore, those who have not seen the closed material may well find it surprising that the Board decided that a direction to withhold the material from the appellant's representatives should be given. But that question was first explored in the directions hearing before Sir Richard Tucker who, having considered all the relevant material, concluded inter alia that "if full disclosure of the contents of section C were made to Mr Roberts, there would be a real risk to the safety of the source or sources". After a further directions hearing with further submissions on the appellant's behalf, the Board concluded that disclosure of the information to Mr Roberts' representatives would lead to a real risk of inadvertent disclosure to him by those representatives. In the decision under review they therefore directed that the sensitive information should not be disclosed to Mr Roberts or his legal representatives but only to the specially appointed advocate. Not only was that decision taken after careful consideration of the submissions of counsel but, "upon a review of the utmost intensity," Maurice Kay J approved the deployment of the specially appointed advocate procedure in this case. In doing so, he specifically held, [2004] 2 All ER 776, 787f – g, that there was no sensible way in which the evidence in question, which is relevant to the performance of the Board's function, could have been placed before it, save for the way that had been pursued. Moreover, in his view, "the fears of the source are both subjectively and objectively justified" and "exceptional circumstances ... exist" in this case. There is no appeal against his judgment on the merits.

109. The House must therefore proceed on the basis, first, that, given what Maurice Kay J described in his closed judgment as "the potential importance of the sensitive material," the material should be available to the Board when taking their decision on the appellant's release, but, secondly, that the risk of danger to the informant or informants is indeed such as to make it necessary and proportionate to withhold the material from the appellant and his solicitor. In other words, the circumstances justify a direction in terms of rule 6(3). In that situation the use of the specially appointed advocate procedure is a way of protecting Mr Roberts' interests, while allowing the Board to carry out their statutory function of deciding, on the basis of all the relevant information, whether he can be safely released.

110. Lord Woolf points out that in a case such as the present things may well turn out differently at the hearing: at an early stage the prisoner may in fact be informed of the gist of the evidence against him, or documents may be made available in a redacted version. But to rely on that comforting scenario would really be to wish away the very problem which the House is required to confront. The House is called upon to consider what is to be done when, as here, the Board decide, in good faith and for good reason, that information which is relevant to their decision cannot be made available to the prisoner or his representative in any shape or form without jeopardising the safety of the source of the information. These circumstances - for which no-one is to blame – are exceptional. They pose a difficult problem for our system – one, moreover, which inapposite references to Kafka do nothing to illuminate and tend, rather, to trivialise.

111. In fact, rule 6(3), which was made by the Secretary of State under the authority of Parliament, points to the solution which the House must adopt in this case: the Board may use the information, even though the prisoner and his representative do not have access to it. By appointing a special advocate, the Board have done what they can to assist Mr Roberts in the predicament brought about by the proper application of this rule – and no-one has suggested how they could have done more. Of course, as all concerned recognise, a hearing conducted on this basis falls short of the ideal. Therefore, if the vires of rule 6(3) were under challenge (which they are not), one question might well be whether, in the case of a convicted murderer, the procedure met the minimum standard of fairness for a hearing of this particular kind in circumstances where the use of the material was necessary and proportionate. The answer to that question, relating to the vires of the rule, could not depend on the contingencies of particular proceedings, such as those involving Mr Roberts. In addressing the question, however, a court

would have to contemplate the two possible alternative solutions, each of which gives decisive weight to the interests of the prisoner. One solution would be to disclose the information to the prisoner's representative and, if possible, to require the informant to give evidence, even though this would risk putting his life or health in jeopardy. That solution would be, to say the least, unattractive and might well give rise to significant issues under articles 2 and 3 of the European Convention. The other solution would be for the Board to exclude from their consideration any evidence which could not be safely disclosed to the prisoner or his representative. In other words, the Board should close their eyes to evidence, even though it would be relevant to the decision which Parliament has charged them to take for the protection of the public. That solution too would be – again, to say the least - unattractive and, moreover, hard to reconcile with the Board's statutory duty not to direct a prisoner's release on licence unless they are satisfied that it is no longer in the interests of the public that he should be confined. I therefore respectfully regard Lord Woolf's observations in paras 79 – 81 as being of great force, but I say no more about the point, since it does not arise for decision in this case and the House did not hear argument on it.

