IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
CROWN OFFICE LIST
DIVISIONAL COURT

CO/2955/96
CO/2997/96
CO/2979/96

Royal Courts of Justice
The Strand
London

Friday 15 November 1996

B e f o r e:

THE LORD CHIEF JUSTICE OF ENGLAND
(Lord Bingham of Cornhill)

LORD JUSTICE ROSE

and

MR JUSTICE BLOFELD

R E G I N A

- v -

GOVERNOR OF BROCKHILL PRISON

Ex parte MICHELLE CAROL EVANS

and

R E G I N A

- v -

GOVERNOR OF ONLEY YOUNG OFFENDER INSTITUTION RUGBY

Ex parte PAUL REID

MR E FITZGERALD QC and MR P WEATHERBY (instructed by Messrs John Howell & Co, Sheffield) appeared on behalf of THE FIRST APPLICANT

MR M MANSFIELD QC and MR M SOORJOO (instructed by Messrs J R Jones, Ealing) appeared on behalf of THE SECOND APPLICANT

MR S RICHARDS and MR M FORDHAM (instructed by the Treasury Solicitor)
appeared on behalf of THE RESPONDENT

J U D G M E N T
(As Approved by the Court)

Friday 15 November 1996

THE LORD CHIEF JUSTICE: If a defendant spends time in custody awaiting trial for a single offence, and if on conviction he is sentenced to a term of custody, the term he is required to serve will be reduced by the period he spent in custody before sentence (unless during that pre-sentence period he was in custody for some reason unrelated to the offence for which he is sentenced).

If he spends time in custody awaiting trial for more than one offence, and if on conviction he is sentenced to consecutive terms of custody, the total term he is required to serve will be reduced by the total period he spent in custody before sentence, subject to the same exception as before, at any rate so long as the period spent on remand for any offence does not exceed the period to be served of the consecutive sentence imposed for that offence.

These applications concern a third situation: where a defendant spends time in custody awaiting trial for more than one offence, and is on conviction sentenced to concurrent or overlapping terms of custody. To what extent is account to be taken, in assessing the term of custody to be served in pursuance of the sentence in that situation, of time spent in custody (otherwise than for some unrelated reason) before the sentences were imposed? That is the problem the court is now called upon to resolve.

Michelle Carol Evans

On 12 January 1996 the applicant Michelle Carol Evans was sentenced for four offences at Cardiff Crown Court. For robbery she was sentenced to 2 years' imprisonment; for each of two burglaries she was sentenced to 9 months' imprisonment; for assault occasioning actual bodily harm she was sentenced to 3 months' imprisonment. All the sentences were concurrent. Her total sentence was therefore one of 2 years'.

The applicant had been arrested for burglary on 4 May 1995 and spent two days in police custody before being bailed. She had been re-arrested on 20 June 1995 and held in custody until 18

August 1995 before again being bailed. This period amounted in total to 62 days in custody. During the latter period of custody (20 June - 18 August, a period of 60 days) the applicant had also been held on the assault charge. On the robbery charge, the applicant had been held in prison from 31 October 1995 until 11 January 1996, a total of 73 days. During this last period of custody she had not been remanded on the charges of burglary and assault but for the robbery alone.

The applicant now seeks an order of habeas corpus and leave to move for judicial review. The respondent is the Governor of Her Majesty's prison at Brockhill. The issue between the applicant and the respondent concerns her date of release.

The basis of the respondent's calculation is this. The sentence of 2 years is treated as one of 731 days. To calculate the date on which her sentence expires, the respondent deducts the 73 days which the applicant spent in custody in relation to the robbery charge, this being the longest (and in the respondent's contention the dominant) sentence. On this basis the effective sentence is one of 658 days and expires on 30 October 1997. In order to calculate the applicant's conditional release date the respondent takes the length of the sentence (731 days) as reduced by the period spent on remand on the robbery charge (73 days), i.e. 658 days, and deducts 365 days, the period of the sentence which a short-term prisoner is not obliged to serve. This yields a total of 293 days to be served, to which must be added 19 additional days awarded on disciplinary grounds, yielding a release date of 18 November 1996.

The applicant accepts 731 days as the length of the sentence, but seeks to deduct from it 135 days (the sum of 62 days spent in custody for the burglary, including 60 days spent at the same time in custody on the assault charge, plus the 73 days in custody on the robbery charge) giving a total effective sentence of 596 days, which yields a sentence expiry date of 29 August 1997. To calculate her conditional release date the applicant takes this figure of 596 days and deducts 365 days (the period which need not be served by a short-term prisoner), obtaining a figure of 231 days. To this total of 231 days she adds the 19 additional days awarded on disciplinary grounds and achieves a release date of 17 September 1996. On this calculation the applicant should already have been released from

prison.

The essential difference between the two modes of calculation is clear. The respondent allocates time spent in custody to the particular offence for which the applicant was at the relevant time held in custody. Thus, since the sentences were all imposed at the same time and the longest sentence imposed was that of 2 years' for robbery, that period is reduced only by the 73 days which she spent in custody on that charge. The 62 days spent in custody on the burglary charge and the 60 days spent in custody on the assault charge do not, on this approach, reduce the period which the applicant is obliged to serve. The applicant does not seek to count twice the period of 60 days during which she was held in custody for both burglary and assault, but does claim that the 62 days spent in custody on the burglary charge and the 73 days spent in custody on the robbery charge should be added together and deducted from the length of the total sentence. The respondent's approach has been called the "particular" approach, the applicant's "the aggregate" approach.

Paul Reid

On 7 May 1996 at Snaresbrook Crown Court Blofeld J passed multiple concurrent sentences on this applicant, as follows:

(1)	Handling	9 months'
(2)	Burglary	27 months'
(3)	Burglary	27 months'
(4)	Burglary	27 months'
(5)	Burglary	27 months'.

Although it proved impossible to achieve agreement of the facts until over a week after the hearing of the application before us had been concluded (and there is still a measure of disagreement), it appears that for offence (1) the applicant had before sentence spent three periods on remand: (a) from 21

November 1994 to 17 January 1995 (58 days); (b) from 20 January 1995 to 1 May 1995 (102 days); and (c) from 9 December 1995 to 7 May 1996 (150 days). For each of offences (2) and (3) he had been in custody for periods (b) and (c), but not (a); for offence (4) he had been in custody for period (c), but not periods (a) or (b); for offence (5) he had been in custody for part of period (c), from 11 March to 7 May 1996 (58 days), but not for periods (a) or (b), or (c) before 11 March 1996.

This applicant makes the same applications as the applicant Evans, but in this case the respondent is the Governor of Onley Young Offender Institution, where he is held.

