DRA. Nos. 9, 10 and 11 of 2000

(1) Karl Anderson
(2) Alexander Reid and
(3) Brian Doherty *Appellants*

v.

(1) The Scottish Ministers and
(2) The Advocate General for Scotland *Respondents*

FROM

THE INNER HOUSE OF THE COURT OF SESSION

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 15th October 2001

Present at the hearing:-

Lord Slynn of Hadley
Lord Hope of Craighead
Lord Clyde
Lord Hutton
Lord Scott of Foscote

Lord Slynn of Hadley

1. I have had the advantage of reading the text of the speeches of my noble and learned friends Lord Hope of Craighead and Lord Clyde. I fully agree that these appeals should be dismissed for the reasons which they have given. On what is the core issue it seems to me clear that the provisions of section 1 of the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 are not incompatible with article 5(1)(e) of the Convention: the continued detention of restricted patients in a hospital on grounds of public safety is not dependent on their condition being capable of treatment. There is nothing in article 5 to require that such detention be so restricted.

Lord Hope of Craighead

2. These are three appeals under paragraph 12 of Schedule 6 to the Scotland Act 1998 against the determination of a devolution issue by the

Inner House of the Court of Session (in the First Division, comprising the Lord President (Rodger), Lady Cosgrove and Lord Philip) on a reference under paragraph 7 of that schedule from the sheriff court at Lanark where the State Hospital at Carstairs is situated: *A v The Scottish Ministers* 2000 SLT 873. As Lady Cosgrove said at the outset of her opinion at p 895D-E, they represent a significant milestone in the development of Scots law.

3. The milestone is to be seen in the fact that we are concerned in this case with the first Act of the Scottish Parliament. The Bill which became the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 was introduced on 31 August 1999. The Parliament, which was opened on 1 July 1999, met to conduct business for the first time on 1 September 1999. Stage 1 of the Bill took place the following day. Decisions were taken which authorised an emergency debate on the Bill and established the timetable. The Bill passed through all its remaining stages on 8 September 1999, and it received the Royal Assent on 13 September 1999. The swift passage of this measure was achieved, with commendable despatch on the part of all concerned, at the very outset of the work of the new Parliament. But it has the distinction too of having attracted the first challenge to the Parliament's legislative competence under section 29 of the Scotland Act 1998. The challenge has been made on the ground that its provisions are incompatible with the appellants' Convention rights. The Court is being asked for the first time to strike down a provision which the Parliament has enacted.

The legislation

4. I should like to say a word first about the structure of the legislation which provides the context for the determination of a devolution issue as to the legislative competence of the Scottish Parliament. The issue has been defined by the appellants in these terms:

> "Is section 1 of the Mental Health (Public Safety and Appeals)(Scotland) Act 1999 a provision (in whole or in part) outwith the legislative competence of the Scottish Parliament by virtue of section 29(2)(d) of the Scotland Act 1998 and accordingly not law, in terms of section 29(1) thereof."

5. Section 29(1) of the 1998 Act provides that an Act of the Scottish Parliament is not law so far as any provision of the Act is outside the

legislative competence of the Parliament. Section 29(2) defines the limits on that legislative competence. Paragraph (d) of that subsection provides that a provision is outside that competence if it is incompatible with any of the Convention rights. Section 126(1) provides that the expression "the Convention rights" has the same meaning as in the Human Rights Act 1998. Those are the rights set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms to which effect is given by section 1 of the Human Rights Act 1998 for the purposes of that Act. Among these rights are those in article 5 of the Convention which are concerned with the right to liberty.

6. The Advocate General drew attention to various safeguards which have been built into the Scotland Act 1998 to ensure so far as possible that there is no breach of the limits of the Parliament's legislative competence. These are to be found in sections 31 and 33 of the Act. Section 31(1) provides that a member of the Scottish Executive who is in charge of a Bill shall, before its introduction, state that in his view it is within the legislative competence of the Parliament. This corresponds to section 19 of the Human Rights Act 1998, which requires a Minister of the Crown before second reading of a Bill in either House of the Parliament at Westminster to make a statement of compatibility. Section 31(2) requires the Presiding Officer, on or before the introduction of the Bill, to decide whether the Bill would be within the Parliament's legislative competence and to state his decision. This enables him to issue a warning to the Parliament if he is of the opinion the Bill would be outside its competence.

7. Important though these two safeguards may be in practice to the work of the Scottish Parliament, they are no more than statements of opinion which do not bind the judiciary. With that in view section 33 enables the Advocate General, the Lord Advocate or the Attorney General to refer the question of whether a Bill or any provision of a Bill would be within the Parliament's legislative competence to the Judicial Committee for its decision. This procedure is available to the Law Officers after the passing of the Bill but before it receives Royal Assent: see section 32(2). In the present case the Law Officers notified the Presiding Officer that they did not intend to make a reference. This enabled the Presiding Officer to submit the Bill for Royal Assent without delay. But the fact that the Law Officers decided not to test the matter in this way is of no consequence at this stage. The court has power to deal with it as a devolution issue under Schedule 6 to the Act after the Bill has been

enacted if a member of the public claims that the provision was outside the Parliament's legislative competence.

