**Easter Term**
**[2013] UKSC 23**
*On appeal from: [2011] EWCA Civ 349; [2012] EWCA Civ 452*

# JUDGMENT

# R (on the application of Faulkner) (FC) (Appellant) *v* Secretary of State for Justice and another (Respondents)

# R (on the application of Faulkner) (FC) (Respondent) *v* Secretary of State for Justice (Respondent) and The Parole Board (Appellant)

# R (on the application of Sturnham) (Appellant) *v* The Parole Board of England and Wales and another (Respondents)

**before**

**Lord Neuberger, President**
**Lord Mance**
**Lord Kerr**
**Lord Reed**
**Lord Carnwath**

## JUDGMENT GIVEN ON

## 1 May 2013

**Heard on 19, 20 and 21 November 2013**

*Appellant*
Hugh Southey QC
Jude Bunting
(Instructed by Chivers)

*Respondent*
Sam Grodzinski QC
Tim Buley
(Instructed by Treasury Solicitors)

*Appellant*
Sam Grodzinski QC
Tim Buley
(Instructed by Treasury Solicitors)

*Respondent*
Hugh Southey QC
Jude Bunting
(Instructed by Chivers)

*Appellant (Sturnham)*
Hugh Southey QC
Philip Rule
(Instructed by Chivers)

*Respondent*
Sam Grodzinski QC
Tim Buley
(Instructed by Treasury Solicitors)

*Respondent*
Lord Faulks QC
Simon Murray
(Instructed by Treasury Solicitors)

**LORD REED (with whom Lord Neuberger, Lord Mance and Lord Kerr agree)**

*The background to the appeals*

1. Until relatively recent times, English judges were obliged to impose sentences of imprisonment for life only in cases of murder. A judge might also impose a discretionary life sentence in other cases where a determinate sentence would not provide adequate protection to the public against the risk of serious harm presented by the particular individual. In practice, such sentences were highly unusual. Following a series of judgments in which the European Court of Human Rights considered the compatibility of life sentences with the European Convention on Human Rights and Fundamental Freedoms ("the Convention"), statutory reforms were introduced so that, where a life sentence was imposed, the judge determined a minimum period or "tariff" to be served for the purposes of retribution and deterrence, following which the continued detention of the prisoner depended upon an assessment of the level of risk which he continued to present, carried out by the Parole Board ("the Board"). I shall return to the statutory functions of the Board.

2. In more recent times, sentencing legislation required judges to impose "automatic" life sentences upon a much wider range of offenders. In particular, section 2 of the Crime (Sentences) Act 1997 ("the 1997 Act") required the courts to impose a life sentence upon anyone convicted of a second serious offence, unless there were exceptional circumstances permitting the court not to take that course. A similar duty was imposed by section 109 of the Powers of Criminal Courts (Sentencing) Act 2000 ("the 2000 Act"). Section 225 of the Criminal Justice Act 2003 ("the 2003 Act") introduced, with effect from 4 April 2005, indeterminate sentences of imprisonment for public protection ("IPP"), which were to be automatically imposed whenever a person was convicted of any one of a large number of offences designated as "serious offences" and the court thought there to be a significant risk of serious harm to members of the public by the commission of a further "specified offence". Risk was to be assumed in cases where the person had previously been convicted of a "relevant offence".

3. The Board is responsible for the release of prisoners sentenced to life imprisonment and those serving IPP sentences. Under section 28(5) of the 1997 Act as amended, the Secretary of State is required to release a life or IPP prisoner who has served his tariff period if the Board has directed his release. Section 28(6) provides that the Board shall not give such a direction unless the Secretary of State

has referred the prisoner's case to it, and the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. Section 28(7) provides that a life prisoner may require the Secretary of State to refer his case to the Board at any time after the expiry of his minimum term. In practice, cases are normally referred to the Board by the Secretary of State some months before the expiry of the tariff period. The Board also receives from the Secretary of State the reports which it requires on the prisoner's progress, and then fixes an oral hearing prior to reaching its decision.

4. One consequence of the changes introduced by the legislation described in paragraph 2, and in particular the introduction of IPP sentences, was greatly to increase the number of prisoners whose cases required to be considered by the Board. Another consequence was that a much higher proportion of prisoners subject to indeterminate sentences, particularly in IPP cases, had short tariff periods. The cumulative effect of these developments was greatly to increase the workload of the Board. Although these consequences of the introduction of IPP sentences were entirely predictable, they had not been anticipated by the Secretary of State, and the Board was not provided with a commensurate increase in its resources. It soon became clear that the existing resources were insufficient. The result was delay in the consideration of the cases of prisoners who had served their tariff period, and whose further detention could only be justified on the basis of an assessment of the risk which they continued to present.

5. Steps have been taken to address the problem. The 2003 Act was amended by the Criminal Justice and Immigration Act 2008, with effect from 14 July 2008, so that IPP sentences are no longer mandatory. In addition, the Board has been provided with additional resources, and administrative changes have been introduced in order to increase the efficiency of the system. The courts however have to deal with the legal consequences of the problems which I have described.

*Convention rights*

6. In that regard, important issues arise under the Human Rights Act 1998 ("the 1998 Act"). In that Act, Parliament required the courts to give effect to Convention rights corresponding to those guaranteed by the Convention. Those rights include the rights conferred by article 5(1) and (4) of the Convention. Article 5(1) provides:

> "(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

> (a) the lawful detention of a person after conviction by a competent court …"

Article 5(4) 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."

7. Compliance with article 5(1)(a) requires more than that the detention is in compliance with domestic law. As the European court stated in *Weeks v United Kingdom* (1987) 10 EHRR 293, para 42:

> "The 'lawfulness' required by the Convention presupposes not only conformity with domestic law but also … conformity with the purposes of the deprivation of liberty permitted by sub-paragraph (a) of article 5(1). Furthermore, the word 'after' in sub-paragraph (a) does not simply mean that the detention must follow the 'conviction' in point of time: in addition, the 'detention' must result from, 'follow and depend upon' or occur 'by virtue of' the 'conviction'. In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue."

In relation to a discretionary life sentence imposed for the purpose of public protection, the court added (para 49):

> "The causal link required by sub-paragraph (a) might eventually be broken if a position were reached in which a decision not to release or to re-detain was based on grounds that were inconsistent with the objectives of the sentencing court. 'In those circumstances, a detention that was lawful at the outset would be transformed into a deprivation of liberty that was arbitrary and, hence, incompatible with article 5.'"

8. The court further held in that case that, where a defendant was recalled to prison following release on licence, it followed that it was necessary for him to be able to bring proceedings, as soon as he was recalled to prison and at reasonable intervals thereafter (since the need for continued public protection was liable to change over time), in order to determine whether his continued detention had become "unlawful" for the purposes of article 5(1)(a), on the basis that it was no

longer consistent with the objectives of the sentencing court. The obligation to provide an opportunity for such a determination arose under article 5(4).

9. In *Thynne, Wilson and Gunnell v United Kingdom* (1990) 13 EHRR 666 this reasoning was applied in relation to discretionary life prisoners whose tariff periods had expired. Since there was a question whether their continued detention was consistent with the objectives of the sentencing court, it followed that they too were entitled under article 5(4) to have the question determined. The subsequent judgment in *Stafford v United Kingdom* (2002) 35 EHRR 1121 confirmed that a mandatory life prisoner was also entitled to the protection of article 5(4), by means of regular reviews of the risk which he presented, once the punitive period of his sentence had expired.

10. The implications of these judgments were then reflected in domestic case law. In relation to "automatic" life prisoners, in particular, it was held in *R (Noorkoiv) v Secretary of State for the Home Department* [2002] 1 WLR 3284 that article 5(4) requires a review by the Board of whether the prisoner should continue to be detained once the tariff period has expired, and therefore requires a hearing at such a time that, whenever possible, those no longer considered dangerous can be released on or very shortly after the expiry date. In practice, that meant that the Board should hold hearings prior to the expiry of the tariff period. Since Noorkoiv's case had not been heard until two months after the expiry of his tariff period, he was therefore the victim of a violation of article 5(4). That approach has been followed in the subsequent case law.

11. Another important aspect of the 1998 Act is that the remedies which Parliament has provided for a violation of Convention rights, by section 8 of the Act, include damages. Accordingly, it was accepted in the case of *R (James) v Secretary of State for Justice* [2010] 1 AC 553 that a violation of a prisoner's rights under article 5(4) could result in an award of damages.

12. The present appeals are concerned primarily with the circumstances in which a life or IPP prisoner who has served his tariff period, and whose case has not been considered by the Board within a reasonable period thereafter, should be awarded damages under the 1998 Act, and with the quantum of such awards. They raise a number of questions: in particular, (1) whether an award should be made only in a case where the prisoner would have been released earlier if his case had been considered by the Board without undue delay, or whether an award may also be appropriate even if the prisoner would not have been released earlier; (2) if the latter view is accepted, whether an award should be made whenever undue delay has occurred, or whether delay has to have been of a certain duration before an award is appropriate; and (3) how, on either view, damages should be assessed. A question is also raised as to whether the detention of a prisoner, during a period

when he would have been at liberty if his case had been considered by the Board in accordance with article 5(4), constitutes false imprisonment under the common law, or a violation of article 5(1) of the Convention.

*Summary of conclusions*

13. It may be helpful at this point to summarise the conclusions which I have reached.

1. A prisoner whose detention is prolonged as the result of a delay in the consideration of his case by the Board, in violation of article 5(4) of the Convention, is not the victim of false imprisonment.

2. Nor is he ordinarily the victim of a violation of article 5(1) of the Convention: such a violation would require exceptional circumstances warranting the conclusion that the prisoner's continued detention had become arbitrary.

3. At the present stage of the development of the remedy of damages under section 8 of the 1998 Act, courts should be guided, following *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673, primarily by any clear and consistent practice of the European court.

4. In particular, the quantum of awards under section 8 should broadly reflect the level of awards made by the European court in comparable cases brought by applicants from the UK or other countries with a similar cost of living.

5. Courts should resolve disputed issues of fact in the usual way even if the European court, in similar circumstances, would not do so.

6. Where it is established on a balance of probabilities that a violation of article 5(4) has resulted in the detention of a prisoner beyond the date when he would otherwise have been released, damages should ordinarily be awarded as compensation for the resultant detention.

7. The appropriate amount to be awarded in such circumstances will be a matter of judgment, reflecting the facts of the individual case and taking into account such guidance as is available from awards made by the European court, or by domestic courts under section 8 of the 1998 Act, in comparable cases.

8. Pecuniary losses proved to have been caused by the prolongation of detention should be compensated in full.

9. It will not be appropriate as a matter of course to take into account, as a factor mitigating the harm suffered, that the claimant was recalled to prison following his eventual release. There may however be circumstances in which the claimant's recall to prison is relevant to the assessment of damages.

10. Damages should not be awarded merely for the loss of a chance of earlier release.

11. Nor should damages be adjusted according to the degree of probability of release if the violation of article 5(4) had not occurred.

12. Where it is not established that an earlier hearing would have resulted in earlier release, there is nevertheless a strong, but not irrebuttable, presumption that delay in violation of article 5(4) has caused the prisoner to suffer feelings of frustration and anxiety.

13. Where such feelings can be presumed or are shown to have been suffered, the finding of a violation will not ordinarily constitute sufficient just satisfaction. An award of damages should also be made.

14. Such damages should be on a modest scale.

15. No award should however be made where the delay was such that any resultant frustration and anxiety were insufficiently severe to warrant such an award. That is unlikely to be the position where the delay was of the order of three months or more.

14. In the remainder of this judgment I shall explain the grounds upon which I have reached those conclusions.

*The lawfulness of detention when there is a violation of article 5(4)*

15. Before considering the issue of just satisfaction, it is necessary to consider first whether, as was argued, the detention of a prisoner, during a period when he would have been at liberty if his case had been considered by the Board "speedily" as required by article 5(4), constitutes false imprisonment at common law, entitling the prisoner to an award of damages in tort. Alternatively, it was argued that the detention of the prisoner in such circumstances constitutes a violation of article 5(1), entitling the prisoner to an award of just satisfaction for unlawful detention.