There is, again, a difference between the applicant and the respondent concerning the applicant's date of release. They agree that the sentence of 27 months' is to be treated as 822 days. From this total the respondent deducts 58 days (the part of period (c) spent by the applicant on remand for offence (5)) to achieve an effective sentence of 764 days and a sentence expiry date of 9 June 1968. From the total so reached of 764 days he deducts 411 days (the half of the sentence which need not be served) to reach a total of 353 days to be served. To that total must be added 82 additional days which the respondent says have been awarded under prison rules, giving a conditional release date of 15 July 1997.

The applicant deducts from the sentence of 822 days the total of 310 days spent on remand for all these offences, achieving an effective sentence of 512 days and a release date of 30 September 1997. From the total of 512 days he deducts 411 days (the half of the sentence which need not be served) to reach a total of 101 days to be served. With the addition of 54 disciplinary days (said by the applicant to be the total number of additional days awarded) he achieves a conditional release date of 8 October 1996. If the respondent is right and the applicant wrong about the number of additional days awarded, the conditional release date on this approach would have been 5 November 1996.

It is plain from the record that when passing sentence the judge understood that the applicant would be released shortly, and intended that he should. The calculations now advanced by the respondent are not easy to reconcile with those supplied to the applicant's solicitor when his release date was first questioned; and the applicant's confidence cannot have been enhanced by a message

from the prison reading "Sorry about the diagram. I tried doing it twice but it looked so complicated even I couldn't understand it."

The relevant statutory provisions

Section 33(1) of the Criminal Justice Act 1991 provides:

> "As soon as a short-term prisoner has served one-half of his sentence, it shall be the duty of the Secretary of State --
>
> .....
>
> (b) to release him on licence if that sentence is for a term of twelve months or more."

In subsection (5) a "short-term prisoner" is defined to mean a person serving a sentence of imprisonment for a term of less than 4 years. Section 51(2) of the 1991 Act reads:

> "For the purposes of any reference in this Part, however expressed, to the term of imprisonment to which a person has been sentenced or which, or part of which, he has served, consecutive terms and terms which are wholly or partly concurrent shall be treated as a single term".

Since both these applicants received sentences for a term of more than 12 months but less than 4 years, treating the concurrent sentences as a single term, both are short-term prisoners within the meaning of the Act and entitled to release on licence after serving one-half of their sentences.

Section 41 of the 1991 Act reads:

> "Remand time to count towards time served:
>
> (1) This section applies to any person whose sentence falls to be reduced under section 67 of the Criminal Justice Act 1967 ("the 1967 Act") by any relevant period within the meaning of that section ("the relevant period").

(2) For the purpose of determining for the purposes of this Part --

(a) whether a person to whom this section applies has served one-half or two-thirds of his sentence; or

(b) whether such a person would (but for his release) have served three-quarters of that sentence,

the relevant period shall, subject to subsection (3) below, be treated as having been served by him as part of that sentence".

Thus both applicants are obliged to serve one-half of their sentences, but in determining whether they have done so the period to be served must be treated as reduced by what section 67 of the 1967 Act defines as the "relevant period".

As originally enacted section 67 of the 1967 Act, so far as relevant, provided:

"(1) The length of any sentence of imprisonment imposed on an offender by a court shall be treated as reduced by any period during which he was in custody by reason only of having been committed to custody by an order of a court made in connection with any proceedings relating to that sentence or the offence for which it was passed or any proceedings from which those proceedings arose, but where the offender was previously subject to a probation order, an order for conditional discharge or a suspended sentence in respect of that offence, any such period falling before the order was made or suspended sentence passed shall be disregarded for the purposes of this section.
.....

(4) Any reference in this Act or any other enactment (whether passed before or after the commencement of this Act) to the length of any sentence of imprisonment shall, unless the context otherwise requires, be construed as a reference to the sentence pronounced by the court and not the sentence as reduced by this section."

The Act also provided, in section 104(2):

"For the purposes of any reference in this Act, however expressed, to the term of imprisonment or other detention to which a person has been sentenced or which, or part of which, he has served, consecutive terms and terms which are wholly or partly concurrent shall be treated as a single term".

Section 67 has been amended and now provides:

> "(1) The length of any sentence of imprisonment imposed on an offender by a court shall be treated as reduced by any relevant period, but where he was previously subject to a probation order, a community service order, an order for conditional discharge or a suspended sentence in respect of that offence, any such period falling before the order was made or suspended sentence passed shall be disregarded for the purposes of this section.
>
> (1A) In subsection 1 above "relevant period" means --
>
> (a) any period during which the offender was in police detention in connection with the offence for which the sentence was passed; or
>
> (b) any period during which he was in custody --
>
> (i) by reason only of having been committed to custody by an order of a court made in connection with any proceedings relating to that sentence or the offence for which it was passed or any proceedings from which those proceedings arose; or
>
> (ii) by reason of his having been so committed and having been concurrently detained otherwise than by order of a court".

Section 67(4) remains in force unamended. So does section 104(2).

The Argument

The respondents contend that the particular approach is required by the language of section 67(1A)(b)(i) and its reference to a period during which an offender had been in custody "in connection with any proceedings relating to that sentence or the offence for which it was passed". Thus, it is said, time spent in custody in connection with proceedings relating to offence A cannot serve to reduce the sentence imposed for offence B. It is (the respondents argue) necessary to investigate what sentence was passed for what offence, and what period was spent in custody in connection with proceedings relating to that sentence or that offence. On this approach, section 104(2) of the 1967 Act and 51(2) of

the 1991 Act have little or no bearing: the earlier subsection was directed to the calculation, for example, of release dates; so too was the later subsection, which was also directed to determining whether a person was a long-term or short-term prisoner.

The applicants rely on section 51(2), alternatively section 104(2), and contend that since any reference to the term of imprisonment to which a person has been sentenced, however it may be expressed, is to be understood as treating consecutive terms and wholly or partly concurrent terms as a single term, and since (unless the contrary intention appears) words in the singular include the plural, the sentence or sentences passed by the court and the offence or offences for which it or they were passed, must be treated as giving rise, whether the sentences were concurrent or consecutive, to a single term, in reduction of which the whole period of pre-sentence custody (unless served for some unrelated reason) is to be set in calculating the release date.

The cases and the commentaries

In support of their contention the respondents are able to rely on four decisions of the Queen's Bench Divisional Court. The earliest of these was Reg. v. Governor of Blundeston Prison, Ex parte Gaffney [1982] 1 W.L.R. 696. In that case the applicant committed one group of offences (offence A) for which he was held in custody before trial for a short period. When he appeared in court sentence was deferred. He later committed another group of offences (offence B) for which he was held in custody for 2 months, being held in custody for offence B only. He appeared in court to be sentenced for both offence A and offence B. He was sentenced to 37 months' imprisonment for offence A and 36 months' imprisonment concurrently for offence B. The issue was whether, in calculating his release date, he could count against the 37 month sentence on offence A only the short period spent in custody on offence A or whether he could also set off the longer period spent in custody on offence B. He could set that longer period of custody against the slightly shorter sentence imposed on offence B, but that would not have the result of reducing the effective sentence he had to serve. Giving the first judgment Eastham J held that he could only set against the sentence for offence A the short period he

spent in custody on offence A. He therefore upheld the particular approach. Lloyd J agreed. Lord Lane CJ also agreed, but added:

> "It may be that the result appears to be unjust, but it is a result which we are forced to achieve by reason of the wording of the Act".

