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Case No: CO/9344/2006 CO/8167/2006 CO/10269/2006

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/09/2007

Before :

LORD JUSTICE HUGHES
MR JUSTICE TREACY

Between :

The Queen on the application of Michael Brooke and Gagik Ter-Ogannisyan	<u>Claimant</u>
- and -	
The Parole Board	<u>First</u>
-and-	<u>Defendant</u>
The Lord Chancellor and Secretary of State for Justice	<u>Second</u>
	<u>Defendant</u>
The Queen on the application of David O'Connell	<u>Claimant</u>
-and-	
The Parole Board	<u>First</u>
-and-	<u>Defendant</u>
The Lord Chancellor and Secretary of State for Justice	<u>Second</u>
	<u>Defendant</u>
The Queen on the application of Michael Murphy	<u>Claimant</u>
-and-	
The Parole Board	<u>First</u>
-and-	<u>Defendant</u>
The Lord Chancellor and Secretary of State for Justice	<u>Second</u>
	<u>Defendant</u>

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The Lord Chancellor and Secretary of State for Justice**

Hearing dates: Thursday 5th and Friday 6th July 2007

Approved Judgment

Lord Justice Hughes :

1. This is the judgment of the Court, to which we have both contributed.
2. In recent years Parliament has progressively altered the process of criminal sentencing in a way which has placed ever greater emphasis upon conditional release on licence as part of the sentence. Release upon licence carries with it the possibility of recall; if recall is in question, a decision must be made whether it is justified or not. Meanwhile, some prisoners have always been sentenced to indefinite terms of imprisonment which justify their continued detention whilst they remain an unacceptable danger to the public. Where such a sentence is passed, a judgment must be made from time to time whether the prisoner can now safely be released on terms. If release is right, it will be on conditional licence, as in the case of a fixed term prisoner, and the same decisions whether or not to recall may arise later. That was always true of a comparatively small number of prisoners sentenced to life imprisonment. Most recently, the Criminal Justice Act 2003 has effected a significant policy shift towards preventive sentencing of this kind. It has created two new forms of preventive sentence: imprisonment or detention for public protection ('IPP') and extended sentences. The former is a new form of indefinite sentence, differing only marginally from a life sentence but required by law for a very much larger group of convicted persons than formerly qualified for a life sentence. The second is a sentence with a maximum term, but under which the decision when to release is not made by the sentencing court, but later according to an assessment of the prisoner, and particularly of any risk which he presents; it too is required by law for a large number of convicted persons. All such IPP and extended sentence prisoners are thus added to the list of those who (a) require a decision whether or not to release, made not by the sentencing court but subsequently by another body and (b) whose licence, if they are released, is likely to last for many years, bringing with it the prospect of further decisions, outside court, about recall or re-release. Thus for an increasing number of prisoners sentenced by the criminal courts, vital decisions whether they are incarcerated or not fall to be made not at the point of sentence but subsequently. For all such prisoners those decisions assume an importance at least comparable to the fixing by the sentencing court of the initial sentence. Those decisions are equally important to others affected by them, such as people who were injured by the offences, and people who might be offended against in future if there should be a repetition.
3. In the great majority of cases these decisions are committed to the Parole Board. It thus makes, daily, decisions which directly decide the liberty of the subject and which may affect the lives of many other members of the public. Its importance is such that for many years it has been held in case after case that it has to function as a court, or court-equivalent, with all the safeguards that that status entails; in particular its independence from the parties whose cases it decides, and from the Executive. It has been common ground before us that, in respect of most of its decisions, such a requirement of law plainly does exist.
4. These consolidated applications for judicial review are founded on the argument that upon examination the Parole Board proves not sufficiently to enjoy the independence which is the essential hallmark of a court. It should be recorded immediately that nobody questions the independence of mind of the members of the Board. Nor does anyone suggest that in any single individual case any improper attempt has been made

to influence its decision. What however is suggested is that the structure of the Board, and the way it is controlled by the Secretary of State, are such as to give it insufficient clear and real independence from the Executive. The Secretary of State is, via a unit in his Department, its sponsor; he controls its budget, appoints its members and may dismiss them, makes its rules, houses it and staffs it within the Ministry, and closely monitors its activities. All these things he does whilst at the same time being in every case also a party appearing before it. And it is said that the members of the Board do not enjoy the essential security of tenure which those performing judicial functions must have for protection of their independence. Accordingly, it is argued, there is a breach of the requirements of the law that every court demonstrate independence and freedom from even unconscious bias. Such requirements of law are well established in the common law of England and Wales, and are manifest also in Article 5(4) European Convention on Human Rights ('ECHR').

Decisions committed to the Parole Board

5. The principal decisions committed to the Board fall conveniently into two categories:
- i) whether to order initial release on conditional licence;
 - ii) in the event of recall from licence, whether to order re-release, either immediately or subsequently.

Underlying both types of decision is essentially the same exercise, namely the assessment of what risk the prisoner presents, and how that risk can best be managed in the public interest.

6. There is now a bewildering array of different statutory origins for such decisions, each applicable to different sub-groups of prisoner. This has been the necessary consequence of successive radical changes made by Parliament to the structure of sentencing by, amongst others, the Criminal Justice Act 1991 ('CJA 1991'), the Crime (Sentences) Act 1998 ('CSA 1998') and the Criminal Justice Act 2003 ('CJA 2003'). But those differing statutory origins should not obscure the essential similarity of the task. They now include the following:
- i) whether a prisoner who has been sentenced to life imprisonment (or, if under 21, to custody for life or during Her Majesty's Pleasure) should be released conditionally upon licence once the minimum term fixed by the trial judge as commensurate with the offence has been served [s 28 CSA 1998] – i.e. initial release of life prisoners;
 - ii) whether a prisoner who has been sentenced to imprisonment or detention for public protection under s 225/226 CJA 2003 should be released conditionally upon licence once the minimum term fixed by the trial judge as commensurate with the offence has been served [s 28 CSA 1998 as extended by s 34(2)(d) & (e) *ibid*] – i.e. initial release of IPP prisoners ;
 - iii) whether a prisoner who has been sentenced to an extended sentence under s 227/228 CJA 2003 should be released conditionally upon licence during the latter half of the custodial element of his sentence [s 247 CJA 2003] – i.e. initial release of CJA 2003 extended sentence prisoners;

- iv) whether a prisoner sentenced between 1 October 1992 and 4 April 2005, or since that latter date for any offence committed before it, to a determinate term between 4 and 15 years should be released conditionally on licence at any time between the half way and the two thirds points of his sentence [ss 35 & 50 CJA 1991 and the Parole Board (Transfer of Functions) Order 1998 (SI 1998 No 3218), preserved by CJA 2003 (Commencement No 8 etc) Order 2005, SI 2005, No 950, Schedule 2, para 19(c)] – i.e. initial release of most CJA 1991 long term prisoners;
- v) whether to release on licence at any time between one third and two thirds of his sentence a prisoner sentenced to a determinate term prior to 1 October 1992 [originally s 67 Criminal Justice Act 1967, now s 35 and Schedule 12, para 6 CJA 1991] – i.e. initial release of CJA 1967 prisoners;
- vi) whether any life or IPP prisoner who has been released conditionally on licence should be recalled, or, if recalled should be re-released on licence [s32 CSA 1998, as extended by s 34 ibid] – i.e. recall/re-release of life/IPP prisoners;
- vii) whether any fixed term prisoner who has been released conditionally on licence but recalled by the Secretary of State should be re-released on licence [s 254 CJA 2003, or s 39 CJA 1991 for offences committed and recalls made before 4 April 2005: see CJA 2003 (Commencement No 8 etc) Order 2005, SI 2005 No 950, Schedule 2, para 16] – i.e. re-release of fixed term prisoners;

With the exception of group (v), which must be a rapidly vanishing category, these groups comprise a very large number of prisoners. In 2002 the Board made something over 14000 decisions. Whilst one consequence of the CJA 2003 is that new prisoners sentenced to fixed terms for offences committed after 4 April 2005 do not require a decision upon initial release, but rather must be released automatically at the half way stage under s 244, the net effect of that Act is by no means likely to be a reduction in the decisions required. Since October 1992 all fixed term prisoners have been released on licence at some point and the period on licence is now much longer than previously, so that the number potentially falling into group (vii) is very large. More acutely, the enormous increase in prisoners with one or other form of indeterminate sentence means that recurrent decisions are often required in their cases, for there is a right to biennial review.