16. The argument that the detention of a life prisoner constitutes false imprisonment, if it continues beyond the point in time when article 5(4) required a hearing to be held, must be rejected. As was explained in *R (James) v Secretary of State for Justice* [2010] 1 AC 553, the continued detention is authorised by statute. Under the relevant statutory provisions, which I have summarised at paragraph 3, there is no entitlement to release by the Secretary of State until release has been directed by the Board, and a direction to that effect cannot be given until the Board is satisfied that detention is no longer necessary for the protection of the public. By virtue of the relevant legislation, the prisoner's detention is therefore lawful until the Board gives a direction for his release. That conclusion is not affected by section 6(1) of the 1998 Act, which makes an act of a public authority unlawful if it is incompatible with Convention rights. That provision does not apply to an act if, as a result of one or more provisions of primary legislation, the public authority could not have acted differently: see section 6(2)(a). In a case where there has been a failure to review the lawfulness of detention speedily, as required by article 5(4), there may well be some respects in which a public authority could have acted differently; but, as I have explained, the absence of a speedy decision does not affect the question whether the prisoner can be released under the relevant provisions. It has not been suggested that section 3 of the 1998 Act requires those provisions to be read or given effect in a way that differs from their ordinary meaning.

17. The question whether detention may constitute a violation of article 5(1), if it continues beyond the point in time when release would have been ordered if article 5(4) had been complied with, is in my view more difficult.

18. As I have explained, article 5(4) provides a procedural entitlement designed to ensure that persons are not detained in violation of their rights under article 5(1): the notion of "lawfulness" has the same meaning in both guarantees. A violation of article 5(4) does not however entail eo ipso a violation of article 5(1). In *Rutten v Netherlands* (Application No 32605/96) (unreported) 24 July 2001, for example, the European court found that there had been a violation of article 5(4) as a result of delay in the holding of a hearing to determine whether the prolongation of detention was necessary, following the expiry of the period initially authorised. The court also held that there had been no violation of article 5(1). That conclusion was reached on the basis that the purpose of article 5(1) was to prevent persons from being deprived of their liberty in an arbitrary fashion, and, on the facts, the detention during the period of the delay could not be regarded as involving an arbitrary deprivation of liberty.

19. The application of article 5(1) was considered by the House of Lords in *R (James) v Secretary of State for Justice* [2010] 1 AC 553. It is necessary to consider this case in some detail. The principal issue in the case arose from the failure of the Secretary of State to provide courses or treatment which would assist

IPP prisoners to address their offending behaviour and enable them to undergo assessments which could demonstrate to the Board their safety for release. The appellant James's case was first considered by the Board three months after his tariff had expired, at which point a hearing was deferred, as he had been unable to participate in any relevant courses. A hearing subsequently took place, eight months after his tariff had expired, at which point the Board exceptionally directed his release notwithstanding his failure to undertake the courses. The appellant Wells's case was first considered by the Board nine months after his tariff had expired. The Board declined to direct his release, explaining that since he had been unable to take part in the relevant courses he could not demonstrate that he presented an acceptable level of risk. Wells had to wait until about two years after his tariff had expired before he was able to participate in the courses. A further hearing was held more than three years after the tariff had expired, at which point the Board directed his release. The appellant Lee's case was considered by the Board four months after his tariff had expired. No direction was made for his release, since he had been unable to take part in the relevant courses. He had to wait almost three years after his tariff had expired before he could take part in the courses. The Board finally considered his case four years after the tariff had expired, and declined to order his release.

20. The House of Lords held that there had been no violation of article 5(1) in any of the three cases. It was accepted that the causal connection between a prisoner's conviction and the deprivation of his liberty, required by article 5(1)(a), might be broken by a prolonged failure to enable the prisoner to demonstrate that he was safe for release. The facts of the cases did not however demonstrate, in the view of the House, a breakdown of the system of such an extreme character as to warrant the conclusion that the prisoners' detention following the expiry of their tariffs had been arbitrary. In a passage subsequently cited by the European court, Lord Hope of Craighead observed at para 15:

> "The claimants' cases were referred by [the Secretary of State] to the Parole Board as the statute required. A favourable consideration of them may have been delayed, but performance of its task of monitoring their continued detention was not rendered impossible. Mr Lee and Mr Wells remain in custody because the Board was not yet satisfied that they are no longer a risk to the public. The causal link with the objectives of the sentencing court has not been broken."

21. When the cases proceeded to Strasbourg (*James, Wells and Lee v United Kingdom* (2012) 56 EHRR 399, the European court agreed with the House of Lords that there was a sufficient causal connection between the applicants' convictions and their deprivation of liberty following the expiry of their tariffs. Indeterminate sentences had been imposed on the applicants because they were considered to pose a risk to the public. Their release was contingent on their

demonstrating to the Board's satisfaction that they no longer posed such a risk. As Lord Hope had pointed out, this was not a case where the Board was unable to carry out its function: its role was to determine whether the applicants were safe to be released and it had before it a number of documents to allow it to make that assessment. That conclusion was not affected by the fact that, without evidence that the applicants had undertaken treatment to reduce the risks they posed, the Board was unlikely to give an affirmative answer to that question.

22. The European court nevertheless considered that the applicants' post-tariff detention had been arbitrary, and therefore in violation of article 5(1)(a), during the periods when they had no access to relevant courses to help them address the risks they posed to the public. That conclusion reflected the court's view, influenced by international law in respect of prison regimes, that a real opportunity for rehabilitation was a necessary element of any detention which was to be justified solely by reference to public protection. In other words, since the justification for detention after the expiry of the tariff was the protection of the public, it followed that the conditions of such detention must allow a real opportunity for rehabilitation. In the absence of such an opportunity, the detention must be considered to be arbitrary.

23. The judgment of the European court in that case does not appear to me to be directly relevant to the present appeals. That is, in the first place, because these appeals are not concerned with the lack of access to rehabilitation courses which was in issue in *James, Wells and Lee.* Secondly, the awards made in *James, Wells and Lee* were not for loss of liberty but for the feelings of distress and frustration resulting from continued detention without access to the relevant courses: see para 244 of the judgment. That, as I have explained, is not an issue that arises in the present appeals.

*Just satisfaction and damages*

24. Article 41 of the Convention provides:

> "If the court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the high contracting party concerned allows only partial reparation to be made, the court shall, if necessary, afford just satisfaction to the injured party."

25. Article 41 is not one of the articles scheduled to the 1998 Act, but it is reflected in section 8 of the Act, which so far as material is to this effect:

"(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including -

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining -

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under article 41 of the Convention.

…

(6) In this section -

'court' includes a tribunal;

> ‘damages’ means damages for an unlawful act of a public authority; and
>
> ‘unlawful’ means unlawful under section 6(1).”

26. These provisions were considered by the House of Lords in *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673. In a speech with which the other members of the House agreed, Lord Bingham of Cornhill noted at para 6 that there are four preconditions to an award of damages under section 8: (1) that a finding of unlawfulness or prospective unlawfulness should be made based on breach or prospective breach by a public authority of a Convention right; (2) that the court should have power to award damages, or order the payment of compensation, in civil proceedings; (3) that the court should be satisfied, taking account of all the circumstances of the particular case, that an award of damages is necessary to afford just satisfaction to the person in whose favour it is made; and (4) that the court should consider an award of damages to be just and appropriate. In relation to the third and fourth of these requirements, Lord Bingham observed that it would seem to be clear that a domestic court could not award damages unless satisfied that it was necessary to do so; but, if satisfied that it was necessary to do so, it was hard to see how the court could consider it other than just and appropriate to do so.

27. Lord Bingham also stated (*ibid*) that in deciding whether to award damages, and if so how much, the court was not strictly bound by the principles applied by the European court in awarding compensation under article 41 of the Convention, but it must take those principles into account. It was therefore to Strasbourg that British courts must look for guidance on the award of damages. A submission that courts in England and Wales should apply domestic scales of damages when exercising their power to award damages under section 8 was rejected. Dicta in earlier cases, suggesting that awards under section 8 should not be on the low side as compared with tortious awards and that English awards should provide the appropriate comparator, were implicitly disapproved (para 19).

28. Lord Bingham gave a number of reasons why the approach adopted in the earlier cases should not be followed. First, the 1998 Act is not a tort statute. Even in a case where a finding of violation is not judged to afford the applicant just satisfaction, such a finding will be an important part of his remedy and an important vindication of the right he has asserted. Secondly, the purpose of incorporating the Convention in domestic law through the 1998 Act was not to give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of resort to Strasbourg. Thirdly, section 8(4) requires a domestic court to take into account the principles applied by the European court under article 41 not only in determining

whether to award damages but also in determining the amount of an award. Lord Bingham commented that there could be no clearer indication that courts in this country should look to Strasbourg and not to domestic precedents.

29. This approach was not challenged in the present appeals. It differs from the ordinary approach to the relationship between domestic law and the Convention, according to which the courts endeavour to apply (and, if need be, develop) the common law, and interpret and apply statutory provisions, so as to arrive at a result which is in compliance with the UK's international obligations; the starting point being our own legal principles rather than the judgments of an international court. In contrast to that approach, section 8(3) and (4) of the Act have been construed as introducing into our domestic law an entirely novel remedy, the grant of which is discretionary, and which is described as damages but is not tortious in nature, inspired by article 41 of the Convention. Reflecting the international origins of the remedy and its lack of any native roots, the primary source of the principles which are to guide the courts in its application is said to be the practice of the international court that is its native habitat. I would however observe that over time, and as the practice of the European court comes increasingly to be absorbed into our own case law through judgments such as this, the remedy should become naturalised. While it will remain necessary to ensure that our law does not fall short of Convention standards, we should have confidence in our own case law under section 8 once it has developed sufficiently, and not be perpetually looking to the case law of an international court as our primary source.

30. In *Greenfield* the House of Lords rejected a submission, repeated in the present appeals, that the levels of Strasbourg awards were not "principles" within the meaning of section 8(4). Lord Bingham stated at para 19:

> "this is a legalistic distinction which is contradicted by the White Paper [Rights Brought Home: The Human Rights Bill (1997) (Cm 3782)] and the language of section 8 and has no place in a decision on the quantum of an award, to which principle has little application. The court routinely describes its awards as equitable, which I take to mean that they are not precisely calculated but are judged by the court to be fair in the individual case. Judges in England and Wales must also make a similar judgment in the case before them. They are not inflexibly bound by Strasbourg awards in what may be different cases. But they should not aim to be significantly more or less generous than the court might be expected to be, in a case where it was willing to make an award at all."

31. The term “principles” is therefore to be understood in a broad sense. It is not confined to articulated statements of principle: such statements by the European court in relation to just satisfaction are uncommon, and, as will appear, it may be unsafe to take them at face value, without regard to what the court actually does in practice. The focus is rather upon how the court applies article 41: the factors which lead it to make an award of damages or to withhold such an award, and its practice in relation to the level of awards in different circumstances. As Lord Dyson observed in *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2; [2012] 2 AC 72, para 84, in the absence of a guideline case in which the range of compensation is specified and the relevant considerations are articulated, it is necessary for our courts to do their best in the light of such guidance as can be gleaned from the Strasbourg decisions on the facts of individual cases.

32. The search for “principles” in this broad sense is by no means alien to British practitioners, at least to those who had experience of practice in the field of personal injury law before the Judicial Studies Board published its guidelines. The conventions underlying the amounts awarded as general damages (or, in Scotland, solatium) for particular forms of harm could only be inferred from an analysis of the awards in different cases and a comparison of their facts. It is an exercise of a similar kind which may be called for when applying section 8 of the 1998 Act in connection with the quantification of awards for non-pecuniary damage (or “moral damage”, as the court sometimes describes it, employing a literal translation of the French expression).