It does not appear that that authority was cited in the next case to come before a court, R v Secretary of State for the Home Office ex parte Read (1987) 9 Cr. App. R.(S) 206. In that case the applicant had been convicted and sentenced for two robberies. For robbery A, he was arrested in November 1977 and held in custody until his conviction in May 1979 when he was sentenced to 15 years' imprisonment. For robbery B he was charged in July 1979 and bailed, although since he was already in custody he was not released. He was convicted in November 1979 and sentenced to 18 years' imprisonment, reduced on appeal to 16 years'. A co-defendant Sears was also convicted of both robberies. He, however, was arrested for robbery A in November 1978, a year after the applicant. He also was convicted of robbery A in May 1979 and sentenced to 15 years'. He also was charged with robbery B in July 1979, bailed (although not released since already in custody on robbery A), convicted in November 1979 and sentenced to 18 years' (also reduced on appeal to 16 years'). Since the criminal responsibility of the two robbers was at all times treated as the same, the applicant was aggrieved that he should spend a year longer in prison than his co-defendant, but receive no reduction to reflect that period of imprisonment. He sought a reduction in sentence on appeal to the Court of Appeal Criminal Division, but the court, although describing the position as anomalous, did not correct it. The applicant argued that since the prosecution for robbery B had been based on evidence which emerged from the trial for robbery A, the whole period of his confinement from November 1977 to his conviction of robbery B in November 1979 was in respect of robbery B. This argument was rejected. McCullough J, giving the leading judgment, said:

> "The determination of a man's LDR is something which should be

> beyond dispute. Parliament must have intended the provision whereby the determination is made to be easy to apply. This would not be so if the construction for which [counsel for the applicant] contends were correct".

He upheld the particular approach for which the Secretary of State contended, and Woolf LJ agreed.

The next authority was R v Governor of H M Prison Styal ex parte Mooney [1996] 1 Cr. App. R.(S) 74. In this case the applicant was on 29 November 1993 sentenced for a number of offences. For six offences of burglary (one of these being committed on 14 September 1993) she was sentenced to 30 months' imprisonment, all six sentences being concurrent. On eight counts of theft she was sentenced to 6 months' imprisonment concurrently with each other and concurrently with the 30 months' sentence. On four counts of going equipped and other offences she was sentenced to 3 months' imprisonment, those sentences being consecutive but concurrent with the sentence of 30 months'. She was lastly sentenced to one day for burglary. Between February and September 1993, the applicant spent a total of 13 days in police custody in connection with various of these offences, but not in connection with the burglary committed on 14 September 1993. Between March and April 1993 the applicant spent a further 15 days in prison in respect of one or more of these offences, but not in respect of the 14 September 1993 burglary. At the date of sentence, she had thus spent 28 days in custody, but none of them related to the burglary of 14 September. The issue before the court was summarised by Simon Brown LJ in this way (at page 76):

> "The issue can be put thus: whether, when a person is sentenced to more than one period of imprisonment to be served concurrently, the periods spent previously in custody should be deducted from each particular sentence to which they relate before calculating the release date by reference to the total sentence, or whether such periods in custody should be aggregated and the release date calculated simply by deducting that aggregate from the total sentence".

That is essentially the issue which is before us. Having referred to the relevant legislation, under the mistaken belief that section 104(2) of the 1967 Act had been repealed and re-enacted as section 51(2)

of the 1991 Act, and considered the previous authorities, Simon Brown LJ said (at page 77):

> "[Counsel for the applicant], in these proceedings, seeks to argue a point not apparently taken in either ex parte Gaffney or ex parte Read, although, as it seems to me, if a good point it was one which was available to the applicants in each. The point is this: that the phrase 'sentence of imprisonment' in the opening line of section 67 should be interpreted to mean the same as the expression 'term of imprisonment', as that expression is defined in section 51(2) of the 1991 Act, formerly section 104(2) of the 1967 Act. If that be right then every element of an eventual concurrent sentence is a sentence that carries with it the right to credit all pre-sentence periods spent in custody, irrespective of the offences in connection with which they were spent.
>
> In my judgment, however, it is plainly wrong. Section 51(2) simply does not address the question of deduction of time spent on remand. That is left to be dealt with in the specific provision in the 1967 Act, namely section 67 as amended. Section 67 expressly adopts a particular approach, rather than the global or aggregate approach adopted for quite different purposes by section 51. It is true, as [counsel for the applicant] points out, that Part II of the 1991 Act to which section 51 applies, includes within it section 41, but section 41, by its opening words, begs rather than answers the question as to how section 67 applies. Section 41 necessarily leaves its proper construction untouched. As to the proper construction of section 67, the language seems to me unambiguous: it clearly requires the same result here as in both the earlier cases. There is no material distinction on the facts, nor are the statutory provisions presently in play materially different."

It was found to be unnecessary to address the competing policy arguments, but Simon Brown LJ added (at page 78):

> "I would, however, just touch on these because it is clearly important that the profession should know how matters stand and how properly to meet such difficulty as might otherwise be suggested to result from the construction of this provision presently adopted. Defending counsel must always be alive to the fact that not all periods spent in police or prison custody, prior to sentence, will necessarily count to a defendant's credit. That consideration should, in appropriate cases, be drawn to the sentencing judge's attention. My Lord, Curtis J, whose experience in this field is well nigh unrivalled, suggests that that already happens".

Curtis J agreed. He said (at page 78):

> "It is for counsel then to make appropriate submissions to the sentencing judge who will take that matter into account in assessing the total appropriate period of punishment for the defendant's wrongdoing. This, in my experience, is already invariable practice since that Act came into force and especially since the decision in Ex parte Gaffney."

Ex parte Mooney was the subject of comment in [1995] Crim. L. R. 753. Dr D A Thomas wrote:

> ".....it seems obviously unfair to offenders who have spent time in custody on remand awaiting trial for one offence, and are eventually sentenced to concurrent sentences for other unrelated offences. If the offender spends (say) six months in custody awaiting trial for offence A, and is eventually sentenced to concurrent terms of two years for offence A and an unrelated offence, B, he will receive no credit for the time spent in custody on remand as it will not count against the sentence for offence B. If, however, he is sentenced to two consecutive terms of twelve months, he will get full credit for his time in custody, which will reduce the first sentence and thus shorten his total time in custody. A similar result will follow if offence B is taken into consideration, and he is sentenced to two years for offence A. The six months will reduce the effective duration of the two-year sentence".