7. We should record that the Secretary of State and the Board contend that the provisions of Article 5(4) ECHR do not apply to the initial release of pre-CJA 2003 fixed term prisoners or of CJA 2003 extended sentence prisoners (groups (ii), (iv) and (v)) on the ground that such a prisoner is still within the period of a fixed sentence determined by the court. The case of O'Connell is one of a CJA 2003 extended sentence (group (iii)), and there is thus a question in his case whether Article 5(4) applies. We were unable to hear argument on this issue owing to want of time and so cannot decide it, nor whether he is entitled to an oral hearing either under Article 5(4) or at common law. This does not affect the principal issue before us, namely whether the Board has the necessary independence which it is agreed is required by both the common law and Article 5(4) for most of its functions. Nor is there any room for doubt that the common law requirement of independence applies to O'Connell's case as it does to those of the other claimants.

8. In this connection, one consequence of the CJA 2003 should be observed. The effect of the new statutory rule that all fixed term prisoners are automatically released on licence at the half way stage of the sentence is greatly to reduce, and eventually will be to eliminate, the number of decisions which the Board has to make upon initial release of fixed term prisoners (groups (iv) and (v)). Those are the two principal groups in respect of which there remains debate as to the application of Article 5(4). By contrast, the great increase in the numbers of prisoners serving indefinite terms, and of those on licence and thus potentially subject to recall, means that the numbers of decision in groups (i), (ii), (vi) and (vii) will rise significantly. Those are the groups in respect of which there is no debate about the application of Article 5(4).
9. For the initial release of life, IPP and CJA 2003 extended sentence prisoners (groups (i), (ii) and (iii)), the test which the Board is required to apply is, by several different but identically worded statutory provisions:

“[whether]... it is no longer necessary for the protection of the public that the prisoner should be confined.”

For prisoners who have been recalled and whose fresh release is under consideration (groups (vi) and (vii)), there is no statutory test provided. The same is true of groups (iv) and (v). Plainly, however, in all of the decisions which the Board has to reach, the assessment of risk and its management lies at the heart of the process, and that is the basis on which they are approached.

10. The statutory method of committing decisions to the Board is to provide that the Board may either recommend or direct a course of action, and to require the Secretary of State to act accordingly. That means, in effect, that the decision lies with the Board.
11. For the sake of completeness, we should record that the Board is also to be consulted by the Secretary of State (by statute) if release of a prisoner on compassionate grounds is under consideration: s 248 CJA 2003. The duty to consult is soft-edged, subject to exception if circumstances render consultation impracticable. There are also other matters on which the Secretary of State may choose to consult the Board under his general power to do so in s 239(2), for example in relation to whether a prisoner is suitable for a move from closed to open prison conditions. In either case, that kind of consultative role stands in direct succession to the original function of the Board as an advisor to the Secretary of State, who retains responsibility for the decision: see paragraphs 12-14 below. It is to be contrasted with the decision-making powers which we are here considering.

The establishment of the Board

12. The Board was created by section 59 Criminal Justice Act 1967. Its present establishment is under section 239 and Schedule 19 CJA 2003. In Government terms, its status began as an advisory board to the Home Secretary. It was constituted as a body corporate under s 149 Criminal Justice and Public Order Act 1994 and since then its status has been throughout that of an Executive Non-Departmental Public Body ('ENDPB'), operating under the 'sponsorship' of the relevant Department of State. Until the very recent creation of the Ministry of Justice, the relevant Department of State has been the Home Office. All the cases before us, and all the

evidence before us, arose when the Home Office was the sponsoring Department. The Parole Board has now been transferred to the Ministry of Justice, but so have all the former Home Office functions in relation to the management of prisons and prisoners. The relationship between the Secretary of State (now for Justice) and the Board thus remains formally the same as before.

13. The current sponsoring unit within the Department is the Sentencing Policy and Penalties Unit ('SPPU'); that is a subdivision lying within the National Offender Management Service ('NOMS'), which in turn is a service inside the Department.
14. It is relevant to note that when the Board was created it had very limited decision-making powers. It was created as an advisory body for the Home Secretary when exercising powers in relation to the release of prisoners on licence which were, at that time, nearly all entirely a matter for his discretion: see sections 60, 61 and 62 of the 1967 Act. The Board's principal function, at that time, was to make recommendations in relation to the exercise by the Secretary of State of his discretionary powers to make initial release or to recall. Only in relation to re-release did the Board have a decision making power (s 62(5)). Since then there has been, gradually, both an enormous expansion of decisions to be made relating to the release of prisoners, and the committal of the great majority of those decisions to the Board. There has, however, been little corresponding change in the structure or establishment of the Board, nor in its relationship to the sponsoring Department of State.
15. As at March 2007 the Board's membership comprised a Chairman, 3 High Court Judges, 38 Circuit Judges, 9 retired Judges, 21 psychiatrists, 4 criminologists, 8 psychologists and 71 lay members. Nearly all serve part-time.

The decision-making process

16. All the decisions are made by a panel of either one, or more often two or three members. In some cases there is an oral hearing; in others the decision is made upon written submissions. It is not necessary for the purposes of this judgment to trace the history of court decisions on when an oral hearing is and is not mandatory. The Board further has a statutory discretion under s 239(3) CJA 2003 to conduct an interview with the applicant prisoner "if in any particular case the Board thinks it necessary...before reaching a decision." We shall need to refer again later to the matter of interviews with prisoners.
17. Whichever may be the means of considering the case, the Secretary of State, via NOMS, is a party to each one. He fulfils the essential function of preparing a dossier of documents relating to the prisoner, designed to provide the necessary background evidence and risk assessments according to various models. His paperwork will often, but not invariably, include his "view" as to the correct outcome; on other occasions he will simply present the facts. If there is an oral hearing he will have present a representative and may instruct counsel. The prisoner is present at an oral hearing and may be represented. Witnesses may be called and examined. No doubt the procedure is relatively flexible and may proceed in some, perhaps many, cases by way of agreement or by inquiry made by the panel of its own motion. The correct analogy is neither an appeal against an administrative decision nor a prosecution for an alleged offence but rather an application or referral for original decision.

Nevertheless, there are clearly two parties to each case, the Secretary of State and the prisoner, and liberty is what is at stake.

The European Convention

18. Article 5(4) ECHR provides:

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

It has been common ground before us that the effect of the Human Rights Act 1998 is that where that right is engaged, it applies in English law. It is well established, and accepted, that it is engaged at least where decisions (i), (ii), (vi) and (vii) in paragraph 6 above are concerned; that is to say all decisions relating to indefinite term prisoners and all recall or re-release decisions.