33. As Lord Bingham acknowledged, although the court must take into account the principles applied by the European court, it is not bound by them: the words “must take into account” are not the same as “must follow”. In particular, important though the guidance provided by the European court may be, there are differences between an international court and a domestic court which require to be borne in mind.

34. One difference, of degree at least, which I have already mentioned is that the European court does not often articulate clear principles explaining when damages should be awarded or how they should be measured. That reflects a number of factors. One is that the court cannot replicate at an international level any one of the widely divergent approaches to damages adopted in the domestic legal systems from which its judges are drawn: the systems of 47 countries, stretching from the Atlantic to the Caspian, with diverse legal traditions. Nor is there a relevant body of principles of international law which it can apply. The court has therefore had to develop its own practice through its case law. Given the differing traditions from which its judges are drawn, and bearing in mind that the court has not regarded the award of just satisfaction as its principal concern, it is not altogether surprising that it has generally dealt with the subject relatively briefly, and has offered little explanation of its reasons for awarding particular

amounts or for declining to make an award. Furthermore, as I shall shortly explain, the court has a more limited role in relation to fact-finding than national courts, as is reflected in its procedure and in its treatment of evidence. For all these reasons, the court has treated questions of just satisfaction as requiring what it describes as an equitable approach, as the Grand Chamber explained in *Al-Jedda v United Kingdom* (2011) 53 EHRR 789, para 114:

> "The court recalls that it is not its role under article 41 to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage."

35. In consequence of the European court's treatment of the award of damages as a broader and more discretionary exercise than under our domestic law, some commentators have expressed scepticism as to the existence of "principles" and as to the value of any attempt to identify them. Similar scepticism was expressed at the hearing of these appeals by counsel for the Secretary of State, who submitted that there was an air of unreality about the attempt by counsel for the appellants and the Board to analyse an accumulation of ad hoc decisions by a court which did not have the same regard for precedent as our courts. That view reflects factors which are undeniable. Nevertheless, such scepticism appears to me to be over-stated. As Lord Bingham indicated in *Greenfield* in the passage which I have cited in paragraph 30, and as I have sought to explain in paragraph 31, the statutory expression "principles" has to be understood in a broad sense. In relation to the quantum of awards in particular, section 8(4) of the 1998 Act merely means that courts should aim to pitch their awards at the general level indicated by Strasbourg awards in comparable cases, so far as that can be estimated.

36. In relation at least to some aspects of the application of article 41, a body of identifiable practices has developed through the case law of the European court. In *Greenfield* itself, for example, the House of Lords succeeded in identifying through an analysis of numerous judgments of the court, few of which contained any articulated statement of principle, the ordinary practice of the court when applying article 41 in relation to violations of the rights under article 6 to an independent tribunal, and to legal representation, in the determination of a criminal charge. In so far as there are "principles" in that sense, domestic courts are required by section 8(4) of the 1998 Act to take them into account. That is consistent with the wider approach to the Strasbourg case law described by Lord

Slynn of Hadley in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, para 26: that, in the absence of some special circumstances, the court should follow any clear and constant jurisprudence of the European court. The over-arching duty of the court under section 8(1) is however to grant such relief or remedy as it considers just and appropriate; and that duty exists even where no clear or consistent European practice can be discerned.

37. A second difference between the European court and a national court is that the European court does not normally undertake detailed fact-finding in relation to damages in the way which a national court of first instance would do, at least in jurisdictions such as those of the UK. As it observed in *Denizci v Cyprus* 23 May 2001, Reports of Judgments and Decisions, 2001-V, para 315, "the court is acutely aware of its own shortcomings as a first instance tribunal of fact". The court referred in that connection to problems of language, to an inevitable lack of detailed and direct familiarity with the local conditions, and to its inability to compel the attendance of witnesses (or, it might have added, to secure the production of evidence). In consequence, it is often dependent upon the information and arguments put before it by the parties. If they conflict, rather than resolving the conflict it may say that it declines to speculate, or it may award damages for a loss of opportunity rather than undertaking a more definite assessment of the harm suffered. If, on the other hand, the material placed before it by the parties enables it to proceed upon a more detailed basis, it will do so. That will be the case, in particular, where the relevant facts have been found by the national court. To the extent that domestic courts, applying their ordinary rules of evidence and procedure, are able to resolve disputed issues of fact in circumstances in which the European court would not, and are therefore able to proceed upon the basis of proven facts in situations in which the European court could not, their decisions in relation to the award of damages under section 8 of the 1998 Act may consequently have a different factual basis from that which the European court would have adopted.

38. A third difference between the European court and a national court reflects a further practical aspect of awards of damages at an international level: namely, that the awards made by the European court, including those in respect of non-pecuniary loss, reflect the relative value of money in the contracting states. If applicants from different contracting states who had suffered identical violations of the Convention and had suffered identical non-pecuniary losses were to receive identical awards, those awards would in reality be of much greater value to some applicants than to others. The point can be illustrated by the case of *Cesky v Czech Republic* (2000) 33 EHRR 181, where the applicant claimed the equivalent of £5660 for four years' lost earnings, on the basis of average earnings in the Czech Republic between 1993 and 1997. Awards made by the European court to applicants from countries where the cost of living is relatively low tend to be low

by comparison with awards to applicants from countries where the cost of living is much higher. In order to obtain guidance as to the appropriate level of awards under section 8 of the 1998 Act, it is therefore necessary to focus upon awards made to applicants from the UK or from other countries with a comparable cost of living.

39. Three conclusions can be drawn from this discussion. First, at the present stage of the development of the remedy of damages under section 8 of the 1998 Act, courts should be guided, following *Greenfield,* primarily by any clear and consistent practice of the European court. Secondly, it should be borne in mind that awards by the European court reflect the real value of money in the country in question. The most reliable guidance as to the quantum of awards under section 8 will therefore be awards made by the European court in comparable cases brought by applicants from the UK or other countries with a similar cost of living. Thirdly, courts should resolve disputed issues of fact in the usual way even if the European court, in similar circumstances, would not do so.

40. It is necessary next to turn to some of the authorities which were cited from the case law of the European court. Reflecting the foregoing conclusions, my focus will be primarily upon cases concerned with violations of article 5(4) arising from delay in the holding of a hearing, and in particular upon such of those cases as have concerned delay in the holding of a hearing to determine whether a convicted prisoner should be released. In relation to the quantum of damages, my focus will be upon such of those cases as concerned the UK or other countries in Western Europe.

*Damages for violations of the requirement that the lawfulness of detention be reviewed "speedily"*

41. In the great majority of cases since the inception of the modern court in November 1998, in which the European court has found a violation of article 5(4) by reason of a failure to decide the lawfulness of detention "speedily", it has made an award of compensation in respect of non-pecuniary damage. That has been the case, in particular, in every case of this kind concerned with the Board. In all of these cases the award was made to compensate for feelings of frustration, anxiety and the like caused by the violation. In most of the cases the court made no finding that there had been a loss of liberty, or the loss of an opportunity of liberty, as a consequence of the violation. Indeed, in several of the cases it expressly stated that it could not make any such finding. In the small number of cases where the court found that there had been a loss of an opportunity of liberty, this was not critical to the decision to make an award of damages. It appears therefore that in these cases, even in the absence of a real loss of opportunity of earlier release, the court would have regarded an award of damages as appropriate. The loss of opportunity was

one aspect of the harm suffered; the feelings of frustration and anxiety were another. Very many examples could be cited, but it is enough to refer to the following cases, which I shall discuss in chronological order.

42. *Oldham v United Kingdom* (2000) 31 EHRR 813 was a case where, as in the present appeal by Mr Faulkner, the violation of article 5(4) resulted from a delay between reviews by the Board. There had been a period of two years between successive reviews, in circumstances where the applicant had completed all the work required with a view to rehabilitation within the first eight months of that period. The court did not suggest that there had been any loss of liberty, but stated that "the applicant must have suffered feelings of frustration, uncertainty and anxiety flowing from the delay in review which cannot be compensated solely by the finding of a violation" (para 42).

43. In *Hirst v United Kingdom* (Application No 40787/98) (unreported) 24 July 2001, a violation was found in similar circumstances, where there had been periods of 21 months and two years between successive reviews. The court repeated the statement it had made in *Oldham,* and also stated in terms that "The court does not find that any loss of liberty may be regarded as flowing from the finding of a breach of article 5(4), which in this case is limited to the delay in between reviews" (para 48).

44. In *Reid v United Kingdom* (2003) 37 EHRR 211 there had been a delay in court proceedings in which the applicant challenged the lawfulness of his detention in a psychiatric hospital. The court stated that it could not speculate as to whether the applicant would have been released if the procedures adopted by the courts had been different (para 85). The court however noted a procedural breach concerning the burden of proof (which had been reversed) and the long period of delay in the proceedings brought by the applicant for his release, and considered that "some feelings of frustration and anxiety must have arisen which justify an award of non-pecuniary damage" (para 86).

45. In *Blackstock v United Kingdom* (2005) 42 EHRR 55 the circumstances were similar to those in *Oldham* and *Hirst*. The period between successive reviews was 22 months. The court again stated that it "does not find that any loss of liberty may be regarded as flowing from the finding of a breach of article 5(4), which in this case is limited to the delay in between reviews", but that "the applicant must have suffered feelings of frustration, uncertainty and anxiety flowing from the delays in review which cannot be compensated solely by the finding of violation" (para 56).

46. In *Kolanis v United Kingdom* (2005) 42 EHRR 206 there had been a delay of about 12 months in the reconsideration by a mental health tribunal of the case of a patient detained in a psychiatric hospital, following the discovery that practical difficulties prevented the implementation of an earlier decision that she should be conditionally discharged. The re-consideration of the case resulted in the applicant's discharge. The court stated that "It cannot be excluded on the facts of this case … that the applicant would have been released earlier if the procedures had conformed with article 5(4) and therefore she may claim to have suffered in that respect a real loss of opportunity" (para 92). The court added that "Furthermore … the applicant must have suffered feelings of frustration, uncertainty and anxiety from the situation which cannot be compensated solely by the finding of violation" (*ibid*).

47. In *Mooren v Germany* (2009) 50 EHRR 554, a Grand Chamber decision, there had been a delay in the determination of proceedings for judicial review of an order for the applicant's detention pending trial. There had also been procedural unfairness. The court found that "both the violations of the fairness and of the speed requirements under article 5(4) caused the applicant non-pecuniary damage, such as stress and frustration, which cannot be compensated solely by the findings of violations" (para 130).

48. In *STS v Netherlands* (2011) 54 EHRR 1229 there was a delay in determining an appeal by a juvenile offender against a decision to extend a period of custodial treatment previously imposed. Referring to para 76 of its judgment in the case of *Nikolova v Bulgaria* (1999) 31 EHRR 64, and to its judgments in the cases of *HL v United Kingdom* (2004) 40 EHRR 761 and *Fodale v Italy* (2006) 47 EHRR 965, to all of which it will be necessary to return, the court stated expressly that it "cannot find it established that the Supreme Court would have ordered the applicant released had its decision been given any more speedily" (para 69). "Nevertheless", the court stated, under reference to its judgments in the cases of *Reid, Kolanis* and *Mooren,* "the court considers that the applicant has suffered non-pecuniary damage that cannot be made good merely by the finding of a violation of the Convention" (para 70).

49. *Betteridge v United Kingdom* (Application No 1497/10) (unreported) 29 January 2013, in which judgment was given subsequent to the hearing of the present appeals, was a case where, as in the present appeal by Mr Sturnham, the violation of article 5(4) resulted from a delay in the holding of a review by the Board following the expiry of an IPP prisoner's tariff. The court proceeded on the basis that the Board would not have ordered the applicant's release had the review taken place speedily. It nevertheless made an award on the basis that the delay "gave rise to feelings of frustration which … were not sufficiently compensated by the findings of violations of the Convention" (para 69).