8. Before the court reaches the stage of making a determination that an Act of the Scottish Parliament or any provision in such an Act is outside the legislative competence of the Parliament there are a series of questions that it may have to address. These are to be found in sections 100 to 102 of the Scotland Act 1998.

    a. A person cannot bring proceedings on the ground that an "act", which includes making any legislation, is incompatible with the Convention rights unless he would be a victim for the purposes of article 34 of the Convention if proceedings in respect of the act were brought in the European Court of Human Rights: see section 100(1). So the first question is whether the person by whom the challenge is made is or would be a victim of the provision which he says is outside the legislative competence of the Parliament.
    b. Any provision of an Act of the Scottish Parliament which could be read in such a way as to be outside competence is to be read as narrowly as is required for it to be within the legislative competence of the Parliament, if such a reading is possible, and is to have effect accordingly: see section 101. The aim of this provision is to enable the court to give effect to legislation which the Scottish Parliament has enacted wherever possible rather than strike it down. So the second question is whether the provision which is in issue can be read and given effect in such a way as to avoid the incompatibility.
    c. The court has power, if it decides that an Act of the Scottish Parliament, or any provision in such an Act, which cannot be read compatibly is outside its legislative competence, to make an order removing or limiting the retrospective effect of the decision or suspending its effect for any period and on any conditions to allow the defect to be corrected: see section 102(2). The power to suspend enables the court to give the Scottish Parliament time to reconsider the legislation and to amend it in such a way as to remove the incompatibility. So the third question is whether the case is one where one or other of the orders contemplated by section 102(2) should be made as part of the determination of the devolution issue.

9. Each of these three questions is, to a greater or lesser degree, in play in the present case. They are, of course, bound up with the underlying question as to whether section 1 of the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 ("the 1999 Act"), or any part of it, is incompatible with the patients' Convention rights. But I think that it is important not to lose sight of them, especially in the case of Brian Doherty which presents certain difficulties which do not apply in the other two cases of Karl Anderson and Alexander Reid.

The facts

10. The facts have been described by my noble and learned friend Lord Clyde, and I gratefully adopt what he has said about them. As he has indicated, the 1999 Act was passed in response to the decision by the Sheriff at Lanark in *Ruddle v Secretary of State for Scotland*, 1999 GWD 29-1395, following the decision of the House of Lords in *R v Secretary of State for Scotland*, 1999 SC (HL) 17, to grant an absolute discharge to a restricted patient from the State Hospital. It was an emergency measure, which was intended to prevent the release from the hospital for the time being of other patients in that category whose continued detention in a hospital was shown to be necessary on grounds of public safety.

11. The Scottish Ministers made it clear in the debates on the Bill that they appreciated that the law relating to high risk offenders with personality disorders was in need of review and that it was their intention to introduce further legislation in the light of the recommendations of two committees. These were a committee set up under the chairmanship of the Rt Hon Bruce Millan to carry out a general review of the Mental Health (Scotland) Act 1984 ("the Millan Committee") and a committee set up under the chairmanship of Lord MacLean to review the sentencing and treatment of sexual and violent offenders ("the MacLean Committee"). The reports of both committees have now been published.

12. The MacLean Committee set out their views on the 1999 Act in chapter 12 of their report: Report of MacLean Committee on Serious Violent and Sexual Offenders (SE/2000/68). In paragraphs 12.3 and 12.4 they recognised that there might be some patients at the State Hospital who, as a result of the Act, remained detained even although the mental disorder from which they were suffering might not be one that was appropriate for treatment in hospital. But they did not think that there

was any recommendation that they could reasonably make that would alter the existing situation for these patients. They observed that the compulsory transfer of this group of patients to prison was not permissible by law and would not be proper on human rights grounds, but that the assessment of risk and its management were the crucial factors in determining their continued detention and in assessing their suitability for transfer to less secure facilities. They said that it was essential that the assessment of that risk be carried out to the highest standards.

13. The Millan Committee dealt with the 1999 Act in chapter 28 of their report: Report on the Review of the Mental Health (Scotland) Act 1984, January 2001 (SE/2001/56). In paragraph 12 of that chapter they said that in their view the aim of mental health services should be to offer treatment and not preventive detention, which should be a matter for the criminal law. In paragraph 39 they addressed the problem presented by those patients who are already subject to hospital orders with restrictions who may present a risk to the public, are not treatable and cannot lawfully be transferred to prison. Noting, in paragraph 40, that the MacLean Committee had considered this group and did not feel there was any recommendation they could make, they said that they had the same difficulty. In paragraph 42 they said that they had concluded that it was a matter for the Scottish Executive and Parliament to consider whether there was a need for some form of transitional provision which would retain the effect of the 1999 Act for this very limited group of high risk patients. In recommendation 28.4 they said that the transitional provisions should be drawn in such terms as to ensure that their effect did not reach beyond this group.

14. In the light of these reports it seems likely that section 1 of the 1999 Act will have a longer life than was originally intended. As neither committee has been able to devise another solution to deal with this group of patients, the question whether it was within the legislative competence of the Scottish Parliament raises important issues as to how the general interest of the community is to be balanced against the protection of the fundamental rights of individuals: *Soering v United Kingdom* (1989) 11 EHRR 439, 468, para 89.

