PETCH v HM ADVOCATE

No 26
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[2011] HCJAC 20

Lord Justice-General (Hamilton),
Lord Osborne, Lord Eassie
Lord Clarke, Lord Emslie
Lord Wheatley and Lord Philip

Morris Petch, Appellant—*Shead, Prais*
Her Majesty's Advocate, Respondent—*Cherry QC, A-D, Devaney*

Robert Foye, Appellant—*Shead, Mason*
Her Majesty's Advocate, Respondent—*Cherry QC, A-D, Devaney*

Justiciary – Sentencing – Non-mandatory indeterminate sentences – Discretionary life sentences and orders for lifelong restriction – Punishment part – Method of calculation – Prisoners and Criminal Proceedings (Scotland) Act 1993 (cap 9), sec 2(2)

Section 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (cap 9), as amended, provides that a prisoner sentenced to less than four years is entitled to be released unconditionally after he has served one-half of his sentence, and that a prisoner sentenced to four years or more is eligible for release on licence after he has served one-half of his sentence if the Parole Board so recommends, and is entitled to release on licence after he has served two-thirds of the sentence. Section 2, as amended, provides, *inter alia*, ''(1) In this Part of this Act 'life prisoner', except where the context otherwise requires, means a person– (a) sentenced to life imprisonment for an offence for which, subject to paragraph (b) below, such a sentence is not the sentence fixed by law; or (aa) sentenced to life imprisonment for murder or for any other offence for which that sentence is the sentence fixed by law; or (ab) who is subject to an order for lifelong restriction in respect of an offence, ... and in respect of whom the court which sentenced him for that offence made the order mentioned in subsection (2) below. (2) The order referred to in subsection (1) above is an order that subsections (4) and (6) below shall apply to the life prisoner as soon as he has served such part of his sentence ('the punishment part') as is specified in the order, being such part as the court considers appropriate to satisfy the requirements for retribution and deterrence (ignoring the period of confinement, if any, which may be necessary for the protection of the public), taking into account– (a) the seriousness of the offence, or of the offence combined with other offences of which the life prisoner is convicted on the same indictment as that offence; (aa) in the case of a life prisoner to whom paragraph (a) or (ab) of subsection (1) above applies– (i) the period of imprisonment, if any, which the court considers would have been appropriate for the offence had the court not sentenced the prisoner to imprisonment for life, or as the case may be not made the order for lifelong restriction, for it; (ii) the part of that period of imprisonment which the court considers would satisfy the requirements of retribution and deterrence (ignoring the period of confinement, if any, which may be necessary for the protection of the public); and (iii) the proportion of the part mentioned in sub-paragraph (ii) above which a prisoner sentenced to it would or might serve before being released, whether unconditionally or on licence, under section 1 of this Act; (b) any previous conviction of the life prisoner; and (c) where appropriate, the matters mentioned in paragraphs (a) and (b) of section 196(1) of the 1995 Act. ... (4) Where this subsection applies, the Secretary of State shall, if directed to do so by the Parole Board, release a life prisoner on licence. (5) The Parole Board shall not give a direction under subsection (4) above 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.... (6) Where this subsection applies, a life prisoner may, subject to subsection (7) ..., require the Secretary of State to refer his case to the Parole Board.''

Morris Petch was convicted after trial on two charges of rape involving girls aged between eight and eleven years and sentenced to life imprisonment. The

punishment part of that sentence was specified as 12 years. The sentencing judge took the view that the notional determinate sentence which might have been imposed for such an offence, regard being had to retribution and deterrence alone, would have been in the region of 18 years. Robert Foye pled guilty to the assault to injury and rape of a 16-year-old girl and was made the subject of a lifelong restriction order. The punishment part of that sentence was specified as nine years. The sentencing judge took the view that the notional determinate sentence which might have been imposed for the offence would have been 13 years. Both appellants appealed against sentence to the High Court of Justiciary. The issue of principle which arose for decision was the proper approach to the determination of the punishment part to be specified under sec 2(2) of the 1993 Act, as amended, in respect of non-mandatory indeterminate sentences (discretionary life sentences and orders for lifelong restriction).

Held that: (1) (*diss* Lord Emslie) in introducing para (aa) to sec 2(2) of the 1993 Act Parliament intended to give statutory effect to what the court envisaged in *O'Neill v HM Advocate*, and resort can legitimately be had to parliamentary material (paras 47–49, 60, 63, 84, 87, 112, 113, 119); (2) (*diss* Lord Eassie and Lord Emslie) in the determination of the punishment part of a non-mandatory indeterminate sentence the first step is the identification of a determinate sentence which notionally might have been imposed if a life sentence had not been, and such a sentence would be likely, in some cases at least, to have built into it a custodial element for protection of the public, but the potential length of that element should not be exaggerated (paras 43, 57, 84, 112, 113); (3) (*diss* Lord Eassie and Lord Emslie) the second step is to strip out of that notional sentence the whole protective element (paras 44, 57, 84, 112, 113, 116); (4) (*diss* Lord Emslie) the third step requires taking into account the provisions for release made for determinate sentences under sec 1, the disjunctive expression ''would or might'' must be read disjunctively, and ''might'' is a reference to the earliest possible date when the long-term prisoner might be released, namely halfway through his sentence (paras 45, 57, 82, 84, 112, 113, 117); (5) (*diss* Lord Osborne and Lord Emslie) the general or residual discretion in sec 2(2) may not be used to correct the anomaly that the indeterminate prisoner is apparently being dealt with more favourably than the determinate prisoner (paras 46, 51, 75, 84, 87, 112, 113); and appeals *remitted* to a court of three judges for disposal in light of the views expressed in the judgment of the court and of other relevant considerations.

Observed (per Lord Justice-General (Hamilton), Lord Clarke and Lord Emslie) however unsatisfactory it may appear as a matter of comparative justice, Parliament has given statutory effect to an arrangement under which an indeterminate prisoner will, or at least may, become first eligible for consideration for parole at an earlier stage in his sentence than an equivalent determinate prisoner; if this situation is to be remedied it is for Parliament to remedy it; and the divisions of opinion expressed judicially in these appeals would suggest that a clear, well-considered legislative solution is called for (paras 49, 53, 88, 111).

Observed (per Lord Eassie) step (i) in para (aa) of sec 2(2) of the 1993 Act should be interpreted as directed to the need to decide a determinate sentence discounting the factors dictating preventive detention; at step (ii) the sentencing judge, while having discounted in step (i) to the best of his or her ability the risk factors dictating a preventive lifelong disposal, may nonetheless consider that there remains some particular element of that discounted, hypothetical, determinate sentence which ought to be taken into account as being discretely preventive in its detention consequences; were the sentencing judge to have appropriately discounted at step (i) it would be unusual that any significant discount would require to be made at step (ii); thus normally the answer to the question implicitly posed at step (i) will not differ from that to be given at step (ii), but there may be cases in which, in order to achieve the wider intention of ensuring broad parity in the jurisdictional boundaries, the sentencer will give a different answer to that implicit question at step (ii) (paras 77–81).

Dissenting (per Lord Osborne) it is an inevitable consequence of the form and wording of sec 2(2) of the 1993 Act that the undertaking of the exercise required by para (aa) is not the end of the whole discretionary exercise required by the subsection, and factors (a) and, where appropriate, (b) and (c) must also be taken into account, and the order which is finally made under the provision may involve the specification of a period as the punishment part which is greater or lesser than the period that has emerged from the exercise under para (aa), depending upon the circumstances of the individual case (paras 58, 59, 61, 62).

Dissenting (per Lord Emslie) that: (1) para (aa) simply adds to the list of matters to which the court must have regard (and give such weight as may seem appropriate) in approaching the relevant assessment, and the legislation preserves the overall discretion which is essential if the goals of justice, and comparative justice, are to be achieved, and sentencing judges will be entitled to consider the factors listed in paras (a), (aa), (b) and (c) in any preferred order or combination and to avoid the unwelcome predicament of feeling obliged by statute to impose a punishment part so short that the relevant life prisoner ends up eligible to be considered for parole years earlier than if he had received a determinate sentence instead (paras 94, 95); (2) the minister's parliamentary statement at the time when the amendment was introduced must be held inadmissible as an aid to construing the statute as ultimately amended (paras 99, 100); (3) para (aa)(i) requires the sentencing judge to undertake the task of identifying a determinate sentence which might realistically have been imposed if a lifetime disposal were thought inappropriate or unavailable and in this respect the objective may simply be to discount the potentially indefinite period of preventive detention which characterises any lifetime disposal, and para (aa)(ii) imports an obligation on the sentencing judge to try to separate out the punitive part of that determinate sentence, namely such part of the total as may be thought to reflect retribution and deterrence alone, and this would seem to involve a further stripping out of some, but possibly not all, of the public protection considerations which are elsewhere acknowledged as being integral to any determinate sentence of imprisonment, whether extended or not (para 101); (4) practical sense can be made of para (aa)(iii) by reading into it the words ''as part of the notional determinate sentence referred to in (i) above'' immediately after the words ''a prisoner sentenced to it''; as regards any fraction deemed applicable under para (aa)(iii), mathematical rigidity would be inappropriate in a sentencing context and it was quite possible to envisage situations in which any supposed minimum might justifiably be exceeded, and the most satisfactory view of para (aa)(iii) is that it merely calls for the court to have in mind the overall statutory scope of the Parole Board's early release jurisdiction under sec 1 and there is no question of the court having to predict what the Board might do in a hypothetical case; the composite phrase ''would or might'' can properly be accepted as applying, *mutatis mutandis*, to all notional determinate sentences, in tandem with the later words ''whether unconditionally or on licence'', and this approach does away altogether with any need for the court to agonise over particular fractions in individual cases, and with any second guessing or speculation relative to the Parole Board's exercise of its exclusive jurisdiction to assess future risk and public protection; but if particular fractions were for the court to judge under para (aa)(iii) the court must take account of the nature and circumstances of a prisoner's offending in order to judge future risk (paras 102–110).

Ansari v HM Advocate 2003 JC 105 *overruled* and *O'Neill v HM Advocate* 1999 SCCR 300 *discussed*.

MORRIS PETCH was charged on an indictment at the instance of the Right Honourable Elish F Angiolini QC, Her Majesty's Advocate, the libel of which set forth, *inter alia*, charges of rape. The appellant pled not guilty and the cause came to trial before Lord Malcolm and a jury in the High Court of Justiciary at Edinburgh. On 24 May 2007 the appellant was convicted of two charges of rape involving girls aged between eight and eleven years. On 10 August 2007 he was sentenced to life imprisonment, and the punishment part of that sentence was specified as 12 years.

The appellant appealed against sentence to their Lordships in the High Court of Justiciary. On 24 April 2009 a court of two judges granted the appellant's motion to remit the appeal to a bench of three judges to be heard along with the appeal of Robert Foye in order to revisit the issue of the formula for determining the punishment part of a discretionary life sentence.

ROBERT FOYE was charged on an indictment at the instance of the Right Honourable Elish F Angiolini QC, Her Majesty's Advocate, the libel of which set forth a charge of assault to injury and rape of a 16-year-old girl. On 23 January 2008 at the High Court of Justiciary at Glasgow he pled guilty before Lady Smith. On 1 October 2008 he was made the subject of a lifelong restriction order, and the punishment part of that sentence was specified as nine years. The appellant appealed against sentence to their Lordships in the High Court of Justiciary. On 26 March 2009 a court of two judges remitted the appeal to a bench of three judges.

The causes called before the High Court of Justiciary (Lord Osborne, Lord Clarke and Lord Emslie) for a hearing on 18 December 2009 at which doubts about the soundness of the decision in *Ansari v HM Advocate* were raised. The court appointed the appeals to be heard by a bench of seven judges for reasons which were subsequently delivered on 8 January 2010 ([2010] HCJAC 2).

Cases referred to:
Advocate (HM) v Boyle [2009] HCJAC 89; 2010 JC 66; 2010 SLT 29; 2010 SCCR 103; 2010 SCL 198
Advocate (HM) v L sub nom Laidlaw v Parole Board for Scotland [2007] HCJ 16; 2008 SCCR 51; 2007 GWD 19-341
Ansari v HM Advocate 2003 JC 105; 2003 SCCR 347; 2003 SLT 845
Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591; [1975] 2 WLR 513; [1975] 1 All ER 810
Clift v UK [2010] ECHR 7205/07
Du Plooy v HM Advocate 2005 1 JC 1; 2003 SLT 1237; 2003 SCCR 640
Flynn v HM Advocate 2005 1 JC 271; 2004 SLT 1195; 2004 SCCR 702
Gardner v Lees 1996 JC 83; 1996 SLT 342; 1996 SCCR 168
Kelly v HM Advocate 2001 JC 12; 2000 SCCR 815; 2000 GWD 27-1042
Kelly v HM Advocate [2010] HCJAC 20; 2010 SLT 967; 2010 SCL 773; 2010 GWD 8-144
Locke v HM Advocate [2008] HCJAC 6; 2008 SLT 159; 2008 SCCR 236; 2008 SCL 504
MC v Bulgaria (2005) 40 EHRR 20; 15 BHRC 627
Metropolitan Water Board v Assessment Committee of the Metropolitan Borough of St Marylebone [1923] 1 KB 86; 86 JP 225; 20 LGR 832; 92 LJ (KB) 161; 128 LT 358
O'Neill v HM Advocate 1999 SLT 958; 1999 SCCR 300
Pepper (Inspector of Taxes) v Hart [1993] AC 593; [1992] 3 WLR 1032; [1993] 1 All ER 42
R v Bellamy [2001] 1 Cr App R (S) 34; [2000] Crim LR 771
R v Central Criminal Court, ex p Francis and Francis (A Firm) [1989] 1 AC 346; [1988] 3 WLR 989; [1988] 3 All ER 77
R v Dalziel [1999] 2 Cr App R (S) 272
R v Errington [1999] 1 Cr App R (S) 403; [1999] Crim LR 91
R v Hall [2010] EWCA Crim 782
R v Hassall [1999] 2 Cr App R (S) 277; [1999] Crim LR 676
R v Jabble [1999] 1 Cr App R (S) 298
R v Jarvis [2006] EWCA Crim 1985
R v M (Discretionary Life Sentence); R v L sub nom R v Marklew and Lambert [1999] 1 WLR 485; [1998] 2 All ER 939; [1999] 1 Cr App R (S) 6; [1998] Crim LR 512
R v Maguire [2004] EWCA Crim 2220; [2005] 1 Cr App R (S) 84
R v Mills [2004] EWCA Crim 3506
R v Mullen [2000] QB 520; [1999] 3 WLR 777; [1999] 2 Cr App R 143; [1999] Crim LR 561
R v Secretary of State for the Home Department, ex p Furber [1998] 1 All ER 23; [1998] 1 Cr App R (S) 208; [1997] Crim LR 841
R v Secretary of State for the Home Department, ex p Venables; R v Secretary of State for the Home Department, ex p Thompson [1998] AC 407; [1997] 3 WLR 23; [1997] 3 All ER 97

R v Smith [2004] EWCA Crim 1040; [2004] 2 Cr App R (S) 92; [2005] 1 Prison LR 16
R v Szczerba [2002] EWCA Crim 440; [2002] 2 Cr App R (S) 86; [2002] Crim LR 429
R v West [2001] 1 Cr App R (S) 30
R v Wheaton [2004] EWCA Crim 2270; [2005] 1 Cr App R (S) 82; [2005] Crim LR 68
R v Wilson [2009] EWCA Crim 999; [2010] 1 Cr App R (S) 11; [2009] Crim LR 665
Robertson v HM Advocate 2004 JC 155; 2004 SLT 888; 2004 SCCR 180
Siliadin v France (2006) 43 EHRR 16; 20 BHRC 654
Thynne v UK; Wilson v UK; Gunnell v UK (1991) 13 EHRR 666
Wilson v First County Trust Ltd (No 2) sub nom Wilson v Secretary of State for Trade and Industry [2003] UKHL 40; [2004] 1 AC 816; [2003] 3 WLR 568; [2004] 4 All ER 97
X v Netherlands; Y v Netherlands (1986) 8 EHRR 235

Textbooks etc referred to:
Chalmers, J, ''*Punishment Parts and Discretionary Life Sentences*'' 2003 SLT (News) 199
Parole Board for Scotland, *Annual Report 2001* (SE/2002/95) (TSO, Edinburgh, May 2002), pp 1, 2
Parole Board for Scotland, *Annual Report 2008/09* (SG/2009/263) (TSO, Edinburgh, December 2009), p 11
Parole Board for Scotland, *Corporate Plan 2005* (Parole Board for Scotland, Edinburgh, 2005), Ch 2 (Online: www.scottishparoleboard.gov.uk/pdf/CORPORATE%20PLAN%202005.pdf (28 July 2011))
Scottish Home and Health Department, *Parole and Related Issues in Scotland: Report of the Review Committee* ('Kincraig Committee') (Cmnd 598, 1989), para 5.6, Ch 8

The causes called before the High Court of Justiciary, comprising the Lord Justice-General (Hamilton), Lord Osborne, Lord Eassie, Lord Clarke, Lord Emslie, Lord Wheatley and Lord Philip, for a hearing on 28 and 29 September and 21 and 22 October 2010.