Dr Thomas pointed out that section 104(2) had not been repealed as the court had thought, and suggested that if section 67 of the 1967 Act had been interpreted in the light of this section (which had not been mentioned in either ex parte Gaffney or ex parte Read) it seemed impossible that the court could have come to the conclusion which it did in any of those cases.

Dr Thomas published a further and more detailed critique of this decision and the preceding authority in Current Sentencing Practice News, Issue 4, August 1995, pages 8-10. He suggested that:

> "The basic principle is that time spent in custody will be deducted from the resulting sentence unless the offender was simultaneously in custody for some other reason".

He repeated, tentatively, the suggestion that section 104(2) remained in force, and attributed the court's decision in ex parte Mooney (in his view a mistaken decision) to its failure to appreciate that fact. He also pointed to the serious injustice and undesirable anomalies which the court's decision could produce:

> "if the sentencing court can be persuaded (contrary to the usual and preferred practice) to pass a series of shorter consecutive terms with the same aggregate, he [the defendant] will retain all of the credit, as each of the periods of time on remand will be deducted from its related sentence. A defendant who has spent time in custody will be discouraged from pleading guilty to additional offences which have come to light more recently, for fear of losing the value of his remand time if concurrent sentences are passed. If he can have the other offences taken into consideration, he will preserve the value of his remand time, as the only sentence will be for the offences in relation to which the time was spent on remand, and the problem in ex parte Mooney will not arise".

Dr Thomas concluded:

> "The real lesson of these cases is the desperate need to remedy the grotesque deficiencies of the statutory framework of sentencing, at least by a consolidation of the existing law into a single Act. The fact that the Divisional Court can go seriously wrong not once but three times, as a result of a failure to identify relevant statutory provisions, and in the course of doing so arrive at a result which is both unjust to individual defendants and productive of yet more anomalies and technicalities is [the] clearest possible indication of the urgency of the problem".

R v Secretary for the Home Department and H M Prison Service ex parte Woodward and Wilson, unreported, came before the court on 24 June 1996. The applicant Woodward had spent 143 days on remand before being sentenced to 33 months' imprisonment. He served part of that sentence, absconded, and committed further offences before he was again arrested. For those further offences, he again appeared in court and received concurrent sentences amounting in total to 3½ years'. The issue was whether he was entitled to set the 143 days on remand against the sentence of 3½ years'.

The applicant Wilson had been sentenced to concurrent sentences of 3½ years for a number of offences committed at different times. Before sentence, he had spent a total of 244 days on remand. Of that total, he had spent 84 days in custody before being released on bail. He had then committed further offences, for which he had again been arrested. He had then spent a further 160 days awaiting trial. The issue was whether the period of 84 days counted only against the sentences for the original offences (in which event they would not serve to reduce his effective sentence) or whether the whole period of 244 days should be set against the sentence of 3½ years. On this occasion, the court had the benefit not only of the previously decided cases, but also Dr Thomas' criticism of them, and the court appreciated that section 104(2) of the 1967 Act remained in force. Giving the first judgment, Scott Baker J said:

> "In my judgment the key to the construction of section 67(1) lies in the expression 'sentence of imprisonment' as opposed to the expression 'term of imprisonment' in section 104(2) and section 51(2).
>
> It cannot, in my judgment, be doubted that by section 104(2), which clearly is applicable, these Applicants each have a single term of imprisonment, but the question is what are the consequences of that single term, and that is a matter which is resolved not by section 104(2) but by section 67(1). Section 51(2) and section 104(2) are both general provisions, neither is concerned with how remand time and police detention time is to be deducted, that question is dealt with by section 67 of the 1967 Act in conjunction with section 41 of the 1991 Act.
>
> For my part, I have no doubt, bearing in mind the reasoning of Simon Brown LJ with which Curtis J agreed, that had that court been aware that section 104(2) of the 1967 Act was still in force they would have reached precisely the same conclusion.
>
> There is clearly a distinction between section 51(2) and section 104(2) because section 51(2)applies only to the relevant Part of the l991 Act whereas section 104(2) applies to the whole of the l967 Act, but that distinction is, in my judgment, quite immaterial for the purposes of these applications and in particular for the purposes of the correct construction of section 67 of the l967 Act.
>
> In my judgment, section 67(1) clearly envisages the particular approach. It has been so interpreted by a number of authorities over the last 14 years.
>
> There is, so far as I am aware, no decision to the contrary in the period

> of almost 20 years since the l967 Act was envisaged.
>
> If Parliament had intended to change the law to the aggregate approach it could easily have done so in one of the numerous Criminal Justice Acts that have been passed in recent years. The reasoning of Simon Brown LJ in Mooney prevails, and in my respectful view is correct.
>
> Section 67 was intended to link periods of custody to particular sentences for particular offences.
>
> For my part, I cannot see any injustice or unfairness. One starts with the proposition that a defendant should be sentenced for each offence of which he has been convicted. The judge then has to consider the overall sentence that justice demands and for this reason, sentences are often ordered to be served concurrently, but I cannot see on the face of it why time spent in custody in respect of offence A should be credited against the sentence for offence B.
>
> There will, in my judgment, be no injustice provided the judge bears in mind the effect of any time spent on remand or in police custody on the constituent elements of the sentence he is minded to pass. Counsel should ensure that the judge is informed of any periods that the defendant has spent in custody and the offences to which they relate.
>
> If these applications have done nothing else, they have illustrated the urgent need for one consolidated Act of Parliament to deal with the law relating to sentencing".

Russell LJ agreed. Leave to move for judicial review was refused.

On 4 September l996, the Divisional Court (Simon Brown LJ and Popplewell J) gave judgment in R v Secretary of State for the Home Department ex parte Naughton, unreported. The facts of the case, ignoring irrelevant details, were these. The applicant was arrested for unlawful possession of cannabis and spent 81 days in custody before being released on bail. He was later arrested for burglary and then spent a further period of 239 days in custody in connection with the proceedings both for the cannabis offence and the burglary offence. He was sentenced to 18 months' imprisonment for each of these offences, the sentences to run consecutively and so to produce a total of 36 months'. It was common ground that in computing the applicant's release date he was entitled to credit for the two periods of 81 days and 239 days. He, however, adopting the particular approach upheld by the court in the decisions already referred to, contended that since for 239 days he had been

held in custody on both of these two charges for which he received consecutive sentences, each of such sentences should be reduced by that period of 239 days. If periods spent on remand in relation to an offence were to reduce the sentence passed for that offence, then a prisoner was entitled to count the time twice. The Home Secretary challenged that contention.