15. The mischief which the 1999 Act was designed to address can be stated quite simply. Section 59A of the Criminal Procedure (Scotland) Act 1995, which was inserted by section 6 of the Crime and Punishment

(Scotland) Act 1997, enables a court to impose a sentence of imprisonment accompanied by a hospital direction if it considers that a person who has been convicted on indictment is suffering from a mental disorder which is susceptible to treatment. This enables the offender to undergo an immediate period of treatment in hospital to alleviate the condition or prevent its deterioration. He will be returned to prison to serve the remainder of the sentence after the treatment is over or if it turns out at some later date that the condition is not treatable. The group of patients affected by the 1999 Act is confined, with one exception, to about 12 individuals who were dealt with under the predecessors of sections 58 and 59 of the 1995 Act before that reform of the criminal law was introduced. As it was thought at the time of their conviction that the psychopathic personality disorder from which they were suffering was treatable, they were not sentenced to any period of imprisonment but simply ordered to be detained as restricted patients under a hospital order. They have been assessed as presenting a high risk of danger to the public if released into the community. But medical knowledge of psychopathic personality disorder, while still incomplete, has moved on and there is now a strong body of opinion that the condition is not treatable. They cannot be sent to prison, as the criminal charges against them have been disposed of. The sheriff's decision in *Ruddle's* case indicated that it was likely in these circumstances that they would be granted an absolute discharge.

16. The solution which was devised in terms of the 1999 Act addresses this problem by adding public safety to the grounds for not discharging a restricted patient from hospital under sections 64 and 66 (appeals to the sheriff) and sections 68 and 74 (discharge by the Scottish Ministers) of the Mental Health (Scotland) Act 1984 ("the 1984 Act"). The patient may not be discharged if the sheriff or the Scottish Ministers, as the case may be, are satisfied "that the patient is suffering from a mental disorder the effect of which is such that it is necessary, in order to protect the public from serious harm, that the patient continue to be detained in a hospital, whether for medical treatment or not". The enactment was retrospective, as section 1(5) of the 1999 Act provides that the amendments were to have effect in relation to appeals to the sheriff in which the hearing took place on or after 1 September 1999 and to cases considered by the Scottish Ministers after that date.

The issues

17. Karl Anderson and Alexander Reid are both being detained under a hospital order in the State Hospital as restricted patients, because they are patients who are subject to a restriction order: see section 63 of the Mental Health (Scotland) Act 1984. They cannot be returned to prison in the event of their obtaining a discharge under section 64 of that Act as, under the law in force at the time when the hospital orders were made, they were not sentenced to any term of imprisonment. In the event of their discharge from hospital they would have to be released into the community.

18. Brian Doherty is in a different position. He is a restricted patient because he is subject to a restriction direction. He was sentenced in Northern Ireland to a period of imprisonment which he was still serving when he was diagnosed as suffering from a mental disorder which was considered to be treatable. He was admitted to hospital by reason of a transfer direction together with a restriction direction made by the Secretary of State for Northern Ireland under articles 53 and 55 of the Mental Health (Northern Ireland) Order 1986 (SI 1986/595). There were no suitable facilities for his detention in Northern Ireland, so he was transferred under section 81 of the 1984 Act to the State Hospital. The effect of the restriction direction which was made in his case is that the Scottish Ministers must return him to prison to complete his sentence in the event of his being granted a discharge: section 74 of the 1984 Act, read with section 81(2).

19. The cases of Anderson and Doherty differ from that of Reid in respect that on 8 July and 22 July 1999 respectively they lodged summary applications at Lanark Sheriff Court seeking a discharge from their detention as restricted patients on the grounds set out under section 64 of the 1984 Act. So their applications were already pending when the 1999 Act was brought into force on 13 September 1999. Reid did not lodge his application for a discharge until 8 March 2000. But the Scottish Ministers accept that all three appellants satisfy the victim test laid down in section 100(1) of the Scotland Act 1998, on the assumption – which they dispute – that the mental disorder from which they are suffering is not treatable.

20. Section 1 of the 1999 Act is said to be incompatible, in whole or in part, with article 5(1)(e) and article 5(4) of the Convention. The issues which the case raises are the following:

a. Is section 1, in whole or in part, incompatible with article 5(1)(e)? Article 5(1) provides that no one shall be deprived of his liberty save in the cases which it describes, which in paragraph (e) include the lawful detention of persons of unsound mind, and in accordance with a procedure prescribed by law. This issue is raised by all three appellants.
b. Is the case of Doherty under article 5(1)(e) to be distinguished from those of Anderson and Reid? Doherty wishes to obtain his discharge so that he can be returned to prison to serve the remainder of his sentence of imprisonment. He is not seeking to be released into the community.
c. Is section 1, in whole or in part, incompatible with article 5(4)? Article 5(4) provides that 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. This issue also is raised by all three appellants.
d. Is the retrospective application of section 1 to pending proceedings incompatible with article 5(4)? This issue, which relates to the right known as the right to equality of arms, is raised only by Anderson and Doherty.
Compatibility with article 5(1)(e) generally

21. The jurisprudence of the European Court of Human Rights indicates that there are various aspects to article 5(1) which must be satisfied in order to show that a person's detention is lawful for the purposes of that article: see *R v Governor of Brockhill Prison, Ex p Evans (No 2)* [2000] 3 WLR 843, 857H-858C, where I set out my understanding of what is involved.