At advising, on 1 March 2011—

LORD JUSTICE-GENERAL (HAMILTON)—

The issue

[1] The issue of principle which arises for decision at this stage in each of these appeals is the proper approach to the determination of the punishment part to be specified, under sec 2(2) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (cap 9) (as amended), in respect of non-mandatory indeterminate sentences (discretionary life sentences and orders for lifelong restriction).

[2] Section 2 of the Act (as amended) provides:

> '(1) In this Part of this Act ''life prisoner'', except where the context otherwise requires, means a person–
>
> (a) sentenced to life imprisonment for an offence for which, subject to paragraph (b) below, such a sentence is not the sentence fixed by law; or
> (aa) sentenced to life imprisonment for murder or for any other offence for which that sentence is the sentence fixed by law; or
> (ab) who is subject to an order for lifelong restriction in respect of an offence, . . .
>
> and in respect of whom the court which sentenced him for that offence made the order mentioned in subsection (2) below.
>
> (2) The order referred to in subsection (1) above is an order that subsections (4) and (6) below shall apply to the life prisoner as soon as he has served such part of his sentence (''the punishment part'') as is specified in the order, being such part as the court considers appropriate to satisfy the requirements for retribution and deterrence (ignoring the period of confinement, if any, which may be necessary for the protection of the public), taking into account–

(a) the seriousness of the offence, or of the offence combined with other offences of which the life prisoner is convicted on the same indictment as that offence;
(aa) in the case of a life prisoner to whom paragraph (a) or (ab) of subsection (1) above applies–

(i) the period of imprisonment, if any, which the court considers would have been appropriate for the offence had the court not sentenced the prisoner to imprisonment for life, or as the case may be not made the order for lifelong restriction, for it;
(ii) the part of that period of imprisonment which the court considers would satisfy the requirements of retribution and deterrence (ignoring the period of confinement, if any, which may be necessary for the protection of the public); and
(iii) the proportion of the part mentioned in sub-paragraph (ii) above which a prisoner sentenced to it would or might serve before being released, whether unconditionally or on licence, under section 1 of this Act;

(b) any previous conviction of the life prisoner; and
(c) where appropriate, the matters mentioned in paragraphs (a) and (b) of section 196(1) of the 1995 Act. ...

(4) Where this subsection applies, the Secretary of State shall, if directed to do so by the Parole Board, release a life prisoner on licence.
(5) The Parole Board shall not give a direction under subsection (4) above 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. ...

(6) Where this subsection applies, a life prisoner may, subject to subsection (7) ... , require the Secretary of State to refer his case to the Parole Board.'

Introduction

[3] On 8 January 2010, this court remitted the present appeals to a bench of seven judges. In doing so, it issued an opinion which suggested that the approach adopted in *Ansari v HM Advocate* to the determination of the punishment part of non-mandatory indeterminate sentences to be specified under sec 2(2) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ('the 1993 Act') as amended might have to be reconsidered.

Background

[4] On 24 May 2007, at the High Court in Edinburgh, the first-named appellant, Morris Petch, was convicted after trial on two charges of rape involving girls aged between 8 and 11 years. On 10 August 2007 he was sentenced to life imprisonment. The punishment part of that sentence was specified as 12 years. The sentencing judge took the view that, in all the circumstances including a previous conviction in the High Court for assault with intent to ravish for which imprisonment for 30 months had been imposed, the notional determinate sentence which might have been imposed for such an offence, regard being had to retribution and deterrence alone, would have been in the region of 18 years. On 23 January 2008, at the High Court in Glasgow, on an indictment under sect 76 of the Criminal Procedure (Scotland) Act 1995 (cap 46) ('the 1995 Act'), the second-named appellant, Robert Foye, pled guilty to the assault to injury and rape of a 16-year-old girl.

On 1 October 2008, in terms of sec 210F of the 1995 Act, he was made the subject of a lifelong restriction order. The punishment part of that sentence was specified as nine years. The sentencing judge took the view that, in all the circumstances, including the plea of guilty, the notional determinate sentence which might have been imposed for the offence would have been 13 years. Against those sentences, both appellants now appeal.

Submissions on behalf of the appellants

[5] On behalf of both appellants, counsel submitted that *Ansari v HM Advocate* had been wrongly decided. The majority had misinterpreted sec 2(2)(aa) of the 1993 Act, which had simply given the procedure outlined in *O'Neill v HM Advocate* statutory force. *O'Neill* had to be taken into account when interpreting it. The section involved the hypothetical legal construct of the 'notional determinate sentence', not a real exercise of 'second guessing' the Parole Board (*cf Ansari*, per Lord Justice-Clerk Gill, paras 32–40, Lord Marnoch, para 45). The correct approach was to identify the custodial period which would be appropriate purely as punishment for the crime, ignoring risk, and, in all but exceptional cases, specify one-half of that period as the punishment part (*O'Neill*, per Lord Justice-General Rodger, para 963A). The reasoning of Lord Reed in his dissenting opinion in *Ansari* ought to be accepted as correct. That approach ensured comparative justice between a discretionary life prisoner and a prisoner sentenced to a determinate sentence as regards the stage at which they respectively might be considered for early release under sec 1 of the 1993 Act (*Ansari*, per Lord Reed, paras 69, 88).

[6] The decision in *O'Neill* had been influenced by the approach adopted in England, where the proportion of the notional determinate term to be served as part of an indeterminate sentence was normally one-half (*R v M (Discretionary Life Sentence)*, per Thomas J, p 491; *R v Szczerba*, per Rose LJ, para 31; *R v Wilson*, per Judge CJ, para 19). The statutory provisions in that jurisdiction were not materially different from the 1993 Act as amended (*cf Ansari*, per Lord Justice-Clerk Gill, para 25). One rationale for fixing the punishment part at one-half, as opposed to two-thirds, of the notional determinate sentence was the 'peculiarly disadvantaged' position in which a life sentence prisoner was placed (*R v M (Discretionary Life Sentence)*, per Thomas J, pp 490, 491, referring to *R v Secretary of State for the Home Department, ex p Furber*, per Simon Brown LJ, pp 28, 29).

[7] The majority in *Ansari* had also erred in their interpretation of r 8 of the Parole Board (Scotland) Rules 2001 (SSI 2001/315). In considering the early release of a discretionary life prisoner, the Parole Board in Scotland was, in practice, only concerned with the protection of the public and whether a prisoner presented an acceptable risk (*HM Advocate v L*, per Lord McEwan, paras 32, 33). That was reflected in the statutory provisions (1993 Act, sec 2(4), (5)). The rules provided a non-exhaustive guide of matters which could be taken into account, but only in the context of that overarching question of risk (*Ansari*, per Lord Reed, para 77; *cf* Lord Justice-Clerk Gill, para 32).

[8] If sec 2(2)(aa) was considered ambiguous, resort could be made to a statement made by the Deputy First Minister and Minister for Justice (Mr Jim Wallace) at stage 3 of the Convention Rights (Compliance) (Scotland) Bill, which introduced the provision (Scottish Parliament, Official Report, 30 May 2001, cols 1090–1091; *cf Pepper v Hart*). That made clear Parliament's intention to preserve the approach adopted in *O'Neill*. A purposive approach ought to be adopted to give effect to that intention.

Moreover, the 1993 Act had to be interpreted in a manner which respected the appellants' Convention rights (Human Rights Act 1998 (cap 42), sec 3). If it discriminated, without justification, against the appellants as regards the applicability of the statutory early release provisions, it would amount to a contravention of their rights under Arts 5 and 6 when considered in conjunction with Art 14 (*Clift v UK*). That would be an odd result where the Act was designed to protect Convention rights (*cf Flynn v HM Advocate*, per Lord Justice-Clerk Gill, para 5).

Submissions on behalf of the Crown

[9] The Advocate-depute submitted that, while *O'Neill v HM Advocate* formed part of the background to the introduction of sec 2(2)(aa), one now had to focus on the wording of that provision. It not being ambiguous, reference to ministerial statements was unnecessary (*Pepper v Hart*, per Lord Bridge of Harwich, p 49, Lord Griffiths, p 50, Lord Browne-Wilkinson, p 69, Lord Oliver of Aylmerton, p 52; *Gardner v Lees*, per Lord McCluskey, p 90). The Crown's primary position was that the approach adopted by the majority in *Ansari v HM Advocate* was correct. Alternatively, one interpreted the overarching criterion of sec 2(2) as being a punishment part which satisfied 'the requirements for retribution and deterrence'. The matters in para (aa) were to be 'taken into account' in the sense that one 'took cognisance' of them (*cf Metropolitan Water Board v Assessment Committee of the Metropolitan Borough of St Marylebone*, per Lord Hewart CJ, p 99), but were not determinative. They provided a 'touchstone' against which to test the justice of a designated punishment part (*Locke v HM Advocate*, per Lord Justice-General Hamilton, para 17).

[10] It was submitted that this approach provided judges with the discretion needed to specify an appropriate punishment part according to the circumstances. Indeed, it enabled the sentencing judge to specify a punishment part of up to and beyond two-thirds of the retributive and deterrent part of the notional determinate sentence: sec 2(2)(aa)(i) confirmed that a determinate sentence imposed on the same prisoner for the same offence was the correct comparator; sec 2(2)(aa)(ii) reminded the judge to focus on its retributive and deterrent element; and sec 2(2)(aa)(iii) accommodated the possibility that, as, in terms of sec 1 of the 1993 Act, such a prisoner 'might' be released having served one-half of that whole sentence, and 'would' be released having served two-thirds of it, the proportion of the retributive and deterrent part of that sentence served could be greater than two-thirds. That interpretation ensured comparative justice. In contrast, the appellants' interpretation placed the discretionary life prisoner in a better position than the determinate sentence prisoner as regards early release, an anomaly identified, but not resolved, in *O'Neill* (*cf* Lord Justice-General Rodger, p 962I–K).

[11] *Esto* the section was ambiguous, a proper analysis of *O'Neill*, referred to in the ministerial statement, was required. The ratio of that case concerned the need for comparative justice and for a punishment part which bore a 'fair and reasonable relationship' to the minimum period which a prisoner would serve under a determinate sentence imposed in equivalent circumstances (per Lord Justice-General Rodger, p 962G). It did not simply prescribe one-half of the retributive and deterrent element of the notional determinate sentence as the normal punishment part. Moreover, the Minister's comments concerned only para (aa): one required to look at sec 2(2) as a whole. In so far as they could not be reconciled, the wording of sec 2(2) had to be preferred to *O'Neill*. Mindful of the anomaly

identified in *O'Neill*, Parliament may not have adopted precisely the same approach to securing comparative justice.

[12] Contrary to the appellants' submissions, the role of the Parole Board in Scotland, and the criteria which it had to apply, were not straightforward. Its primary function might be to protect the public, but that was not expressly set out in the statute (*cf* 1993 Act, secs 2(5), 20). Rule 8 of the 2001 Rules provided it with a wide discretion as to the matters to be taken into account in considering early release and these were not restricted to risk (*Ansari*, per Lord Justice-Clerk Gill, para 32; *HM Advocate v L*, per Lord McEwan, paras 11, 15; Chalmers, *'Punishment Parts and Discretionary Life Sentences'*). That might allow issues of retribution to be taken into account. In any event, even on Lord Reed's approach the seriousness of the offence was relevant to risk.

[13] The English authorities were of limited assistance (*Ansari*, per Lord Justice-Clerk Gill, paras 21–25). Unlike Scotland, historically the English legislation expressly required a judge to take into account the early release provisions for determinate sentence prisoners. That remained the position (Crime (Sentences) Act 1997 (cap 43), sec 28; Powers of Criminal Courts (Sentencing) Act 2000 (cap 6), sec 82A; Criminal Justice Act 2003 (cap 44), sec 244(1)). Moreover, an amendment to the legislative scheme, yet to be brought into force, would allow consideration of the seriousness of the offence when determining the proportion of the notional determinate sentence to be served (Criminal Justice and Immigration Act 2008 (cap 4), sec 19). Despite the guidance in *R v M (Discretionary Life Sentence)*, the authorities suggested that judges did not always leave risk out of account in ascertaining the notional determinate sentence. Conflicting opinions had been issued in that regard (*R v Smith*; *cf R v Wheaton*; *R v Maguire*).

[14] While the English practice, other than in narrow exceptional circumstances, was to fix one-half of the notional determinate sentence as the specified period (*R v Szczerba*), the overarching criterion in Scotland was a punishment part which satisfied the requirements of retribution and deterrence (1993 Act, sec 2(2)). The fixing of the punishment part at only half of the notional determinate sentence was not justified by the 'peculiarly disadvantaged' position of a life sentence prisoner. That could not determine what was required as regards retribution and deterrence. The only justification for a discretionary indeterminate sentence was risk. They were two separate issues. The rationale in England appeared to be that the life sentence prisoner should be no worse off than a prisoner subject to a determinate sentence (*R v West*, per Pill LJ, para 7; *R v Hall*, per McCombe J, para 19). However, the courts had failed to address the anomaly identified in *O'Neill*.

[15] The approach in *Ansari* was Convention rights compliant. The requirements of legal certainty were met by the imposition of a specified punishment part and did not require the application of a detailed formula. Should an appellant be concerned about a failure by the Parole Board to respect his Convention rights at some future date, a remedy would be open to him at that time. Moreover, the sentence imposed should not violate the Convention rights of victims under Arts 3 and 8(1), particularly where, as here, they were young or vulnerable (*MC v Bulgaria*, paras 148–153; *X and Y v Netherlands*, para 27; *Siliadin v France*, para 148).

[16] Finally, it was submitted that any opinion issued should be in the form of guidance in relation to sec 2(2), with the result that it would not have retrospective effect (*cf Locke v HM Advocate*, per Lord Justice-General Hamilton, paras 18–20; *Kelly v HM Advocate* (2010), per Lord Kingarth, para 12; *HM Advocate v Boyle*, per Lord Justice-General Hamilton, para 23).