19. The critical question in this case is whether the Parole Board satisfies the test of being a “court” for the purposes of this Convention right. The same test arises in other cases under Article 6. The jurisprudence of the Strasbourg court, applied frequently in English law, makes it clear, first, that a “court” for this purpose need not be part of the classic integrated national court structure, providing it sufficiently demonstrates independence and impartiality. The test of independence has been repeated on numerous occasions by the Strasbourg court. We take it, as did the House of Lords in Porter v Magill [2002] 2 AC 357 at paragraph 88, from Findlay v UK (1997) 24 EHRR 221, but the same formulation is to be found in many other cases, and it has not been in contention before us:

“In order to establish whether a body can be considered ‘independent’ regard must be had *inter alia* to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence.

As to the question of impartiality, a distinction must be drawn between a subjective test, whereby it sought to establish the personal conviction of a given judge in a given case, and an objective test, aimed at ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.

The concepts of independence and objective impartiality are closely linked...”

In many cases, and in this, there is no issue about the personal integrity of the individual judges; what is in question is the objective test of impartiality, which is closely associated with the requirement that independence be apparent, and that there be no objective perception of lack of it. As the court observed in Kleyn v The

Netherlands (2003) Nos 39343/98 et al, echoing words used many times, and applied by the House of Lords in Millar v Dickson [2002] 1 WLR 1615 at paragraph 19:

“Under the objective test, it must be determined whether, quite apart from the judges’ personal conduct, there are ascertainable facts which may raise doubts as to their impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to proceedings.”

In Millar v Dickson at paragraph 63 Lord Hope emphasised the importance of objective appearance.

“...the appearance of independence and impartiality is just as important as the question whether these qualities exist in fact. Justice must not only be done, it must be seen to be done. The function of the Convention right is not only to secure that the tribunal is free from any actual personal bias or prejudice. It requires this matter to be viewed objectively. The aim is to exclude any legitimate doubt as to the tribunal’s independence and impartiality”

The common law

20. Independently of the Convention, the common law rule of procedural fairness also requires an absence of apparent bias. That latter pejorative word means, in this context, either partiality or lack of independence. In Porter v Magill [2002] 2 AC 357 at paragraphs 100-103 Lord Hope of Craighead, with whom the other members of the House agreed, made clear that (assuming an absence of actual bias) the test of apparent bias is whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. That test, he held, is in harmony with the objective test applied by the Strasbourg court. In this respect, as in some others, the Convention has not developed differently from English common law. Indeed the same test is, as Lord Hope made clear, reflected in many other jurisdictions also, including most Commonwealth countries and Scotland. Accordingly he concluded in that case (at paragraph 118) that the question whether Convention rights (there under Article 6) were infringed and the question whether there was procedural unfairness contrary to English common law marched together. Lord Bingham reached the same conclusion in R (Smith and West) v Parole Board [2006] 1 WLR 350 at [37].

“[the Board’s] review will in my opinion satisfy the requirements of Article 5(4) provided it is conducted in a manner that meets the requirement of procedural fairness already discussed.”

21. In the present case the test for whether the Parole Board satisfies the common law test of procedural fairness by the absence of apparent bias and the presence of independence and impartiality is therefore, with one proviso, the same as the test under Article 5(4) of the Convention. The proviso is that the common law must yield

to express statutory enactment, whereas in applying the Convention test to the Board its structure and operation must be taken as a whole, even if part of it is statutory. That difference may be relevant in the present case to the provision for appointment of Board members by the Secretary of State, which are contained in statute. Otherwise the test is, as it seems to us, identical.

The positions of the parties.

22. The claimants contend that the position of the Board fails to satisfy this test. Whilst emphasising that their combined effect in the overall picture must be considered, rather than individual features examined piecemeal, they refer in particular to (i) appointment of members by the Secretary of State; (ii) their tenure; (iii) the particular position of Probation Officer members; (iv) Rules of procedure made by the Secretary of State; (v) directions for decision-making given by the Secretary of State; (vi) funding by the Secretary of State; (vii) the consequences of sponsorship generally, including its effect on the above-mentioned matters and the close level of private contact between the Board and the Department, together with staffing and housing by the Department. They rely on carefully expressed concern about the absence of the appearance of independence voiced by successive Chairmen of the Board and its Chief Executive, and also on the expressed views of two other members.
23. The Secretary of State contends that neither separately nor together do any of these features detract from the Board's essential independence in fact. Reliance is placed upon the acknowledged fact that no-one suggests that any attempt has ever been made to bring improper influence to bear upon the outcome of any individual case. It is submitted that the position of the Board has been specifically considered by the Strasbourg court in two cases, Weeks v UK (1988) 10 EHRR 293, and Hirst v UK (2000) no 40787/98, and in both cases the challenge to its independence failed.
24. The Board has maintained a neutral stance on this issue. It has, however, made available to the other parties evidence which is at its disposal and which considerably exceeds the evidence available in either Weeks or Hirst.

Weeks and Hirst

25. Weeks concerned recall and possible re-release under a discretionary life sentence. There was held to be a breach of Article 5(4) irrespective of whether the Board was sufficiently independent to be treated as a court, because insofar as initial release and recall were (then) concerned its powers were advisory rather than decisive and because in relation to re-release there was insufficient access by the prisoner to the material considered by the Board. However, the question of independence was considered. The Court said this at paragraph 62:

“The applicant maintained that the Parole Board is not independent of the Home Secretary, primarily because he appoints the members of the Board, provides its staff and makes the rules under which it conducts its procedures.

The Parole Board sits in small panels, each of which in the case of life prisoners includes a High Court Judge and a psychiatrist.

The manner of appointment of the Board's members does not, in the Court's opinion, establish a lack of independence on the part of the members. Furthermore the Court is satisfied that the judge member and the other members of the Board remain wholly independent of the executive and impartial in the performance of their duties.

There remains the question whether the Board presents an appearance of independence, notably to persons whose liberty it considers. On this point, as the Government stated, the functions of the Board do not bring it into contact with officials of the prisons or of the Home Office in such a way as to identify it with the administration of the prison or of the Home Office.

The Court therefore sees no reason to conclude that the Parole Board and its members are not independent and impartial."

26. Hirst concerned a discretionary life prisoner whose commensurate term ('tariff') had expired. The Board refused to order release but did recommend transfer to an open prison, which latter course the Secretary of State declined to take. The complaint that there was a breach of Article 5(4) on grounds of absence of timely ('speedy') reviews was permitted to go forward. But the complaint that the Board lacked independence was ruled inadmissible at the preliminary stage. The prisoner relied upon the facts that the Secretary of State appointed members, staffed the Board and made its rules, and he pointed to the presence on his panels of a former member of the prison Board of Visitors and of doctors who had formerly held appointments in the Prison Service. The Court followed Weeks and said:

"The Court is not persuaded that the presence on the [panels], which are presided over by a judge, of doctors or other qualified persons who have previous relevant experience of work within prisons, for or in contact with the Prison Service, is sufficient to cast doubt on their independence or impartiality in their functions for the Parole Board. Nor does it perceive that their independence is undermined by the staffing or budgetary arrangements as described."

27. In neither case, it is plain, was the Court provided with anything like the range of evidence which is before us. As the third paragraph of the extract cited from Weeks demonstrates, it was not acquainted with the level of contact between the Board and its sponsoring Department, and the latter's approach to sponsorship, which we consider below. Nor could it know that several members of the Board were to express concern about the perception of lack of independence to which the organisation of the Board has given rise. Moreover, the range and importance of the Board's decisions have increased as time has passed. These two decisions cannot relieve us of the necessity of examining the overall question of the objective appearance of the Board in the light of the evidence presented to us.