22. There are three distinct questions that need to be addressed. The first question is whether the detention is lawful under domestic law. Any detention which is unlawful in domestic law will automatically be unlawful under article 5(1). As the court said in *Winterwerp v The Netherlands* (1979) 2 EHRR 387, 402-403, para 39, the lawfulness of the detention for the purposes of article 5(1)(e) presupposes conformity with the domestic law in the first place and this covers procedural as well as substantive rules. The second question is whether, assuming that the detention is lawful under domestic law, the domestic law also complies with the general requirements of the Convention. These are based upon the principle that any restriction on human rights and fundamental freedoms must be prescribed by the law: see articles 8

to 11 of the Convention. They include the requirements that the domestic law must be sufficiently accessible to the individual and sufficiently precise to enable the individual to foresee the consequences for himself. The third question is whether, again assuming that the detention is lawful under domestic law, it is nevertheless open to criticism on the Convention ground that it is arbitrary because, for example, it was resorted to in bad faith or was not proportionate: *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, 669, para 58.

23. As the Court said in *Winterwerp v The Netherlands* 2 EHRR 387, 405, para 45, the domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein. That is the background to section 29(2)(d) of the Scotland Act 1998, which defines the limits of the legislative competence of the Scottish Parliament in regard to the Convention rights. Nevertheless the wording of article 5, as interpreted by the court, shows that it is in the first instance a matter for the domestic law to lay down the substantive and procedural rules which regulate the detention of persons of unsound mind.

24. In the present case the answer to the first question as to the position in domestic law is that the appellants are being detained under Part VI of the Mental Heath (Scotland) Act 1984 as amended by the 1999 Act. The legislation as it now stands permits the continued detention of restricted patients who no longer satisfy the condition which section 17 of the 1984 Act lays down for detention in a hospital that their mental disorder is treatable if the sheriff or the Scottish Ministers, as the case may be, are satisfied that the patient is suffering from a mental disorder the effect of which is such that it is necessary, in order to protect the public from serious harm, that the patient continue to be detained in hospital, whether for medical treatment or not: sections 64(A1), 68(2A) and 74(1B) of the 1984 Act as amended. The effect of the amendment was to reverse the decision in *R v Secretary of State for Scotland*, 1999 SC (HL) 17. Assuming for the moment that the relevant provisions of the 1999 Act are compatible with the appellants' Convention rights – as the first question refers only to domestic law – the continued detention of the appellants is authorised by the amendments which it made to the 1984 Act. It is lawful under the domestic law which no longer requires, in the case of restricted patients whose continued detention in a hospital is necessary on grounds of public safety, that their mental disorder is treatable.

25. As for the second question, it has not been suggested that the relevant provisions of the 1984 Act, as amended by section 1 of the 1999 Act, are inaccessible or insufficiently precise. The procedure which the law prescribes for the appellants' continued detention satisfies the requirements mentioned in paragraph 45 of the *Winterwerp* case. It is stated in that paragraph that the notion underlying the words "in accordance with a procedure prescribed by law" in article 5(1) is one of fair and proper procedure, namely that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority, and the procedure under which this is done should not be arbitrary. Although the appellants' counsel did not contend otherwise, the fact that they are being detained under a procedure prescribed by domestic law which complies with the general principles of the Convention is an important factor on the issue of compatibility. The 1999 Act satisfies these tests.

26. The third question is the one to which the appellants' counsel directed their argument. In *X v United Kingdom* (1981) 4 EHRR 188, 203, para 43 the court said that the object and purpose of article 5(1) is precisely to ensure that no one should be deprived of his liberty in an arbitrary fashion. In other words, what the Convention requires is that there must be no element of arbitrariness. That is the context in which, in paragraph 39 of its judgment in the *Winterwerp* case, the court laid down the three minimum conditions which have to be satisfied for there to be lawful detention of persons of unsound mind within the meaning of article 5(1)(e). These conditions were restated in *X v United Kingdom* (1981) 4 EHRR 188, 202, para 40, in *Luberti v Italy* (1984) 6 EHRR 440, 449, para 27 and in *Johnson v United Kingdom* (1997) 27 EHRR 296, 322, para 60. In the *X* case they were said to be that:

> "the individual concerned must be reliably shown to be of unsound mind, that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder."

27. As the Lord President said, 2000 SLT 873, 888J, the system which the 1999 Act lays down satisfies these criteria. The sheriff or the Scottish Ministers must be satisfied that the patient is suffering from a mental

disorder (the first *Winterwerp* criterion) and that it is such as to make it necessary for the protection of the public that he continue to be detained in hospital (the second and third *Winterwerp* criteria). As all three criteria are satisfied, the system does not appear to be open to the criticism that, in Convention terms, it is arbitrary.

28. The appellants' counsel nevertheless contended that the system was incompatible with article 5(1)(e) on the ground that the article, read purposively with article 18 which limits restrictions on rights permitted under the Convention to the purpose for which they have been prescribed, did not permit the detention of persons of unsound mind in circumstances where there is neither a genuine intention to provide medical treatment to that person nor the possibility of benefit from such treatment. In my opinion the jurisprudence of the Strasbourg Court does not support this proposition. In *Winterwerp v The Netherlands* 2 EHRR 387, 407 para 51 the court said that a mental patient's right to treatment appropriate to his condition cannot as such be derived from article 5(1)(e). In *Ashingdane v United Kingdom* (1985) 7 EHRR 528, 543, para 44 the court looked again at the question whether the expression "lawful detention of a person of unsound mind" could be construed as including a reference to matters such as the conditions of detention. It held that, although there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention, the article was not in principle concerned with suitable treatment or conditions.