112. So far as the argument based on the European Convention is concerned, substantially for the reasons given by Lord Bingham, I consider that the House cannot decide in advance whether the full hearing, involving the specially appointed advocate, meets the requirements of article 5(4). The same competing interests fall to be considered for the purposes of article 5(4), but the weight to be attached to the various factors may well depend, in part at least, on what happens at the hearing. For example, perhaps in the light of the advocate's cross-examination based on a study of the solicitor's file, the Board may reject the evidence of the source as unreliable or incredible. Or else, the Board may accept it in part but none the less order Mr Roberts' release. These and similar possibilities mean that a court will be in a position to determine whether Mr Roberts has had the kind of hearing required by article 5(4) only once the hearing has taken place and the Board have reached their decision.

113. For these reasons I would dismiss the appeal.

LORD CARSWELL

My Lords,

114. The appellant Harry Maurice Roberts, who is now aged 68 years, was convicted on 12 December 1966 of the murder by shooting of three policemen. He was sentenced to imprisonment for life and the minimum term which he was to serve (then commonly known as the "tariff") was fixed at 30 years. On the expiry of that term on 30 September 1996 it became the duty of the Parole Board, under the statutory provisions to which I shall refer, to consider whether he should be released. It has not yet given a decision in favour of release and the appellant remains in prison. The appeal before the House concerns the procedure which the Parole Board may adopt in considering sensitive information and whether it may have resort to the practice adopted in certain other tribunals of engaging a specially appointed advocate ("SAA") to represent, so far as he is able, the interests of the prisoner.

115. The statutory foundation of the Parole Board is to be found in the Criminal Justice Act 1991. Section 32(1) provides, as amended:

> "The Parole Board shall be, by that name, a body corporate and as such shall
>
> (a) be constituted in accordance with this Part; and
>
> (b) have the functions conferred by this Part in respect of long-term and short-term prisoners and by Chapter II of Part II of the Crime (Sentences) Act 1997 … in respect of life prisoners within the meaning of that Chapter."

There is a clear implication from the matters to which the Secretary of State has to have regard in giving directions under section 32(6) that these are objects of the Board. They are (a) the need to protect the public from serious harm from offenders and (b) the desirability of preventing the commission by them of further offences and securing their rehabilitation. As my noble and learned friend Lord Bingham of Cornhill confirmed in *R (West) v Parole Board* [2005] 1 WLR 350 at para 26, the Board's sole concern is with risk, and it has no role at all in the imposition of punishment.

116. Powers relating to the Board's functions were conferred by paragraph 1(2) of Schedule 5 to the 1991 Act:

> "It shall be within the capacity of the Board as a statutory corporation to do such things and enter into such transactions as are incidental to or conducive to the discharge of …
>
> (b) its functions under Chapter II of Part II of the Crime (Sentences) Act 1997 in respect of life prisoners within the meaning of that Chapter."

By virtue of the provisions of the Crime (Sentences) Act 1997 and the Criminal Justice Act 2003 the Parole Board now has the function of deciding on the release of life prisoners, as distinct from merely advising the Secretary of State, and its remit extends to mandatory as well as discretionary life prisoners. Section 28(5) and (6) of the 1997 Act provide:

> "(5) As soon as –
>
> (a) a life prisoner to whom this section applies has served the relevant part of his sentence; and
>
> (b) the Parole Board has directed his release under this section,
>
> it shall be the duty of the Secretary of State to release him on licence.
>
> (6) The Parole Board shall not give a direction under subsection (5) above with respect to a life prisoner to whom this section applies unless –
>
> (a) the Secretary of State has referred the prisoner's case to the Board; and
>
> (b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined."

117. Rules were made by the Secretary of State, pursuant to the power contained in section 32(5) of the 1991 Act, with respect to the proceedings of the Parole Board. No express provision for the appointment of an SAA is contained in any of the rules made and authority has to be sought from the general power contained in

paragraph 1(2) of Schedule 5 to the 1991 Act, to do such things as are incidental to or conducive to the discharge of its functions.