Legality/Policy

28. We should make it clear that the function of the Court upon applications for judicial review, such as these are, is not to re-write the constitution or procedure rules of the Board according to its own conception of what the best provision would be. It is no more, but no less, than to determine whether the present position of the Board, taken overall, is lawful, in the sense of having the necessary objective independence, or otherwise. If lawful, it matters not that some might contend that it should be better organised, or differently constituted, or housed elsewhere within the public sector, nor that other improvements might be made such as by extending its powers, or in its ability to manage the presentation of evidence. Whilst we have had regard on the question of the objective appearance of independence to the concerns expressed by responsible members of the Board, we have cautioned ourselves that some of the matters which they (properly) address fall into the category of policy, rather than legality.

Appointment

29. By section 239 and Schedule 19, paragraph 2, CJA 2003 the members of the Board are appointed by the Secretary of State.
30. In practice the method of appointment is not normally in his personal hands. The Board notifies the Department annually of the numbers of lay members needed. An external recruitment consultant is instructed to conduct the advertisement process by reference to specifications and job descriptions agreed between the Board and the Department. Shortlisted candidates attend a half day assessment course and are interviewed by a panel of three, one from the Department, one from the Board and one from the Office of the Commissioner for Public Appointments (OCPA). Appointment is governed by OCPA principles, which include the requirements for appointment to be made on merit and for independent scrutiny – hence the OCPA member of the interviewing panel. Similar but modified arrangements exist for the appointment of criminologist, medical, psychologist or judge members. The High Court Judge members are nominated by the Lord Chief Justice.
31. The appointment by Ministers of judges of differing tribunals and courts is a common practice in many countries. It applied to the judges of the ordinary English courts until very recently. Alone, it need not detract from the independence of the judge when once appointed. We respectfully endorse the views of the Strasbourg Court on that subject, as expressed in Campbell and Fell v UK (1984) 7 EHRR 165 at paragraph 79 (in relation to Prison Boards of Visitors):

“...to hold otherwise would mean that judges appointed by or on the advice of Minister having responsibilities in the field of the administration of the courts were also not independent.”

Similarly, in Starrs v Ruxton (1999) 8 BHRC 1 (which concerned temporary Scottish sheriffs), the Lord Justice-Clerk said this at page 25:

“I do not have difficulty with the fact that temporary sheriffs are appointed by the Executive, following on their selection by the Lord Advocate.....However, appointment by the

Executive is consistent with independence only if it is supported by adequate guarantees that the judge enjoys security of tenure.”

We were referred to Tsfayo v UK (2006) No 60860/00, a decision of the Strasbourg court upon the Housing Benefits Review Board, but that case involved not so much the power of appointment of board members but their position as councillors of the Council which, as the potential payer of the benefit, had a direct pecuniary interest in the outcome.

32. In the present case the appointing Minister is, significantly, not only responsible for the Board but also concerned as a party in every case it decides. We agree that that distinguishes the case from many others of ministerial appointment, and calls for clear evidence that in fact the appointing Minister demonstrably abjures any significant input into the selection of members. But if the arrangements which we have set out above for appointment are rigorously followed, we are unable to see that the power of appointment alone need create any objective absence of independence.
33. The evidence before us is that generally this happens. The Board’s Chief Executive has confirmed that she knows of no case in which the Secretary of State has not accepted the assessments of the interviewing panel. The routine arrangements for appointment accordingly seem to us to be quite consistent with objective independence. What is not consistent with it is the use which one recent Secretary of State made of the power of appointment when under public and political pressure to try to change the approach of the Board to the performance of its duties. We think that that occurred as a consequence of the sponsorship arrangement which induces the impression that the Board is in some respects an in-house Departmental body, for which the Secretary of State has direct responsibility, and we refer to it under the heading of sponsorship below.

Chief Probation Officers

34. Chief or Assistant Chief Probation Officer members are appointed by a system of ministerial interviews outwith the ordinary recruitment process. The claimants point to the fact that such officers moreover remain employed within NOMS, a service constituted within the Department.
35. As the Court of Appeal pointed out in R (PD) v West Midlands and North West Mental Health Review Tribunal [2004] EWCA Civ 311, when considering the position of a consultant psychiatrist employee of a Health Authority qua member of that tribunal, it follows from the House of Lords decision in a court martial case, R v Spear [2002] UKHL 13; [2003] 1 AC 734, that there is no absolute rule that employment by a party of a member of a court always creates an objective lack of independence. Further, in PD the court referred (at paragraph 11) to the fact that it is necessary not to lose sight of practical realities of the availability of suitably qualified persons when considering this question. In that case, there was held to be no lack of objective independence irrespective of such considerations. But the present case is one where such practical realities are relevant. One of the strengths of many specialist tribunals is that relevant specialist experience can be built into their membership alongside the legally qualified and lay representative members: see the observations of Lord Hope in Gillies v Secretary of State for Work and Pensions

[2006] UKHL 2; 1 WLR 781 at paragraph 22. There will often be a tension between, on the one hand, achieving that specialist expertise and, on the other, the fear that tribunal members might be seen as identified with the Executive or with a party. The Parole Board particularly needs experienced probation officers. It found that it was not getting enough by the ordinary process of recruitment. It specifically asked for the change in the manner of their recruitment. During their term of office, such members sit alongside judges, lay members and members with other expertise. We do not think that there is any significant risk that their performance of their duties as members will be affected by the likelihood of their returning to their Service, nor that that would be perceived to be a risk by an independent observer knowing the facts. This particular group of appointments falls on the right side of the line between expertise and identification with the Department. It does not present any appearance of want of independence.

Tenure

36. Members of the Board are appointed for an initial period of three years. Their terms provide that subject to satisfactory performance the appointment may be extended to a second three-year term. The evidence is that such renewal is routinely made where the member seeks it.
37. The terms of appointment provide that the Secretary of State may terminate the appointment at any time if satisfied that he has:
- "a) failed satisfactorily to perform his/her duties;
 - b) become for any reasons incapable of carrying out his/her duties;
 - c) been convicted of any criminal offence;
 - d) conducted himself/herself in such a way that it is not fitting that he/she should remain a member; or
 - e) acted in contravention of the Board's Code of Conduct."
38. At 3 + 3 years the term of appointment is short. The conventional term for nearly all members of nearly all tribunals in England and Wales is 5 + 5 years. The term of members of the directly comparable Scottish Parole Board was altered in 2001 to 6-7 years, with provision for re-appointment after a gap of 3 years. That alteration was undoubtedly made – in the Convention Rights (Compliance) (Scotland) Act 2001 – because it was felt to be necessary in order to safeguard independence, particularly after the decision in Starrs v Ruxton had emphasised the importance of security of tenure to judicial independence. As pointed out above, in its requirements for independence the law of Scotland is the same as the law of England and Wales. In Scanfuture v SS Trade & Industry [2001] ICR 1096 a 3 year term coupled with the power to remove at will was regarded as insufficient guarantee of independence albeit the power to remove was never known to have been exercised, but a later change to a serially-renewable 3 year term coupled with removal for grounds shown and an element of open competition was held to provide such guarantees. In Starrs v Ruxton itself, the term was but one year, although the 'virtually automatic' practice was to renew indefinitely unless reason not to do so were considered to exist. Although there