29. The conclusion which I would draw from these cases is that the question whether a person who is deprived of his liberty on the ground that he is a person of unsound mind in circumstances which meet the *Winterwerp* criteria should also receive treatment for his mental disorder as a condition of his detention is a matter for domestic law. So too is the place of his detention, so long as it is a place which is suitable for the detention of persons of unsound mind. It follows that the fact that his mental disorder is not susceptible to treatment does not mean that, in Convention terms, his continued detention in a hospital is arbitrary or disproportionate.

30. In *Guzardi v Italy* (1980) 3 EHRR 333, 366, para 98 and *Litwa v Poland* (Application No 26629/95), ECHR, 4 April 2000 (unreported), para 60 the court recognised that a predominant reason why the Convention allows the persons mentioned in article 5(1)(e) to be

deprived of their liberty is not only that they are dangerous for public safety but also that their own interests may necessitate their detention. So the need to protect the public from serious harm is in itself a legitimate reason for the detention of persons of unsound mind, provided always that the *Winterwerp*conditions are satisfied. In this context the fair balance which is inherent in the whole of the Convention between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights favours the general interests of the community.

31. For these reasons I agree with the judges in the Inner House that section 1 of the 1999 Act is not incompatible with the appellants' rights under article 5(1)(e) of the Convention. I would hold that it was not incompatible with the appellants' rights under article 5(1)(e) for the Scottish Parliament to require the continued detention of restricted patients in a hospital where this is necessary on grounds of public safety, whether or not their mental disorder is treatable.

Doherty's case under article 5(1)(e): restriction direction patients

32. Mr Mitchell QC for Doherty said that he was a criminal who simply wished to go back to prison. As he had been sentenced to imprisonment for life, there was no prospect of his being released from hospital into the community. Section 65 of the 1984 Act requires the sheriff, in the event of his being of the opinion that a patient who is subject to a restriction direction would, if subject to a restriction order, be entitled to be discharged under section 64 of the Act, to notify the Scottish Ministers with a view to his being remitted to any prison where he might have been detained if he had not been removed to hospital. His complaint was that, due to inadequate drafting, he had been sucked by section 1 of the 1999 Act into a system which was designed to protect the public from restricted patients subject to restriction orders who would have to be released into the community in the event of their obtaining a discharge from hospital.

33. Mr Mitchell said that Mr Doherty would be content to be told that he did not satisfy the victim test because section 1 of the 1999 Act did not apply to him. But his arguments were presented on the assumption that his case was caught by section 1 and that but for its provisions he would be entitled, on proof that his mental condition was not treatable, to be remitted to prison under section 65 of the 1984 Act. As I understood the

argument, it was that, whatever might be the position in regard to patients who were subject to restriction orders, the system laid down by section 1 of the 1999 Act did not meet the second test in *Winterwerp* in Doherty's case as he was subject to a restriction direction, not a restriction order, and that for this reason the section was incompatible with article 5(1)(e).

34. At first sight it might seem odd to hold that a provision was outside the legislative competence of the Scottish Parliament because the class of persons to whom it applied included a single individual with whose Convention rights, in contrast to all other members of that class, it was incompatible. But I think that this is the inevitable consequence of the restriction which section 29(2)(d) has imposed on its legislative competence. If the class of persons to whom the provision is to apply is defined too widely, so that it includes any one or more persons who ought not to be there because to include them would be incompatible with their Convention rights, the provision as a whole must be held to be outside the legislative competence of the Parliament. It is, of course, an overriding requirement that those who seek to challenge a provision on the ground of an incompatibility with the Convention rights must satisfy the victim test in section 100(1) of the Scotland Act 1998. But, provided this test is satisfied, it is open to any individual who claims that the provision is incompatible with his Convention rights to challenge its legislative competence on this ground irrespective of whether anyone else is affected by the provision in this way. It is fundamental to a proper understanding of this new system to appreciate that the Convention exists to protect the fundamental rights and freedoms of each and every individual. This is not a situation in which a solution that is good for most people must be accepted as good for everybody.

35. Appreciating that it would not be in the public interest for section 1 of the 1999 Act to be struck down simply because it was incompatible with Doherty's Convention rights, Mr Mitchell suggested that an order should be made under section 102(2)(b) of the Scotland Act 1998 suspending the effect of the decision for a period of three months to enable the Scottish Parliament to correct the defect which he had identified. If the only solution to the problem he has raised was to hold that section 1 was invalid on the ground that it was outside the Parliament's legislative competence, I would have thought it appropriate to make such an order in this case.

36. But it is only if the legislation cannot be read and given effect by reading it as narrowly as is required for it to be within competence that the question can arise as to whether it should be held to be outside competence. So the first point to be addressed under the system which the Scotland Act 1998 lays down is how the legislation ought to be interpreted. I think that the solution to the problem which has been raised by Doherty's case is to be found by making use of the interpretative obligation which is laid down by section 101(2) of the Act, bearing in mind the observations which I made in *R v Lambert* [2001] 3 WLR 206, 233-234, paras 78-81 as to how the corresponding obligation in section 3(1) of the Human Rights Act 1998 ought to be used.