118. Rule 6 of the Parole Board Rules 2004 (which it is agreed will apply to the Board's hearing of the appellant's case) makes provision for the service of information and reports:

> "6. (1) Within 8 weeks of the case being listed, the Secretary of State shall serve on the Board and, subject to paragraph (2), the prisoner or his representative –
>
> (a) the information specified in Part A of Schedule 1 to these Rules,
>
> (b) the reports specified in Part B of that Schedule, and
>
> (c) such further information as the Secretary of State considers to be relevant to the case.
>
> (2) Any part of the information or reports referred to in paragraph (1) which, in the opinion of the Secretary of State, should be withheld from the prisoner on the grounds that its disclosure would adversely affect national security, the prevention of disorder or crime or the health or welfare of the prisoner or others (such withholding being a necessary and proportionate measure in all the circumstances of the case), shall be recorded in a separate document and served only on the Board together with the reasons for believing that its disclosure would have that effect.
>
> (3) Where a document is withheld from the prisoner in accordance with paragraph (2), it shall, unless the chair of the panel directs otherwise, nevertheless be served as soon as practicable on the prisoner's representative if he is –
>
> (a) a barrister or solicitor,
>
> (b) a registered medical practitioner, or
>
> (c) a person whom the chair of the panel directs is suitable by virtue of his experience or professional qualification;
>
> provided that no information disclosed in accordance with this paragraph shall be disclosed either directly or indirectly to the prisoner or to any other person without the consent/authority of the chair of the panel."

The express power contained in rule 6(3) for the chair of the panel to direct the withholding of a document from the prisoner's representative was an innovation in the 2004 Rules, though such a power may have previously existed by necessary implication. As my noble and learned friend Lord Woolf has pointed out, it will be exercised by a chairman who has held high judicial office and applies his experience of balancing conflicting considerations in deciding whether to give such a direction. The use of an SAA, with all of the handicaps which it imposes upon a prisoner, accordingly will operate to mitigate the rigour of a direction and the disadvantages accruing to him.

119. The appellant's dossier which was furnished to the Parole Board shows a progression over time in his behaviour and attitude from a hostile and unco-operative prisoner, who made numerous escape plans in the earlier part of his detention, to one who had with maturity and the passing of time settled down into a well behaved prisoner who qualified for enhanced status. In March 2000 he was transferred to an open prison. A review was due to begin in September 2001, with the prospect that a process leading towards eventual release would be put in train. Then in or about September 2001 HM Prison Service received allegations that he had been involved in drug dealing, bringing unauthorised material into prison and other infractions of discipline. He was transferred back to a closed prison and investigations into the allegations commenced. His solicitors made detailed representations on his behalf and were informed by a letter of 22 April 2002 that although material disclosed to them in connection with the appellant's removal from the open prison would be added to the dossier, certain material to be included in it would not be disclosed to him. The solicitors protested strongly in correspondence about the withholding of this material. The Prison Service has expressed as its reason for withholding a fear for the safety of the source of the information on which it is based if it should become known whence it had come and the unwillingness of the informant to give evidence unless he had a sufficient assurance that the information would not be given to the appellant or his representatives.

120. The appellant's case was referred to the Parole Board by the Secretary of State in May 2002 and he was interviewed by a member of the Board on 6 June 2002. He then brought an application for judicial review, which was concluded by a consent order dated 18 October 2002 whereby the appellant and the Secretary of State agreed on a procedure for dealing with the sensitive material. Although it referred to the appointment of an SAA as a possible procedure, the consent did not extend to agreement on the part of the appellant that it should be adopted. The Vice-Chairman of the Parole Board Scott Baker LJ

considered the matter and recommended on 15 November 2002 that an SAA should be appointed, the sensitive material should be disclosed to him and a hearing should take place before the legal chairman of the panel to discuss procedure and receive representations.

121. That hearing took place on 30 May 2003, when the chairman of the panel Sir Richard Tucker presided and representatives of the Secretary of State, the Prison Service and the appellant were present, including counsel, together with the SAA Mr Nicholas Blake QC. Mr Blake had been appointed as recommended by Scott Baker LJ and took part in directions hearings on 9 May and 30 May 2003. He had also furnished an opinion in February 2003, in which he advised, after seeing the sensitive material, that consideration be given to disclosing it to counsel nominated by the appellant's solicitor, who would be subject to the restrictions contained in the Parole Board Rules forbidding disclosure to the prisoner or any other person without the consent or authority of the chair of the panel. This advice was not accepted and the matter remained to be considered at the hearing on 30 May 2003.