Original enactment

[17] Section 1 of the 1993 Act (as enacted) made separate provision for the early release of a 'short-term prisoner' (one serving a sentence of imprisonment for a term of less than four years) and a 'long-term prisoner' (one serving a sentence of imprisonment for a term of four years or more). The Secretary of State was, subject to any supervised release order made judicially at the time of sentencing, required to release unconditionally a prisoner in the first category after he had served one-half of his sentence (sec 1(1)). He was required to release a prisoner in the second category on licence once he had served two-thirds of his sentence (sec 1(2)). Section 1(3) provided:

> 'After a long-term prisoner has served one-half of his sentence the Secretary of State may, if recommended to do so by the Parole Board under this section, release him on licence.'

Thus a long-term prisoner, while entitled to be released on licence after serving two-thirds of his term, might be so released at any time after he had served one-half of his term. Whether he was would depend on a recommendation for release having been made by the Parole Board and, as enacted, upon the Secretary of State accepting that recommendation; by subsequent amendment he became, in general, bound to release him on such a recommendation being made. Other than on compassionate grounds (sec 3) a prisoner serving a determinate sentence could not, under the statute as enacted, be released earlier than halfway through his sentence.

[18] The Act also addressed the release of prisoners serving indeterminate (ie life) sentences, other than those serving such a sentence mandatorily. It did so by providing that, where a court was imposing a discretionary life sentence, it might, and ordinarily would, make an order specifying a part of the sentence after the expiry of which certain steps towards the release of the prisoner might be taken. This part was, in the Act as enacted, identified as 'the relevant part'. Where the court which imposed the life sentence decided not to make an order, it required to state its reasons for so deciding. Thus, unless the circumstances were of such seriousness that a 'whole life' sentence was appropriate, an order specifying the relevant part was to be expected. The only guidance which at that stage was given to the court as to the criteria to be adopted in specifying the relevant part was that it was to be

> 'such part as the court considers appropriate taking into account–
>
> (a) the seriousness of the offence, or of the offence combined with other offences associated with it; and
> (b) any previous conviction of the life prisoner.'

The significance of the specified relevant part for the prisoner was that on its expiry he might, subject to certain exceptions, at any time require the Secretary of State to refer his case to the Parole Board (sec 2(6)). The Parole Board was empowered to give a direction for release of the prisoner but was required not to do so 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' (sec 2(5)).

On such a direction being given, the Secretary of State was required to release the prisoner on licence (sec 2(4)).

[19] In broad terms, accordingly, two functions can be discerned from these provisions: the function of the sentencing court to specify a relevant part having taken into account the seriousness of the offence (together with any associated offences) and the prisoner's criminal record; and the function of the Parole Board to make an order for release but not before the expiry of the relevant part and not until it was satisfied that it was no longer necessary for the protection of the public that the prisoner should be confined. These functions were, on the face of the statute, distinct.

[20] Section 2 was designed to give effect in Scotland to the decision of the European Court of Human Rights in *Thynne, Wilson and Gunnell v UK* in which it was held that discretionary life sentences imposed by the English courts were composed of a punitive element and subsequently of a security element (para 73) and that, in respect of the security element, the applicants were entitled under Art 5(4) of the Convention 'to take proceedings to have the lawfulness of their continued detention decided by a court at reasonable intervals and to have the lawfulness of any re-detention determined by a court' (para 76). In seeking to give effect, under English law, to this judgment Parliament, in enacting Pt II of the Criminal Justice Act 1991 (cap 53), took the view that the Parole Board had the status of a court for the purpose of reviewing the security element of a discretionary life sentence. The same view was taken when statutory provision was made for Scotland in the 1993 Act.

[21] The provisions enacted for England and Wales in 1991 were not identical to those subsequently enacted for Scotland. In particular, sec 34 of the English statute provided:

> '(1) A life prisoner is a discretionary life prisoner for the purposes of this Part if–
>
> (a) his sentence was imposed for a violent or sexual offence the sentence for which is not fixed by law; and
> (b) the court by which he was sentenced for that offence ordered that this section should apply to him as soon as he had served a part of his sentence specified in the order.
>
> (2) A part of a sentence so specified shall be such part as the court considers appropriate taking into account–
>
> (a) the seriousness of the offence, or the combination of the offence and other offences associated with it; and
> (b) the provisions of this section as compared with those of section 33(2) above and section 35(1) below.'

Section 33(2) was in the following terms:

> 'As soon as a long-term prisoner has served two-thirds of his sentence, it shall be the duty of the Secretary of State to release him on licence.'

Section 35(1) was in the following terms:

> 'After a long-term prisoner has served one-half of his sentence, the Secretary of State may, if recommended to do so by the Board, release him on licence.'

[22] There was thus, in the provisions for the release of discretionary life prisoners under the English statute, a specific cross-reference for comparative purposes to the provisions for release of long-term prisoners sentenced to determinate terms. No such specific cross-reference was made in the Scottish legislation. By contrast, the

Scottish provisions directed the court in sentencing the prisoner to take into account any previous conviction of his; the English provisions gave no such direction. This latter difference may simply reflect differences between the jurisdictions in sentencing practice.

Early English cases

[23] In *R v Secretary of State for the Home Department, ex p Furber* the Divisional Court was concerned with a juvenile female who had pled guilty to the manslaughter of a relative. She had been sentenced under sec 53(2) of the Children and Young Persons Act 1933 (23 & 24 Geo 5 cap 12) to detention for life. In accordance with English practice at the time, the minimum ('tariff') sentence to be served 'to meet the requirements of retribution and deterrence' was ultimately to be fixed by the Secretary of State, he having taken advice from the trial judge and the Lord Chief Justice. The applicant's case fell to be dealt with under the transitional provisions of the Criminal Justice Act 1991, she having been sentenced on 20 December 1991. The Secretary of State fixed that period at seven years. That decision was challenged by judicial review. Lord Justice Simon Brown (as he then was) discussed existing English authority on the application of sec 34 of the 1991 Act, with particular reference to what proportion of an equivalent determinate sentence should be fixed. He said (p 28):

> 'The starting point for calculating s 34 tariffs is the appropriate determinate sentence where there [is] no need to pass a life sentence for the protection of the public. Given that determinate sentences themselves are sometimes longer than otherwise they would be so as to provide some additional safeguard for the public, it might be thought appropriate to strip out that risk element and discount the general range of such sentences. Yet s 34 tariff periods appear to take longer, rather than shorter, notional determinate sentences as their starting point. If it be suggested that the explanation for this lies in the fact that offences attracting life sentences are likely to be amongst the graver diminished responsibility manslaughter cases, I have to say that for my part I can find little support for this view in the facts of the various cases.
>
> There are, moreover, other considerations which might perhaps be thought to suggest that the tariff in life sentence cases — the point at which the Parole Board first starts to consider the possibility of releasing the prisoner under licence — should certainly be no longer than had considerations of public safety not dictated the need for an indeterminate rather than a determinate sentence in the first place. One should not overlook the peculiarly disadvantaged position of life sentence prisoners: not to be released back into society unless and until the Parole Board is satisfied that they have ceased to pose any real (as opposed to merely minimal) risk. This, as was recognised in *R* v *Parole Board, ex p Bradley* [1990] 3 All ER 828 at 838, [1991] 1 WLR 134 at 145, ''may well cause the accused to serve longer, and sometimes substantially longer, than his just deserts''. Should not the corollary of that be that, if the prisoner can indeed safely be released back into the community, then the possibility of such release should not ordinarily be postponed by a long tariff period. Secondly it should be borne in mind that even where the Parole Board in life sentence cases is inclined to make a favourable recommendation, almost invariably it requires a two-year trial period during which the prisoner can be tested in open prison conditions. Given this in-built delay in the overall release process, ought not that process to start if anything earlier rather than later than in the case of determinate sentence prisoners whose eligibility for parole, under statute, starts at the half-way point of their sentence and who must in any event be released after serving two-thirds.'

There is nothing to suggest that this secondary consideration has any application, at least now, in Scotland.

[24] These observations were subsequently quoted in *R v M (Discretionary Life Sentence)*, a decision of a Court of Appeal chaired by the then Lord Chief Justice (Lord Bingham of Cornhill), the judgment of the court being delivered by Thomas J (as he then was). These were applications for leave to appeal against the minimum periods of detention fixed under sec 34 of the 1991 Act — again in respect of youths, both aged 17, who had been sentenced to detention for life for arson. The court agreed with the reasoning of Simon Brown J in *R v Secretary of State for the Home Department, ex p Furber*. Thomas J said (p 491):

> 'In the case of a young person who is to be sentenced to a period of detention for life under the provisions of section 53(2) [of the Children and Young Persons Act 1933] or an adult who is to be sentenced to a discretionary life sentence, the general approach is to decide first the determinate part of the sentence that the judge would have imposed if the need to protect the public and the potential danger of the offender had not required him to pass a life sentence. It is the imposition of the life sentence that protects the public and is necessitated by the risk that the defendant poses. That element is therefore not to be reflected in the determinate part of the sentence that the court would have imposed; the determinate part is therefore that part that would have been necessary to reflect punishment, retribution, and the need for deterrence. It is we consider important that the judge should, when passing sentence, make clear to the defendant what that determinate period would have been.
>
> The judge should then exercise his discretion in fixing the specified period. In so doing the general approach in the case of a young person should be to fix a period of half the determinate sentence that would have been passed. This approach would in most cases reflect the court's duty under section 44 of the Children and Young Persons Act 1933 and take into account particularly the age of the defendant. There may be circumstance that might arise in the particular facts of a case where a longer period would be appropriate, but having regard in particular to provisions of section 44, that would be the exceptional case.
>
> In the case of adult offenders, we consider that again the general approach should be to begin consideration of the specified period under section 34 by taking half the determinate period that would have been passed; that determinate period will reflect the element of punishment, retribution and deterrence in the sentence. In many cases half the determinate period may well be the appropriate period to specify under section 34. However there may well be circumstances, as the decisions of this court show, where it would be appropriate for the judge in the exercise of his general discretion and in circumstances that arise on the facts of a particular case to fix the specified period at a period which was more than half and up to two-thirds of the determinate sentence that would have been passed.'

[25] Thus, although these applications were each concerned with young people sentenced to detention for life, the court, albeit *obiter*, suggested that the same general approach should be adopted in relation to adults sentenced on a discretionary basis to life imprisonment — that is, to begin consideration of the specified period by taking half the determinate period that would have been passed, that period reflecting the element of punishment, retribution and deterrence in the sentence. It was, however, made clear that the figure so arrived at need not be the final stage of the exercise: there might well be circumstances where it would be appropriate for the judge in the exercise of his discretion to fix a large fraction, but not more than two-thirds.

O'Neill

[26] The reasoning in *R v M (Discretionary Life Sentence)*, subsequently cited as *R v Marklew and Lambert*, was influential in the reasoning of this court in *O'Neill v HM Advocate*. There the appellant, who had a prior record of serious assaults, had pled guilty to assault to severe injury. The sentencing judge sentenced him to life imprisonment and fixed the 'designated part' (as it was now called under sec 2(2) of the 1993 Act, as amended by the Crime and Punishment (Scotland) Act 1997 (cap 48)) at seven years. The appellant appealed against the sentence of life imprisonment and also against the period designated. The appeal against the life imprisonment was refused but the appeal against the designated part succeeded; that period was reduced to three years, being one-half of an appropriate determinate sentence (leaving out of account the element for protection of the public) of six years.

[27] Delivering the opinion of the court the Lord Justice-General (Rodger) having referred to *R v M (Discretionary Life Sentence)* continued (pp 962E–963E):

> 'Since the purpose of the order under section 2(2) is to determine the punitive period which the prisoner must serve before he can require the Secretary of State to refer his case to the Parole Board, the period selected must be the minimum period which the prisoner should actually serve in prison as a punishment for his crime before he could be released. That is different from the period to which a judge might actually sentence him for the crime, for two reasons: first, the judge would, normally at least, simply decide what sentence was appropriate as a punishment and would not consider at what point in the sentence the prisoner might actually be released; secondly, the judge would take all relevant factors into account and would not isolate those specified in section 2(2)(a) and (b). It follows that the exercise of determining a designated part in terms of section 2(2) is distinct from the exercise of determining the appropriate determinate sentence for a similar crime. On the other hand, the designated part must bear some relationship to such a determinate sentence, since, leaving aside the exceptional case where imprisonment for life would be the appropriate punishment, comparative justice requires that the designated period should bear a fair and reasonable relationship to the minimum period which a prisoner would actually require to serve under a determinate sentence imposed in similar circumstances, but lacking the special requirement of public protection which has led to the life sentence. That minimum period is in effect set by Parliament in terms of the 1993 Act. Under section 1(3) a prisoner serving a sentence of four years or more is entitled to be released on licence after serving two-thirds of his sentence and may be released on licence after serving one-half of his sentence, if the Parole Board recommends that he should be released. These provisions show that Parliament currently takes the view that the minimum period which a long-term prisoner should serve as a punishment before he can be released on licence is one-half of his sentence. In our view, therefore, in deciding what period to specify as the designated part after which a prisoner is entitled to have the Parole Board consider whether he should be released, the court must have regard to the actual minimum period which the prisoner would have required to serve before he could be released if a determinate sentence had been imposed for the crime.
>
> The obvious difficulty, which was pointed out by the advocate-depute, is that, in deciding what is the appropriate determinate sentence to impose for a particular crime, the court may often have regard to the need to protect the public. If, therefore, the court were simply to have regard to what would be the appropriate determinate sentence, given the need to protect the public, the figure which would be reached by reference to one-half of that sentence would be a figure which would include an element of protection of the public, rather than being a figure which was concerned only with punishment. If, on the other hand,

the element of the protection of the public were stripped out, the effect would be to reduce what might be the usual figure for the determinate sentence and hence, correspondingly, to reduce the figure for half that determinate sentence. On that second approach it would be possible, in theory at least, for the Parole Board to recommend that a designated life sentence prisoner should be released earlier than a prisoner who had been given a determinate sentence for the same crime.

We are conscious of the difficulty which the provisions present for a sentencing judge. In our view, however, the appropriate interpretation should reflect both the terms of the statute and the purpose for which the system was introduced. As we have stressed, that purpose is to determine the punitive period which the prisoner must serve. After that period is over, the prisoner's detention on the ground of the protection of the public must be reviewed by an independent body. It follows that the designated part should be concerned with matters of punishment, rather than with the protection of the public. It is for this reason that the court is directed to take into account the factors set out in subsection (2)(a) and (b). Of course, the court may be entitled to have regard to factors other than those specified in fixing the period, but the resulting period must be one which is concerned with punishment rather than with the protection of the public. Therefore, when specifying the appropriate period in terms of subsection (2), in the normal case the court should decide what period of detention would be appropriate, purely as a punishment for the crime, and should then designate half that period. The effect will be that, once he has served that period, the prisoner will be entitled to have his case referred to the Parole Board. In practice their deliberations take some time, especially if there is a substantial issue as to possible danger to the public. It is therefore unlikely that a discretionary life prisoner will be released immediately after his case has been referred to the Parole Board. For that reason the anomaly to which reference was made in argument may be more apparent than real. We recognise, however, that in specifying a period under section 2(2) the court is not carrying out a mechanical exercise and that there may be circumstances in which it would be appropriate for the court applying the statutory criteria to specify a period longer than half the equivalent determinate sentence though less than two-thirds of that sentence. That is specifically recognised by the Court of Appeal in *Marklew* (at p 12). Like the Court of Appeal, we prefer, however, to express no view about the circumstances in which that might be appropriate.