In his judgment, Simon Brown LJ pointed out and illustrated the obvious absurdity to which that contention could give rise. But, in rejecting the particular approach to consecutive sentences, he was caused to doubt the correctness of that approach in relation to concurrent sentences, with which all the previous cases had been concerned. He concluded:

> "The one result of section 67 which in my judgment Parliament could not possibly have intended was that contended for by the applicant here. It would produce a complete nonsense. Whatever may be said about the language of the section it certainly does not lead clearly to that result. In truth, the only argument for the section to be construed in that way derives from the Gaffney line of cases. Powerful and logical though at first blush that argument may appear - and no doubt it was that power and logic which caused the prison service, so soon after the decision in Woodward and Wilson, to introduce the new release guidelines - in my judgment it cannot prevail. If, indeed, consistency with the Gaffney approach would require consecutive sentences to be dealt with as the applicant submits, then I should unhesitatingly conclude that the Gaffney approach was wrong. The principle of stare decisis does not apply in the Divisional Court and we need not follow other decisions of this court when we are "convinced that [they are] wrong" - see Reg. v. Greater Manchester Coroner, Ex parte Tal [l985] Q.B. 67. I would if necessary decline to follow even such a well established line of authority as this rather than produce the absurd result contended for here.
>
> It is therefore unnecessary and, as it seems to me, inappropriate in the present case to reach any final conclusion as to whether it is indeed possible to construe section 67 sensibly so far as consecutive sentences are concerned consistently with the correctness of the present approach in concurrent sentence cases. Suffice to say that my preferred path of construction to [counsel for the respondent's] undoubtedly sensible (indeed compelling) conclusion as to how consecutive sentence cases must be treated is by way of section 104(2). If that route is indeed thought difficult to reconcile with the Gaffney approach, so be it. Of one thing I am clear: whatever relevance (if any) we might have attached to section 104(2) in Mooney had we known it remained in force, had we been alive to the present argument -- i.e. the consecutive sentence dimension to the case -- I for my part would certainly not have described the language of section 67 as 'unambiguous' with regard to the

correct treatment of concurrent sentence cases".

Popplewell J agreed, both as to the absurdity of the particular approach as contended for in relation to consecutive sentences and in expressing reservations as to the correctness of the decisions on concurrent sentences.

The conclusion reached in ex parte Naughton was, on the facts, plainly correct. But while the court clearly and rightly rejected the submission that the applicant could double-count the 239 days spent in custody simultaneously for both the cannabis and burglary offences, the facts did not require the court to choose between the particular and aggregate approaches. Suppose that (as was the case) the applicant had spent 81 days on remand in relation to the cannabis charge alone and (as was not the case) 239 days on remand in relation to the burglary charge alone. Suppose that (as was the case) he was sentenced to 18 months' and 18 months' consecutive. He would have had to serve half the total of 36 months, namely 18 months. On these assumed facts he could, on the aggregate approach, have claimed to reduce the period he had to serve by the full period of 320 days spent on remand (as, on the actual facts, it was common ground he was entitled to do). But on those assumed facts, on the particular approach, that would not be accepted: he could set off the 239 days spent on remand against the term to be served on the burglary charge, leaving no period to serve (the 182 days to serve being outweighed by the 239 days served); but against the period to serve (182 days) for the cannabis offence the applicant would be able to set off only 81, leaving 101 days to serve. On this approach the applicant would gain credit for 263 days spent on remand, not 320. Although the facts in ex parte Naughton did not require the court to choose between these specific approaches, it seems that the court would have preferred the former.

We were shown a draft of an article by Dr Thomas reviewing these latest decisions (now published in Current Sentencing Practice News, Issue 4, 11 November 1996 at page 10). In it, he points to objectionable anomalies in the existing law on concurrent sentence:

> "A man spends six months in custody on remand in respect of one offence; he is subsequently sentenced to a total of two years' imprisonment for that offence and other offences for which he has been on bail. If the sentence is in the form of twelve months and twelve months consecutive, he will serve a further six months; if the sentence is in the form of two years and two years concurrent, he will serve twelve months. How can this anomaly be justified? The Court of Appeal has for years,and on countless occasions, advised sentencers that, in a case involving multiple sentences, what matters most is the totality of the composite sentence, not the make up of the individual parts. This principle is totally inconsistent with the ex parte Mooney approach, and a judge who follows it may produce a consequence which is the opposite of what he intends. Take the case of a man who has spent nine months in custody on remand for one set of offences, and has been on bail in respect of another group of offences. If the sentencer's first thought is that he should serve eighteen months for the first set of offences and eighteen months' consecutive for the second set, making a total sentence of three years, the offender will have to serve a further nine months in custody after sentence. His nine months in custody on remand will count against the first of the consecutive sentences, and he will have to serve half of the second sentence before release. He will have been in custody for a total of eighteen months overall. If the sentencer, following the guidance of the Court of Appeal in many cases that he should stand back and review the aggregate sentence, decides that taken as a whole three years is too long, and that a fairer sentence would be thirty months on each indictment concurrent, he will reduce the nominal length of the total sentence by six months, but the rule in ex parte Mooney means that the offender must now serve six months longer in custody than he would have done under the original sentence of three years. His nine months on remand will be deducted from only one of the two concurrent sentences of thirty months, and he will have to serve another fifteen months before being released from the second concurrent sentence".

Dr Thomas strongly argues that section 104(2) should lead the court to the conclusion that the aggregate approach should be adopted in relation to concurrent as well as consecutive sentences.

Conclusions

Section 33(1) of the 1991 Act requires the Secretary of State to release each of these applicants after they have served one half of their sentences. In section 33 subsections (1) and (5) "sentence" must be interpreted in the light of section 51(2) which requires any reference to a term of imprisonment, however expressed, to be treated as a single term even though it is made up of

consecutive or wholly or partly concurrent terms. The length of the single term for this purpose is dependent on the sentence as pronounced by the court: section 67(4) of the 1967 Act.

In the case of consecutive sentences, the single term is plainly the total of the individual sentences ordered to be served consecutively. This is so whether the sentences are imposed on the same occasion or different occasions.

If concurrent sentences are imposed on the same occasion, the single term will in effect be the longest of the concurrent terms because that will be the last sentence to expire. Where concurrent sentences are imposed on different occasions they must still be treated as a single term, but the terminal date of the sentence pronounced by the court will not necessarily be that of the longest of the concurrent terms; it will, however, be the terminal date of the last sentence to expire, which may or may not be the longest of all the sentences. In the case of concurrent sentences it is not, obviously, a question of adding the relevant sentences together but of seeing which expires last.

The references to "sentence" in subsections (1) and (2) of section 41 of the 1991 Act must be read subject to section 51(2), as construed above. A short-term prisoner is accordingly to be treated as having served such part of the one half of his sentence he is required to serve as is to be regarded as a "relevant part" of that sentence as defined in section 67(1A). For present purposes there appears to be no practical distinction between police detention in paragraph (a) of that subsection and custody in paragraph (b). It seems clear, as was held by the court in ex parte Naughton,that the expression "only" in paragraph (b)(i) is intended to preclude any account being taken of periods in custody unrelated to the offence or offences for which the relevant sentence or sentences were passed.