122. At the directions hearing on 9 May 2003 the chairman made the following findings:

> "i) with regard to the 'sensitive material' contained in section C of the dossier, the fears of the source or sources are genuine and held on reasonable grounds
>
> (reference para 11 of Ms Kaufmann's skeleton argument of 7 May 2003);
>
> ii) if full disclosure of section C were to be made to Mr Roberts, there would be a real risk to the safety of the source or sources (para 12 of Ms Kaufmann's skeleton argument);
>
> iii) in making directions on disclosure, the Board must balance the interests of the various parties involved.
>
> These are:
>
> a) the public – the Board's ultimate purpose is to protect the public. Moreover, it is important that all judicial decisions are made on the basis of the broadest information available;
>
> b) the prisoner – the prisoner has the right to proper representation and examination of the evidence. This is not, however, an absolute right. The Parole Board Rules, while not

specifically applicable to mandatory lifers, but issued in line with the application of Article 5(4) of the ECHR to other categories of life sentence prisoners, acknowledge that the public interest may restrict the prisoner's right in this respect (reference rule 5 [of the Parole Board Rules 1997]);

c) the source or sources of the 'sensitive material' - these parties have the right under articles 2 and 3 of the ECHR, and under common law, to protection."

The three interests concerned have been referred to throughout this case as the "triangulation of interests".

123. Following the hearing on 30 May 2003 the Parole Board notified the appellant's solicitors by letter dated 13 June 2003 that it considered that the balance of interests was firmly in favour of the appointment of an SAA to represent the appellant in relation to the sensitive material. Disclosure of that material would be made only to him and not to the appellant or his legal representatives. The directions did not spell out what Mr Blake was to do but, as Tuckey LJ set out in paragraph 7 of his judgment in the Court of Appeal [2005] QB 410, 415:

> "It is common ground that it was intended that he would perform the same functions and be subject to the same restrictions as a special advocate appointed under the Special Immigration Appeals Commission (Procedure Rules) 1998 (SI 1998/1881). Thus he was required to represent the interest of the [appellant] by making submissions to the board at any closed hearings, cross examine witnesses at any such hearing and make written submissions to the board. In performing these functions he was not to disclose any sensitive material to or obtain instructions from the prisoner or his representatives, although they could and had provided him with as much information about the case as possible."

124. The appellant then commenced the proceedings for judicial review of the Parole Board's decision of 13 June 2003 which are before the House. The matter came before Maurice Kay J, who heard argument both on the principle of appointing an SAA and, in closed session at

which he considered the sensitive material, on the issue whether it was appropriate in the case before him. He gave a written judgment on 19 December 2003 [2003] EWHC 3120 (Admin), [2004] 2 All ER 776, on the "open" matters, dismissing the application. He gave a separate judgment on the "closed" matters, but this has not been the subject of appeal and the House has not seen or considered any of the sensitive material or heard any argument based upon it.

125. When the appeal came before the Court of Appeal it was confined to a point of principle, the contention that it was not open to the Parole Board to adopt the procedure of appointing an SAA. By a judgment dated 28 July 2004 [2004] EWCA Civ 1031, [2005] QB 410 the court dismissed the appeal. Tuckey LJ, with whom the other members agreed, held that the Parole Board had power to adopt the SAA procedure, notwithstanding the absence of specific provision in the Rules. He did not accept the appellant's argument that if there was such power its exercise was confined to cases involving national security. He also held that adoption of the SAA procedure did not in principle infringe proper standards of fairness and did not involve a breach of article 5(4) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It was therefore open to the Parole Board to adopt it in a suitable case, though he agreed with the judge that such a solution should only be adopted in exceptional circumstances and should not become the norm.

126. It is undeniable that to have material withheld from his legal representatives as well as himself and to have his interests represented only by an SAA is a substantial handicap to a prisoner in a hearing before the Parole Board. Lord Woolf in para 60 of his opinion justifiably described the disadvantages of being left in ignorance of the case against him as grave, repeating the epithet which he used in *M v Secretary of State for the Home Department* [2004] 2 All ER 863 when describing the problems facing appellants before the SIAC. I would not seek in any way to minimise those disadvantages. A prisoner against whom unfounded allegations have been made is in a Kafka-esque situation, as my noble and learned friend Lord Steyn has graphically indicated. He may be altogether in the dark about the allegations made and unable to divine what they may be and give instructions about rebutting them. The SAA is necessarily limited in the steps which he can take to challenge them, bearing in mind his inability to take instructions from the prisoner. The difficulties faced by SAAs were authoritatively described in the written evidence given by a number of SIAC special advocates to the House of Commons Constitutional Affairs Committee:

> "Special Advocates can identify (by cross-examination and submissions) any respects in which the allegations made by the Home Secretary are unsupported by the evidence relied upon and check the Home Secretary's evidence for inconsistencies. But Special Advocates have no means of knowing whether the appellant has an answer to any particular closed allegation, except insofar as the appellant has been given the gist of the allegation and has chosen to answer it. Yet the system does not require the Secretary of State necessarily to provide even a gist of the important parts of the case against the appellants in the open case which is provided to the appellants. In these situations, the Special Advocates have no means of pursuing or deploying evidence in reply. If they put forward a positive case in response to the closed allegations, that positive case is inevitably based on conjecture. They have no way of knowing whether it is the case that the appellant himself would wish to advance. The inability to take instructions on the closed material fundamentally limits the extent to which the Special Advocates can play a meaningful part in any appeal." (Seventh Report of Session 2004-2005, HC 323-II, Ev 55, para 10).

Other practical difficulties involved in the use of SAAs were outlined by Lord Bingham of Cornhill in para 22 of his opinion in *R v H* [2004] 2 AC 134.

127. Against that one has to set the risks to the informant if the material is disclosed. I have little doubt that the fears entertained by an informant confined in prison of dangerous and unpleasant consequences if it were discovered that he had given information about the nefarious activities of fellow prisoners are very real. Unlike persons who are free to move about in ordinary society, he is very limited in the actions he can take to protect himself. Prisoners who did not wish their activities to be exposed would undoubtedly make considerable efforts to find out who had given information, if they received the slightest inkling that this had occurred. This factor provides the reason for the restrictive rules under which SAAs have to work. Even though the prisoner's legal representatives may be of the highest integrity – and it should be emphasised that the integrity of the appellant's advisers is unquestioned – their inquiries of their client, however carefully and skilfully conducted, may well give him or his associates sufficient information

for them to make a serviceable guess at the source of the information on which the allegations are based.

128. The third element in the triangulation of interests is the public interest in the performance by the Parole Board of its function of deciding whether it is safe to release prisoners who have been imprisoned for grave crimes, a matter which is one of serious public concern and the subject of anxious consideration by the Board. And as Sir Thomas Bingham MR observed in *R v Parole Board, Ex parte Watson* [1996] 1 WLR 906, 916-917,

> " … in the final balance, the board is bound to give preponderant weight to the need to protect innocent members of the public against any significant risk of serious injury."

129. Before your Lordships' House Mr Owen QC for the appellant focused on two issues, the Board's power to adopt the SAA procedure and the contention that to do so would constitute a breach of article 5(4). Lord Woolf has set out in paras 64 et seq of his opinion the core submissions advanced by Mr Owen and I need not repeat them. I agree with his conclusions on each of these submissions and I shall express my opinion on the issues in fairly brief compass.

130. It was submitted on behalf of the appellant that in the absence of specific statutory authority the Parole Board did not have power to adopt the SAA procedure. Mr Owen contrasted the Board with other tribunals which had been given such specific power (for a review of a number of such tribunals: see *R v H* [2004] 2 AC 134 at para 21, per Lord Bingham of Cornhill).

131. It was argued on behalf of the Parole Board that the power to appoint an SAA arose by necessary implication from its functions, as specified by or derived from the terms of the Criminal Justice Act 1991 and the Crimes (Sentences) Act 1997. That may well be correct, although the test of necessary implication is demanding. It seems to me, however, that the Board can more simply and easily satisfy the test contained in para 1(2) of Schedule 5 to the 1991 Act, which provides that it is within its capacity to do such things as are "incidental to or conducive to the discharge of its functions." The functions of the Board are to assess whether it is safe to release offenders or whether they would constitute a danger to the public if set free from prison. In order

to discharge these functions it is essential that it has before it all material information necessary for determination of that issue of public safety. If the only effective way to get that information from reluctant informants is to use the SAA procedure, then I consider that the use of that procedure incidental to or conducive to the discharge of its functions.

132. This conclusion is reinforced by the point made both by Tuckey LJ at para 29 of his judgment and by Lord Woolf in several places in his opinion, that the Parole Board has power to withhold material altogether from the prisoner and his representatives. That power is now specifically conferred by rule 6 of the Parole Board Rules 2004, but probably existed by necessary implication under earlier rules: see para 56 of Lord Woolf's opinion. The use of the SAA procedure is in these circumstances a mitigation to some extent of the considerable disadvantage which the prisoner would suffer if the material were altogether withheld.