- were, additionally, features of that case which are not present in this, namely that temporary sheriffs might aspire to permanent appointment (by the Executive), and that the operation of call-up from the pool beyond the minimum annual period of service was also in Executive hands, the term of office coupled with the possibility of non-renewal was plainly held inconsistent with the necessary objective appearance of independence. In Campbell v UK, a term of three years or less at discretion was regarded as short but in the circumstances justified by the difficulty of obtaining volunteers.
39. The explanation offered by the Department for the term standing at 3 + 3 years is twofold. First, it is said that the legislative changes in the Board's work are likely to result in a greater incidence of oral hearings and thus in a different balance between lay and qualified members. The short term is said to give greater flexibility in appointment. That may be so, but the term has remained the same for years, as has invariable renewal. Secondly, it is said that the short term may help to appoint further black and minority ethnic members, in the interests of diversity. That laudable aspiration applies to all tribunals and does not stand in the way of a longer term of office, whilst the practice of invariable renewal tends to suggest that it is not the reason. No evidence has been presented showing the consideration of such factors, nor that they were raised with the Board as reasons for keeping the term short. Both explanations seem likely to owe more to ex post facto rationalisation than to evidence-based prospective consideration of them as reasons not to make a change in term which would otherwise have been made.
40. There is no known instance of the power to remove under paragraph (a) of the conditions of appointment being invoked. It is to be contrasted with paragraph (e), removal for breach of the Board's Code of Conduct. That Code stipulates general obligations wide enough to encompass culpable neglect of duty; it provides that if breach of the Code is in question an investigation will be undertaken by a member nominated by the Board Chairman, with provision for a hearing if necessary and for appeal to the Chairman. Paragraphs (b) to (d) would in most cases also involve breaches of the Code, with the attendant procedural safeguards. Paragraph (a) is however not confined to culpable neglect of duty. Since it extends to any act in the course of duty which the Secretary of State considers unsatisfactory, this paragraph provides him with an unfettered power of removal, and no procedure is prescribed for investigation, determination, or appeal. Counsel told us that it was 'envisaged' that the Code procedure would in fact be followed if the invocation of paragraph (a) were in contemplation, and of course we accept that those instructions represent the reaction of the Department to the raising of the question in these proceedings. It seems clear that the point had not previously been considered, and that for this reason there exists no check, either formal or informal upon the breadth of paragraph (a). It follows that future circumstances might result in a different view of its use being taken.
41. The importance of security of tenure to the independence of a member of a court is not to be under-estimated. This court, the Parole Board, makes large numbers of decisions on, frequently, highly sensitive issues. It makes them, necessarily, on information much of which cannot be made public, nor are the detailed reasons for its decisions made public. It sits in prisons; the public cannot have free access to its hearings. In the rare, but foreseeable, case its decision may well attract a great deal of

public attention, much of it necessarily less than fully informed. Under the present sponsorship arrangements, the Secretary of State may well come under public or political pressure in relation to such a decision. When members of the Board are making a decision (whether to release or to refuse to release) which may prove to be unpopular, either immediately or more often with hindsight later, their ability to make it strictly on the merits is considerably enhanced if they know that they have security in their position. It is thus essential in the public interest that they should have that confidence. As the law makes clear, objective appearance may matter as much as current practice. In Starrs v Ruxton at 16a, the Lord Justice-Clerk cited with approval the words of Le Dain J in the Canadian case of Valente v R (1985) 24 DLR (4th) 161 at 169:

“The word ‘independent’...reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the Executive Branch of government, that rests on objective conditions or guarantees.”

It was for this reason that the usual practice of indefinite renewal was held not to save the formal insecurity of temporary sheriffs.

42. We conclude that the period of appointment in this case is near the low borderline of what is capable of providing the necessary guarantee of independence, but would if taken alone pass the test. However, when coupled with the power to remove under paragraph (a) without any procedure for the determination of the merits, the provisions for tenure fail the test of independence for the same reason that there was failure in Starrs v Ruxton. It is clear that these rules of tenure are, like Departmental sponsorship which we consider below, a product of the historical origin of the Board as an advisor to the Minister. When the overall position of the Board vis-à-vis the Secretary of State qua Executive and party falls to be considered, they need to be taken together with the other consequences of sponsorship.

Rule Making

43. The power to make Rules of Procedure for the Board is vested in the Secretary of State by s 239(5) CJA 2003 (formerly s 32(5) CJA 1991). As a result of recent amendment to s 330 CJA 2003, such Rules must now be laid before Parliament under the negative resolution procedure. Previous rules have been the subject of consultation between the Board and the Department. We were told of a current debate about Rule 20 and whether it permits the Board to make recommendations as to categorisation of prisoners and otherwise; that is, however, an example of discussion upon the ambit of what the Board's jurisdiction ought to be rather than upon its independence within the jurisdiction accorded to it by law. It is impossible to regard it as ideal that the Rules should be made by a party to the proceedings before the Board, since it is inevitable that from time to time there will necessarily be differences of opinion as to content, but the Parliamentary procedure appears to us to mean that, taken by itself, the rule-making power does not create an appearance of lack of independence.

Directions

44. Apart from the formal rule-making power in s 239(5) CJA 2003, the Secretary of State is empowered by s 239(6) to give directions as to the matters to be taken into account by the Board in discharging its functions. The directions given have recently and authoritatively been considered by the Court of Appeal in R (Girling) v Parole Board [2006] EWCA Civ 1779; [2007] 2 WLR 782. It was held that there was no objection in principle to such power since it was to be construed as a power to give guidance on matters to be taken into account only insofar as they were legally relevant. The directions which have been given were held to have satisfied this test in all but one respect. The exception was, however, significant. The directions had in one respect significantly re-stated the statutory test. The re-stated test would have narrowed the statutory criterion for release. It would have done so in line with the then policy of the Secretary of State. There may well have been appreciable political or public pressure on the Secretary of State to achieve such a modification on grounds of anxiety about re-offending by persons released. The closeness of the Department to its erstwhile advisory body presented the temptation to use the direction-giving power to do so. The modification by the Executive, in pursuit of policy, of a statutory rule which governs a court's decision-making is something which does create the clear appearance (indeed the fact) of lack of independence, the more so when the arm of the Executive in question is a party to the court's proceedings. It is important to observe that it is not open to us to pass any kind of judgment upon the policy objective, and we do not do so. The law would be the same if the policy objective were rather to widen than to narrow the test for release, for example because of pressure on prison places.
45. We conclude that the power to give directions is not inconsistent with the Board's independence, but that the particular use made of it which was addressed in Girling provides an illustration of the manner in which sponsorship and its application in practice does create the appearance of want of independence.

Funding

46. The statutory basis for the funding of the Board is Schedule 19, paragraph 7, CJA 2003, which provides that the Secretary of State shall pay to the Board any expenses incurred in respect of payments to members and staff and, with the consent of the Treasury, such sums as he thinks fit in relation to any other expenses. The Board has control of its own budget once allocated. Allocation is made by the Department. As an ENDPB the Board's budget forms part of that of its sponsoring unit, the SPPU. The Board submits a bid which is considered by SPPU, by NOMS above it, and in due course, to the extent approved in the various departmental stages of consideration, it becomes part of the overall departmental bid (now of the Ministry of Justice) to the Treasury, and is voted upon by Parliament as part of the departmental budget, rather than separately.
47. Whilst it would no doubt enhance independence if an independent budget were granted by Parliament, we regard it as impossible to contend that such independent funding is an essential feature of an independent court. A court does not require a blank cheque to achieve independence. All public services are under considerable budgetary pressure. Public accountability requires that there be at some point ministerial responsibility for the expenditure of public funds. That in this case the

minister responsible should also be a party to the Board's proceedings is the product of the Board's history, but providing that the Board's independence of decision-making is scrupulously preserved from the exercise of departmental supervision of budget allocation, that does not occasion a breach either of Article 5(4) or of the common law of fairness.