50. A number of examples can be found in the case law of the "old" court of cases in which the European court found a violation of article 5(4) by reason of a failure to decide the lawfulness of detention speedily, but made no award of compensation in respect of non-pecuniary damage. They include *Bezicheri v Italy* (1989) 12 EHRR 210, where the court did not state the extent to which it considered that the proceedings had been unduly prolonged, but focused on the final two months; *Koendjbiharie v Netherlands* (1990) 13 EHRR 820, where unsuccessful proceedings brought by the applicant to challenge his detention in a state psychiatric clinic had taken four months to be completed, the period allowed under domestic law being three months; and *E v Norway* (1990) 17 EHRR 30, where the unacceptable delay would appear to have been about three or four weeks, and where the European court observed that, if the applicant had suffered any non-pecuniary injury as a result of the undue length of the proceedings, the judgment provided him with sufficient just satisfaction.

51. In the modern case law of the court, cases where no award has been made are unusual. One example is *Rutten v Netherlands* (Application No 32605/96) (unreported) 24 July 2001, where domestic court proceedings had lasted two and a half months at first instance and a further three months on appeal. The proceedings had been brought by the public prosecutor to obtain an extension of the period during which the applicant, who had been convicted of attempted murder, was confined in a secure institution where he was being treated. The proceedings were based on the institution's assessment that the applicant remained dangerous. The applicant unsuccessfully opposed the proceedings on a technical ground relating to jurisdiction. This was not, therefore, a case of delay affecting proceedings in which a person sought to establish that his continued detention was unjustified. The delayed hearing resulted in a decision that continued detention was justified. The European court found that "the length of the proceedings … may have engendered in the applicant a certain feeling of frustration, but not to the extent of justifying the award of compensation" (para 59).

52. Another example is *Pavletić v Slovakia* (Application No 39359/98) (unreported) 22 June 2004, where the European court found a violation of article 5(3) in that the applicant's detention prior to trial, for a period of two years, had lasted an unreasonably long time. There was also a breach of article 5(4) relating to an application which the applicant had made to the public prosecutor to be released on bail. The prosecutor had transmitted the request to the domestic court, which had failed to deal with it. The European court found however that the applicant's detention on remand had been justified. In dealing with the claim under article 41, it noted that the period spent on remand had been deducted from the prison sentence which the applicant was ordered to serve following his conviction; and the court has long accepted that the deduction of a period of detention from the ultimate sentence may remove the need for any further award in respect of non-

pecuniary loss arising from a violation of article 5(3) (see, for example, *Neumeister v Austria (No 2)* (1974) 1 EHRR 136, para 40). It decided that "In view of the circumstances of the case" the finding of a violation was sufficient to afford just satisfaction (para 110). The circumstances of the case included (i) that the detention on remand was justified, and (ii) that the period on remand had been deducted in full from the sentence. Although the court cited its *Nikolova* judgment, to which I shall return, in connection with an unrelated aspect of the case, it made no reference to it in its discussion of article 41.

53. It is apparent therefore that the general practice of the European court is to apply article 41 on the basis that the failure to decide the lawfulness of detention speedily, as required by article 5(4), causes harm in the form of feelings of frustration and anxiety, for which damages should be awarded. It also appears that the court is prepared to presume such harm without direct proof, consistently with its approach to non-pecuniary loss in other contexts. In *Scordino v Italy (No 1)* (2006) 45 EHRR 207, for example, the Grand Chamber said at para 204, in the context of unreasonable delay in violation of article 6(1), that there was a strong but rebuttable presumption that excessively long proceedings would occasion non-pecuniary damage. It is clear from the cases which I have discussed that the court will make an award on that basis even where there has been no deprivation of liberty or loss of an opportunity of earlier release. Where such additional harm is established, however, the court can normally be expected to make an award of damages on that basis, which may be for both pecuniary and non-pecuniary losses.

54. The case law of the European court in relation to violations of the requirement to review the lawfulness of detention "speedily" is, therefore, unequivocally inconsistent with the submission, made on behalf of the Board, that there is a general rule that an award can only be made in respect of a violation of article 5(4) if the violation has resulted in a deprivation of liberty. That submission was based on judgments of the court which concerned violations of the requirement to have such reviews decided in accordance with a fair procedure. As these judgments appear to have been misinterpreted, it is necessary to turn to them next.

*Violations of the requirement that reviews of the lawfulness of detention follow a fair procedure*

55. The case in this category upon which the greatest weight was placed by the Board was *Nikolova v Bulgaria* (1999) 31 EHRR 64, a decision of the Grand Chamber concerned with the applicant's detention in custody prior to trial. Her detention had initially been ordered by prosecutors. Her initial appeals against her detention were also decided by prosecutors. After three weeks she appealed to a court, which refused her appeal about four weeks later. It confined its

consideration to the question whether she had been charged with a serious crime and whether her medical condition required that she be released. It did not consider the applicant's arguments that she was unlikely to abscond or to interfere with the investigation. The case was examined in camera and without the participation of the parties, and the court considered written comments from the prosecutor to which the applicant had no opportunity to respond. The European court found that there had been a breach of article 5(3), which provides (so far as material):

> "Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial."

There had also been a breach of article 5(4): the proceedings before the domestic court were not truly adversarial and did not ensure equality of arms, and the court had failed to consider the applicant's contentions.

56. The European court decided by a majority to make no award under article 41 in respect of non-pecuniary damage, stating (para 76):

> "The court recalls that in certain cases which concerned violations of article 5(3) and (4) it has granted claims for relatively small amounts in respect of non-pecuniary damage (see *Van Droogenbroeck v Belgium* (1983) 13 EHRR 546, para 13, and *De Jong, Baljet and Van den Brink v Netherlands* (1984) 8 EHRR 20, para 65). However, in more recent cases concerning violations of either or both paragraphs 3 and 4 of article 5, the court has declined to accept such claims (see *Pauwels v Belgium* (1988) 11 EHRR 238, para 46, *Brogan v United Kingdom* (1989) 11 EHRR 117, para 9, *Huber v Switzerland* 23 October 1990, Publications of the European Court of Human Rights, Series A no 188, p 19, para 46, *Toth v Austria* (1991) 14 EHRR 551, para 91, *Kampanis v Greece* (1995) 21 EHRR 43, para 66, and *Hood v United Kingdom* (1999) EHRR 365, paras 84-87). In some of these judgments the court noted that just satisfaction can be awarded only in respect of damage resulting from a deprivation of liberty that the applicant would not have suffered if he or she had had the benefit of the guarantees of article 5(3) and concluded, according to the circumstances, that the finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage suffered.

> In the present case the court sees no reason to depart from the above case law. The court cannot speculate as to whether or not the applicant would have been detained if there had been no violation of the Convention. As to the alleged frustration suffered by her on account of the absence of adequate procedural guarantees during her detention, the court finds that in the particular circumstances of the case the finding of a violation is sufficient."

57. Counsel for the Board also referred to a number of other judgments of the European court concerned with violations of article 5(4) in which the same approach was followed as in *Nikolova,* on broadly similar facts. They include *Niedbala v Poland* (2000) 33 EHRR 1137, *Migoń v Poland* (Application No 24244/94) (unreported) 25 June 2002, *HL v United Kingdom* (2004) 40 EHRR 761, *Fodale v Italy* (2006) 47 EHRR 965, *Galliani v Romania* (Application No 69273/01) (unreported) 10 June 2008 and *Mitreski v Former Yugoslav Republic of Macedonia* (Application No 11621/09) (unreported) 25 March 2010. A number of judgments concerned with violations of article 5(3), in which the same approach was followed, were also referred to. They included *SBC v United Kingdom* (2001) 34 EHRR 619.

58. Paragraph 76 of the *Nikolova* judgment is relied on by the Board as an important statement of a general principle: as counsel put it, "just satisfaction can be awarded only in respect of damage resulting from a deprivation of liberty that the applicant would not have suffered if he or she had had the benefit of article 5(3) and (4) protection". It is however apparent from the subsequent cases which I have discussed in paragraphs 40 to 48 that there is no such general principle: the European court has repeatedly made awards in respect of non-pecuniary damage resulting from a violation of article 5(4) consequent upon delay, in the absence of any finding that the applicant had suffered a deprivation of liberty as a result of the violation. Furthermore, in several of those cases the court referred to *Nikolova,* without any indication that there was perceived to be an inconsistency between the court's award of just satisfaction in the case at hand and the *Nikolova* judgment. Those cases include *Reid, STS v Netherlands* and *Betteridge,* and also the judgment of the Grand Chamber in *Mooren*.

59. The true scope of the judgment in *Nikolova* appears to be narrower. It is important to appreciate that the violation of article 5(4) with which the *Nikolova* judgment was concerned related solely to the procedural fairness of the domestic proceedings: in the court's words, the absence of adequate procedural guarantees. The same is true of the later judgments in which it was followed. Similarly, none of the earlier cases cited in *Nikolova*, in which the court had declined to make an award, concerned a violation of article 5(4) arising from delay. When the court spoke in *Nikolova* of procedural guarantees it appears to have had in mind the procedure followed when the lawfulness of the applicant's detention was

considered, rather than to the time that it took for that exercise to take place. That would be consistent with the court's approach under article 6(1), where awards are regularly made for breaches of the "reasonable time" guarantee, but where compensation may be denied in cases which have involved only procedural breaches of fair hearing guarantees.

60. The distinction between the European court's approach to just satisfaction in cases where the violation of article 5(4) results from delay, and in cases where it results from some other procedural failure, was explained by the court in *HL v United Kingdom* (2004) 40 EHRR 761. The court described *Nikolova* as having endorsed the principle that, where the violation of article 5(3) or (4) was of a procedural nature, just satisfaction could be awarded only in respect of damage resulting from a deprivation of liberty that the applicant would not otherwise have suffered (para 148). The court then distinguished cases concerned with violations of article 5(4) arising from delay, stating (para 149):

> "The awards of non-pecuniary damages in *Reid v United Kingdom* (2003) 37 EHRR 211 and in the series of French cases to which the applicant referred [*Delbec v France* (Application No 43125/98) (unreported) 18 June 2002 and *Laidin v France* (Application No 43191/98) (unreported) 5 November 2002, both concerned with failures to deal speedily with applications to be discharged from psychiatric hospitals] followed findings of, *inter alia*, unreasonable delay in the domestic proceedings determining applications for release from detention. This is consistent with the award of non-pecuniary damages following a finding of unreasonable delay under article 6(1) of the Convention: despite the procedural nature of such a violation, it is accepted that there can be a causal link between the violation (delay) and the non-pecuniary damage claimed (see, more recently, *Mitchell and Holloway v United Kingdom* (2002) 36 EHRR 951, para 69)."

61. Although it is unnecessary to consider *Nikolova* further for the purpose of the present appeals, it should also be borne in mind that in para 76 of the judgment the court stated that it reached its conclusion "in the particular circumstances of the case". Consistently with the court's general approach to article 41, that is not the language of a strict rule. There are numerous cases subsequent to *Nikolova*, not concerned with delay, in which awards have been made to applicants who had suffered feelings of frustration and anxiety caused by a violation of article 5(4). Examples include *Curley v United Kingdom* (2000) 31 EHRR 401, *Stafford v United Kingdom* (2002) 35 EHRR 1121, *Waite v United Kingdom* (2002) 36 EHRR 1001, *Von Bulow v United Kingdom* (2003) 39 EHRR 366 and *Allen v United Kingdom* (Application No 18837/06) (unreported) 30 March 2010 (in which *Nikolova* was cited, but not in connection with article 41). In its recent

judgment in *Abdi v United Kingdom* (Application No 27770/08) (unreported) 9 April 2013 at para 91 the court cited para 76 of *Nikolova* and para 149 of *HL* in support of the proposition that "in cases concerning article 5(3) of the Convention it has not made an award of damages unless it could be shown that the applicant would not have suffered if he or she had had the benefit of the guarantees of that article."