As we read them, section 51(2) and section 104(2) focus attention on the overall term ordered to be served as distinct from the terms, whether consecutive or concurrent, which contribute to or go to make up that overall term. Thus sentences of 9 months' and 9 months' consecutive is to be regarded as a single term of 18 months' and the period to be served is 9 months', not 4½ months' and 4½ months'. On this construction it would, at first blush, seem illogical and inconsistent to revert to consideration of the individual sentences contributing to or making up the overall term in order to determine what

period of custody on remand is to be set against each. The argument for doing so essentially rests on the singular language ("that sentence or the offence for which it was passed") in section 67(1A). But by section 6(c) of the Interpretation Act 1978 words in the singular include the plural unless the contrary intention appears. Since section 67(1A) applies to single as well as multiple sentences there was good reason to use the singular. Does a contrary intention appear? In our judgment it does not: as already indicated, we consider that logic and consistency support application of the statutory rule of interpretation. Considerations of justice point in the same direction. Time spent in custody in relation to any of the offences for which sentence is passed should serve to reduce the term to be served, subject always to the condition that time can never be counted more than once.

Had this rule been applied in ex parte Gaffney, the applicant would have gained the benefit of his second and longer period in custody, as he would if consecutive sentences of 19 and 18 months' had been passed. In ex parte Read the applicant would not have had to serve a year longer than his equally guilty co-defendant. In ex parte Mooney the fact that the applicant had spent no time in custody for one of her many offences would not have deprived her of the benefit of the time she had spent in custody on all the others. In Woodward the applicant would have gained the benefit of the 143 days he spent on remand, although only once. In Wilson the applicant also would have gained the benefit of the full period spent on remand and not only part. On this approach the injustices highlighted by Dr Thomas, if not obviated, would be reduced.

In the course of an able and helpful argument Mr Stephen Richards for the respondents contended that the applicants' approach also would produce injustice. He put the following case:

> "Consider the example of defendant A who is arrested for offence X, spends 6 months on remand in respect of offence X, is released on bail, commits offence Y and then spends a further 3 months on remand in respect of offence Y. He is then convicted and sentenced to 9 months' imprisonment concurrent for each of offences X and Y. It is difficult to see why the sentence for offence Y should be reduced (allowing the defendant in this example to walk free) by reference to the time spent on remand in respect of offence X before offence Y was even committed. Suppose further that there is a co-defendant B in respect of offence Y and that co-defendant B also spends 3 months on remand in respect of

> offence Y and receives 9 months' imprisonment for that offence. Co-defendant B on any view still has 6 months until expiry of sentence. In all justice defendant A should have the same time until expiry of sentence in respect of offence Y. He should not benefit from the fact that he has spent time on remand for a different and earlier offence".

The first of these cases involves no injustice: defendant A has spent twice as long in prison as the law requires. The second would indeed be an unjust result. But that is because it would be bad sentencing practice to impose the same sentence on A, who had committed two offences, one of them while on bail for the other, as on B who had only committed one offence. In the absence of good reason for doing otherwise, the sentencer would impose consecutive terms on A, or longer concurrent terms. In this way there would be no injustice.

It has been urged upon us, and we unreservedly accept, that we should not depart from previous decisions of this court unless we are satisfied that they are wrong. Our reluctance must be the greater when, as in this case, the authorities have quite rightly founded their practice on these decisions. We are, however, of the clear opinion that the construction previously put upon the legislative provisions we have reviewed was wrong. We are moreover of opinion that that construction is capable of producing, and has in some of the decided cases produced, injustice. Although differing with diffidence from the very clear view expressed by Curtis J, we feel bound to say that in the collective experience of this court it has not been the practice of sentencing judges to take account of the particular approach upheld in ex parte Gaffney when passing sentence. We have been referred to no reported case in which a judge has adopted that practice, nor has any of us adopted it. It is indeed evident that in one of the instant cases one of our number passed sentence in the belief that the defendant would, as he intended, be released very shortly. At the time of passing sentence the information necessary to decide, in applying the particular approach, what periods of pre-sentence custody would be taken into account and which would not would by no means always be available to the sentencing judge. It has in our experience been the practice to assume that all periods of custody before sentence, other than custody wholly unrelated to the offences for which sentence is passed, will

count against the period of the sentence to be served.

We feel bound to conclude that the argument advanced on behalf of these applicants is correct and we are willing to grant appropriate relief.

The principle that a prisoner's release date should be beyond dispute, and that the provisions governing it should be easy to apply, is of great importance, for reasons both of fairness and good administration. It is not, on any showing, a test which the present provisions meet. They are not clear to the courts, or the legal profession, or prisoners or (it would seem) the prison authorities. They are certainly not simple. It appears that defendants are remaining in prison when the sentencing court did not intend that they should. The Law Commission has described it as an important feature of any criminal justice system that sentencing provisions should be accessible and comprehensible and has recommended the enactment of a comprehensive statutory consolidation of sentencing provisions. As already noted, Dr Thomas in August 1995 and this court in June 1996 drew attention to the urgent need for such a statute. We hope that this may be seen as a task commanding a high degree of priority.

This is the judgment of the court.

THE LORD CHIEF JUSTICE: I see on the bench a proposed point of law of general public importance, but it would appear to me in any event that any appeal lies to the Court of Appeal Civil Division, not to the House of Lords.

MR RICHARDS: My Lord, can I deal with a number of points and come to that in a moment, if I may? Counsel have had an opportunity to discuss the appropriate relief, if I can deal with that first. The effect of your Lordships' judgment is that both applicants have passed their conditional release date and are entitled to be released on licence. We cannot resist an order that they be released forthwith on licence.

THE LORD CHIEF JUSTICE: Do you want an order or a declaration?

MR RICHARDS: My Lord, it matters not which. We agreed upon an order. There is another aspect to which I shall come, but I am content with an order for their release or, if your Lordships think it more appropriate, a declaration that they are entitled to be released on licence would certainly suffice from all parties' point of view.

THE LORD CHIEF JUSTICE: My initial inclination is always in favour of the least draconian relief necessary to achieve the object of the exercise.

MR RICHARDS: Can I mention this additional point in relation to the events where there are proceedings for judicial review as well as habeas corpus? The question arises about a declaration appropriate to the judicial review proceedings and Mr Fitzgerald and I agree that an appropriate form of declaration in the case of Evans is a declaration that her conditional release date, correctly calculated, was 17 September 1996.

THE LORD CHIEF JUSTICE: Her conditional of release date was?

MR RICHARDS: That her conditional release date, correctly calculated, was 17 September 1996. That is the date that appears at page 3 of your Lordships' judgment. That would be sufficient in the case of Evans.