48. We were referred to three examples where it was argued that the Department's control of the budget has been employed in a manner inconsistent with the Board's independence. First, it was contended that the Board is required if in legal dispute to employ the services of the Treasury Solicitor even if its interests diverge from those of the Secretary of State. We are satisfied that this is not so. It is open to the Board to instruct other solicitors if it needs to do so, and it has on occasion done so. No doubt that involves it in expense which would not be incurred if the Treasury Solicitor were instructed, but that is a decision for the Board to take in any individual circumstance. Second, we were referred to a difference of opinion which has arisen between the Board and the Department over adjournments ('deferrals'). The decision whether or not to adjourn is no doubt a judicial one, and one on which parties, especially routine parties such as the Secretary of State, are likely to have views. Whilst in this instance the difference of opinion clearly exists, the evidence does not support the contention that SPPU has attempted to trim the budget of the Board so as to control the decision to adjourn. The third example relates to budgetary influence upon the decision whether or not to interview the prisoner. In this respect we are satisfied that the evidence does show that budgetary control appears to have been used to achieve influence on the Board's decision-making, and that that arose from the departmental perception created by the relationship of sponsorship: we deal with it as such below.
49. We conclude that the funding arrangements for the Board are not in themselves inconsistent with the independence required by Article 5(4) and the common law, providing that they are not used to influence decision-making, but that in one respect they appear to have been so used.

Sponsorship generally

50. A number of features of the Board's organisation spring from its origins as an advisor to the Minister and its sponsorship within the Department of State. Appointment and funding, together with rule- and direction-making are clearly four of them. Until very recently the Board was housed within a Home Office building containing principally other units of the Department, and without anything indicating separate identity; now it is housed in a separate, but still departmental, building. Many of its staff are seconded from the Department. Its information technology, including Email, is part of the in-house Departmental provision. Regular and confidential meetings are held between representatives of the Board and officers of the Department at several different levels.
51. The meetings between representatives of the Board and of the Department do not address individual cases. There are, however, a substantial number of them. The Board's Chairman and Chief Executive attend quarterly strategy meetings with the various heads of departments within NOMS; these were described by the senior departmental representative on 22 January 2003 as having evolved into 'an improvement programme board' for the Board. There are monthly meetings between Board managers and other departmental managers designed to monitor the work of

the Board. There are meetings to monitor probation reports relating to parole, to discuss the management of the caseload, and to consider the operation of the new recall arrangements under CJA 2003. These are additional to, and more frequent than, user group or 'stakeholder' meetings at which other parties' representatives are also present, but they involve frequent discussions of the kind which for most courts or tribunals would find a place in meetings of all users, rather than with just one of them.

52. The closeness of this relationship with the sponsoring Department has led to several public statements of carefully expressed anxiety from within the Board itself. In October 2003 the then Chairman, giving written evidence to the Home Affairs Select Committee of the House of Commons, said this:

"We believe that we should be able to manage ourselves in a more obvious state of independence. Although there has been no pressure on us in any individual case to make a decision one way or the other, there is still a perception that we are still part of either the Prison Service or the Home Office and that is not helpful."

More recently in September 2006, at a Cambridge conference on the role and functions of the Board, the present Chairman said:

"...the issue does arise as to whether, in perception at least, we are judicially independent given the following points. The Home Secretary is a party to our proceedings and [NOMS] exercises significant sponsorship influence at the same time as managing the offenders we review."

And after reviewing the administrative arrangements, he went on to say:

"The Home Office has announced that they are to review their NDPBs and we will take the opportunity in the course of the review to argue the case that we should be sponsored elsewhere."

The Chief Executive said on the same occasion:

"A major theme of this conference has been the lack of perceived independence caused by the sponsoring arrangements with the Home Office. It is not possible to justify a process where a tribunal has its members and its chairman appointed by one of the parties to the decisions it makes and in circumstances where that tribunal must follow directions set by that same party. It doesn't convey the impression of equality of arms. No matter that there has not been any attempt at any level to interfere in any individual case decision – the arrangements are not sustainable if we really want public confidence in the Board."

Additionally one judicial member has on several public occasions expressed the same anxiety. A former prison governor member has said the same in a witness statement

to us. These views are not determinative but cannot be taken lightly when what is under consideration is whether the objective appearance of the Board is that of an independent court. The statements of both chairmen and of the Chief Executive appear to show that the perception of lack of independence is common, if not general, amongst those closest to the Board.

53. Among several in-house Home Office reviews of the Board which have taken place, a "Comprehensive Review" was conducted by the Sentence Management Group in October 2001. Its steering group included, of 12 members, 3 from the Parole Board - the Chairman, a second member and the Chief Executive. It was, nevertheless, unmistakably a departmental review. It reported to the Prisons Minister. It was far-ranging and included an examination of virtually every aspect of the Board's work. We are not here concerned with whether its conclusions as to working practices were sound or not; no doubt most were and there was scope for legitimate disagreement about some. What is significant is that the structure of the Board is such that the government department which is a party before it in every case found itself naturally undertaking this kind of detailed examination of how the Board carries out its statutory function. The Review's terms of reference significantly included the requirement to

"...recommend changes to the ...processes which ensure that.....demanding performance targets and measures are established with clear plans for delivery stated".

54. The Review included conclusions and recommendations to the Minister upon such matters as the composition of panels, the approach to oral hearings, the division of work as between members and the secretariat, the training of new members, the terms of appointment of members and the issue of prisoner interviews. The Review also gave consideration to the fact of departmental sponsorship. It stated that it had considered a wide range of options against various factors, one of which was described as "the Board independence issue". Despite that avowed starting point, the only options discussed were which should be the sponsoring departmental unit, rather than whether departmental sponsorship was appropriate at all. As to the import of sponsorship, the Review considered that two of the primary purposes of it were:

"providing Ministers with advice on the overall efficiency and effectiveness of the Parole Board and its usefulness as an instrument of Government policy;" and

"monitoring the Board's performance and providing support and advice and, if necessary, imposing sanctions to ensure efficient and effective delivery of required services."

55. The conclusion arrived at was that the existing arrangements for sponsorship should be retained

"and should support all necessary and appropriate measures for ensuring greater Prison Service awareness of the Board's role and needs across the Prison Service, Home Office and National Probation Service and greater engagement of the Board in wider criminal justice policy development."

The references to the Board being an instrument of Government policy, to the need for it to engage with wider criminal justice policy development, and to the imposition of sanctions no doubt came naturally enough to a departmental examination of what was seen as an in-house body. They are, however, quite inappropriate to discussion of an independent court making decisions which bind the departmental Head.

56. Although the internal organisation of the Department changed subsequently with the creation inside it of NOMS and within that of the SPPU, that change is simply of the unit within the Department which is the sponsor of the Board. The evidence of the Department in the present case is that Ministers continue to take the view that the Board ought to be sponsored by it "in order to ensure that there is accountability on the part of the [Secretary of State] for the overall management of offenders in the community." Such is said to be "vital in order to maintain the public confidence in the system".
57. One purpose, amongst others, of having an independent court is to give the public confidence that decisions of this kind are not a matter for the Executive. It does not follow from the fact that there is ministerial responsibility for the supervision of those released on licence that the decision to release is itself one for ministerial accountability. If that were so, the same argument would suggest that because ministers are accountable for the management of prisons they should also be accountable for the decisions of sentencing courts which make prisoners out of citizens; and then one of the important protections given to ministers, as well as to citizens, by this aspect of the separation of powers, would be lost.
58. With that background we need to consider two particular examples of the ways in which sponsorship appears to condition the relationship between the Department and the Board.