*Is there a* de minimis *principle?*

62. If, then, the failure to decide the lawfulness of detention "speedily" will normally result in an award of damages as compensation for mental suffering, does the delay have to be of a minimum duration in order to warrant such an award, as counsel for the Board contended? Is it enough that the delay is sufficiently long to constitute a violation of article 5(4), or may a delay which results in a violation of article 5(4) nevertheless not be sufficiently long to warrant an award of damages?

63. The court did not specify in terms of time, in the cases discussed in paragraphs 41 to 49, the extent to which there had been a failure to decide the matter "speedily". In the group of UK cases concerned with delays between successive reviews by the Board, the court observed that the question whether the periods between reviews complied with article 5(4) must be determined in the light of the circumstances of each case: it was not for the court to attempt to rule as to the maximum period of time between reviews which should automatically apply to an entire category of prisoners, since there were significant differences between their personal circumstances. The court also observed that in previous cases the Convention organs had accepted periods of less than a year between reviews and had rejected periods of more than a year. It was therefore not the entirety of the period between reviews in these cases which was unacceptable, but the excess beyond what would have been reasonable. The court did not specify what that period was. The cases are therefore of limited assistance in relation to the point now under consideration. Most of them would appear however to have involved an unacceptable delay of nine months or more. In the case of *Betteridge v United Kingdom* (Application No 1497/10) (unreported) 29 January 2013, the hearing before the Board took place 13 months after the expiry of the tariff. In *Kolanis v United Kingdom* (2005) 42 EHRR 206, the delay was of the order of a year. The cases of *Reid v United Kingdom* (2003) 37 EHRR 211 and *STS v Netherlands* (2011) 54 EHRR 1229 appear to have involved delays of several months.

64. There are other cases in which awards were made which involved shorter periods. In *Mooren v Germany* (2009) 50 EHRR 554, the proceedings for review of the order for the applicant's detention on remand took two months and 22 days, which was considered excessive. The Grand Chamber emphasised the right of persons who have instituted proceedings challenging the lawfulness of their

deprivation of liberty to a speedy judicial decision, and the strict standards laid down by the court in that respect (paras 106-107). In that regard, the court cited earlier decisions concerned with detention on remand. These included the case of *GB v Switzerland* (2000) 34 EHRR 265, where the court found that proceedings which had lasted 32 days had violated article 5(4) by reason of the time taken, and awarded compensation. It is however necessary to bear in mind, in considering these decisions, that persons detained on remand are in a particularly sensitive position, and are in consequence particularly liable to experience stress and anxiety if their application for bail is not determined speedily. Such proceedings cannot therefore be assumed to be equivalent, in relation to the award of damages for delay, to applications for release from imprisonment following conviction.

65. Those cases might be contrasted with others in which no award was made. In *Rutten v Netherlands* (Application No 32605/96) (unreported) 24 July 2001, the unacceptable delay appears to have been of a few months at most, and the applicant sought compensation on the basis that his rights had been violated for a period of at least 17 days. As I have explained in paragraph 50, no compensation was awarded in that case. A similar conclusion was reached in the judgments, now somewhat dated, in *Koendjbiharie v Netherlands* (1990) 13 EHRR 820 and *E v Norway* (1990) 17 EHRR 30, which I have discussed in paragraph 49. In the former case, the unacceptable delay would appear to have been of about one month; in the latter, about three or four weeks.

66. The question whether feelings of frustration and anxiety are sufficiently serious to warrant an award of compensation will evidently depend to some extent upon the circumstances of the individual case. Where for example there is a particular reason for anxiety, or where there is mental illness, even a relatively short delay may occasion acute mental suffering. It is impossible therefore to lay down absolute rules. It is on the other hand reasonable to suppose that the presumption that the lack of a speedy decision has occasioned sufficiently serious mental suffering to justify an award of compensation should only apply if the delay has been of a significant duration. In the circumstances of a convicted prisoner awaiting review of his case by the Board, the cases which I have discussed suggest that a delay of three months or more is likely to merit an award, whereas the stress and anxiety which can be inferred from a delay of shorter duration are ordinarily unlikely to be of sufficient severity.

*The quantum of awards for feelings of frustration and anxiety*

67. Awards for frustration and anxiety caused by violations of the article 5(4) guarantee of a speedy decision have invariably been modest. In *Oldham v United Kingdom* (2000) 31 EHRR 813 the court awarded £1000. In *Hirst v United Kingdom* (Application No 40787/98) (unreported) 24 July 2001 the award was

again £1000. In *Reid,* where the delay was more substantial and there was also procedural unfairness, the award was €2000. In *Blackstock v United Kingdom* (2005) 42 EHRR 55 the award was €1460, the equivalent at that time of £1000. In *Mooren* the Chamber had awarded €1500 for distress resulting from delay alone. The Grand Chamber increased the award to €3000, but that award was for stress and frustration caused by the unfairness of the procedure as well as by delay. In *STS* the court awarded €2000, but in that case there was a breach of the requirement of effectiveness as well as of the requirement as to speed. In *Betteridge v United Kingdom* (Application No 1497/10) (unreported) 29 January 2013 the court awarded €750, equivalent to £645.

68. It would be a mistake to attempt to analyse these awards too closely: they were considered "equitable" in their particular circumstances. The cases involving delay in reviews by the Board nevertheless indicate the modest level of awards in the absence of special circumstances.

*The quantum of awards for loss of liberty*

69. No case was cited to this court in which the European court had made an award for a loss of liberty resulting from a violation of the speedy decision guarantee in article 5(4). There are however a number of cases in which awards were made for the loss of an opportunity of earlier release. Reference was also made to a number of cases in which awards were made for a loss of liberty resulting from violations of article 5(1), article 5(3) and article 6.

70. Considering first the loss of opportunity awards under article 5(4), in the case of *Kolanis v United Kingdom* (2005) 42 EHRR 206*,* discussed in paragraph 46, the court considered that it could not be excluded that the applicant would have been released earlier from detention in a psychiatric hospital if the procedures had been in conformity with article 5(4). The delay had been of about 12 months. The award was €6000. The earlier case of *Weeks v United Kingdom* (1987) 10 EHRR 293 (judgment on the merits), (1988) 13 EHRR 435 (article 50 judgment) concerned the recall to prison of a prisoner who had been released on licence. His recall and subsequent detention were considered by the Board, but under the system then in place it could only make a non-binding recommendation. Recommendations for release had not been acted upon. When the applicant was subsequently released, some years after his release had first been recommended, he repeatedly reoffended, and his licence was again revoked. The Grand Chamber made an award of £8000, equivalent to about £17600 if adjusted for inflation, for both pecuniary and non-pecuniary losses. In relation to the former, the applicant had made a substantial claim which the court considered could not be completely discounted. In relation to non-pecuniary loss, the court said that the applicant must

have been caused feelings of frustration and helplessness. The court did not explain how it arrived at the global sum which it awarded.

71. The parties also cited a number of cases concerned with violations of article 5(1) which had resulted in a deprivation of liberty. In some of the cases relied upon, awards were made which were either unusually low or unusually high, for particular reasons explained by the European court. In other cases, the low awards reflected the value of money in the countries in question. Awards made in more typical cases involving the UK, or other countries with a comparable cost of living, are potentially of greater assistance. In *Johnson v United Kingdom* (1997) 27 EHRR 296 the applicant had been detained in a psychiatric hospital in breach of article 5(1) for a period of three and a half years. The court observed that the delay in his release could not be attributed entirely to the authorities: some delay was inevitable, as a suitable hostel placement had to be found, and in addition the applicant had contributed to the delay by his refusal to co-operate. Having regard to those factors, the court awarded £10,000. In *Beet v United Kingdom* (2005) 41 EHRR 441 the court made an award of €5000 as compensation for unlawful detention in prison for a period of two days. In *Medvedyev v France* (2010) 51 EHRR 899 an award of €5000 was made by the Grand Chamber to applicants who had been unlawfully detained on board a ship for 13 days. The relatively low awards made in such cases as *Jecius v Lithuania* (2000) 35 EHRR 400, *Kucheruk v Ukraine* (2007) 52 EHRR 878 and *Veniosov v Ukraine* (Application No 30634/05) (unreported) 15 December 2011, to which the Board referred, are less relevant for the reasons I have explained in paragraph 38.

72. Reference was also made to a number of cases in which awards were made for violations of article 5(3). These cases do not appear to me to be of assistance. The case of *Caballero v United Kingdom* (2000) 30 EHRR 643 concerned an applicant who had been detained in custody prior to trial as he fell within a category of accused persons to whom bail could not be granted. The period spent on remand had been deducted from the sentence, so that ordinarily no award would have been made. The court however noted that the applicant's state of health was such that any release on bail prior to his trial could have been his last days of liberty. There was also undisputed evidence that the applicant would have had a good chance of being released on bail but for the breach of article 5(3). In these exceptional circumstances, an award of £1000 was made "on an equitable basis". The other cases cited concerned countries where the value of money is much lower than in the United Kingdom.

73. Reference was also made to two UK cases where there had been a loss of liberty, or of the opportunity of liberty, as a result of violations of article 6. First, in *Perks v United Kingdom* (1999) 30 EHRR 33 there had been a finding by the domestic courts that the applicant was unlikely to have been committed to prison, where he spent six days, if he had received competent legal assistance. Proceeding

on that basis, the European court awarded £5500. Secondly, in *Hooper v United Kingdom* (2004) 41 EHRR 1 the applicant had been imprisoned for two weeks in default of finding surety for a binding-over order. It had been found by the High Court that, if a fair procedure had been followed, the magistrate might well have been persuaded to a different result. The European court observed that this conclusion was not expressed in such strong terms as in *Perks,* and awarded €8000.

74. In considering these awards, it is necessary to bear in mind that unlawful detention in violation of article 5(1) is often a particularly serious violation of the Convention, and is of a different nature from a violation of article 5(4). It is also necessary to take into account that the freedom enjoyed by a life prisoner released on licence is more circumscribed in law and more precarious than the freedom enjoyed by the ordinary citizen, as the European court has recognised (*Weeks v United Kingdom* (1987) 10 EHRR 293*,* para 40). The risk that a prisoner may be recalled to custody, even where no further offence has been committed, is real, as the facts of *Weeks* and of Mr Faulkner's case, to which I shall return, amply demonstrate. Although the European court does not make precise adjustments to reflect inflation, it is also necessary to bear in mind that some of these awards were made many years ago. For these reasons, none of the awards which I have mentioned offers any clear guidance. That said, the most helpful is perhaps the award in the *Kolanis* case, since it related to a breach of article 5(4). As I have explained, in that case €6000 was awarded in 2005 as compensation for the loss of a real opportunity of release 12 months earlier from a psychiatric hospital. A higher award would no doubt have been appropriate if there had been a definite loss of liberty for 12 months; but a lower award would have been appropriate if, instead of a patient losing her liberty, the case had concerned a convicted prisoner who had lost an opportunity of earlier release on licence. The award in *Weeks,* considered in the context of the facts of that case, similarly suggests a level of awards for breaches of article 5(4) in respect of convicted prisoners which is much lower than the level in such cases as *Beet* or *Perks.*

75. Allowing for the various factors which I have mentioned, and in particular for the important differences between conditional release and complete freedom, the cases which I have discussed suggest that awards where detention has been prolonged for several months, as the result of a violation of article 5(4), could reasonably be expected to be significantly above awards for frustration and anxiety alone, but well below the level of awards for a loss of unrestricted liberty. It is however impossible to derive any precise guidance from these awards. In accordance with section 8(1) and (4), a judgment has to be made by domestic courts as to what is just and appropriate in the individual case, taking into account such guidance as is available from awards made by the European court, or by domestic courts under section 8 of the 1998 Act, in comparable cases.

76. It remains to apply the general principles which I have explained to the particular cases which are before the court.