THE LORD CHIEF JUSTICE: Then we would need to grant leave to move for judicial review in Evans' case?

MR RICHARDS: It has been granted. There was technically before your Lordships both the judicial review application and the habeas corpus application.

THE LORD CHIEF JUSTICE: I appreciate that, but I thought there was an application for leave to move. I am getting support from the Associate.

MR FITZGERALD: And from my junior. Apparently leave was not granted.
THE LORD CHIEF JUSTICE: The only piece of paper we had in our bundle was an application for leave.

MR RICHARDS: My Lord, I have been under a misunderstanding. I thought leave had been granted, but in that event I would certainly invite your Lordships to grant leave to move?

THE LORD CHIEF JUSTICE: It is obvious we should do that. The suggested order is twofold so far: (1) leave to move for judicial review; and (2) a declaration that in the case of Evans her conditional release date correctly calculated was 17 September 1996.
MR RICHARDS: My Lord, yes.

THE LORD CHIEF JUSTICE: Yes.

MR RICHARDS: In the case of Reid the problem, as regards any similar declaratory relief, is the remaining dispute on the additional days, which means one cannot at this point grant a declaration which has a specific date.

THE LORD CHIEF JUSTICE: No, but we could make a declaration which excluded the question of additional days.

MR RICHARDS: Yes, and it would be entirely appropriate, in my submission, to have a declaration that Reid is entitled to be released on licence as of today, leaving open the remaining doubt as to precisely when --

THE LORD CHIEF JUSTICE: I think -- am I wrong about this -- that in Reid's case also there was an application for leave to move for judicial review?

MR RICHARDS: No, I think not in Reid's case. I think it was only in the case of Evans that there was a judicial review application.

THE LORD CHIEF JUSTICE: That appears to be correct. So is the only application in Reid's case for habeas corpus?

MR RICHARDS: Yes.

THE LORD CHIEF JUSTICE: Can we make a declaration on an application for habeas corpus?

MR MANSFIELD: My Lord, the paperwork was prepared and put in and lodged for judicial review in Reid's case as well. I wonder if that can be checked?

THE LORD CHIEF JUSTICE: Yes, I do in fact have a notice of application for leave to move for judicial review in Reid's case with a Crown Office number.

MR RICHARDS: I understand that had not been served on us. We were not aware of that.

THE LORD CHIEF JUSTICE: Could I ask the Associate to show you that piece of paper? (Same handed)

MR RICHARDS: My Lord, having seen these, even in the absence of service upon us, we are content that it be treated before your Lordships as an application for leave, which we obviously would not resist in these circumstances, and your Lordships having determined the substantive application, because the issues are identical to those argued before your Lordships in the habeas application.

THE LORD CHIEF JUSTICE: It has the same Crown Office number, but the Associate tells me she is doubtful whether it has been issued. Would there have been an additional fee? Can you help on this, Mr Mansfield?

MR MANSFIELD: I am sure we can rustle up the necessary if it has not been paid.

THE LORD CHIEF JUSTICE: I think this is the most convenient way of dealing with this: would you make sure that any appropriate procedure, paperwork and fees are dealt with?

MR MANSFIELD: Certainly.

THE LORD CHIEF JUSTICE: Then we will in this case also grant leave to move for judicial review and declare that this applicant is entitled to immediate release.

MR RICHARDS: My Lord, for the avoidance of misunderstanding, that is immediate release on licence?

THE LORD CHIEF JUSTICE: On licence, yes.

MR RICHARDS: Because both applicants will be subject to normal licence conditions and will have to appreciate that action may be taken against them, particularly recall to prison, if they breach the conditions.

THE LORD CHIEF JUSTICE: Of course.

MR RICHARDS: In addition, my Lord, I am going to raise in a moment the question of appeal. It is important that both applicants appreciate the risk of being recalled to prison in the event of a successful appeal and the Secretary of State's position being upheld.

THE LORD CHIEF JUSTICE: Yes. I have no doubt, Mr Fitzgerald and Mr Mansfield, that you will

make sure that your clients understand that, if any other court should take a view different from our own, they are liable to be recalled to prison to serve whatever period remains.

MR MANSFIELD: Certainly.

THE LORD CHIEF JUSTICE: You will advise them of that?

MR FITZGERALD: Yes. My Lord, that might make a difference whether you grant an order in the habeas corpus application because if your Lordships' view is correct that this is a civil habeas corpus, my understanding is that you cannot be recalled to prison if you have been granted release. But if, as we think, it is a criminal habeas corpus, you can. So it may make some difference.

THE LORD CHIEF JUSTICE: We are not granting an order for habeas corpus at the moment.

MR FITZGERALD: Then, my Lord, we will certainly indicate to our client that in the light of the judicial review order. My Lord, there is the final matter of the claim for damages.

THE LORD CHIEF JUSTICE: Shall we deal with leave first of all?

MR FITZGERALD: Yes.

THE LORD CHIEF JUSTICE: I think Mr Richards is just dealing with leave at the moment.

MR RICHARDS: My Lord, I think the damages' issue does arise now because the outstanding matter in both the judicial review applications is a claim for damages. It is agreed that that should be adjourned so that questions of liability and quantum would fall to be considered at a later date and no further order is required arising out of your Lordships' judgment, subject to the question of appeal. As your Lordships have indicated, the first question is whether this is a criminal cause or matter. All counsel, having considered the matter, take the view that it is criminal for this reason. We are concerned here with the correct calculation or computation of the sentence handed down by the court under section 67, and also as part of that process of computation we are concerned with the correct treatment of periods spent in custody on remand, again pursuant to an order of the court in the criminal proceedings. Those closely related facets led us to the view that this is properly to be regarded as a question raised in or with regard to criminal proceedings, albeit that it arises by way of a challenge to an executive decision not to release. Thus although in the broader cases where one was concerned with discretionary matters the view was taken that it was a civil cause or matter and the appeal lay to the Court of Appeal, it would, in my submission, be different here where we are not concerned in substance with the mere executive decision, but we are concerned with what in truth under the statute was the correct computation of the sentence handed down by the court in the criminal proceedings. It is not, I accept, an entirely easy question to know in cases in this general area which side of the line it falls, but in my submission it does fall on the criminal side of the line.

THE LORD CHIEF JUSTICE: I think our initial view -- it may be wrong -- is that it was analogous to disputes over the setting of the tariff in cases like Pierson and Doody.

MR RICHARDS: I understand why your Lordship would take that analogy. In those cases, however, one is concerned with a discrete executive decision which involves an element of discretion in the tariff cases. Here we are only concerned with the executive giving effect to the requirement of the statute as to what is the period that has to be served before release on licence and, as part and parcel of the same question, what is the correct computation of the term of imprisonment pursuant to the sentence of the court? So that here one does seem to be much more closely connected with the actual criminal proceedings than in those tariff cases.