Prisoner interviews

59. S 32(3) CJA 1991 provided as follows:

"...if in any particular case the Board thinks it necessary to interview the person to whom the case relates before reaching a decision, the Board may authorise one of its members to interview him and must consider the report of the interview made by that member."

Its successor, s 239(3) CJA 2003, is in identical terms. By 2003 there was a substantial disagreement between the Board and Ministers as to the exercise of this power. The Board took the view that interviews were valuable, at least where the prisoner was not going to have an oral hearing, and for a variety of reasons; it conducted them in most if not all cases. The Department took the view that they were not valuable, or not sufficiently valuable. The Department relied on some research which had been conducted in the late 1990s; the Board disputed its findings. We are not here in any manner concerned with the merits of this question; which was the better of the two views we simply do not know. What is absolutely clear is that the statute makes the decision whether or not to interview one which is to be made by the Board. Only primary legislation could change that. By 2003 the Home Office was proposing that the budget for ensuing years should be reduced by the cost of what it

regarded as unnecessary interviews. The Quarterly management group minutes of 22 January 2003 recorded the Board registering its "strong objections", but the senior departmental representative announcing that "ministers are strongly in favour of the reforms". The difference of opinion was discussed frequently at different levels. The Chairman of the Board also set out the Board's case for prisoner interviews to the Home Affairs Select Committee in October 2003. In that month the Chief Executive of the Board wrote formally to SPPU to say that she was "unhappy with the manner in which a decision is being forced on the Board, without our agreement, by means of withholding funding." She went on to invite consideration of seeking amendment to the statute. The latter was not sought, for whatever reason; the 2003 Act was enacted late in November with the provision unaltered and there has been no subsequent amendment. At a monthly meeting on 31 October 2003 the senior departmental representative recorded that funding for interviews was approved only to the year end in April 2004. On the same day at a meeting of the Parole Board Advisory Committee, attended by a representative of the Secretary of State, there was a long discussion on whether the Board ought to continue its practice of interviewing even without funding. Eventually, the budget for 2004/5 was approved within the Department on the basis that there would be interviews in only 10% of cases. The quarterly management meeting minutes for 16 March 2004 record the senior departmental representative saying that, despite the Board's protests, "Ministers had chosen to remove interviews and little could be done about it." The Board adjusted its practice in consequence. It appears that it found it difficult to distinguish, at least prior to panel discussion, between cases in which interviews would be essential and those where they would not. In the result it conducted very few indeed. It is clear that it did so under protest.

60. Before us, and in subsequent written submissions for which we gave leave, the Secretary of State's contention has been that nobody in the Department ever intended interviews to be abandoned altogether, nor in any way to limit the discretion of the Board, and that the only object of the Department was to require an individual decision to be made in every case whether to conduct an interview or not. The evidence of the Board, for its part, is that that is not what it was being told, or understood that it was being told, at the time. We have seen a high-level submission to ministers, to which the Board would not have been privy, which does suggest that the Department was alive to the import of the statutory provision, but it also makes clear that what was contemplated – and ensued – was unilateral, and decisive, budgetary action. We conclude that whatever may have been the internal discussions within the ministry, it is perfectly clear that the message being received by the Board was that no or very few interviews would be paid for; there is no sign of it being told that the budget would follow the exercise of its judgment in each case. The difference of opinion was about the value of interviews in general. However, it does not in the event matter whether the Department's wish was to remove interviews altogether or considerably to limit them. The objective perception is as follows. The decision was by statute for the Board; the Board felt that interviews should routinely take place and were valuable; the Department disagreed; the Department used its control of the budget to ensure that its view prevailed; the Board felt that it had no option but severely to limit interviews notwithstanding its judgment of what was right. Applying the law as we have set it out, the question is: is this exercise of the power of budgetary control consistent with the objective appearance of the independence of the Board from the Executive and from a party? The answer can only be that it is not.

Appointments with a view to outcomes

61. We have described above how the business of appointments to the Board normally proceeds, entirely consistently with the Board's independence. In Spring 2006 the annual round of that process was well advanced, and the shortlisting had been finished, when it was overtaken by a ministerial initiative. This had been signalled in advance to the Board by the Department and was announced publicly when on 22 May 2006 the then Home Secretary delivered the Board's annual lecture. It came at a time when there was public anxiety about re-offending by released prisoners, particularly because of two very high-profile murders committed by such persons. The import of the lecture was that there could be no excuses for a system which did not prevent such events, that the safety of the public must outweigh the rights of the offender, and that anyone serving an indeterminate sentence could be released only if the panel members were 'absolutely satisfied' that it was safe to do so. The Secretary of State went on to announce that by June he intended to appoint new members of the Board with experience either of being a victim of crime or of involvement with a victim support organisation. The purpose of these appointments, he said, was to "re-balance the whole system in favour of victims." In order to accommodate this new initiative, there had had to be put in train a separate and parallel selection process, involving the targeting of suitable persons, superimposed on the existing appointment round and after the shortlisting had already been done.
62. It is no part of a court's function to make any finding about the merits of the proposed alteration to the selection criteria, for which the case may or may not have been strong. But it came from the minister of the Crown whose task it is, in every disputed case before the Board, to present the case against release. It was an explicit exercise by that party of the power of appointment, alongside exhortation to require a near guarantee of future behaviour in released prisoners, with a view to changing what was perceived to be over-readiness to release. It was designed to alter, to some extent at least, the outcome of cases before the Board. Whatever the merits of the then current debate about parole, this exercise of that power can only be inconsistent with the objective appearance of the Board's independence from the Executive and from one party to its proceedings. We have little doubt that it came the more easily to hand because the Board exists as a sponsored unit within the appointing minister's Department of State, which arrangement induces the appearance of direct ministerial responsibility for it.

Conclusion

63. The question for us is whether the Parole Board has the necessary objective independence which a court must have in order to satisfy both the common law of England and Wales and the requirements of Article 5(4) ECHR. There is no question about the independence of mind and impartiality of the individual members of the Board. The issue is whether the relationship with the sponsoring Department of State, formerly the Home Office and now the Ministry of Justice, makes the Board too close to both the Executive and the principal party to all its decisions. We have found no sign of any attempt by the Department to influence individual cases, as distinct from the general approach to release decisions; that is so whether the individual cases are those of the claimants before us or any others. In some respects we have found that the structure of the Board is consistent with the necessary objective independence. But we are satisfied that the relationship of sponsorship is such as to create what

objectively appears to be a lack of independence, and to cause the sponsoring Department sometimes to treat the Board as part of its establishment (see paragraph 55). That has led to inadequate protection for the security of tenure of members (see paragraph 42). It has also led to documented examples of the use of the powers of the Department which have not been consistent with the need to maintain the Board's objective independence; those have been powers of funding (see paragraphs 48-9 & 60), of appointment (see paragraphs 33 & 62) and to give directions (see Girling and paragraph 45). The continuing practice of regular confidential meetings between the Board and one party to its decisions, and the appearance given by the integration of the Board with the Department for housing and for electronic communications might not, alone, be inconsistent with the necessary demonstration of objective independence, but taken together with the other incidents of sponsorship they are. What was a perfectly appropriate, if not essential, relationship with the Secretary of State when the Board existed to advise him upon decision-making which was his statutory responsibility is no longer appropriate once the Board has been entrusted by Parliament with the duty of making the decisions itself, as a court, and those decisions are binding upon him.