37. The word "public" in the phrase "in order to protect the public from serious harm" in each of the various amendments included in section 1 of the 1999 Act is capable of meaning either the public in general or a section of the public, as the context requires. In Doherty's case, there is no question of his coming into contact with the public in general as he would be remitted to prison in the event of his discharge from hospital. But the persons with whom he would be liable to come in contact in a prison may be regarded as a section of the public. They include prison officers, other inmates and a variety of people who visit prisons for religious, educational, social work or other purposes. Read in this way, the effect of the amendments introduced by section 1 of the 1999 Act is to require the sheriff or the Scottish Ministers, as the case may be, to be satisfied in Doherty's case that it is necessary for him to be detained in a hospital to protect that section of the public from serious harm.

38. In my opinion, on this narrow interpretation of the word "public", the amendments introduced by section 1 of the 1999 Act are consistent with the second *Winterwerp* test in Doherty's case, as there would be no element of arbitrariness in a decision that the risk of serious harm to that section of the public warranted his compulsory confinement in a hospital. It could not be said that his continued detention in the State Hospital was disproportionate to the legitimate aim of protecting that section of the public from serious harm. But it must also follow that, if the sheriff or the Scottish Ministers are not satisfied that it is necessary for Doherty to continue to be detained in a hospital to protect that section of the public from serious harm, he will be entitled to be transferred back to prison if the psychiatric evidence shows that his mental condition is not treatable.

Compatibility with article 5(4) generally

39. The function of article 5(4) was explained by the court in *Winterwerp v The Netherlands* 2 EHRR 387, 408, para 55, where it was said that the very nature of the deprivation of liberty under consideration in article 5 would appear to require a review of lawfulness at reasonable intervals. In paragraph 58 the court said, in the case of the special category of the detention of persons of unsound mind, the absolute minimum for a judicial procedure was the right of the individual to present his own case and to challenge the medical and social evidence adduced in support of his detention. Thus, the domestic remedy available under article 5(4) should enable judicial review at reasonable intervals of the conditions which are essential for the lawful detention of a person on the ground of unsoundness of mind: *X v United Kingdom* 4 EHRR 188, 206-207, paras 52, 53; *Ashingdane v United Kingdom* 7 EHRR 528, 545, para 52. The review must encompass the lawfulness of the detention under article 5(1)(e) as well as its lawfulness under domestic law.

40. The appellants maintained that the review provisions now contained in sections 64(A1) and 64(B1) of the 1984 Act as amended by section 1 of the 1999 Act were incompatible with article 5(4) as they did not require a review of whether the grounds which made their detention lawful under article 5(1)(e) existed or continued to exist. Mr Bell QC for Anderson said it was necessary for the review to include a consideration of the therapeutic element. That argument loses its validity if, as I would hold, it is not a necessary condition of the lawfulness of their detention on Convention grounds that the mental disorder from which they are suffering should be treatable. But there remain Mr Bell's broader arguments, which were (1) that the introduction of the overriding test of public safety enables the appellants to continue to be detained without there being any review of the lawfulness of their continued detention on the basis on which they were originally admitted and detained, and (2) that when he is applying the public safety test the sheriff is not conducting a review but exercising the function of a primary decision maker.

41. In my opinion the answer to the first argument lies in the fact that the domestic law has been changed since the appellants were originally admitted and detained. As Mr Hodge QC for the Scottish Ministers said, the lawfulness of the detention must be assessed at the time of the assessment. The original basis on which the appellants were admitted

was that, as required by section 17 of the 1984 Act, they were suffering from a mental disorder which was treatable. Treatability remained a condition of their detention in hospital until the law was changed by section 1 of the 1999 Act. The effect of that change is that they are now subject to a further and overriding condition which prevents their release, irrespective of whether their mental condition remains treatable, if the Scottish Ministers can show that it is necessary to protect the public from serious harm that they be detained in a hospital. For reasons already given, I consider that this condition is compatible with the three tests which were identified in *Winterwerp*. So their continued detention on this ground is lawful in terms of both domestic law and the requirements of the Convention.

42. As for the second argument, article 5(4) does of course require judicial review at reasonable intervals of the question whether the appellants' continued detention in a hospital is still necessary on public safety grounds. On one view a decision by the sheriff that a patient must continue to be detained in a hospital on public safety grounds is that of a primary decision maker. But the context in which that decision is made is one where the patient in question is already the subject of a restriction order or a restriction direction made on grounds of public safety. It is also one in which the Scottish Ministers are continuing to detain the patient in the light of the reports on his condition prepared under section 62(2) of the 1984 Act by the responsible medical officer at regular intervals. In this context the exercise which the sheriff is required to conduct by sections 64(A1) and 64(B1) at reasonably intervals is one which can properly be described as a review. It is a review of the patient's continued detention in the light of the new rules which have been introduced on public safety grounds by the Scottish Parliament. I would hold that it is not incompatible with article 5(4).