In applying that approach to the present case, we consider that, having regard to the appellant's previous convictions, the appropriate determinate sentence, leaving out of account the element of protection of the public, would have been six years and that the minimum period which he would therefore have required to serve as a punishment for the crime before he could be released on licence would have been three years. In these circumstances, for the reasons which we have given, in the absence of any particular circumstances indicating that a longer period should have been selected, the appropriate period for the sentencing judge to designate would have been three years.'

[28] I find some difficulty with the first sentence, as expressed, in the passage quoted. The principal clause of it should, it appears to me, read either 'the period selected must be the period which the prisoner should actually serve as a punishment for his crime before he could be released' or 'the period selected must be the minimum period which the prisoner should actually serve in prison before he could be released'. Otherwise an inappropriate minimum is introduced into the fixing of the punishment part. The reasoning of the rest of the first paragraph quoted is, however, clear — although the difference between the English and the Scottish legislation is not noticed.

[29] It is appropriate at this stage to remind oneself of the context in which *O'Neill* was decided. As earlier explained, the functions which the court and the Parole Board (acting judicially) were to perform were distinct. The court was to specify the

designated (previously relevant) part taking into account the seriousness of the offence, and of associated offences, and the prisoner's prior criminal record, if any. The Parole Board was to determine whether it was satisfied that it was no longer necessary for the protection of the public that the prisoner should be confined. No such determination could be made until the designated (relevant) period had expired. The task which the sentencing judge (or the appeal court on any appeal) had to perform was to specify the designated (relevant) part. *O'Neill* was decided before the 1993 Act was further amended by the Convention Rights (Compliance) (Scotland) Act 2001 (asp 7). Thus, at the time of that decision there was in place for Scotland no statutory provision equivalent to sec 34(2)(b) of the 1991 Act which enjoined the English courts, in specifying the relevant part, to take into account secs 33(2) and 35(1), which were concerned with prisoners sentenced to determinate terms. As, however, the court recognised in *O'Neill*, it was appropriate, in the interests of comparative justice, that 'the designated part must bear some relationship to . . . a determinate sentence [for a similar crime]'. The comparative exercise, of course, required the court to take like with like. On one view the unlike elements as between a life sentence and a determinate sentence were, in the former, the indeterminate element and, in the latter, any element in that sentence which reflected a need for protection of the public. Once any such element in the latter was disregarded ('stripped out'), the remaining period could form some basis of comparison from which could be determined, by further calculation, what period might be specified as the relevant (designated) part.

[30] There is inevitably some difficulty about such an exercise. In the first place, there is unlikely to be a body of settled jurisprudence of 'similar' determinate sentences. Cases in which life imprisonment is imposed on a discretionary basis are comparatively rare and involve factors which are unlikely to be found in imposing determinate, even extended, sentences (*Robertson v HM Advocate*; *cf Kelly v HM Advocate* (2001); see also *Locke v HM Advocate*, para 23). Secondly, perhaps more importantly, a person serving a determinate sentence will reach the halfway point only when he has served half the whole of his sentence (including any element in the custodial sentence referable to risk), not half the purely punitive element. (A speciality arises in relation to extended sentences, to which I shall return.) This point was made by the Advocate-depute in *O'Neill* and noticed by the court (pp 962I–963B) but the difficulty presented by it does not appear to have been addressed — other than by a reference to possible delay in the Parole Board reaching a decision on the question of the prisoner's release. There is nothing to suggest that, at least now, there are significant delays in processing applications for release by indeterminate prisoners who have served their punishment parts. Current intelligence is to the effect that the case of every indeterminate prisoner is referred to the Board at a point before the expiry of the relative punishment part. Once referred, the prisoner is scheduled to have his first review tribunal immediately at the end of the punishment part. If granted parole, he would be released at that point. The same promptness is applied in the case of long-term prisoners as they approach halfway through their sentences.

[31] The difficulty presented by seeking to make an arithmetical comparison with determinate sentences might have been avoided by taking a different route. The court was not (in contrast to the English courts) at that time constrained by statute to have regard to the provisions in relation to determinate sentences. It might, due regard being had to the factors referred to in sec 2(2)(a) and (b) of the 1993 Act, have developed (as it subsequently did in relation to persons sentenced mandatorily to

life imprisonment or detention) a body of jurisprudence in relation to relevant/designated parts of discretionary life sentences. That jurisprudence might appropriately have had regard for comparative purposes to determinate sentences without being confined by any arithmetical relationship. But the court did not take that course; and Parliament has subsequently intervened.

Parole Board

[32] Before considering the effect of that intervention, it is appropriate to consider the function of the Parole Board in more detail. In the report *Parole and Related Issues in Scotland* (Kincraig Committee Report, Cmnd 598), published in 1989, in considering the machinery of parole generally, the authors said (para 5.6):

> 'We think that **the basic considerations which affect the grant of parole should be set out in legislation. The central question for the Parole Board should be whether the offender can be safely released on licence having regard to the risk to the public from re-offending**.' (Original emphasis.)

The report does not appear to discuss (in the chapter concerned with life sentence prisoners: Ch 8) the specific function of the Parole Board in relation to such prisoners. It did not consider a scheme such as that subsequently enacted in sec 2 of the 1993 Act (which, as earlier narrated, was a legislative response to *Thynne, Wilson and Gunnell v UK*). In that statute the Board's function is described negatively. By sec 2(5) it 'shall not give a direction [for release] unless ... [it] is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined'. Section 20(2) provided that it was the duty of the Board 'to advise the Secretary of State with respect to any matter referred to it by him which is connected with the early release or recall of prisoners'. Section 20(4) provided that the Secretary of State may by rules make provision with respect to the proceedings of the Board, including provision: '(c) as to what matters may be taken into account by the Board ... in dealing with a case.' Section 20(5) provided:

> 'The Secretary of State may give the Board directions as to the matters to be taken into account by it in discharging its functions under this Part of this Act; 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 offenders of further offences and of securing their rehabilitation.'

Section 20(6) with sch 2 made supplementary provisions with respect to the Board; but these are not of assistance for present purposes.

[33] The Convention Rights (Compliance) (Scotland) Act 2001, which received the royal assent on 5 July 2001 and came into force on 8 October 2001, further amended the 1993 Act. The terms of sec 2 of that Act (as so further amended) have been set out earlier. The effect of the amendment was broadly (1) to bring prisoners mandatorily sentenced to life imprisonment into the scheme of sec 2, (2) to define the criteria appropriate for what was redesigned as 'the punishment part', distinguishing between retribution and deterrence on the one hand and the protection of the public on the other, and (3) to insert, in relation to discretionary life prisoners, the approach to determination of the punishment part specified in the new para (aa).

[34] The 2001 Act made further provision as to the Parole Board but did not expand upon its function in relation to life prisoners.

[35] The Scottish Ministers (now to be read for the Secretary of State) in exercise of their powers under sec 20(4) of the 1993 Act (as further amended) made the Parole Board (Scotland) Rules 2001. Rule 8 provided:

> 'In dealing with a case of a person, the Board may take into account any matter which it considers to be relevant, including, but without prejudice to the foregoing generality, any of the following matters:
> (a) the nature and circumstances of any offence of which that person has been convicted or found guilty by a court;
> (b) the person's conduct since the date of his or her current sentence or sentences;
> (c) the risk of that person committing any offence or causing harm to any other person if he or she were to be released on licence, remain on licence or be re-released on licence as the case may be; and
> (d) what that person intends to do if he or she were to be released on licence, remain on licence or be re-released on licence, as the case may be, and the likelihood of that person fulfilling those intentions.'

These rules were also brought into force on 8 October 2001.

[36] We were advised that the Scottish Ministers have not given to the Board any directions under sec 20(5) of the 1993 Act.

[37] The Board's first annual report after the passing of the 2001 Act (Annual Report 2001) contained the following statement in its chairman's foreword:

> 'At the expiry of [the period set by the court as the punishment part], the case is referred to the Board sitting as a Tribunal. The function of the Board is to satisfy itself regarding whether it is no longer necessary for the protection of the public that the prisoner should be confined. In determining this, the Board looks at the question of the risk which the person would pose if released into the community. If the Board is persuaded that the level of risk is acceptable, it must order Scottish Ministers to release the person, subject to any conditions thought necessary to assist in risk management.'

In its Corporate Plan 2005 the Board in Ch 2 (under the heading 'The Work of the Board') said (para 1):

> 'The Parole Board endeavours to ensure that those prisoners who are no longer regarded as presenting a risk to the public safety during a period of parole may serve the remainder of their sentence in the community under the supervision of a social worker. It is not the responsibility of the Board to consider the questions of punishment and general deterrence.'

In its Annual Report 2008/09 the Board (under the heading 'Life Prisoners') said (p 11):

> '**The Board has the powers to direct the Scottish Ministers to release life prisoners on licence in circumstances where a Tribunal of the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. The Board will only be required to consider the case when the prisoner has served the punishment part of his or her sentence, i.e. the minimum period fixed by the Court that the prisoner must serve in custody before being eligible for release on licence**.' (Original emphasis.)

[38] These public statements on the part of the Board make it clear that it perceives its function to be, and only to be, to assess the risk (if any) which, on the expiry of the punishment part, the life prisoner, if released, would present to the

public. It does not, it seems, perceive its function as being concerned in any respect with the punitive element of the sentence.

[39] Although the statutory provisions are not as explicit as they might have been, the Board's perception of its function is, in my view, consistent with these provisions. The 1993 Act (as amended) makes a clear distinction between the judicial function of the court of specifying, on the basis of the requirements for retribution and deterrence, the punishment part of a life sentence and the quasi-judicial function of the Board in determining whether it is necessary for the protection of the public that a particular life prisoner whose punishment part has expired continue to be confined. These functions are distinct and should not be confused.

Approach in Ansari

[40] In *Ansari v HM Advocate* (to which I shall return) reliance was placed by the Lord Justice-Clerk (Gill) on r 8 of the 2001 Rules to rebut any statutory assumption that the protection of the public represents the sole criterion on which the Parole Board will in due course make any recommendation for release. In my view that rule, properly construed, does not import that the Parole Board should, must or can rely on any wider criteria. Matters (b), (c) and (d) in the rule are clearly related to an assessment of the risk presented by the prisoner. Matter (a), read in context, is also, in my view, relative to risk. In making an assessment of risk for the future it will almost inevitably be necessary for the assessing body to take into account the nature and circumstances of the offence of which the prisoner has been convicted; any assessment of risk would be vitiated if that matter were ignored. The terms of this rule provide no basis, in my view, for the proposition that the Parole Board has a function to perform in respect of retribution or deterrence. In any event, the terms of any rules made under the statute cannot control the clear import of the statutory provisions themselves. There is accordingly no question, in my opinion, of the court in specifying a punishment part having to 'second guess' the Parole Board, whether in respect of the life prisoner in question or in respect of any hypothetical determinate prisoner with whom any comparison falls to be made (Lord Marnoch, para 1). Lord Marnoch correctly identifies the consequences of the majority's approach ('second guessing' of the Parole Board); but that observation also points up the impracticability of such an approach. Once, however, it is recognised that the sentencing court and the Parole Board have quite distinct functions, such impracticability falls away. That is not, however, to say that the statutory provisions are easy to construe or that the answer which they give on a proper construction is necessarily satisfactory.

[41] In argument before us the Advocate-depute did not seek to advance the proposition that the court, when specifying a punishment part, should seek to predict the view of the Parole Board. She was, in my view, right not to do so.

Construction of sec 2(2)(aa)

[42] In the end the question before the court is one of statutory construction. It is legitimate in performing that exercise to take into account the context of the legislation (as finally amended in 2001). Part of that context was the decision in *O'Neill v HM Advocate* where the court, following an approach used by the courts in England in the context of similar but not identical legislation, had adopted a step by step approach to the determination of punishment parts in discretionary life sentences.

[43] The first step is the identification of a determinate sentence which notionally might have been imposed if a life sentence had not been. Such a sentence would be likely, in some cases at least, to have built into it a custodial element for protection of the public. The potential length of that element should not, however, be exaggerated. Determinate sentences are basically retributive in character (see commentary on *Ansari v HM Advocate* (SCCR), p 376A–C) and the notional determinative sentence to be identified should not be extravagantly enlarged in a vain attempt to equiparate it with an indeterminate sentence. Moreover, the notional sentence which might have been imposed might in many cases be an extended sentence — which would give a measure of protection to the public, albeit in the community. This extension period under current legislation may be as long as ten years (Criminal Procedure (Scotland) Act 1995, sec 210A(3)). Although an extended sentence is a composite sentence which includes both a custodial term and an extension period, the prisoner is eligible for consideration for release on licence once he has served one-half of the custodial term.

[44] The second step is to strip out of that notional sentence any element for public protection. That element is expressed in *O'Neill* as 'lacking the special requirement of public protection which has led to the life sentence' (p 962G) and 'leaving out of account the element of protection of the public' (p 963D). The former expression might be construed as stripping out of the hypothetical determinate sentence only that element notionally equivalent to the protection which called for the life sentence but leaving a protective custodial element which might be included in any determinate sentence. But the latter expression is not, in my view, open to such a construction; it envisages stripping out the whole protective element. This is, moreover, the more natural reading of the court's opinion read as a whole. In the preceding paragraph on p 963 the Lord Justice-General had said:

> '[I]n the normal case the court should decide what period of detention would be appropriate, *purely as punishment for the crime*, and should then designate half that period' (emphasis added).

It is also, in my view, the natural reading of step (ii) in sec 2(2)(aa): 'ignoring the period of confinement, if any, which may be necessary for protection of the public' — a repetition of the same words used earlier in the subsection — points, in my view, to the ignoring/stripping out of the whole protective element. The first and second steps identified judicially in *O'Neill* are closely paralleled by sub-paras (i) and (ii) of sec 2(2)(aa) of the 1993 Act (as amended in 2001).

[45] The third step is more problematic. It requires taking into account the provisions for release made, for determinate sentences, in sec 1. It involves an element which is artificial since the hypothetical prisoner would not serve a 'stripped down' proportion of his sentence before being released but the requisite proportion of the whole of his sentence; but as the exercise is itself hypothetical, perhaps a measure of artificiality is unavoidable. The critical phrase is 'the proportion … which a prisoner … would or might serve before being released, whether conditionally or on licence, under section 1'. The disjunctive expression must be read, in my view, disjunctively (see *Ansari*, per Lord McCluskey, para 2) — that is, the prisoner of whom it can be said that he 'would' serve a proportion is the prisoner who would be released unconditionally; he, the short-term prisoner, would be so released having served half of his sentence. Correlatively, the prisoner who 'might' be released on licence is the long-term prisoner; he might be released

halfway through his sentence, though, on the other hand, he might not be and might serve a larger proportion up to two-thirds. But just as in the case of the short-term prisoner the expiry of the half proportion is the earliest date, albeit the mandatory date, when he can be released, so I would be inclined to read 'might' serve before being released as a reference to the earliest possible date when the long-term prisoner might be released, namely, again a half. That would be consistent with *O'Neill*. Against that construction it has to be said that, if Parliament had intended in both cases to refer to the halfway stage, it could have expressed that intention much more simply.

[46] Lord Reed in *Ansari* considered (paras 39–41) exceptional circumstances in which a court actually specifying a punishment part might specify a period longer than one-half (but less than two-thirds). This flexibility is also to be found in *O'Neill* and in the English authorities, especially *R v M (Discretionary Life Sentence)*. But this does not appear to be concerned with the stepped exercise discussed in *O'Neill*, or with the equivalent English approach, but as an aspect of the general or residual discretion which the court has under sec 2(2) as a whole (see *R v M (Discretionary Life Sentence)*, p 491H; *O'Neill*, p 963C).