133. Mr Owen argued as a fallback position that if it were held that the Parole Board has power to use the SAA procedure, it should be confined to cases where protection of the information is necessary in the interests of national security. He pointed to other instances in which statutory power was conferred to use the SAA procedure, but only for that purpose. The context of the work of most of these, eg the Special Immigration Appeals Commission and the Pathogens Access Appeal Commission, is such that information affecting national security is the only sort of sensitive material likely to be considered by them. It is therefore not remarkable that the power to use the SAA procedure is specifically directed towards such information.

134. It is notable that the authority of several bodies in Northern Ireland to use the SAA procedure is wider, and for reasons which apply *mutatis mutandis* to the Parole Board. The three bodies in question are the Sentence Review Commissioners appointed under the Northern Ireland (Sentences) Act 1998, the Life Sentence Review Commissioners appointed under the Life Sentences (Northern Ireland) Order 2001 (SI 2001/2564) and the Commissioner appointed to advise the Secretary of State in the discharge of his functions under the Northern Ireland (Remission of Sentences) Act 1995. The Rules made under the 1998 Act, in pursuance of which the Sentence Review Commissioners have the function of considering the early release of persons imprisoned for terrorist offences, provide for the withholding of "damaging information" and the appointment of an SAA. One of the heads of damaging information is information whose disclosure would be likely

to "adversely affect the health, welfare or safety of the person concerned or any other person." The Life Sentence Review Commissioners have the duty of considering the release of prisoners sentenced to life imprisonment, in the same way as the Parole Board in England and Wales. The Rules made under the 2001 Order provide for withholding of certified "confidential information" and the appointment of an SAA. Confidential information is defined as including material whose disclosure would affect the safety of any individual. Finally, the Secretary of State adopted safeguards for the discharge of his duty under the 1995 Act of considering the recall of prisoners released from prison on licence. The Commissioner appointed to advise him is not to reveal to the prisoner any information certified by the Secretary of State as "damaging information" within the meaning of the Rules made under the Northern Ireland (Sentences) Act 1998, and provision is made for the appointment of an SAA. I do not think that it is possible to draw from these examples the conclusions which Mr Owen seeks to draw; on the contrary, the example of the several sets of Northern Ireland provisions shows that a wider range of sensitive material can in a suitable case be brought before a tribunal. The Parole Board regularly has such cases in the course of its work and in my view a restriction to national security has no foundation in principle or practice.

135. The second major issue argued on behalf of the appellant was the compatibility with the Convention of the use of the SAA procedure by the Parole Board, which as a public authority is required by section 6 of the Human Rights Act 1998 not to act in a way which is incompatible with a Convention right. The right in question is contained in article 5(4), 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."

It was common case that this provision was engaged. A prisoner whose tariff period has expired is entitled to have his continued detention decided by a "court", and for these purposes the Parole Board has the essential features of a court. An adversarial procedure involving oral representation and the opportunity to call and question witnesses is required: *Hussain v United Kingdom* (1996) 22 EHRR 1.

136. The submission advanced on behalf of the appellant was that the use of an SAA imposed such grave disadvantages upon him that the Parole Board's procedure did not satisfy the requirements of fairness which would make it compatible with article 5(4). Mr Owen did not contend, however, that the power under the Parole Board Rules to withhold material altogether was incompatible. In support of this submission he cited a number of decisions in which it was held that complainants did not have a hearing compatible with the requirements of article 5(4) when deprived of access to documentation material to the case.

137. Mr Owen relied on several cases decided by the European Court of Human Rights in which it was held that the inability to challenge the prosecution case in various respects constituted a breach of article 5(4). In *Lamy v Belgium* (1989) 11 EHRR 529 when the complainant, who had been arrested on charges relating to his bankruptcy and detained on remand, sought to challenge the detention, the Indictments Chamber of the Court of Appeal relied in rejecting his appeal on two material documents which were not communicated to the complainant. The Court held that access to the documents was essential, that there had been inequality of arms, the procedure was not truly adversarial and there was accordingly a breach of article 5(4). In so concluding it examined the reasons put forward by the Government to justify withholding the documents and found them insufficient.