Anderson and Doherty's case under article 5(4): equality of arms

43. Article 5(4) of the Convention prohibits interference with the administration of justice designed to influence the judicial determination of a dispute other than on compelling grounds of the general public interest: *The National & Provincial Building Society v United Kingdom* (1997) 25 EHRR, 181, para 112; *Zielinski v France* (2001) 31 EHRR 19. Anderson and Doherty maintain that section 1 of the 1999 Act was designed to interfere with the judicial determination of the summary applications which they had already made

in Lanark sheriff court seeking their discharge on the grounds set out under section 64 of the 1984 Act, as it was provided in section 1(5) of the 1999 Act that the amendments made by subsections (1) and (2) of that section were to have effect in relation to appeals proceeding under sections 64, 65 or 66 of the 1984 Act in which the hearing took place on or after 1 September 1999. Mr Hodge said that there were compelling grounds of public interest for making these provisions retrospective so that they applied to the cases of Anderson and Doherty as well as to those of the other patients who were being detained as restricted patients in the State Hospital.

44. In my opinion the test which the court has identified is made out in this case. The purpose of the 1999 Act was to protect the public, including the section of it which is relevant in Doherty's case, from lethal attacks by mentally disordered persons with a prior history of committing homicide whose mental disorder was regarded as untreatable. A gap in the legislation relating to such persons was identified in *R v Secretary of State for Scotland* 1999 SC (HL) 17, and its practical consequences had been demonstrated by the sheriff's decision in *Ruddle's* case. It was necessary for the Scottish Parliament to address the serious risk to public safety which would arise if others whose mental disorder was regarded as untreatable were to apply to the sheriff for their discharge.

45. As the Lord President said, 2000 SLT 873, 894K-L, adopting the language used by the Court in *The National & Provincial Building Society v United Kingdom*, p 181, para 112, any retrospective interference with the sheriff's conduct of an appeal which has already been made to him under section 64 of the 1984 Act must be treated with the greatest possible degree of circumspection. But I do not think that it could be said that the Parliament was reacting disproportionately to that risk, having regard to the nature of the risk to public safety and the high test of necessity to protect the public from serious harm which the amending legislation has laid down.

46. The Lord President said, at p 895B, that he was doubtful whether retrospection would have been justified if the only pending appeal had been that of Doherty since there was no prospect of him being discharged into the community. But I consider that the narrow meaning which I would give to the word "public" in his case, as indicating the section of the public with whom he would come in contact if he were to be returned to prison, removes this doubt. The necessity that he continue

to be detained in a hospital to protect that section of the public from serious harm, which is the test the sheriff must apply under section 64(A1) of the 1984 Act as amended, provides as compelling a reason for making the amendment retrospective in order to catch his case as the application of the public safety test in the broader sense does in the case of Anderson. I agree with the judges of the First Division that there was no violation of article 5(4) in this respect.

Conclusion

47. For these reasons and those given by my noble and learned friend Lord Clyde, I would hold that section 1 of the 1999 Act is neither in whole nor in part outwith the legislative competence of the Scottish Parliament in terms of section 29(1) and 29(2)(d) of the Scotland Act 1998. I would dismiss all three appeals.

Lord Clyde

48. This group of three appeals are the first appeals to come to this Board in which the lawfulness of an Act of the Scottish Parliament is under challenge. The Act in question is the Mental Health (Public Safety and Appeals)(Scotland) Act 1999, the first Act passed by the Scottish Parliament. The matter is raised as a "devolution issue" as defined in Schedule 6, Part I, paragraph 1(*a*) of the Scotland Act 1998, that is to say, "a question whether an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament is within the legislative competence of the Parliament". The principle provision of the Act which defines the legislative competence of the Parliament is section 29. Section 29(2) provides that a provision of an Act of the Scottish Parliament is outside its legislative competence if, among other things, "(*d*) it is incompatible with any of the Convention rights …". The Convention rights are the rights detailed in section 1 of the Human Rights Act 1998 (section 126(1) of the Scotland Act 1998) and for present purposes it is enough to note that that includes article 5 of the European Convention for the protection of Human Rights and Fundamental Freedoms. Section 29(1) of the Scotland Act states that "An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament".

49. The issue in each of the present appeals has been raised by way of a reference to the Inner House of the Court of Session from the sheriff at

Lanark. The question which he referred was in each case in the same terms and these were as follows:

> "Is section 1 of the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 a provision in whole or in part, outwith the legislative competence of the Scottish Parliament by virtue of section 29(2)(d) of the Scotland Act 1998 and accordingly not law in terms of section 29(1) thereof?"

Section 1 of the 1999 Act sought to make certain amendments to the provisions of the Mental Health (Scotland) Act 1984 relating to the discharge of patients who were subject to restriction orders or restriction directions. The three appellants were the subject of criminal proceedings in which they were each found to be suffering from some form of mental disorder warranting their detention in hospital. In so ordering the respective authority also imposed a restriction on their discharge. In each case it has yet to be resolved whether the respective appellant is or is not entitled to be discharged under the original provisions of the legislation, quite apart from the effect of the provisions added by the 1999 Act.

The factual and legislative background

50. The appellant Anderson pled guilty in 1968 to a charge of culpable homicide. The victim was a girl of 12 whom he forced to accompany him into a cellar and there strangled and killed her. On 6 December 1968 Lord Justice Clerk Grant acting under section 55(1) of the Mental Health (Scotland) Act 1960 made a "hospital order", authorising his admission to and detention in the state hospital at Carstairs. He also imposed an order under section 60(1) of that Act restricting his discharge, the effect of which was that Anderson was to continue to be liable to be detained by virtue of the hospital order until he was absolutely discharged under further provisions of that Act. Since then Anderson has been continuously detained in the state hospital. Sections 55 and 60(1) were replaced by new provisions in the Criminal Procedure (Scotland) Act 1975, and the powers to make hospital orders and restriction orders are now to be found in sections 58 and 59 of the Criminal Procedure (Scotland) Act 1995. The present appeals have proceeded upon the basis that the orders made under the 1960 Act now have effect as if they had been made under the 1995 Act (Criminal Procedure (Consequential Provisions) (Scotland) Act 1995). The provisions in the 1960 Act governing the continued detention of Anderson have been replaced by the corresponding provisions of the Mental Health (Scotland) Act 1984.