[47] While I do not find the statutory provisions, and in particular sec 2(2)(aa)(iii) easy, as a matter of language, to construe, it is a legitimate question to ask what Parliament can have had in mind in introducing para (aa) to sec 2(2). One possible answer is that it was endeavouring to put into statutory form what had been decided judicially in *O'Neill*, that judicial decision having itself been heavily influenced by *R v M (Discretionary Life Sentence)* in England. The alternative is that it was trying to do something quite different. I find it impossible to accept that it was taking the latter course. The stepped exercise set out in subsec (2)(aa) is, taken as a whole, so redolent of the exercise envisaged by the court in *O'Neill* that I find it inconceivable that Parliament intended to do anything other than to give statutory effect to what the court envisaged in *O'Neill*. In any event, if the construction which as a matter of language I prefer is not clear, the legislation can readily be described as ambiguous or obscure. In these circumstances resort can legitimately be had to parliamentary material (*Pepper v Hart*).

[48] Paragraph (aa) was introduced into the Convention Rights (Compliance) (Scotland) Bill at a late stage (stage 3) and without significant debate. In moving the amendment (amendment 1) the Deputy First Minister and Minister for Justice (Mr Jim Wallace) said:

> 'The purpose of amendment 1 is to preserve the effect of the decision in the case of O'Neill v HM Advocate ... Amendment 1 was lodged to avoid any doubt that the decision in the O'Neill case will be maintained.
>
> Since that case, when the court sets a designated part of a discretionary life sentence, it has been required to approach that task in a particular way. The court must have regard to the determinate sentence that it would have given the same offender for the same crime if it had not decided to impose a life sentence. Such a determinate sentence might have been imposed both for the purposes of punishment and deterrence and for the protection of the public. The court is therefore required to disregard any part of that notional determinate sentence that it would have imposed for the protection of the public and to have regard specifically to that part of the notional determinate sentence that it would have imposed for the purposes of punishment and deterrence only.
>
> Then the court is required to take into account the period that a prisoner sentenced to a determinate sentence of that duration would have served before becoming eligible for release under the early release provisions that are set out

> in subsections (1) to (3) of section 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993. Under these provisions, a prisoner who is sentenced to fewer than four years is entitled to release when he has served half of his sentence. A prisoner sentenced to four years or more is eligible for release on parole when he has served one half of his sentence, and is entitled to release on licence when he has served two thirds of his sentence. ...
>
> I indicate that the purpose of amendment 1 is to maintain the present position in respect of discretionary life prisoners as determined by the court in the case of O'Neill.'

While this statement cannot be said to be very illuminating in relation to the proper construction of sub-para (iii), it is at least plain that the intention was to give statutory force to the decision of the court in *O'Neill*. It is accordingly legitimate to have regard to the common law as expounded in *O'Neill* for the purpose of construing the statute (*R v Central Criminal Court, ex p Francis and Francis*, per Lord Griffiths, pp 384, 385; see also *R v Mullen*, p 540).

[49] As mentioned earlier there will be cases where, under sub-para (i), the determinate period of imprisonment which the court considers would have been appropriate for the offence, had the court not sentenced the prisoner to an indefinite term, will include a significant period of confinement which may be thought necessary for the protection of the public. In such cases, once the remaining steps in sec 2(2)(aa) are carried out, the resultant prospective punishment part will be shorter, in some cases perhaps significantly shorter, than the period after which the hypothetical equivalent determinate prisoner will first be eligible for consideration for parole. This appears, at least at first sight, anomalous. The indeterminate prisoner is apparently, in this respect, being dealt with more favourably than the determinate prisoner, and vice versa. This anomaly was noticed in *O'Neill* and, in my respectful view, less than satisfactorily dealt with there. Parliament appears nonetheless, and without any material debate on the point, to have adopted the *O'Neill* approach without qualification. This anomaly was not addressed in *Ansari*. It may be that Parliament is content that, in this respect, discretionary life prisoners are dealt with more favourably than determinate prisoners — such that in the case of the former the Parole Board's function may become exercisable at an earlier stage. If it is not, then it would be appropriate that the existing provisions be revisited legislatively.

[50] I have considered whether the existing legislation could be construed so as to resolve that anomaly — including the interpretation of sub-para (i) favoured by Lord Eassie and of sub-para (iii) favoured by Lord Emslie. But I am not persuaded that either of these could be accepted without doing illegitimate violence to the language used and, in the case of Lord Emslie's suggestion, disregarding the plain intention of Parliament.

Ultimate responsibility

[51] The carrying out of the *O'Neill v HM Advocate* comparative exercise might not, however, necessarily be the end of what is required of the sentencer. The ultimate responsibility of the court under sec 2(2) is to specify 'such part of the life sentence as the court considers appropriate to satisfy the requirements for retribution and deterrence (ignoring the period of confinement, if any, which may be necessary for the protection of the public)'. In performing that task it must '[take] into account' various matters specified in the paragraphs which follow. These matters are not themselves determinative, albeit relevant. I was

initially attracted to the notion that this general or residual discretion might be used to correct the identified anomaly — in substance, the view favoured by Lord Osborne. But this would mean that, having gone through the exercise in subsec (2)(aa) and arrived at a figure, the sentencer would have to revisit that exercise by taking into account the circumstance that a determinate prisoner would require to serve one-half of the whole of his sentence before becoming eligible for consideration for parole — and by making an upward adjustment to the figure earlier arrived at. While this might correct the anomaly, it would be an unduly tortuous exercise and appears to negate the plain intention of Parliament that statutory effect be given to *O'Neill* and thus that a proportion of a 'stripped down' determinate sentence ordinarily be the requisite measure. I have accordingly rejected this approach.

Ansari revisited

[52] It is appropriate at this point to say something further about *Ansari v HM Advocate*. For the reasons I have given I am unable to accept the reasoning of the majority in so far as it proceeded, expressly or implicitly, on the premise that the Parole Board, in deciding whether or not to recommend release, would have regard to what was appropriate in terms of punishment. I agree with Lord Reed (para 30) that the fact that, under the Parole Board (Scotland) Rules, the Board is entitled to take account of the nature of the relevant offence does not entail that its functions involve considerations of retribution or deterrence. I also agree with him that, ordinarily, the exercise required by sec 2(2)(aa)(iii) will involve taking half the figure brought out by that exercise up to that point, the seriousness of the offence having already been taken into account under subsec (2)(a) and (aa)(i).

Conclusion

[53] I have accordingly come, with regret, to the view that, however unsatisfactory it may appear as a matter of comparative justice, Parliament has given statutory effect to an arrangement under which an indeterminate prisoner will, or at least may, become first eligible for consideration for parole at an earlier stage in his sentence than an equivalent determinate prisoner. If this situation is to be remedied, it is for Parliament to remedy it. The divisions of opinion expressed judicially in these appeals would suggest that a clear, well-considered legislative solution is called for. Meantime, sentencers should, in my view, adopt the approach to these provisions preferred by Lord Reed in *Ansari v HM Advocate*. These appeals will now be remitted to a court of three judges for disposal in light of the views expressed in the judgment of this court and of other relevant considerations.

LORD OSBORNE— [54] I am grateful to your Lordship in the chair for your description of the circumstances in which these cases have come before this court and for your narrative of the statutory provisions which require to be considered. Section 2(3) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (as amended) ('the 1993 Act') provides for the making of an order such as is described in sec 2(2) of the Act, which is, of course, the crucial provision that lies at the heart of the issues which have arisen in these cases. In my opinion, it is necessary to take into account, among other things, the form of subsec (2) in reaching a view as to how it was intended by Parliament to operate.

[55] The opening words of the subsection describe the order which the court must make, being 'an order that subsections (4) and (6) below shall apply to the life prisoner as soon as he has served such part of his sentence (''the punishment part'') as is specified in the order, being such part as the court considers appropriate to satisfy the requirements for retribution and deterrence (ignoring the period of confinement, if any, which may be necessary for the protection of the public), taking into account' the series of factors thereafter specified. At this point, I consider that it would be appropriate to highlight the words 'taking into account', where they occur in that context. In this connection, I would echo what is said by Lord Emslie in para 93 of his opinion under reference to the observations of Lord Hewart CJ in *Metropolitan Water Board v Assessment Committee of the Metropolitan Borough of St Marylebone* (p 99). Lord Hewart points out that the phrase may denote the necessity to include figures in a mathematical calculation, whereas, in other circumstances, the requirement to take something into account would merely be to pay attention to that matter in the course of an intellectual process. I agree with the view expressed by Lord Emslie to the effect that, in the context of sec 2(2) of the 1993 Act as it stood prior to 2001, the listed factors would have fallen to be taken into account in the latter rather than the former sense. I also agree with the view that Lord Emslie expresses that it is hard to see any reason why the new para (aa) should be treated differently from any of the other listed factors.

[56] In subsec (2), following the words 'taken into account', there are, of course, to be found the four paras (a), (aa), (b) and (c). It is plain that the factors mentioned in paras (b) and (c), having regard to their nature, may not apply in all cases. One, or other, or both of them may apply, depending on the circumstances of the particular individual who is being sentenced. However, on the contrary, subsec (2) requires that, in the making of the order required by subsec (3) to be made and defined in subsec (2), where the court is dealing with a person such as is specified in sec 2(1)(a) or (ab), factors (a) and (aa) must be taken into account. In my view that is a quite inescapable consequence of the form of the subsection. It respectfully appears to me that that feature of the subsection has been largely ignored.

[57] One may pass over the terms of para (a), only making the comment that its terms are quite clear. However, turning to para (aa) the same comment cannot be made. Further, its operation is not without difficulty. Paragraph (aa)(i) requires the reaching of a determination of an hypothetical period of imprisonment; para (aa)(ii) requires the modification of the hypothetical period of imprisonment developed under sub-para (i) by the elimination from it of 'the period of confinement, if any, which may be necessary for the protection of the public', an extension of the hypothetical exercise required under sub-para (i). Paragraph (aa)(iii) requires the identification of a proportion of the period developed under sub-para (ii), 'which a prisoner sentenced to it would or might serve before being released, whether unconditionally or on licence, under section 1 of this Act.' Your Lordship in the chair has indicated how these difficult provisions should be approached and with your view I would respectfully agree. In particular, I agree with the approach desiderated in relation to para (aa)(iii) and with the view expressed in relation to the respective functions of the court and of the Parole Board.

[58] When the difficult exercise required by the terms of para (aa) has been undertaken, it is necessary to appreciate the significance of the product of that exercise. In my opinion, it is an inevitable consequence of the form and wording of sec 2(2) of the 1993 Act, as amended, that the undertaking of the exercise required by para (aa) is not an end in itself and, in particular, is not the end of the whole

discretionary exercise required by the subsection. What I consider that exercise necessarily involves is the use of the product of the exercise under para (aa) in the making of the final determination under sec 2(2). That means that factors (a) and, where appropriate, (b) and (c) must also be taken into account. It appears to me therefore that the order which is finally made under the provision may involve the specification of a period as the punishment part which is greater or lesser than the period that has emerged from the exercise under para (aa), depending upon the circumstances of the individual case. The period might be greater if factors (a) or (b) pointed in that direction; and lesser, if for example factor (c) were to operate. As I would read the observations of Lord Reed in his opinion in *Ansari v HM Advocate* (para 36), he recognised that possibility.

[59] In my view, if Parliament had intended to enact that the product of the exercise desiderated in subsec (2)(aa) was to be a definitive measure of the punishment part to be identified in the case of discretionary life sentences or lifelong restriction orders, it would have been simple to achieve that end by enacting a free-standing provision, including the terms of para (aa) which was to take effect in relation to such sentences. However, indisputably that has not been done. Parliament has simply enacted that the product of the para (aa) exercise is to be a factor in the broader discretionary exercise required by subsec (2).

[60] In the discussion before us consideration was given to the observations of the Deputy First Minister and Minister for Justice, who moved the amendment (amendment 1) introduced into the Convention Rights (Compliance) (Scotland) Bill at a late stage. That amendment introduced para (aa). While there may be some doubt as to the legitimacy of considering the Minister's observations, having regard to the terms of para (aa), I tend to the view that in the circumstances here it is legitimate to take into account the Minister's remarks. Your Lordship in the chair has quoted those remarks in full in para 48 of your opinion. I would only say this about the significance of the Minister's pronouncements, that they related only to para (aa) itself and not to the existing statutory provision into which that paragraph was being introduced. Accordingly, in my view, the Minister's observations have no bearing upon the subject-matter of the opinion which I am expressing, that is to say the overall effect of sec 2(2) of the 1993 Act as amended.

[61] It might be objected to the view that I am expressing that, if it were correct, it would mean that the exercise to be undertaken under sec 2(2) would involve what has been called 'double counting'. By that is meant, as I understand it, that the seriousness of the offence committed by the subject of the sentencing process would require to be taken into account under para (a), but would also require to be taken into account under sub-para (i), in the selection of the period of imprisonment which the court might consider appropriate for the offence, had the court not decided to sentence the prisoner to imprisonment for life, or, as the case might be, not made an order for lifelong restriction. I immediately accept that the view that I am expressing would involve that approach, whether one chooses to use the pejorative expression 'double counting' or not. I would not. As I would see it, the undertaking of 'double counting' would be objectionable in the context of a statistical, economic, or accounting exercise, but would not be in the present context. The taking into account of the seriousness of the offence involved in the two different ways that I have indicated, it seems to me, is no more than the performance of the exercise which Parliament has enacted should be performed. In any event, in my view, the use of the expression 'double counting' in this context is wholly

inappropriate, in the sense that what is being undertaken is a discretionary exercise of judgment, not a mathematical one.

[62] In para 51 of the opinion of your Lordship in the chair, your Lordship recognises that the ultimate responsibility of the court under sec 2(2) is to specify 'such part of the life sentence as the court considers appropriate to satisfy the requirements for retribution and deterrence (ignoring the period of confinement, if any, which may be necessary for the protection of the public)'. In performing that task the court requires to 'take into account' the various elements set forth in sec 2(2). However, your Lordship goes on to say that to follow the approach which I have desiderated 'would mean that, having gone through the exercise in subsec (2)(aa) and arrived at a figure, the sentencer would have to revisit that exercise by taking into account' other matters. I would respectfully disagree with that view. The exercise required by subsec (2)(aa) is a very specific one determined by the terms of para (aa); in then undertaking the final exercise required by sec 2(2), the sentencer would not be 'revisiting' that undertaken under para (aa) but undertaking a different one using the product of the first. Your Lordship has expressed the view that that would be 'an unduly tortuous exercise and appears to negative the plain intention of Parliament that statutory effect be given to *O'Neill v HM Advocate*'. I must respectfully disagree. Parliament has chosen to express its intention in sec 2(2) as it stands. I am of the view that effect has to be given to the plain meaning of the words and form of that subsection. I regret therefore that I cannot agree with your Lordship's overall conclusion.

LORD EASSIE— [63] I am in agreement with your Lordship in the chair that, given the state of the law at the time of the enactment of the Convention Rights (Compliance) (Scotland) Act 2001 as set out in *O'Neill v HM Advocate*, the stepped nature of the exercise stipulated in para (aa) of sec 2(2) points in itself to the legislative intent having been that of putting *O'Neill* into statutory form. However in so far as the language deployed in the text of that subsection is on any view unclear, I also agree with your Lordship that one may legitimately look to the parliamentary debates; and on doing so it is of course plain from the ministerial statements that the intention of the minister in moving the amendment which placed para (aa) into the subsection was indeed to put *O'Neill* into statutory form.