THE LORD CHIEF JUSTICE: I understand, Mr Fitzgerald, that you and Mr Mansfield take that same view?

MR FITZGERALD: My Lord, yes. The closest parallel is the case of Read, which had to deal with a computation of a sentence of imprisonment imposed in Spain which then had to be transferred by warrant into a sentence to be served in England. That was treated as a criminal cause or matter which had to go to the Divisional Court and to the House of Lords. I have Read, if your Lordships would like to see it.

THE LORD CHIEF JUSTICE: I think we can see that in a sense the Parole Board cases and the mandatory life tariff cases are distinguishable. In a sense I suppose the question here is: what did the sentence imposed by the criminal judge mean?

MR FITZGERALD: Yes, and the orders on which they rely for their credit are orders made in criminal proceedings, that is to say you would have to go into the nature of the order made in criminal proceedings in order to compute how much credit they are entitled to. That is how we say it is the interpretation of a criminal sentence, but also when one is looking at credit, you are looking at credit which accrued by virtue of orders made for remand in criminal proceedings. So in those circumstances we say that this is a criminal cause or matter, whereas in the Board of Visitors' cases it was about remission where there had been an interposing disciplinary hearing. In the parole cases, as my learned friend says, there is an interposing administrative discretion rather than an operation of law.

THE LORD CHIEF JUSTICE: Very well. Is there agreement on this point of law of general public importance?

MR RICHARDS: My Lord, there is agreement that we should seek to formulate it in general terms rather than incorporate in it the two final tests that have been canvassed before your Lordships. How general is a matter for your Lordships. The respondent has put forward this wording:

> "The correct method of determining the 'relevant period' for the purposes of section 41 of the Criminal Justice Act 1991 and section 67 of the Criminal Justice Act 1967 in a case where an offender spent separate periods on remand in custody in respect of offences for which he is given concurrent sentences."

That, we would suggest, effectively meets the circumstances of these two cases. The applicants have put forward a somewhat wider version. The applicants' draft is:

> "What is the proper construction of section 67(1) of the Criminal Justice Act 1967 in respect of relevant periods of remand custody to be set against sentence?"

It would be my submission that either form encapsulates the essential issue of general public importance before your Lordships and would be a perfectly proper basis upon which to consider the question of appeal to their Lordships' House.

THE LORD CHIEF JUSTICE: I think we rather prefer your version.

MR RICHARDS: My Lord, undoubtedly if this matter is canvassed in their Lordships' House it will traverse the entirety of the ground arising out of that question.

THE LORD CHIEF JUSTICE: I am sure. The answer to the question is unlikely to be affected by the phrasing.

MR RICHARDS: Indeed so. Are your Lordships prepared to grant a certificate in those terms?

THE LORD CHIEF JUSTICE: Is it a point of law or a question of law. What does the Act refer to?

MR RICHARDS: It is a point of law of general public importance.

THE LORD CHIEF JUSTICE: A point of law, so we do not need to put a question mark at the end and say: what is ...?

MR RICHARDS: We will check on the wording. We have the relevant provision here. I had it in mind that it was a point of law.

THE LORD CHIEF JUSTICE: Yes.

MR RICHARDS: As to leave, my Lords, of course I recognise the clear- cut nature of the decision of this court, and I recognise that it was only because this court took the clear view that the previous and long-standing authorities on the subject were wrong that the court reached the conclusion that it did. The fact remains that there is, and has been over many years, a body of authority in support of the Secretary of State's position, and views have been expressed in the decided cases in very strong terms in favour of the Secretary of State's position. In those circumstances, notwithstanding the clear-cut view being reached by this court, it would in my submission be an appropriate case for leave to appeal.

THE LORD CHIEF JUSTICE: Thank you.

MR FITZGERALD: My Lord, we say that the point is, as your Lordships have said, a clear one. We would oppose leave. We do not dispute that it is a point of law of public importance. We simply submit that the Secretary of State, if leave is refused, may well on mature reflection realise that there is no point in pursuing this further and that would lead to a swifter determination that if leave was granted and we reach the situation where there might be some expectation that he has got to appeal and as a result in fact it would create further uncertainty while people awaited the House of Lords' decision. We respectfully submit that this decision is very clear and the interpretation is unambiguous when the two matters which have not really been considered by the earlier courts are looked at, that is to say the Interpretation Act and section 104(2), so that really this is a case where, for the first time, it has been fully considered by a very strongly constituted court. We would respectfully submit that in those circumstances it actually might create further uncertainty if leave is granted. If leave is refused, then the Secretary of State would have to reconsider whether really he has a point to pursue to the House of Lords and, if he concludes on advice that he has not, then no expectation would be created and so we submit that in those circumstances leave should be refused in order that it may result in a speedier determination and a removal of any further uncertainty.

THE LORD CHIEF JUSTICE: Mr Mansfield, you agree with that?

MR MANSFIELD: Yes, I concur.

MR RICHARDS: Could I make this clear? Although I asked for leave to appeal because we say it is an appropriate case for that, any final decision as to whether to pursue an appeal will of course have to be taken in the light of very careful consideration of your Lordships' judgment and in asking for leave I do not prejudge that final decision.

THE LORD CHIEF JUSTICE: Thank you. We of course recognise, as is common ground, that the issue raised by these appeals is one of general public importance -- and very considerable importance -- to a number of individuals as well as to the Home Office which is responsible for the administration of this important branch of the penal system. We shall accordingly certify as a point of law of general public importance the issue as framed on behalf of the Home Office. We shall not grant leave to appeal. Our reasons for refusing leave are twofold. First, as we have indicated in the course of our judgment, we ourselves, rightly or wrongly, consider the answer to be clear; if we had not considered the answer to be clear, we should not have departed from previous authority. But at the same time we wish to make it clear that the purpose of refusing leave is not in any way intended to thwart the Home Office from pursuing the matter if so advised. It is of course open to them to go to their Lordships' House and seek leave, which their Lordships will give if they think the matter deserves further argument. If, however, in the light of our judgment, the statutory analysis and the academic comments to which reference is made, the House of Lords feel that there is no point deserving of further argument, then we shall be doing no one a service by granting leave. I hope that makes plain the reason for taking the view we do.

MR RICHARDS: My Lord, I am grateful. The only other matter which I have not mentioned is costs. We cannot resist an order for costs and I think both applicants require legal aid taxation.

THE LORD CHIEF JUSTICE: Very well. I have indicated the order on a point of law of public importance and leave. In each case there will be leave to move for judicial review. In the case of Michelle Evans there will be a declaration that her conditional release date as correctly calculated was 17 September 1996; the issue of damages will be adjourned; she is entitled to her costs; and there will be an order for legal aid taxation. In the case of Reid there will be a declaration that he is entitled to immediate release on licence; the question of damages is adjourned; and there will in his case also be an order for costs against the respondent and an order for legal aid taxation.