*The case of Daniel Faulkner*

77. In 1999 Daniel Faulkner, then aged 16, was sentenced to two years' detention for an offence involving grievous bodily harm. In 2001, at the age of 18, he was convicted of a second such offence. He was sentenced to custody for life, in accordance with section 109 of the 2000 Act. The tariff period was set at two years and eight and a half months. That period expired in April 2004.

78. In May 2005 the Board recommended that Mr Faulkner should be transferred to open conditions, but that recommendation was rejected by the Secretary of State. In January 2007 the Board made a similar recommendation, which was again rejected. Mr Faulkner's case was next due to be heard by the Parole Board in January 2008. The Secretary of State was informed of that date, but the case was not referred to the Board by a case-worker in the Ministry of Justice until 21 December 2007, making it impossible to fix a hearing for January 2008 as intended. The case was however provisionally listed for a hearing in May 2008, pending the receipt of the necessary dossier of reports, known as the "rule 6 dossier", from the prison where Mr Faulkner was detained. That dossier should have been provided to the Board in about September 2007. In the event, the dossier was not provided until 6 May 2008. The reasons for that delay are not apparent. Having received the dossier, the Board conducted a case management review on 16 May 2008, at which it decided that the hearing could not now proceed during that month. It also directed the prison to provide further reports which it required and which were missing from the dossier. Those reports were not received until 8 October 2008. The reasons for the time taken to provide those reports are not apparent. The Board then fixed a hearing to be held on 8 January 2009. On 23 January 2009 the Board directed Mr Faulkner's release, and he was released four days later.

79. On 22 May 2009 Mr Faulkner's licence was revoked. He had been arrested on suspicion of wounding, and had failed to attend a meeting with his offender manager. He remained in hiding until 17 October 2009, when he was returned to prison. He was subsequently acquitted of the charge of wounding. The Board directed his release on 22 April 2010, and he was then released.

80. On 13 June 2011 Mr Faulkner's licence was again revoked, following his arrest on suspicion of having committed an offence of grievous bodily harm. He was subsequently acquitted of that charge. He remains in custody.

81. In October 2008 Mr Faulkner was granted permission to apply for judicial review of the failure of the Board and the Secretary of State to conduct a review of his detention, in breach of article 5(4) of the Convention as given effect by the 1998 Act. The application was heard in June 2009, while Mr Faulkner was unlawfully at large, and was dismissed ([2009] EWHC 1507 (Admin)). The judge considered that, even if Mr Faulkner had succeeded on the merits of his appeal, no award of damages would have been appropriate. An appeal against that decision was allowed by the Court of Appeal ([2010] EWCA Civ 1434; [2011] HRLR 165). In a judgment delivered by Hooper LJ, with whom Sedley and Wilson LJJ agreed, the court held that:

> (1) Mr Faulkner had suffered a breach of article 5(4) lasting for a period of 10 months, between March 2008 and January 2009, due to unjustified delays on the part of the Ministry of Justice. There had not been any unjustified delay by the Board in setting the hearing date, once all the reports were available.
>
> (2) There was no reason in this case to award damages for a breach of article 5(4) on the basis of a loss of a real chance of earlier release. Rather, it was necessary for Mr Faulkner to show that he *would* have been released earlier if the breach had not occurred.
>
> (3) Mr Faulkner had shown on the balance of probabilities that he would have been released if the review had taken place in about March 2008.
>
> (4) As a result of the breach of article 5(4), Mr Faulkner had spent some 10 months in prison when he ought not to have done.

The court then invited parties to make written submissions on the quantum of damages.

82. Hooper LJ's conclusion that Mr Faulkner could only recover for a loss of liberty if he established on a balance of probabilities that he would have been released earlier, and that it was not enough to show that there was a loss of a chance, was in my view correct. As I have explained at paragraph 37, the Strasbourg court's approach to this issue reflects its limited fact-finding role: it will make an award for a loss of liberty if that is uncontested, but otherwise it is likely either to decline to speculate, or to make an award for a loss of opportunity. A domestic court is not however restricted in its fact-finding capabilities. In those circumstances, it is not in my view required by section 8 of the 1998 Act to apply a self-denying ordinance, but should establish the facts of the case in the usual way, and apply the normal domestic principle that the claimant has to establish on a balance of probabilities that he has suffered loss.

83. Hooper LJ also rejected a submission that events following Mr Faulkner's release were relevant to the issue of quantum. He observed that it would be speculation to say that, if Mr Faulkner had been released earlier, he might have been back in prison a few months later for breach of his licence; and, furthermore, that taking into account that Mr Faulkner spent a further six months in prison following his recall, for conduct of which he was ultimately acquitted, there was no reason why his damages award should be reduced. I agree. The court cannot reduce the damages it would otherwise have awarded on the basis of speculation. It is possible to conceive of circumstances in which a different conclusion might be appropriate: for example, where the claimant was recalled after committing an offence which he had been planning prior to his release and which would probably have been committed earlier if he had been released earlier. This is not however a case of that kind. On the facts of Mr Faulkner's case, including his acquittal of any criminal responsibility in respect of the circumstances leading to his recall, the court is not in a position to say that, if he had been released earlier, he would simply have behaved that much sooner in the manner which led to the revocation of his licence.

84. In its decision on quantum ([2011] EWCA Civ 349; [2011] HRLR 489), the Court of Appeal ordered the Secretary of State to pay Mr Faulkner £10000. The judgment of the court was delivered by Sedley LJ. He correctly proceeded on the basis that the court should not adjust its award according to the degree of probability of release had the violation not occurred. That follows from the general approach which I have discussed in paragraph 37. Once the court has found on a balance of probabilities that the claimant would have been released earlier if there had been no violation, he should ordinarily be fully compensated for the harm which he has suffered. In relation to quantum, the court arrived at the figure of £10000 by making a broad assessment of the award which appeared to it to be appropriate.

85. The Board appealed to this court against that award on the ground that it was excessive. The fact that the appeal was taken by the Board, rather than by the Secretary of State, reflects the fact that the judgment is regarded as having significant consequences for the Board in relation to other cases, although the Secretary of State has agreed to be responsible for the discharge of any award made in the present case. No point was taken on behalf of Mr Faulkner in respect of the identity of the appellant. Mr Faulkner also appealed against the award on the ground that it was inadequate. He was in addition granted permission to argue that his detention, after the date when his case ought to have been heard by the Board, constituted false imprisonment at common law, or a violation of article 5(1) of the Convention. These contentions had not been advanced in the courts below, but no objection was taken on behalf of the Board or the Secretary of State.

86. For the reasons which I have explained at paragraph 16, the submission that Mr Faulkner was the victim of false imprisonment under English law must be rejected. So too, for the reasons explained at paragraph 23, must the submission that he was detained in violation of article 5(1). The problems which resulted in delay in Mr Faulkner's case, according to the findings of the Court of Appeal, appear to have been the result of errors by administrative staff, of a kind which occur from time to time in any system which is vulnerable to human error. It was extremely unfortunate that the errors occurred and resulted in the prolongation of Mr Faulkner's detention, but they were not of such a character, and the delay was not of such a degree, as in my view to warrant the conclusion that there was a violation of article 5(1).

87. An appellate court will not interfere with an award of damages simply because it would have awarded a different figure if it had tried the case at first instance. In these appeals however this court is being invited to give guidance as to the appropriate level of awards in cases of this character. For that purpose, the court has undertaken a fuller analysis of the Strasbourg authorities than the Court of Appeal, in the course of which it has considered authorities to which that court was not referred. In the light of that analysis, and applying the general approach which I have described in paragraph 75, it appears to me that an award in the region of £6500 would adequately compensate Mr Faulkner for his delayed release, bearing in mind the conditional and precarious nature of the liberty foregone. That amount falls well short of the award of £10,000 made by the Court of Appeal. In the circumstances, it is in my view appropriate for this court to allow the Board's appeal and to reduce the award accordingly.

*The case of Samuel Sturnham*

88. In May 2006 Samuel Sturnham was involved in an altercation outside a public house in the course of which he punched a man, who fell backwards and struck his head on the ground. He died the next day. In January 2007 Mr Sturnham was convicted of manslaughter. He had no previous convictions for offences of violence. An IPP sentence was imposed under section 225 of the 2003 Act, with a tariff period of two years and 108 days. That period expired on 19 May 2009.

89. Mr Sturnham's case was referred to the Board by the Secretary of State on 10 July 2008, in good time for a review to take place around the time when his tariff expired. The Secretary of State however misinformed the prison where Mr Sturnham was detained as to the date when the rule 6 dossier was required, with the result that it was not prepared in time. The prison appears to have disregarded correspondence from the Board informing it of the date when the dossier was required, and subsequent correspondence informing it that the dossier was overdue. The prison then failed to prepare the dossier in accordance with the

Secretary of State's instructions. The Secretary of State had not followed the normal practice of setting up a mechanism for a reminder to be sent if the dossier was not provided in time. As a result of these various administrative failures, the dossier was not provided to the Board until 30 July 2009. A hearing was not convened until April 2010. The delay in listing the case for hearing was due in part to a request by Mr Sturnham for an extension of time to make representations. That hearing had to be adjourned, as Mr Sturnham was unwell. A review finally took place on 10 May 2010. The Board declined to order Mr Sturnham's release, but recommended his transfer to open conditions. He was transferred to such conditions in August 2010. His case was again reviewed in July and August 2011, when the Board directed that he should be released on licence. He was released in September 2011.

90. Mr Sturnham brought proceedings for judicial review in which he challenged the lawfulness of the decision taken by the Board following the hearing in May 2010, and also the delay in holding that hearing. The application was heard in March 2011 by Mitting J, who rejected the challenge in respect of the lawfulness of the decision. In relation to the issue of delay, he held ([2011] EWHC 938 (Admin)) that:

> (1) Mr Sturnham's rights under article 5(4) were breached in that the hearing before the Board did not take place until approximately six months had elapsed from the date on which it should have taken place. That delay resulted from the delay in the delivery of the dossier to the Board.
>
> (2) There was no prospect that Mr Sturnham's release would have been ordered if the hearing had taken place six months earlier.
>
> (3) It was more likely than not that the Board would have directed Mr Sturnham's transfer to open conditions six months earlier than occurred.
>
> (4) Such a transfer would not necessarily have resulted in his earlier release. Nor would it have done so to a lower standard of probability.
>
> (5) Mr Sturnham had been caused anxiety and distress by the delay.

91. In view of the six-month delay, the judge ordered the Secretary of State to pay Mr Sturnham £300 as compensation for the consequent anxiety and distress. He arrived at that figure by taking as a guide the award of £1200 made in *R (Guntrip) v Secretary of State for Justice* [2010] EWHC 3188 (Admin), where the first hearing before the Board, following the expiry of the tariff, had not taken place until about two years after the latest date by which it ought to have been held. The judge treated the award in *Guntrip* as amounting to £50 per month, and accordingly awarded £300 for a delay of six months.

92. The Secretary of State appealed against that award on the ground that no award should have been made. Mr Sturnham appealed against the High Court's rejection of his challenge to the lawfulness of the Board's decision. He also sought permission to cross-appeal on the ground that the award should have been higher. The Court of Appeal allowed the Secretary of State's appeal, dismissed Mr Sturnham's appeal and quashed the award ([2012] EWCA Civ 452; [2012] 3 WLR 476). It refused Mr Sturnham permission to cross-appeal on quantum.