[64] That said, there are aspects of the terms of the opinion of the court in *O'Neill* which to my mind present difficulties, which I shall endeavour to explain.

[65] I take as a starting point the decision of the European Court of Human Rights ('ECtHR') in *Thynne, Wilson and Gunnell v UK*, which, while concerned with the discretionary life sentence in England and Wales, was in all material respects equally applicable to the discretionary life sentence in Scotland. The ECtHR noted that the nature of such a sentence was that it went beyond the usual punishment for the offence to include what was described as the 'security element'. While various linguistic phraseology may be deployed, it seems to me clear that what was thus recognised was that a discretionary life sentence is not imposed because it would be an appropriate sentence for the particular crime committed, due regard being had to its seriousness and the accused's previous offending, but is imposed as a measure of preventive detention in light of the identification of some special risk, flowing possibly from some disordered aspect or aspects of the accused's personality which, taken with his criminal history, makes it very likely that he may commit grave offences causing serious public harm in the future. Such preventive detention naturally raises important human rights issues; and hence the decision of the

ECtHR that the continued preventive detention should be open to review by a judicial body from time to time. In the event, the Parole Boards were constituted with that judicial function of reviewing from time to time the continuing need to detain the person concerned for preventive purposes. The more recent statutory provisions in Scotland for orders for lifelong restriction similarly recognise the need for identification of specific risk factors before such an order for preventive detention may be imposed. As I noted them, counsel for the appellants and the Advocate-depute did not question that the selection of a lifetime custodial disposal involved such a significant measure of preventive detention.

[66] There thus arises a need to set a temporal, jurisdictional boundary at which the Parole Board's function of reviewing the continuing necessity of detention for preventive reasons may commence. In the case of prisoners subject to determinate sentences, that temporal jurisdictional boundary is fixed by the provisions of the 1993 Act; thus the Parole Board may, in the case of long-term sentences, allow release after serving one-half of the determinate sentence prison term. As I understood the submissions on both sides, it was not disputed that the intention underlying the legislation at issue in these appeals was to achieve broad parity as respects the point at which the Parole Board would assume jurisdiction for considering the prisoner's possible release in both the case of the prisoner subject to an hypothetical determinate sentence for the offence in question and the prisoner subject to an order permitting lifelong confinement.

[67] At this point I would comment that, in my view, the true issue in respect of these appeals is that jurisdictional one. The use of the term 'punishment part' in the ultimately amended legislation is, I think, somewhat misleading in this context and apt to lead to misunderstanding by the public of what the particular sentencing exercise truly involves.

[68] Reaching that broad parity of position would in principle be achieved if, in any given case, the notional determinate sentence for comparative purposes were assessed on the hypothesis of ignoring the particular factors which dictate the passing of a discretionary life sentence or order for lifelong restriction instead of a determinate custodial sentence. On my reading of the judgment of the Court of Appeal in *R v M (Discretionary Life Sentence)*, subsequently known as *R v Marklew and Lambert*, that is indeed what the court was saying in the first paragraph of the part of the judgment quoted by your Lordship in the chair and which, for convenience, I set out again (p 491):

> 'In the case of a young person who is to be sentenced to a period of detention for life under the provisions of section 53(2) [of the Children and Young Persons Act 1933] or an adult who is to be sentenced to a discretionary life sentence, the general approach is to decide first the determinate part of the sentence that the judge would have imposed if the need to protect the public and the potential danger of the offender had not required him to pass a life sentence. It is the imposition of the life sentence that protects the public and is necessitated by the risk that the defendant poses. That element is therefore not to be reflected in the determinate part of the sentence that the court would have imposed; the determinate part is therefore that part that would have been necessary to reflect punishment, retribution, and the need for deterrence. It is we consider important that the judge should, when passing sentence, make clear to the defendant what that determinate period would have been.'

While I recognise of course that the exercise of identifying and excluding those factors may not be an easy one to perform, it is in my view implicit in the selection of

a lifelong disposal that the sentencer should have identified factors justifying that disposal, rather than the usual disposal by selection of a determinate period of detention or imprisonment. So those factors, even if not easily capable of being weighed with precision, ought generally to be in the mind of the sentencer.

[69] Had the court in *O'Neill* simply followed that approach I would have no difficulty with that. I do however respectfully have reservations about the appropriateness of the further step which appears to be indicated by the Lord Justice-General (Rodger) in delivering the opinion of the court, namely that from within the hypothetical determinate sentence reached on the foregoing basis there should be recognised, and discounted, some discrete element 'for the protection of the public'. In normal course, in passing a determinate sentence, a judge essentially takes account of the nature and gravity of the offence (or offences) for which he, or she, has to pass sentence and of the personal circumstances and criminal history of the accused. He, or she, assesses those matters against his or her knowledge of the practice of the courts in sentencing in cases in the relevant domain of the criminal law. The passing of a determinate sentence does not involve the sentencer in any fixing or identification of a discrete period of preventive detention.

[70] In my view the use of the phrase 'protection of the public' should be treated with some care in this area. The criminal justice system as a whole is intended to serve the dual, principal aims of protecting the public against criminal acts and of protecting the citizen against wrongful, arbitrary and unjustified measures by the state. Most, if not all, sentences passed have the primary function of protecting the public. In particular, the notion of deterrence, whether of the individual convicted or of persons more generally, is inevitably directed to the protection of the public. Plainly, in the case of a convicted person who has a considerable record of recidivism the sentencing judge may appropriately impose a hefty sentence, which can of course be explained and justified by general references to 'protection of the public'; but that protection may readily be attributed to further personal deterrence of the recidivist and of those tempted to follow such a course of criminal activity; or simply to the wider notion of punishment.

[71] But, as I have already mentioned, in general once the sentencer has selected within the range of disposals appropriate for the particular offence a sentence appropriate to the offender, regard being had to the previous criminal history and other personal circumstances, he would not then go on to add a period intended for preventive detention (which might take the sentence outwith the recognised range). There are of course some legislative provisions — apart from a liability to lifetime confinement — whereby a sentencer is enabled to take account of additional risk factors. For example, the sentencer may, if the necessary conditions are satisfied, impose an extended sentence; but in the event of recall on breach of licence in the extension period, the prisoner's position is then subject to the jurisdiction of the Parole Board and its assessment of risk to the public.

[72] In these circumstances, I confess that I have some difficulty in seeing that the 'anomaly' floated by the Advocate-depute in *O'Neill* and which appears to have been taken on board by the court in its opinion in that case was truly an anomaly. It was canvassed, I think, upon a possible misunderstanding of what the Court of Appeal was saying in *R v M (Discretionary Life Sentence)* in the passage to which I have just referred; and, in that context, the notion of 'protection of the public', which, as I have endeavoured to explain, is not confined to some discrete element of preventive detention but is inherent in much, if not everything, that the imposition of a determinate custodial sentence involves. As your Lordship in the chair notes,

the opinion delivered by the Lord Justice-General in *O'Neill* is, in some respects not entirely clear; and I would observe that in the actual disposal of the appeal the court did not in fact go through the two-stage stripping out of risk which preceding parts of the opinion appear to desiderate, though this may be explained by the reference to the practical consideration of delay in Parole Board proceedings at that time.

[73] The 'anomaly' was deployed in the argument before us to present some extreme examples which it was said illustrated an unjustified bias in favour of the prisoner subject to possible lifelong confinement, were the *O'Neill* approach to be followed. Thus we were asked to postulate situations such as a determinate sentence of 15 years, whereof six years was to be attributed to a discrete element of 'protection of the public'. The necessary arithmetic to take account of the early release provisions for those subject to a determinate sentence may well produce an apparently unacceptable result. But in my view it is the hypothesis upon which the arithmetic proceeds which is questionable. A determinate sentence is essentially not concerned with preventive detention, and even in so far as it may be legitimate to include a discrete element of preventive detention, it is, in my view, hard to see the postulated example arising in practice.

[74] All that said, one is ultimately confronted with an issue of the proper interpretation of the legislative text as ultimately amended by the 2001 Act. The infelicitous nature of the drafting of that text is not disputed.

[75] On a general level it is to be noted, in my view, that the terms of para (aa) of sec 2(2) do not fit logically or coherently with the terms of the subsection as it was before the paragraph was inserted into the subsection by the amendment earlier mentioned in connexion with the parliamentary proceedings. The subsection was concerned with life prisoners generally. The amendment in the shape of para (aa) is specifically directed to discretionary life prisoners. It is inserted between para (a) (which refers to the seriousness of the offence, and any other offence of which the prisoner is convicted) and para (b) (which relates to the previous convictions of the person convicted). But it is impossible to conceive that a sentencing judge could ever go through the exercises dictated by para (aa) — particularly the fixing of a determinate sentence in terms of sub-para (i) of para (aa) — without having taken account of both of the matters in paras (a) and (b), namely the seriousness of the offence or offences and the criminal antecedents of the offender. So, for my part, I have difficulty in understanding how it can be maintained that generally, having properly performed the exercises required under para (aa) reliance can then be put by a sentencer on those paragraphs — *scilicet* paras (a) and (b) — to produce a result materially different from that which he reached on the conduct of those exercises. To do so must in effect be a confession that he has gone wrong in those exercises. I acknowledge that resort to the more general power to fix the appropriate period may be necessary to meet the particular exceptional cases — essentially flowing from procedural complications — envisaged by Lord Reed in his dissenting opinion in *Ansari v HM Advocate*. But that is to deal with such exceptional, procedural cases and does not justify a general, final, override of what results from the proper application of para (aa).

[76] I turn now more particularly to the steps in para (aa).

[77] The first step stipulated by the paragraph requires the court to consider 'the period of imprisonment, *if any*, which the court considers would have been appropriate for the offence had the court not sentenced the prisoner to life for it' (emphasis added). In a situation in which the judge has necessarily concluded, for reasons which he or she will have identified, that a lifelong, preventive custodial

sentence is called for, the notion that under step (i) of para (aa) the judge should then select a determinative sentence without discounting the particular factors which compel him to the extreme measure of a life sentence, seems to me to be one which presents difficulty; indeed it invites the sentencing judge to undermine his own decision. In my view, step (i) in para (aa) should be interpreted as directed to the need to decide a determinate sentence discounting the factors dictating preventive detention, as indicated in the passage from *R v M (Discretionary Life Sentence)* to which I have already referred. The words 'if any', emphasised above, appear to me to offer some support for that interpretation. If it had been intended that the sentencer envisage a determinate sentence taking account of all the factors dictating lifelong custody, it is hard to see any need for recognition in the legislative text of the possibility of the determinate sentence being one which was non-custodial. While it may be only in rare cases that discounting those factors would produce a non-custodial result, logic would point to its being right in such a case that the jurisdictional boundary be set so as to give competence from the outset to the Parole Board, as the judicial body intended, and best equipped, to monitor and assess whether the risk factors justifying preventive detention continue to exist.

[78] Taking that view of step (i), I turn to the next of the three steps in para (aa). I recognise that it may be said that having gone through the exercise in step (i) in the manner which I favour, step (ii) becomes redundant. However, conversely, if step (i) does not involve the discounting of the factors to which I have referred, and the carrying out of that discounting exercise is postponed to step (ii), it is difficult to see that carrying out step (i) serves utility, either practically or in terms of construction of the legislative text.

[79] But the view to which I have come is that some content can be given to the provisions of step (ii) in the sense that the sentencing judge, while having discounted in step (i) to the best of his or her ability the risk factors dictating a preventive lifelong disposal, may nonetheless consider that there remains some particular element of that discounted, hypothetical, determinate sentence which ought to be taken into account as being discretely preventive in its detention consequences. It may be that such was what the court in *O'Neill* had in mind. Were the sentencing judge to have appropriately discounted at step (i) it would, I think be unusual that any significant discount would require to be made at step (ii). Thus normally the answer to the question implicitly posed at step (i) will not differ from that to be given at step (ii); but there may be cases in which, in order to achieve the wider intention of ensuring broad parity in the jurisdictional boundaries, the sentencer will give a different answer to that implicit question at stage (ii).

[80] I am conscious that in textual terms it is only in step (ii) that the text adverts to the phrase in parentheses 'ignoring the period of confinement, *if any*, which may be necessary for the protection of the public' (emphasis added) used earlier in the subsection and that the inclusion of this parenthetical phrase at step (ii) might indicate that it is only at that stage that any 'stripping out' may occur. However, the deployment of (my emphasised) 'if any' indicates that the legislative text envisages that there may be no such stripping out at step (ii). One can, I think, leave aside the, frankly inconceivable, case of a crime less than murder attracting an entirely punitive lifelong sentence imposed in circumstances devoid of any element of risk of recidivism. That done, given that the whole of para (aa) only applies to the discretionary life prisoner or someone subject to an order for life long restriction, for both of whom *ex hypothesi* preventive detention has been judged necessary for the

protection of the public and for whom there must inevitably be confinement necessary for the protection of the public, the 'if any' is, in my view, arguably consistent with the primary discounting of the risk to the public having occurred at stage (i) and stage (ii) being concerned with the case in which the sentencer may yet consider, having gone through the discounting process of the factors dictating lifelong preventive detention at stage (i), the hypothetical determinate sentence would yet encompass a discrete element of preventive detention of which account should be taken in considering the point in time at which the prisoner's case should come within the jurisdiction of the Parole Board.

[81] With respect to your Lordship in the chair, I do not consider that this approach does violence to the language of the legislative text. And at the end of the day, in many, if not most, cases that approach will produce the same result as the approach which I understand your Lordship to favour.

[82] As to step (iii), I agree with your Lordship in the chair that it should be construed in the manner advanced by Lord McCluskey in his opinion in *Ansari*. While it may be that the draftsman might have cut matters short by saying that the sentence under step (ii) should be halved, to reflect that it would be treated in practical terms as a 'nett' sentence, with no early release provisions, as opposed to any determinate sentence which would be a 'gross' sentence and subject to those provisions, I am satisfied that, while no doubt circumlocutory, the provisions of step (iii) have that, intended, effect. Since, as I have already stated, I consider the issue properly to be a jurisdictional one, it seems to me to be in principle wrong that in setting a jurisdictional boundary the court should anticipate the exercise of the other judicial body of its jurisdiction and alter or justify the setting of that boundary accordingly. Put another way, and employing Lord Marnoch's phrase, the sentencer is not called upon to 'second guess' the view which the Parole Board might take in the future in the particular case before him.

[83] It follows from what I have said that I agree that — Lord McCluskey's construction of sub-para (iii) of para (aa) apart — the majority approach in *Ansari* should be overruled. I do not see what I have said in this opinion to be inconsistent with the views expressed by Lord Reed in his dissenting opinion in *Ansari*, with which opinion I therefore agree.

LORD CLARKE— [84] Subject to the following comments, I agree with what is said in the opinion of your Lordship in the chair and, in particular, how the question which has been raised in these appeals should be answered.

[85] That question raised is one of statutory construction. It is, however, a question which arises because of the interplay of the statutory scheme for early release of prisoners and the sentencing role of judges. The early release provisions are not judge-made law. They are the product of the legislative approach to penal policy developed over the years and, indeed, altered from time to time by the legislature. Those provisions may, no doubt, be justified on a number of distinct grounds, such as availability of prison estate. To encourage good behaviour in prison, and to cater for genuine reform, the provisions do cause difficulty for the public in that their operation will often result in a prisoner serving a sentence significantly less than the sentencing judge appeared to consider appropriate in sentencing the prisoner. But difficulties, or anomalies, which the statutory scheme might appear to create are matters to be addressed, if they are to be addressed, by the legislature and not by the courts, particularly not by judges indulging in an interpretation of the statutory scheme which is at odds with plain parliamentary intent.