138. In *Nikolova v Bulgaria* (1999) 31 EHRR 64 the issue was again the legality of an order continuing the complainant's detention on remand when challenged by her. She had been charged with false accounting and misappropriation of State funds. The Regional Court failed to consider facts invoked by her which it was claimed were capable of placing in doubt the conditions requiring to be satisfied for continuing detention. Nor were her lawyers able to consult any of the documents in file in order to challenge the reasons put forward by the prosecutor for her detention. The Court held that there had been a breach of the guarantees afforded by article 5(4). Again no sufficient justification was put forward for depriving the complainant of access to the documents or failing to consider the facts on which she relied.

139. The ECtHR decision on which the appellant placed most reliance was *Garcia Alva v Germany* (2001) 37 EHRR 335. The complainant had been arrested on suspicion of drug trafficking and was detained on remand. When he brought an application for review of his detention his lawyers were not given access to a number of documents in the file,

including the depositions of a witness whose testimony was key evidence against him. The ground for withholding these was that consultation of these documents would endanger the purpose of the investigations. The Court held that there had been a violation of article 5(4). It stated at para 41 of its judgment:

> "In the Court's opinion, it is hardly possible for an accused to challenge the reliability of such an account properly without being made aware of the evidence on which it is based."

It went on at para 42:

> "The Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect's lawyer."

140. The difference in approach to deciding cases of the European Court of Human Rights by comparison with that of our courts determines the way in which its decisions should be used. Lord Bingham of Cornhill said, when giving the opinion of the Appellate Committee in *R v H* [2004] 2 AC 134, para 33, that following these decisions in too narrow a manner would place judges in a straitjacket. He went on:

> "The consistent partice of the [Strasbourg] court, in this and other fields, has been to declare principles, and apply those principles on a case-by-case basis according to the particular facts of the case before it, but to avoid laying down rigid or inflexible rules … The overriding requirement is that the guiding principles should be respected and observed, in the infinitely diverse situations with which trial judges have to deal, in all of which the

> touchstone is to ascertain what justice requires in the circumstances of the particular case."

In the same vein he said in the earlier case of *Brown v Stott* [2003] 1 AC 681, 704:

> "The jurisprudence of the European court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within article 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for. The general language of the Convention could have led to the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances. But this approach has been consistently eschewed by the court throughout its history. The case law shows that the court has paid very close attention to the facts of particular cases coming before it, giving effect to factual differences and recognising differences of degree. Ex facto oritur jus. The court has also recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention …"

141. In the context of article 6 it was recognised by the ECtHR that the entitlement to disclosure of relevant evidence is not absolute, but there may be competing interests. In *Edwards and Lewis v United Kingdom* (2003) 15 BHRC 189 at para 53 the Court said:

> "The entitlement to disclosure of relevant evidence is not, however, an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals …, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the

fundamental rights of another individual or to safeguard an important public interest …"

142. The passages which I have quoted from *Garcia Alva v Germany* state very clearly the strength of the imperative requiring the detained person to be afforded sufficient knowledge of the case against him if a decision on his continued detention is to satisfy the requirements of article 5(4). The common feature of the three ECtHR decisions on which the appellant relied was that the countervailing reasons militating against production of the material in question were insufficiently strong to outweigh the necessity for its production. In *Lamy* and *Nikolova* the reasons were not apparently compelling, while in *Garcia Alva* they were significant but still not strong enough.

143. The present case is a classic instance of weighing up competing interests. The appellant's interest in presenting his case effectively with sufficient knowledge of the allegations made against him is clear and strong. The informant has a compelling interest in being protected from dangerous consequences which might ensue if any indication leaked out which could lead to his identification. Thirdly, there is the public interest in ensuring that the Parole Board has all proper material before it to enable it to decide which prisoners are safe to release from prison.

144. Having balanced these interests, I conclude that the interests which I have outlined of the informant and the public must prevail over those of the appellant, strong though the latter may be. I emphasise, however, that my conclusions relating to the powers of the Parole Board to use the SAA procedure and their compatibility with article 5(4) are a decision in principle, for that was all that was before the House. We were not asked, nor were we in a position to decide, whether it was proper in the instant case of the appellant. I accept that there may well be cases in which it would not be sufficiently fair to be justifiable and each case will require consideration on its own facts. I would agree that the SAA procedure should be used only in rare and exceptional cases and, as Lord Bingham of Cornhill said in *R v H* [2004] 2 AC 134 at para 22, as a course of last and never first resort. The appellant's case was, however, founded on the proposition that in no case would it lawfully be used, and this I cannot accept.

145. I would therefore dismiss the appeal.