93. The judgment of the Court of Appeal was given by Laws LJ, with whom the other members of the court agreed. Laws LJ took as his starting point the different treatment under the common law of wrongs in private law and in public law, and considered that an analogous distinction was reflected in some of the Strasbourg case law: in particular, in the cases of *Nikolova v Bulgaria* (1999) 31 EHRR 64*, Niedbala v Poland* (2000) 33 EHRR 1137 and *Migoń v Poland* (Application No 24244/94) (unreported) 25 June 2002*,* which I have discussed at paragraphs 55 to 61. In the light of those cases, Laws LJ found it difficult to see how cases in which awards had been made for frustration and anxiety, such as *Oldham v United Kingdom* (2000) 31 EHRR 813*, Hirst v United Kingdom* (Application No 40787/98) (unreported) 24 July 2001 and *Blackstock v United Kingdom* (2005) 42 EHRR 55, could be treated as constituting an authoritative body of principle. He concluded that, in an article 5(4) case concerned with delay, just satisfaction would ordinarily be achieved by a declaration of the violation. If however the violation involved an outcome for the claimant in the nature of a trespass to the person, just satisfaction was likely to require an award of damages. The paradigm of such a case arose where the claimant's detention was extended by reason of the delay. Cases where the consequence of the delay was merely stress and anxiety would not generally attract compensation in the absence of some special feature by which the claimant's suffering was materially aggravated. Following that approach, no award was appropriate in Mr Sturnham's case.

94. Mr Sturnham applied to this court for permission to appeal against the Court of Appeal's decision to dismiss his appeal and to allow the Secretary of State's appeal. The Board and the Secretary of State objected to the grant of permission. The court directed that Mr Sturnham's application for permission should be heard with the appeal in Mr Faulkner's case, with the appeal to follow if permission were granted. In the event, the court granted Mr Sturnham's application in relation to the Court of Appeal's decision to allow the Secretary of State's appeal and quash the award, and heard the appeal on that point together with the appeal and cross-appeal in Mr Faulkner's case. The court deferred consideration of Mr Sturnham's application in respect of the Court of Appeal's decision to dismiss his appeal, since it raised a different issue.

95. At the hearing of the appeal, Mr Sturnham also sought permission to argue for a higher award. He relied upon section 40(5) of the Constitutional Reform Act 2005 ("the 2005 Act"), which provides:

> "The court has power to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment."

That provision is concerned with questions which it is necessary to determine in order to do justice in an appeal. It does not provide a means of circumventing the need to obtain permission to appeal, where such permission is necessary in order to raise the question in issue. As I have explained, Mr Sturnham was refused permission to appeal in respect of the quantum of the award. It is unnecessary to determine whether the award was too low in order to do justice in his appeal against the quashing of the award. Mr Sturnham's application should therefore be refused.

96. Turning then to Mr Sturnham's appeal against the quashing of his award of damages, his appeal should in my view be allowed. The Court of Appeal was wrong to take as its starting point the treatment of wrongs under the common law. Following *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673*,* the starting point, at this stage in the development of the remedy of damages under section 8 of the 1998 Act, should be the practice of the European court. The Court of Appeal also erred in its interpretation of the Strasbourg case law. As I have explained at paragraphs 58 to 60, the *Nikolova* line of authority is not concerned with violations resulting from delay. The *Oldham* line of authority illustrates how cases of the latter kind are dealt with. It is unfortunate that the case of *HL v United Kingdom* (2004) 40 EHRR 761*,* which contains the clearest explanation of the distinction between the two lines of authority, does not appear to have been cited to the Court of Appeal.

97. Approaching Mr Sturnham's case in the light of the authorities from *Oldham* to *Betteridge,* it is apparent that an award of damages was appropriate as compensation for the frustration and anxiety which he suffered. The frustration and anxiety occasioned by a delay of six months cannot in my view be regarded as insufficiently severe to warrant such an award. In the light of the awards made in the Strasbourg cases, of which *Betteridge v United Kingdom* (Application No 1497/10) (unreported) 29 January 2013 is the most nearly in point, the award of £300 which was made by the judge was reasonable in the circumstances of this case.

*Conclusion*

98. For the reasons I have explained, I consider that the appeal in the case of Mr Faulkner should be allowed, and that the sum of £10000 awarded as damages by the Court of Appeal should be reduced to £6500. The cross-appeal should be dismissed. Mr Sturnham's appeal against the quashing of his award of damages should be allowed.

*Postscript: submissions on the case law of the European Court of Human Rights*

99. In the present appeals, the Strasbourg case law was presented to the court in the usual way. The court was provided with bound volumes of authorities in which the cases appeared in alphabetical order, and counsel referred the court to the authorities in the order in which they featured in their submissions. Around 75 Strasbourg authorities were cited to the court. It was a time-consuming process to be taken through each of the cases at least twice, as each counsel in turn presented their analysis of it. Eventually the court requested to be provided with a schedule of the kind I shall shortly explain. The manner in which the authorities were presented also made it difficult for the court to discern how the case law had developed over time, as it was difficult to keep track of how the cases related to one another chronologically. Counsel are not to be criticised for having proceeded in this way, but with the benefit of hindsight it is apparent that it would be possible to present the authorities to the court in a more helpful way.

100. With that aim in mind, the following guidance should be followed in any future cases where it is necessary to cite substantial numbers of Strasbourg decisions on the application of article 41 with a view to identifying the underlying principles. That exercise will not of course be necessary in relation to any future case on article 5(4), which should take the present judgment as its starting point.

101. First, the court should be provided with an agreed Scott schedule, that is to say a table setting out the relevant information about each of the authorities under a series of columns. The information required is as follows:

1. The name and citation of the case, and its location in the bound volumes of authorities.
2. The violations of the Convention which were established, with references to the paragraphs in the judgment where the findings were made.
3. The damages awarded, if any. It is helpful if their sterling equivalent at present values can be agreed.

4. A brief summary of the appellant's contentions in relation to the case, with references to the key paragraphs in the judgment.
5. A brief summary of the respondent's contentions in relation to the case, again with references to the key paragraphs.

102. Secondly, the court should be provided with a table listing the authorities in chronological order.

103. Thirdly, it has to be borne in mind that extracting principles from a blizzard of authorities requires painstaking effort. The submissions should explain the principles which counsel maintain can be derived from the authorities, and how the authorities support those principles. Otherwise, to adapt Mark Twain's remark about life, the citation of authorities is liable to amount to little more than one damn thing after another; or even, to borrow a well-known riposte, the same damn thing over and over again.

**LORD CARNWATH**

104. I agree with the disposal of the appeals proposed by Lord Reed, and am content to adopt his reasons. I add a concurring judgment of my own, not by way of disagreement, but merely to suggest an alternative, and perhaps less laborious, route to the same end.

105. It is based on a more selective approach to the Strasbourg jurisprudence, which also accords more closely to that of the Court of Appeal in this case. Given the enormous workload of the Strasbourg court, and the varied composition of the chambers to which cases are allocated, it is unrealistic to treat all decisions as of equal weight, particularly on the issue of damages. The great majority of such awards are made on an "equitable" basis reflecting particular facts. No doubt the judges attempt to achieve a degree of internal consistency. But most of the decisions are not intended to have any precedential effect, and it is a mistake in my view to treat them as if they were.

*"Principles" under the Human Rights Act 1998*

106. The starting point must be section 8 of the Human Rights Act 1998, the relevant parts of which have been set out by Lord Reed. Of particular significance is section 8(4) which requires the court to "take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under article 41 of the Convention."

107. The emphasis on "principles" applied by the Strasbourg court has been seen as problematic. In their review in 2000 (Damages under the Human Rights Act 1998, Law Com No 266; Scot Law Com No 180), the Law Commissioners drew attention to the "striking" lack of clear principles relating to the award of damages in the Strasbourg case-law (para 3.4). They attributed this to a number of factors, including the "diverse traditions" in the countries within the jurisdiction of that court:

> "On the one hand, the German and Dutch systems have rules as detailed as the English. Their theories of causation are highly developed, and pecuniary and non-pecuniary loss are dealt with under clearly separated headings. In contrast, French and Belgian courts proceed 'empirically' in matters of causation, with a minimum of theorising and 'swayed by considerations of fairness as much as causal potency'.
>
> Thus, in French private law, for example, the measure of damages is regarded as a matter for the 'sovereign power of assessment' of the judge of first instance. The comparative lack of structure is most evident in relation to the assessment of the relevant damage. This is always treated as a question of fact, thus leaving the judge in the lower court with a degree of unstructured discretion to adjust the award as he or she sees fit. As long as the award is framed properly in law, the appeal courts will not interfere with it. Conventional scales are sometimes used, but must not be treated as rules of law. In particular, French judges do not draw clear distinctions between different heads of loss. The Strasbourg practice appears to be close to the French tradition." (para 3.7-8).

They also cited practical factors:

> "At a more practical level, the character and size of the court inevitably affects its ability to deal with detailed issues of damages in a consistent way. It is a large body, sitting in a number of different constitutions. The judges are drawn from different backgrounds and diverse jurisdictions, and will have varied experiences of awarding damages. It is inevitable that their views as to the proper level of compensation, and the basis on which it should be assessed, will differ." (para 3.10)

108. Against that background, there was force in the comments of the academic commentators cited by the Commissions (paras 3.12). Thus Dinah Shelton commented:

> "It is rare to find a reasoned decision articulating principles on which a remedy is afforded. One former judge of the European Court of Human Rights privately states: 'We have no principles'. Another judge responds, 'We have principles, we just do not apply them'." (D Shelton, *Remedies in International Human Rights Law* (1999) p 1)

Similarly, Lester and Pannick saw the court's decisions on just satisfaction as "little more than equitable assessments of the facts of the individual case", and urged that there is a "danger of spending time attempting to identify principles that do not exist." (Lord Lester of Herne Hill and D Pannick (eds), *Human Rights Law and Practice* (1999) para 2.8.4, note 3). As will be seen, the court has taken some steps to address these criticisms by choosing particular cases in which to offer more reasoned justifications.

*Domestic case-law*

109. Since the Law Commissions' report a significant body of domestic case-law has developed, the most important authorities being *Anufrijeva v Southwark London Borough Council* [2004] QB 1124 (article 8), in the Court of Appeal, and *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673 (article 6) in the House of Lords. Neither was directly concerned with a violation of article 5(4), as in this case. In the latter Lord Bingham referred to the "risk of error if Strasbourg decisions given in relation to one article of the Convention are read across as applicable to another" (para 7). Those words seem to me of general application, even though he was drawing a specific contrast with article 5(5), which (uniquely in the Convention) confirms a specific right to compensation for arrest or detention in breach of that article. It appears from other Strasbourg authority that article 5(5) has limited effect in relation to the procedural rights conferred by articles 5(3) and (4), under which entitlement to compensation "depends on the circumstances of each case" (*Pavletic v Slovakia* (Application No 39359/98 (unreported) 22 June 2004, para 95).

110. Lord Bingham's speech in *Greenfield* provides the most recent, authoritative guidance on the correct approach of the domestic courts to the issue of compensation for breaches of the Convention rights. As a general comment on the Strasbourg cases on this issue, Lord Bingham adopted the words of the Court of Appeal in *Anufrijeva*, paras 52-53:

> "… The remedy of damages generally plays a less prominent role in actions based on breaches of the articles of the Convention, than in actions based on breaches of private law obligations where, more often than not, the only remedy claimed is damages.
> Where an infringement of an individual's human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance."

111. As Lord Reed has explained, an important point in the speech is the confirmation that, in accordance with section 8(4) of the 1998 Act, domestic British courts should look to Strasbourg, rather than to common law precedents, for guidance on the award and assessment of damages (paras 6, 19). Lord Bingham rejected as unduly "legalistic" an argument that the levels of Strasbourg awards were not "principles" within the meaning of section 8.

112. *Greenfield* itself related to a disciplinary decision in a prison resulting in additional days of imprisonment. By the time the case reached the House of Lords it had been conceded that there was a violation of article 6, in that the decision had not been made by an independent tribunal, and there had been no right to legal representation; the only issue therefore was damages. It is true, as Lord Reed notes (para 36), that Lord Bingham's speech contained analysis "of numerous decisions of the European court, few of which contained any articulated statement of principle". However, that exercise does not appear to have been critical to the ultimate decision. He was able to identify a clear and relevant statement of "practice" in a decision of the Grand Chamber, *Kingsley v United Kingdom* (2002) 35 EHRR 177, para 43:

> "In all the circumstances, *and in accordance with its normal practice*, in civil and criminal cases, as regards violations of article 6(1) caused by failures of objective or structural independence and impartiality, the court does not consider it appropriate to award monetary compensation to the applicant in respect of loss of procedural opportunity or any distress, loss or damage allegedly flowing from the outcome of the domestic proceedings." (emphasis added)

Lord Bingham commented:

> "Thus, whatever the practice in other classes of case, the ordinary practice is not to make an award in cases of structural bias." (para 16)

On the facts of the case before him, he found "no special feature … which warrants an award of damages" (para 29).