[86] In our system of criminal justice, the sentencing judge, in imposing a custodial sentence, does so to reflect the requirements of punishment, retribution, the need for deterrence and the need to protect the public or the prisoner from himself. Once he has passed the appropriate sentence, the sentencing judge's role in assessing the need to protect the public, and for how long that must endure, is over. Any need to protect the public, or the prisoner from himself, in our system is, however, something that requires to be subject to review. The constitutional machinery provided for the review of such matters rests not in the courts, but is carried out by the Parole Board in its role under the early release legislation. For the reasons fully set out by your Lordship in the chair in his opinion, in exercising its functions, and reaching its decisions, the Parole Board must not allow those decisions to be influenced by considerations of punishment and retribution. To blur the distinction, in that respect, between the functions of the courts, on the one hand, and the Parole Board, on the other, would, in my judgment, involve a serious failure to observe the distinctive constitutional role of each body and any such failure will result in a significant displacement of their proper and respective roles and functions. It follows that I, along with your Lordship in the chair must, with due respect, disagree with what the Lord Justice-Clerk and Lord Marnoch had to say about predicting the views of the Parole Board in *Ansari v HM Advocate*.

[87] Sharing entirely the views of your Lordship in the chair on this matter, there is no doubt, in my view, that the existing legislative provisions, with which these appeals are concerned, were intended to put into statutory form (without material modification or qualification) the decision in *O'Neill v HM Advocate*. As explained in *O'Neill*, the effect of fixing the punishment part of the life sentence is simply to allow the Parole Board to exercise its statutory powers and duties under the relevant legislation in relation to the prisoner in question. The court, in fixing that punishment part, does not have its assessment of the appropriate part affected by considerations of safety to the public or the prisoner himself. That has been addressed by the sentencing judge in choosing a discretionary life sentence, in the first place, and is not to be revisited by the court. Any revisiting is for the Parole Board. As Lord Justice-General Rodger put matters in *O'Neill* (p 962L):

> 'In our view, however, the appropriate interpretation should reflect both the terms of the statute and the purpose for which the system is introduced. As we have stressed, that purpose is to determine the punitive period which the prisoner must serve. After that period is over, the prisoner's detention on the ground of protection of the public must be reviewed by an independent body. It follows that the designated part should be concerned with matters of punishment, rather than with the protection of the public'.

That passage, in my judgement, encapsulates the purpose of the legislative provisions with which this court is concerned and those provisions ought to be construed in a way that is compatible with it. Lord Justice-General Rodger had, just before making that statement, acknowledged, fairly and squarely the possible apparent anomaly that this approach to matters might create and which has clearly been of concern to members of this court in the course of these appeals, when he said (p 962K):

> 'On that ... approach it would be possible, in the theory at least, for the Parole Board to recommend that a designated life sentence prisoner should be released earlier than a prisoner who had been given the determinate sentence for the same crime'.

It cannot, in my opinion, be seriously argued that the legislature had not appreciated this possible anomaly in passing the legislation in the terms it did, when the Lord Justice-General had spelt it out so clearly in the judgment which the legislature was seeking to enshrine in the provisions in question. The legislature must be held to have intended to live with that apparent anomaly. As to the actual application of sec 2(2), nothing was said in argument before this court which, in my view, in any material way, demonstrated that Lord Reed's reasoning and conclusions in *Ansari* were anything other than unimpeachable. His Lordship, it should be noted, recognised at para 36 of his opinion, the width of the discretion conferred by sec 2(2). He, therefore, acknowledged that there could be situations where a period longer than either one-half or two-thirds of the notional sentence may appropriately be chosen by the sentencing judge in a proper exercise of his duties under sec 2(2). What his Lordship was ruling out, however, was any adjustment at that stage of the exercise simply to take into account the gravity of the offence, since the gravity of the offence should have been addressed, for once and for all, in fixing the components, initially, of the total sentence. I am of the opinion that the principled approach argued for by Lord Reed is correct. While the one-half or two-thirds proportion may fall to be adjusted in particular circumstances, it may not be adjusted simply because it is thought the gravity of the offence required the prolongation of the period that the prisoner must remain in prison before the early release provisions should apply, for to do so would be to involve the trespass by the sentencing judge into territory which belongs to the Parole Board and which is defined by statute.

[88] I would add this. A good deal of the discomfort apparently felt by some about the consequences of the approach explained by Lord Reed arises from the operation of the early release provisions and the existing statutory regime in that respect. As I said at the outset, it is not, however, for the court to seek, by distorting the legislation in question, to diminish the effects of that regime as enacted in any particular respect. In a democratic society, like ours, penal policy, which may require to be varied from time to time, which is often highly controversial and which may be changed very significantly over time, is a matter for the legislature and not for judges. If there be anomalies arising from penal policy legislation which cause concern it is for the legislature to address any such concerns through the democratic process. The competing approaches to the construction of the relevant statutory provision which emerged in discussion, and debate, in these appeals all, in my opinion, save for the approach which I favour, have suffered from straining the language of those provisions beyond what was legitimate, in an attempt to dilute the outcome of the decision in *O'Neill* which had been expressly and unequivocally adopted by the legislature.

[89] Lastly, when one is, by definition, dealing with two different classes of prisoners, the force of the perceived anomaly is somewhat reduced as it is also by reason of the particular disadvantaged situation which the 'lifer' faces, as opposed to the situation of the person serving a determinate sentence, as described by Simon Brown LJ (as he then was) in *R v Secretary of State for the Home Department, ex p Furber*, in the passage cited by your Lordship in the chair.

LORD EMSLIE—

Opening considerations

[90] More than once in the course of the hearing of these appeals, senior counsel for the appellants accepted that the 'punitive' element of a discretionary life

disposal, namely that part supposedly reflecting nothing but retribution and deterrence, ought to be substantially equivalent to the 'punitive' element of a determinate sentence notionally imposed on the same person for exactly the same offence. Translated into the terms of the 1993 Act, as currently amended, the ultimate end product of sec 2(2) for discretionary life prisoners — that is, the so-called 'punishment part' — ought broadly to correspond to the identically-worded comparative factor for determinate sentence prisoners in sub-para (aa)(ii) of that subsection.

[91] To my mind, the concession thus made was and is incontrovertible. And, because the comparison begins and ends with the assessed 'punitive' element of each of the two different sentencing disposals, it has the merit of arising at a stage when the 'public risk' element of an overall determinate or lifetime sentence, however that might be characterised, has already been 'stripped out' in any assessment process. The concession merely compares two assessed results and finds them to be the same. As Lord Reed observed in *Ansari v HM Advocate* (para 67):

> '[A]s far as the requirements of retribution and deterrence are concerned, the discretionary life prisoner is directly comparable to a determinate sentence prisoner. In principle, therefore, the sentence which would have been appropriate to satisfy the requirements of retribution and deterrence can be determined, in the case of a discretionary life prisoner, in the same way that it would be in the case of a determinate sentence prisoner.'

[92] If, therefore, sub-para (aa)(ii) of the subsection already corresponds to the desired end product for discretionary life disposal purposes, what possible reason could there be for halving it (or indeed for applying any other fraction to it) pursuant to sub-para (aa)(iii)? On what basis could a calculation of half x (or any other fraction of x) be thought useful, or *a fortiori* definitive, where the search is for the equivalent of x and x itself has already been identified? Yet that is the approach which certain English rulings appeared to contemplate in the 1990s, causing the 'punitive' part of a lifetime disposal to end up as a mere fraction of the comparable 'part' or 'period' of a notional determinate sentence for the very same offence. Regrettably, as a result of the decision of this court in *O'Neill v HM Advocate*, the legacy of that approach remains with us in Scotland to the present day.

Structure of sec 2(2) of the 1993 Act

[93] Before turning to consider the particular difficulties which arise in this case, I would wish to emphasise one clear positive feature of the current legislative regime. The saving grace (if I may put it that way) of the amendment to the 1993 Act in 2001 is that it placed the new para (aa) in the middle of a list of factors to be 'taken into account' by the court. Prior to the introduction of that paragraph, none of the listed factors could be thought to constitute any part of a mathematical calculation. Rather, they were merely considerations which the court must have in mind when carrying through the sentencing process. In *Metropolitan Water Board v Assessment Committee of the Metropolitan Borough of St Marylebone* (p 99) Lord Hewart CJ discussed the different meanings which might be given to the phrase 'taken into account'. Depending on the context, the phrase might denote the necessity to include figures in a mathematical calculation, whereas in other circumstances the requirement would merely be to pay attention to a matter in the course of an intellectual process. It is to my mind self-evident that, in sec 2(2) as it stood prior to

2001, the listed factors would have fallen to be 'taken into account' in the latter, rather than the former, sense, and if that is right it is hard to see any reason why the new para (aa) should be treated any differently.

[94] In the result, for the reasons persuasively set out by Lord Osborne in his opinion (and as Lord McCluskey also recognised in *Ansari v HM Advocate*, para 92), the three associated factors embodied in that new paragraph do not, and cannot, represent a mathematical calculation definitive of the 'punishment part' to be imposed in a given case. *Quantum valeat*, para (aa) simply adds to the list of matters to which the court must have regard (and give such weight as may seem appropriate) in approaching the relevant assessment, and on that basis the legislation seems to me to preserve the overall discretion which is essential if the goals of justice, and comparative justice, are to be achieved. In particular, sentencing judges will be entitled to consider the 'mandatory' factors listed in paras (a), (aa), (b) and (c) in any preferred order or combination, and indeed to have regard to what Lord Browne-Wilkinson termed 'all other normal sentencing considerations' (*cf R v Secretary of State for the Home Department, ex p Venables and Thompson*, p 502) which ought not to be ignored in the circumstances of a given case. Conversely, they will be in a position to avoid the unwelcome predicament of feeling obliged by statute to impose a 'punishment part' so short that the relevant life prisoner ends up eligible to be considered for parole years earlier than if he had received a determinate sentence instead.

[95] It is not at all surprising that in his opinion in *Ansari* (para 41) the Lord Justice-Clerk described consequences of the latter predicament as an 'affront to justice', and in so far as the majority of your Lordships appear to take a different view on these important matters then I must, like Lord Osborne, respectfully disagree. It is surely necessary, in judging the meaning and effect of sec 2(2) as amended in 2001, to recognise that the new para (aa) does not stand alone; that paras (a), (b) and (c) are *ex facie* of at least equal significance; and that all four paragraphs are merely to be 'taken into account' by the court when fixing the 'punishment part' on a discretionary life sentence. By declining to give sufficient, or any, weight to these considerations, I fear that the majority of your Lordships are conferring decisive status on para (aa) in a manner for which the statute does not provide, and thereby embracing the worst of the legacy to which previous reference has been made. As with *Du Plooy* discounts, it seems inappropriate that sentencing judges should be obliged to start with, and then work back from, a speculative hypothesis which has not happened. On Lord Osborne's approach to the structure of sec 2(2) it might, I suppose, be easier to live with an implausible and unsatisfactory construction of para (aa), taken in isolation, but if the hypothetical comparative exercise embodied in that paragraph is to be treated as *prima facie* decisive then it becomes all the more important, in my respectful opinion, to search for a construction which avoids, or at least goes some way towards mitigating, the consequences which so concerned the Lord Justice-Clerk and the concurring judges in *Ansari*.

Background to para (aa)

[96] Returning to the point at which comparative justice for life sentence prisoners became an issue in the 1990s, following the decision of the European Court of Human Rights in *Thynne, Wilson and Gunnell v UK*, it is unfortunate that certain decisions south of the border may have appeared to endorse an artificial fragmentation of the notional determinate sentence with which a legitimate comparison might

fall to be made. Some of the discussion in such cases clearly centred on the period which a determinate sentence prisoner would or might actually serve in custody before being eligible for release on parole. Elsewhere, however, the court appeared to focus on the purely punitive 'part' or 'period' of a determinate sentence, taken in isolation, and it was then a halving of that 'part' or 'period' which was *prima facie* deemed to bring out the appropriate 'tariff' for life sentence purposes.

[97] When this court subsequently came to consider the equivalent Scottish position in *O'Neill v HM Advocate*, there was (as noted by your Lordship in the chair) no statutory requirement to gauge comparative justice against any notional determinate disposal. Yet after appearing to recognise that a straightforward comparison might usefully and practically be made with the period which a determinate sentence prisoner would or might actually serve before becoming eligible for early release on parole, and after apparently looking to achieve a measure of 'punitive' parity between life sentence prisoners and their determinate equivalents, (on which see, for example, the opinion of the Lord Justice-General (Rodger), p 962F–J, as later echoed by Lord Reed at various points in *Ansari v HM Advocate*), the court unfortunately went on to embrace the earlier indications of a departure from that useful and practical approach. While clearly appreciating that this was liable to have anomalous consequences, the Lord Justice-General did not then proceed to re-examine the origins of the anomaly but rather sought to diminish its effects by (a) drawing attention to the time which the Parole Board for Scotland might (in the case of a long-term sentence of four years or more) take to consider an application for early release, (b) suggesting that the anomaly might not arise in every case, and (c) like the Court of Appeal in *R v M (Discretionary Life Sentence)*, holding out the possibility that (in circumstances on which no view was expressed) a period 'longer than half the equivalent determinate sentence' might appropriately be specified. With these considerations in mind it is doubly unfortunate that, in 2001, the Scottish Parliament may have felt it appropriate to try to enshrine the *O'Neill* decision in statute.

[98] Interestingly, the position south of the border since the 1990s would seem to have fluctuated, with some courts bearing to apply statutory early release provisions to the whole of a notional determinate sentence after first 'stripping out' no more than the enhanced element of public protection which characterises any lifetime disposal. Among examples included by the respondent in her written submissions were *R v Jabble*, *R v Errington* , *R v Dalziel*, *R v Hassall*, *R v Bellamy*, *R v Smith* and *R v Jarvis*, and to that list I would add the decision of the Court of Appeal in *R v Mills*.

Construction of para (aa)

[99] Turning now to consider the wording of the new para (aa) on its own, and in isolation from its wider statutory context as an integral part of sec 2(2), I acknowledge at once that the majority of your Lordships are not disposed to question the continued application of the earlier approach as endorsed in *O'Neill v HM Advocate* and as apparently reflected in the Minister's declared intention when the amendment was introduced in 2001. But, with great respect, the continued application of that approach would have to involve a willingness to construe sub-para (aa)(iii) as embodying practical impossibility in two separate respects, namely (i) the imposition of only part of a determinate sentence in the first place; and (ii) the application of the early release provisions in sec 1 of the Act to that part alone.

[100] Reluctantly and with regret, I find myself compelled to take a different view. In particular I would, for my part, question whether the new para (aa), as introduced in 2001, must necessarily be construed in a manner which gives credence to such implausible features. As a rule, the court should seek to interpret statutory provisions in such a way as to produce a practical end result consistent with realism and common sense. Implausible or absurd interpretations should *prima facie* be avoided unless the court is left with no alternative, and in this case I am not persuaded that the court should have to regard itself as trapped in a statutory cul-de-sac from which there is no escape, or as obliged by considerations of ambiguity, obscurity or absurdity to consult ministerial statements for assistance. In principle, the presumed will of Parliament is to be derived from the language ultimately enacted, and not from extraneous sources such as the subjective intentions of ministerial or other promoters (*cf Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG*, per Lord Reid, pp 613–615, Lord Wilberforce, p 629, quoted by Lord Browne-Wilkinson in *Pepper v Hart*, pp 1053, 1054; *Wilson v First County Trust Ltd (No 2)*, per Lord Nicholls of Birkenhead, para 67). This has been described as a constitutional principle of high importance; the scope for exceptions, as explained by Lord Browne-Wilkinson in *Pepper v Hart*, is very limited; and in the circumstances of this case I am satisfied that the Minister's parliamentary statement at the time when the 2001 amendment was introduced must be held inadmissible as an aid to construing the statute as ultimately amended.