64. For those reasons we must hold that the present arrangements for the Parole Board do not sufficiently demonstrate its objective independence of the Secretary of State, as required by both English common law and Article 5(4) ECHR. It is an important aspect of the separation of powers that any necessary adjustment to those arrangements is not for us to make but must remain a matter for Parliament or the Executive.

The case of Brooke

65. Michael Brooke was a CJA 1991 long term prisoner with a determinate sentence of 8 years imposed in July 2001. Under the statutory rules applicable to him he was released on licence in May 2006. Within a month he was arrested on suspicion of attempted burglary and accordingly recalled. On 15 August 2006 the Parole Board considered whether or not he should be released. It concluded that he should not. No representations were made on his behalf to the contrary. By then he was awaiting trial for the fresh offence of attempted burglary. In November 2006 the Board decided that his recall under his original sentence should remain effective for the maximum duration of the licence, which for CJA 1991 prisoners is the three quarter point; that would be sometime in or before July 2007, depending on what time he had spent in custody prior to that original sentence being passed in July 2001. Since then, in December 2006, the Claimant has been convicted of the new offence and sentenced to a fresh determinate term of imprisonment for it.

The case of Ter Ogannisyan

66. Mr Ter Ogannisyan is serving a mandatory life sentence for complicity in murders committed in 1993. There were arguably unusual features of the case and the trial judge fixed the notional determinate term commensurate with the defendant's level of responsibility at 15 years; that period will expire in August 2008. His reviews by the Board have thus far been promising. He will be due for further review at or before the expiry of the fifteen year period and seeks a prospective declaration that the Board lacks the demonstrated independence required.

The case of O'Connell

67. Mr O'Connell was sentenced in July 2005 under s 227 CJA 2003 to an extended sentence, composed of a custodial period of 2 years and a licence period of 3 years. Under the statute, he fell to be considered for release at the half way point in the custodial element of that sentence (July 2006), but unlike a prisoner sentenced to a determinate term he was not entitled to such release; rather it was a matter for the decision of the Board: see s 247. The Board decided on 18 July 2006 that he was not suitable for release. In his case the issue arises whether Article 5(4) applies to a CJA 2003 extended sentence prisoner who has not yet finished the custodial part of the imposed term. Although as we understood it, it was agreed on all sides that the common law rule of procedural fairness did apply to his case, Miss Kaufmann urged us on his behalf not finally to decide his claim without resolving the Article 5(4) issue. We understood the reasons for that to be because there remains an issue as to whether he is entitled, either under Article 5(4) or at common law, to an oral hearing, because any finding in relation to the appointment rules for Board members might, at common law, be closed off by the statute, and because the claimant wished to preserve a claim for damages which would not be available at common law. Since we were unable, for want of court time, to hear argument about the application of Article 5(4), we acceded to her application to adjourn final conclusion in his claim to be heard later by a fresh court. It does not require the same constitution of judges.

The case of Murphy

68. Mr Murphy was sentenced on 20 October 2005 to the earlier form of extended sentence provided for by s 85 Powers of Criminal Courts (Sentencing) Act 2000. The sentence was 9 months imprisonment with an extended licence period of 18 months. He was released on licence on 3 March 2006. However, he was recalled to prison on 16 March 2006. It was said that he had breached his licence conditions by failing to comply with satellite tracking.
69. The Parole Board held a hearing on 1 August 2006. The panel, convened to hear representations against recall, decided that the Applicant's recall was justified. It then adjourned the hearing until 21 September 2006 so as to hear further evidence and submissions and to make a decision upon the Applicant's current suitability for release on licence. The panel directed that further information be obtained and in addition directed as follows:

"One or both of the Home Probation Officers who gave oral evidence to this hearing is to attend the adjourned hearing to give evidence regarding the Risk Management and Release plans."

Moreover, it was directed that the seconded probation officer was to give oral evidence regarding Mr Murphy's behaviour and progress since recall with a current assessment of the risk of further sexual offending.

70. The panel re-convened on 21 September 2006. Reports from the home and seconded probation officers concluded that the claimant's risk could be appropriately and effectively managed within the community. His legal representatives submitted that it was therefore clear that his risk could be so managed. In a decision dated 27

September 2006 the Parole Board declined to release him. A letter of that date states that the

“..... decision not to direct your release was centred on a number of factors: Principally your statistically high risk to children, your offending history – including your commission of the index offence despite your previous completion of a Sex-Offender Programme in the Community – your behaviour leading to your recall and the fact that you need to complete a Sex Offender Programme and to address your other admitted contributory areas of risk, i.e. alcohol and stress. In the Panel’s judgement, the risk you pose to children is such that this outstanding work must be completed before you are re-released”

71. Subsequently, on 22 June 2007 the Board concluded that Mr Murphy’s recall should stand until the three-quarter (for him the maximum) point in the original sentence; that will fall in September 2007.
72. Mr Murphy made a discrete submission which related only to his particular case. The issue raised was a reasons challenge to the decision of 27 September 2006. It was submitted that the reasons given did not engage with the key issue of whether the risk posed by the claimant could safely be managed in the community.
73. The complaint is made that, in coming to its decision, the panel simply considered risk by reference to the claimant’s past and failed to apply its mind properly or at all to the question of risk management for the future in the community. Further it was complained that the panel did not give sufficient reasons.
74. We have considered with care the decision letters of 1 August 2006 and 27 September 2006. It is plain to us that when the initial hearing was adjourned that was done with a clear view to the latter hearing being concerned with risk management and release plans. It is clear that the evidence put before the hearing of 21 September addressed those issues. Notwithstanding the fact that there was support from the probation officers for the release of the claimant, the panel was fully entitled to consider the history, together with the fact that this man had previously completed a Sex Offender Programme in the community and had then re-offended. The panel was entitled to take the view that what was needed at this stage before release was the completion of a Sex Offender Programme whilst in custody.
75. Having reviewed the materials, we note that there is no challenge on the basis that the decision made was an unreasonable or irrational one. The submission is couched in the terms already expressed. The panel found that the evidence led the members to the clear conclusion that the claimant’s behaviour, following his earlier release, had raised significant concerns regarding his manageability in the community. In the light of that history the panel was satisfied that effective supervision had been rendered impossible and that the risk to the public was too high for him to return to licence.
76. Whilst those particular findings did relate back to the circumstances which had led to the claimant’s recall, the panel was entitled to have regard to those findings on the recall decision when considering the question of his risk management in the

community. It is plain to us that the panel's reasoning did not solely focus on the historical events, but looked forward to the future, whilst taking account of the past. That is apparent from a full reading of the letters including the passage quoted at paragraph 68 above. In our judgment, no tenable complaint can be made about the way in which the Board approached its task or about the sufficiency of the reasons given for its decision. Accordingly, this discrete reasons challenge raised by Murphy must be rejected.

Relief

77. Final disposal in O'Connell's case is adjourned as explained in paragraph 67 for hearing by a fresh court.
78. The claimants Brooke, Ter Ogannisyan and Murphy are entitled on our findings to declarations that the Parole Board does not meet the requirements of the common law and of Article 5(4) for a court to have demonstrated objective independence of the executive and of the parties. Although final disposal of O'Connell's case must be adjourned as explained in paragraph 67, our findings mean that he is entitled to a declaration that the Board does not meet the requirements of the common law for a court to have demonstrated objective independence of the executive and of the parties.
79. We are unable to detect any basis on which the decisions made in the cases of Brooke or Murphy would have been different if the structure of the Board had not had the flaws which we have identified. We decline to grant any order quashing the decisions in their cases. In the case of Brooke, the period of his recall has moreover now expired.