113. I agree, respectfully, with Lord Bingham that the extreme view - that there are no principles at all - is inconsistent with the underlying assumption of section 8(4). However, the specific reference to "principles" in section 8(4) must be given some effect. Those words may be contrasted with the more general duty imposed on the domestic courts by section 2(1). The duty, when determining any "question … in connection with a Convention right" is to "take into account any … judgment" of the Strasbourg court, so far as considered relevant to the proceedings in which the question arises (section 2(1)). The more specific wording of section 8(4) in my view reflects the reality that not all decisions of the Strasbourg court in relation to damages will be determinative, or even illustrative, of any principle of general application.

114. Accordingly, while Strasbourg case-law must be the starting point, the primary search in my view should be for cases, which are not only referable to the particular article and type of case under consideration, but are also identifiable as more than simple, one-off decisions on their own facts. This may be, for example, because they are expressed in terms of principle or practice (as in *Kingsley*), or contain substantive discussion of principle, or can be shown to be part of a recognisable trend applied in a series of cases on the same subject-matter. The court should not be subjected to a "blizzard of authorities" (as Lord Reed describes it). It is incumbent on those arguing for a "principle" to show why the cases on which they rely meet those requirements. Where the court is faced with an apparent conflict between two different lines of approach, the court may have to choose between them in as "principled" a way as the context makes possible.

*Principles under article 5(4)*

115. That approach can be illustrated by reference to the cases reviewed by Lord Reed in the present case. In *Sturnham* in the Court of Appeal, Laws LJ rightly paid tribute to the helpful discussion of the cases under article 5(4) by Stanley Burnton J in *R (KB) v South London and South and West Region Mental Health Review Tribunal* [2004] QB 936, para 32ff, which had also been cited with approval by Lord Woolf CJ, in *Anufrijeva v Southwark London Borough Council* [2004] QB 1124, para 63.

116. The principal foundation of the reasoning of both Stanley Burnton J and Laws LJ lay in the judgment in *Nikolova v Bulgaria* (1999) 31 EHRR 64. The facts and the reasoning of the court are set out by Lord Reed (paras 56-57). It is noteworthy that an award was refused, even though the issue between the parties

seems to have been one of quantum only. The claim was for US$15,000, which the respondent government described as "excessive", relying on an award of US$3,500. The Commission's Delegate invited the court to award an "equitable amount" (para 75). However, the court refused to make any award, for the reasons given in the passage quoted by Lord Reed.

117. In my view, the courts below were correct to treat this decision of the Grand Chamber (presided over by the President, Judge Wildhaber) as intended to establish an approach of general application in relation to violations of article 5(3) and (4). It is true, as Lord Reed observes (para 62), that the second paragraph of that passage refers to the "particular circumstances" of the case. However, it is clear from the terms of the judgment as a whole, and from its treatment in later cases, that it was intended to draw a line under discrepancies in the previous jurisprudence, and to provide more consistent guidance for the future.

118. That it followed a full debate within the court, and was regarded at the time as dealing with a controversial issue of principle, is apparent also from the strength of the dissents, notably that of Judge Bonello (joined by Judge Maruste). Of interest also is the partly dissenting opinion of Judge Fischbach (joined by Judges Kuris and Casadevall), which complained that the "principle" adopted by the majority was such as to "restrict in advance" the scope for awarding compensation for non-pecuniary damage; whereas in their view that issue was one "to be determined in the light of the particular facts of each case" (para O-II5). Judge Greve, also partly dissenting, thought it would be preferable for the court "normally to use its discretion to award … some equitable satisfaction", the issue then being in each case to settle the amount (para O-III6). It is clear that she understood the majority judgment to reject that approach.

119. That understanding of *Nikolova* was reinforced by my own experience as a participant shortly afterwards in another Grand Chamber decision on the same issue, *Caballero v United Kingdom* (2000) 30 EHRR 643, in which many of the same judges took part (see my article, cited before us without objection, *ECHR Remedies from a Common Law Perspective* [2000] ICLQ 517, in which I related that case to the Law Commissions' then current review, in which I was directly involved as Chairman of one of the commissions). The judgment in *Caballero* repeated (in para 30) the substance of the relevant paragraph in *Nikolova*, but indicated that because of factors special to the instant case (described in para 31) it felt it right in the particular circumstances to make an "equitable" award of £1,000. That case was in turn distinguished in *SBC v United Kingdom* (2001) 34 EHRR 619, para 30, where no award was made, on the grounds that, in *Caballero*, unlike the instant case, the government had in effect accepted that apart from the breach the claimant would have had a good chance of being released on bail prior to his trial (para 31).

120. Another important decision from that period, also highlighted by Stanley Burnton J, is *Migon v Poland* (Application No 24244/94) (unreported) 25 June 2002. A breach of article 5(4) had been found, arising from the failure to provide the applicant with the documents necessary to give him an adequate basis on which to address the arguments relied on in support of the decisions to prolong his detention (para 86). The Chamber chaired by Sir Nicholas Bratza rejected the claim for damages, following *Nikolova*, in which it was said:

> "… the court stated that just satisfaction can be awarded only in respect of damage resulting from a deprivation of liberty that the applicant would not have suffered if he or she had had the benefit of the procedural guarantees of article 5 of the Convention and concluded, according to the circumstances, that the finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage suffered. (para 91)
>
> 92. In the present case, the court cannot speculate as to whether the applicant would have been detained if the procedural guarantees of article 5(4) of the Convention had been respected in his case. Consequently, the court considers that the non-pecuniary damage claimed is adequately compensated by the finding of a violation of this provision."

Faced with a claim of US$300,000 for pecuniary and non-pecuniary loss, alleged to arise from loss of family life, destruction of a business, and pain and distress (para 89), the court made no award, since it was not possible to speculate whether the violation of article 5(4) made any difference to the detention.

121. The continuing relevance of the principle or practice established in *Nikolova* is apparent from the subsequent cases in which it has been cited (one of the more recent being *Mitreski v Former Yugoslav Republic of Macedonia* (Application No 11621/09) (unreported) 25 March 2010) and the absence of any case in which it has been directly questioned. Mr Southey has sought to rely on some cases where awards have been made in apparent departure from the *Nikolova* approach. Some are referred to by Lord Reed (para 61). I find these of no real assistance. As I read them, they were decisions on their own facts, and did not purport to reformulate principle.

122. Mr Southey is, however, on stronger ground, when he argues for an exception to the *Nikolova* principle, applicable to breaches involving delay in proceedings governing release from detention. In support of that distinction he relies on the decision in *HL v United Kingdom* (2004) 40 EHRR 761, which again

is significant because it contains a reasoned discussion of principle. The case has been referred to by Lord Reed (para 60). The court found breaches of both article 5(1) and (4), arising out of the lack of fixed procedural rules governing the detention of a mental patient. The court declined to make an award for non-pecuniary loss.

123. The judgment (by a chamber, which included Judge Bratza and other judges who had been parties to *Nikolova*) dealt at some length with the issue of non-pecuniary loss. The court noted that in *Nikolova* the court had endorsed "the principle" that just satisfaction under articles 5(3) and (4) could only be awarded in respect of damage from a deprivation of liberty that the applicant would not have suffered apart from the violation. It saw no reason to depart from "the position outlined in the *Nikolova* judgment" concerning just satisfaction as regards distress or frustration suffered on account of "the absence of adequate procedural guarantees" (paras 148-149). However (in the passage quoted by Lord Reed - para 60), it distinguished cases in which awards had been made following findings of unreasonable delay in the domestic proceedings determining applications for release from detention. These were seen as "consistent with the award of non-pecuniary damages following a finding of unreasonable delay under article 6(1)". "Despite the procedural nature of such a violation", it was accepted that in such cases there could be "a causal link between the violation (delay) and the non-pecuniary damage claimed."

124. This is another example of the court specifically addressing the principles to be applied to the award of damages under article 5. It is of importance in considering the three cases on which Mr Southey principally relies, which were all cases relating specifically to delay before the Parole Board: *Oldham v United Kingdom* (2000) 31 EHRR 813; *Hirst v United Kingdom* (Application No 40787/98) (unreported) 24 July 2001; *Blackstock v United Kingdom* (2005) 42 EHRR 55. They have all been described by Lord Reed (paras 42, 43, 45), along with a series of other cases less close on their facts to the present. It is right now to add to them another very similar case: *Betteridge v United Kingdom* (Application No 1497/10) (unreported) 29 January 2013.

125. Laws LJ commented that, against the background of the cases analysed by Stanley Burnton J in *KB*, these cases could not be treated as "constituting any authoritative body of principle" (para 20). Taken on their own, I might have been inclined to agree. However *HL*, which was not referred to by the Court of Appeal, puts a different perspective on the earlier cases. There are other factors which in my view give support to Mr Southey's submission that these cases do exemplify a "principle" directly relevant to cases of the kind before us:

i) The issue of damages for non-pecuniary loss under article 5(3) and (4) seems to have been subject to vigorous debate within the court between 2001 and 2002.

ii) The three Parole Board cases demonstrated a consistency of approach, expressed in consistent language, over a period of five years to cases of significant delay before the Parole Board. The court was willing to make an award of £1,000 as "equitable" compensation for non-pecuniary loss, regardless of the prospects of earlier release.

iii) That approach was maintained both before and after the *Migon* decision. Judge Bratza, who led the chamber in *Migon* and was party to the judgment in *HL*, was also involved in all three decisions. There is no indication that he or the chamber as a whole saw any conflict between them. The natural explanation is that drawn by the court itself in *HL.*

126. It is also apparent that not every case of delay attracts an award. In *Rutten v The Netherlands* (Application No 32605/96) (unreported) 24 July 2001), where the court found a breach of article 5(4) because of delays in access to a court for a detained person, the court found that any "feeling of frustration" engendered by "the length of the proceedings" was "not to the extent of justifying the award of compensation" (para 59). As Mr Grodzinski says, it is not easy to work out how long the breach lasted. The claim was for actual loss of liberty for 17 days (para 57), but it appears that the "length of proceedings" to which the court was referring was several months. Similarly, in *Pavletic v Slovakia* (Application No 39359/98) (unreported) 22 June 2004, no award was made in respect of a failure to rule on a petition for release from detention for a period of almost a year, that is, from the date of the petition made on 10 January 1996 (para 89) until the applicant's release on 26 January 1997 (para 17). The court noted that the period of detention had been deducted from his subsequent sentence and made no separate award for "any prejudice which the applicant may have suffered" (para 110).

127. It seems therefore that, where there is no finding of actual or possible loss of liberty, questions of degree are relevant, and that there is a threshold of "distress" below which no award need be made. For these purposes I would concentrate on the cases which are directly related to the present facts, involving failures in the review of detention following conviction. Although the Strasbourg court has declined to lay down a precise measure of acceptable delay, the three cases relied on by Mr Southey seem, as far as one can judge, to have involved unacceptable delays of around a year or more, justifying awards of £1,000. A national court, paying due regard to Strasbourg principles, but also in the interests of certainty and proportionality, may properly take the view that there should be a threshold, defined by a period of excessive delay, in relation to which a breach of

article 5(4) may be established, but no monetary award is necessary. Although I would have regarded a threshold of six months as consistent with the Strasbourg jurisprudence, I do not dissent from the guidance proposed by Lord Reed or from his approval of the award in Mr Sturnham's case.