[101] Against that background, I would begin by concurring with your Lordships in reading sub-para (aa)(i) as requiring the sentencing judge to undertake the task of identifying a determinate sentence which might realistically have been imposed if a lifetime disposal were thought inappropriate or unavailable. In this respect, as convincingly argued by Lord Eassie, the objective may simply be to discount the potentially indefinite period of preventive detention which characterises any life-time disposal. It is perhaps only this step which was considered necessary in the English cases mentioned (para 98 above). Thereafter, on the (reasonable) footing that sub-para (aa)(ii) must have been intended to serve some purpose additional to that of sub-para (aa)(i), I would read it as importing an obligation on the sentencing judge to try to separate out the 'punitive' part of that determinate sentence, namely such part of the total as may be thought to reflect retribution and deterrence alone. Achieving this stated aim would seem to involve a further 'stripping out' of some, but possibly not all, of the 'public protection' considerations which are elsewhere acknowledged (for instance in subsecs (1) and (2) of sec 210A of the 1995 Act) as being integral to any determinate sentence of imprisonment, whether extended or not. However unusual and difficult these exercises may be, bearing in mind (a) that as a rule life sentences are only imposed where no determinate disposal can be viewed as appropriate, and (b) that in reality every moment of a custodial sentence is, at least in some measure, designed to protect the public from the risk of further offending, the end product will in all probability (assuming that the balance of an overall sentence to be served in the community falls outwith the relevant scope of retribution and deterrence) comprise an initial custodial period materially shorter than the determinate sentence as a whole.

[102] It is of course the third aspect of the exercise, under sub-para (aa)(iii), that may be regarded as posing the greatest difficulty. In my respectful opinion, however, a legitimate construction of that subparagraph can be found which avoids all of the unsatisfactory consequences to which attention has already been

drawn. All that this approach requires, as it seems to me, is a willingness to recognise: (a) that the early release provisions in sec 1 of the Act apply to whole determinate sentences and to nothing short of that; (b) that no accused person is ever sentenced to part of a determinate sentence on its own; and (c) that in enacting sub-para (aa)(iii) the Parliament cannot sensibly have intended the court to proceed on any different basis.

[103] With these considerations in mind, it seems to me that practical sense can be made of the provision by reading into it the words 'as part of the notional determinate sentence referred to in (i) above'. This brief explanatory qualification, if introduced immediately after the words 'a prisoner sentenced to it', would not, I think, do any violence to the enacted statutory language. On the contrary, it would simply confirm the practical reality that no one is ever sentenced to part of a determinate sentence except as a component of the whole. Thereafter the provision would intelligibly go on to apply the early release provisions to the whole determinate sentence in accordance with sec 1 of the Act, as envisaged by Lord McCluskey in his opinion in *Ansari v HM Advocate* (para 92). The sentencing judge would then be left to consider the proportion of the 'punitive' part assessed under sub-para (aa)(ii) that the prisoner would or might serve in custody before the (whole-sentence) early release provisions kicked in, and in the event of that proportion amounting to less than 100 per cent there might be reason to reflect on whether a 'punishment part' fixed at the same level as sub-para (aa)(ii) would, along comparative justice lines, be excessive. Recognising the proportion borne by the custodial term which a determinate sentence prisoner would or might actually serve prior to early release, on the one hand, to the 'punitive' part of such a sentence, on the other — and hence to a proposed 'punishment part' at the same level — would thus allow practical and intelligible considerations of comparative justice to influence the desired end result under sec 2(2).

[104] In sharp contrast it is, as your Lordship in the chair observed in the decision in *Locke v HM Advocate* (para 23), hard to see the utility of a comparison postulating, not the ordinary operation of sec 1 on the whole of a determinate sentence as intended, but the unprecedented operation of sec 1 on a fragmented *part* sentence which could never have been imposed in the first place. On this implausible approach even a relatively high 'punitive' part under sub-para (aa)(ii) would, if halved for life sentence purposes, tend to bring the possibility of parole release into play years earlier than if the prisoner had received a determinate sentence instead. As senior counsel for the appellants appeared to accept at the hearing before us, this might even permit determinate sentence prisoners, as a class, to plead prejudicial discrimination by comparison with their life sentence counterparts. For my part, I am unwilling to impute to the Parliament such a gross misunderstanding of the ordinary application of section 1 to determinate sentences. On the contrary, I prefer to be guided by the shining light discernible in sub-para (aa)(iii), namely the Parliament's deliberate incorporation of that familiar and well-understood provision into the exercise, and giving due weight to that feature it is not in my view unreasonable to conclude that the legislative intention was for section 1 to apply in the only way which its terms permit.

[105] As regards any fraction deemed applicable under sub-para (aa)(iii), it seems to me that the court in *O'Neill*, and both the majority and minority judges in *Ansari*, were correct in recognising that mathematical rigidity would be inappropriate in a sentencing context, and that it was quite possible to envisage situations in which any supposed minimum might justifiably be exceeded. However, since it is in my

view of paramount importance that the discretion of a sentencing judge to do justice in individual cases should be preserved, I am inclined to think that the most satisfactory view of sub-para (aa)(iii) is that it merely calls for the court to have in mind the overall statutory scope of the Parole Board's early release jurisdiction under sec 1 of the Act, and that there is no question of the court having to predict what the Board might do in a hypothetical case. As Lord Reed explained in his opinion in *Ansari* (para 79):

> 'I consider that the court should not, when taking decisions under sec 2(2), consider the manner in which the Parole Board deals with the cases coming before it . . . I do not interpret (para (aa)) as requiring the court to consider how the Parole Board would deal with a prisoner serving the notional determinate sentence, but simply as requiring the court to take account of the proportions specified in sec 1'.

[106] Consistently with this approach, it seems to me that the composite phrase 'would or might' can properly be accepted as applying, *mutatis mutandis*, to all notional determinate sentences, in tandem with the later words 'whether unconditionally or on licence'. That is to my mind the most natural and straightforward interpretation of the phrase in its enacted context; it echoes the language in which the early release of long-term determinate sentence prisoners was described by Thomas J in *R v M (Discretionary Life Sentence)* (p 487); and by comparison it is hard to imagine such terms being used by any draughtsman seeking to achieve either (a) exclusive allocation of the word 'would' to what must be the rare case of a notional short-term prisoner receiving a life sentence, or conversely (b) total disapplication of that word in a question with notional long-term prisoners who are likely to make up the substantial majority. A plain interpretation is of course desirable in its own right, but in my judgment the true merit of this approach is that it does away altogether with any need for the court to agonise over particular fractions in individual cases, and with any 'second-guessing' or speculation relative to the Parole Board's exercise of its exclusive jurisdiction to assess future risk and public protection.

[107] On the other hand, if (contrary to the above) particular fractions were for the court to judge under sub-para (aa)(iii), then I would respectfully prefer the majority view in *Ansari* to the effect that, since the Parole Board must inevitably take account of the nature and circumstances of a prisoner's offending in order to judge future risk, then in complying with the statutory obligation to assess for itself what 'would or might' happen under sec 1 (and not simply to halve the product of sub-para (aa)(ii)) the court has no option but to do likewise. At para 23 (beyond which, admittedly, certain later observations may appear to stray), the Lord Justice-Clerk expressly recognises that issues of retribution and deterrence are matters for the court alone; Lord Marnoch says the same (para 45); and it may be thought that all of the judges (including Lord Reed, para 77 in particular) conclude that although the Parole Board may have no 'retribution and deterrence' function it cannot possibly judge future risk without taking the nature and circumstances of a prisoner's offending into account. That is, after all, the position specifically endorsed under r 8 of the Parole Board (Scotland) Rules 2001. The nature and circumstances of a person's offending are thus not only crucial factors in the court's assessment of the 'punitive' element of a notional determinate sentence under sub-para (aa)(ii), and indeed of the notional sentence itself under sub-para (aa)(i), but also relevant factors for the purposes of any further assessment which the court might be obliged to

make under sub-para (aa)(iii) or indeed under the adjacent paras (a) and (b). If the statute requires a series of separate and different assessments to be made, then there is no obvious reason why factors relevant to any one of them should be left out of account. I therefore find myself, with regret, unable to accept the main thrust of what some of your Lordships describe as Lord Reed's 'principled' minority opinion in *Ansari*. There is to my mind no 'double counting' here at all, nor any true confusion of roles, and if it would be illogical and arbitrary to ignore the nature and circumstances of a prisoner's offending under sub-para (aa)(i) or (ii), then it would seem no less illogical and arbitrary to ignore such factors under sub-para (aa)(iii).

[108] A further ground on which I would question the enthusiasm, apparent in some quarters, for a 'bare minimum' approach to fractions is that it seems to owe something to an argument advanced by Simon Brown LJ (as he then was) in *R v Secretary of State for the Home Department, ex p Furber* in 1998. Since that argument is quoted in full by your Lordship in the chair (para 23) I need not repeat it here, but with the greatest of respect I find it less than convincing. There is no obvious reason why the 'punitive' part of a lifetime or determinate disposal, designed to achieve the dual aims of retribution and deterrence in the public interest, should be watered down on account of liberal concerns as to how public safety restrictions might, in the longer term, impinge on an adult prisoner's personal rights and freedoms. One might just as easily (although with an equal lack of justification) contend for an increase in the 'punitive' part of any sentence on the ground that many prisoners may be expected to benefit from a well-ordered prison regime free from drugs, alcohol and external influences, and thereafter, in the event of release, from a measure of supervision in the community. Such issues would in any event be for the Parole Board, or for post-release supervisory authorities, to address in due course, whereas (as I understand all of your Lordships to agree) setting the initial 'punitive' part of any sentence must be a matter for the court alone. Not surprisingly, para (aa) contains no hint that the Parliament intended speculative future benefits or disadvantages to influence the 'punitive' part of a notional determinate sentence in either direction, and the same may be said of the main body of sec 2(2) which regulates the fixing of 'punishment parts' on both mandatory and discretionary life sentences.

[109] Where, however, I must respectfully part company from all of the judges in *Ansari* is in believing that the real solution here lies, not in a consideration of fractions *per se*, but in recognising the practical reality (a) that no one is ever sentenced, and (b) that no early release provisions can therefore apply, to anything short of the whole of a determinate custodial sentence. No useful and practical comparison can be achieved by applying fractions to the 'punitive' part of a notional determinate sentence taken in isolation, since that inevitably brings out a period bearing no relation to the custodial term which the notional determinate sentence prisoner would or might actually serve before being released, whether unconditionally or on licence, under sec 1 of the Act.

Conclusion

[110] As already indicated, it is with reluctance and regret that I differ from the majority of your Lordships, not only on the construction of para (aa) taken in isolation, but also on what I regard as the important relieving effect of its having been introduced as an addition to the list of factors which the court must simply 'take into account' in terms of sec 2(2). At the same time, however, I have to register

a sense of disappointment that in these proceedings a real opportunity would seem to have been lost — an opportunity for this court to take a positive step away from the legacy of *O'Neill v HM Advocate* as influenced by certain English decisions of the 1990s; to reaffirm the wide judicial discretion which must, in the interests of justice, characterise any determinate or lifetime sentencing disposal; to formulate guidance of a kind which would help judges to achieve plausible and consistent results in practice; to reduce the disparity which currently exists between discretionary and mandatory life sentence 'punishment parts'; and to avoid leaving sentencers to cope with the distraction of complex 'stripping out' considerations, or with the curiosity of 'fractions' potentially going beyond the statutory range under sec 1 of the Act.

[111] Some of your Lordships are, of course, entirely content with the decision in *O'Neill*, and with all that has flowed from it, but like your Lordship in the chair (although for very different reasons) I feel that the present outcome is unsatisfactory as a matter of comparative justice and must on that account be regretted. Indeed, with the greatest of respect, I would regard the statutory promotion of comparative injustice as so unsatisfactory that an urgent review and reamendment of the offending provisions should now be undertaken by the Parliament.

LORD WHEATLEY— [112] For the reasons given in the opinion of your Lordship in the chair, I fully agree with your Lordship's conclusions in this case.

LORD PHILIP— [113] I have had the advantage of reading the opinion of your Lordship in the chair and am in full agreement with your Lordship's conclusion.

[114] In particular I agree for the reasons set out by your Lordship that the Parole Board's function is confined to assessing the risk which the prisoner whose case comes before them presents to the public. They are not concerned with the punitive element of the sentence.

[115] I also agree that the functions of the sentencing court and the Parole Board are quite separate and distinct. As Lord Reed made clear in *Ansari v HM Advocate* (paras 22–24) the court's task under sec 2(2) of the 1993 Act is confined to equiparating so far as possible the point at which the discretionary life prisoner's case will come before the Parole Board with that at which the case of the notional determinate sentence prisoner, convicted of the same offence, would come before the Board. In performing that specific task it is not for the court to have regard to considerations of punishment or to attempt to influence or affect the decisions of the Board.

[116] In relation to the matters which the court is enjoined to take into account in terms of para (aa) of sec 2(2), sub-para (ii) can, in my opinion, only be construed, again for the reasons set out by your Lordship, as requiring the court to strip out the whole of the period of confinement necessary for the protection of the public. That period will therefore include any part of the notional determinate sentence which relates to that purpose.

[117] In sub-para (iii) the use of the words 'would or might' are clearly designed to cover the differing provisions of sec 1 of the 1993 Act relating to the early release of short-term prisoners on the one hand and long-term prisoners on the other. The effect is to put the discretionary life prisoner in no worse a position, as regards eligibility for parole, than he would have been in, whether the appropriate determinate sentence would have been less than four years or four years or more.

[118] As to the apparent anomaly whereby it may be thought that the indeterminate prisoner is dealt with more favourably than the determinate prisoner,

I would say this. Sentencing is not and cannot be an exact science. No two cases are identical. In the passage quoted by your Lordship from the opinion of Lord Justice-General Rodger in *O'Neill v HM Advocate*, his Lordship said:

> '[T]he designated part must bear some relationship to such a determinate sentence, since, leaving aside the exceptional case where imprisonment for life would be the appropriate punishment, comparative justice requires that the designated period should bear a fair and reasonable relationship to the minimum period which a prisoner would actually require to serve under a determinate sentence imposed in similar circumstances, but lacking the special requirement of public protection which has led to the life sentence.'

It seems to me that what the legislature was trying to achieve was the 'fair and reasonable relationship' referred to by his Lordship. Standing the separate provisions of sec 1 of the 1993 Act relating to short-term prisoners and to long-term prisoners, I consider that the provisions of para (aa) of sec 2(2) achieve a sufficiently fair and reasonable relationship and should be given effect to as proposed by your Lordship.

[119] I too find it impossible to accept, on a construction of the provisions of sec 2(2), that Parliament intended anything other than to give the force of statute to the decision in *O'Neill*. In the light of the statements of the Minister of Justice during the passage of the Convention Rights (Compliance) (Scotland) Bill, I would find it disturbing if the court were to take a different view.

THE COURT remitted the appeals to a court of three judges for disposal in light of the views expressed in the judgment of the court and of other relevant considerations.

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