It is accordingly to that Act that one turns to find the relevant provisions for his discharge. It was under section 63 of that Act that Anderson made a summary application to the local sheriff for an order for his discharge. He made his application on 8 July 1999.

51. The appellant Doherty has had a different history. He was convicted at Antrim Crown Court on 15 May 1995 of the kidnapping and manslaughter of an eleven year old boy in circumstances which were described by the trial judge as "cruel and macabre". He was sentenced to life imprisonment on the manslaughter charge and to ten years imprisonment concurrently on the kidnapping charge. On 19 June 1995 the Secretary of State for Northern Ireland made a transfer direction under article 53 of the Mental Health (Northern Ireland) Order 1986 (SI 1986/595) in terms of which Doherty was transferred to Holywell Hospital in Northern Ireland. The Secretary of State also made a restriction direction under article 47 of the Order. It was then considered that it was in Doherty's interests that he should be moved to the state hospital at Carstairs and on 27 July 1995 the Secretary of State for Northern Ireland authorised his removal to that hospital under section 81 of the 1984 Act. By virtue of section 81(2) he fell to be treated as if the order and direction which had been imposed in Northern Ireland had been imposed under the corresponding legislation in Scotland. On 22 July 1999 Doherty made a summary application to the sheriff under section 63 of the 1984 Act. Since he was subject to a restriction direction, as distinct from a restriction order, it was section 65(1) which applied to his case. Section 65(1), as amended by section 7(3) of the Crime and Punishment (Scotland) Act 1997, provides that where an appeal is made to a sheriff by a restricted patient who is subject to a restriction direction, the sheriff:

> "(*a*) shall notify the Secretary of State if, in his opinion, the patient would, if subject to a restriction order, be entitled to be absolutely or conditionally discharged under section 64 of this Act …."

Section 65(2), as amended, provides that if the sheriff notifies the Secretary of State that the patient would be entitled to be absolutely discharged, the Secretary of State shall:

> "(a) … by warrant direct that the patient be remitted to any prison or other institution or place in which he might have been detained had he not been … removed … to a hospital

> … and he shall be dealt with there as if he had not been so … removed …"

The case of Doherty is in this respect distinct from the cases of the two other appellants. If they were to be absolutely discharged they would be at liberty, but if Doherty was absolutely discharged he would require to be sent back to prison. The judge who sentenced him at Antrim Crown Court said that he was highly dangerous "and the public protection requires that he should be removed from society for a long period of time, and only after a lengthy period of time, if his condition be reversed, could he be considered for release if it be safe to do so". Even if Doherty was to succeed in his application for absolute discharge before the sheriff he is likely to remain in confinement for a very considerable time. He made his application to the sheriff on 22 July 1999.

52. So far as the appellant Reid is concerned he pled guilty to a charge of culpable homicide and was the subject of orders under sections 55 and 60(1) of the 1960 Act. The orders were pronounced on 8 September 1967. He was detained in the state hospital at Carstairs until 1985 when he was transferred to Sunnyside Hospital in Montrose. In 1986 he was convicted of an assault on an eight year old girl and was sentenced to three months' imprisonment. He was then recalled to the state hospital and has remained there since that time. He made various applications to the sheriff for his discharge, one of which led to an appeal before the House of Lords in *R v Secretary of State for Scotland* 1999 SC(HL) 17. His latest application, being the one in which the present reference was made, was lodged in March 2000.

53. In *R v Secretary of State for Scotland* the House of Lords were concerned principally with the meaning and effect of the provisions of section 64(1) of the 1984 Act. That subsection was in the following terms:

> "64(1) Where an appeal to the sheriff is made by a restricted patient who is subject to a restriction order, the sheriff shall direct the absolute discharge of the patient if he is satisfied –
> (a) that the patient is not, at the time of the hearing of the appeal, suffering from mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment; or

(b) that it is not necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment; and (in either case)
(c) that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment."

54. In construing this section the majority in the House looked to section 17(1) of the Act. Section 17(1) applies generally to voluntary applications for admission to a hospital, but its requirements also come to apply to the case of the compulsory admission of an offender. One of the things of which the court must be satisfied before making a hospital order under section 58 of the 1995 Act is that section 17(1) of the 1984 Act applies in relation to the offender. The view taken by the majority was that there was a significant correspondence between the criteria set out in section 17(1) of the Act for the admission of patients and the provisions of section 64(1) for the making of an order for discharge. In particular the condition in section 17(1) that medical treatment was likely to alleviate or prevent a deterioration of his condition remained a consideration at the stage of his application for discharge. Accordingly where it was found that a patient who had originally in conformity with section 17(1) had a condition which was susceptible to treatment, if it was now the case that he was not or no longer treatable, it could not be said that his mental disorder was such as to make it "appropriate for him to be liable to be detained in a hospital for medical treatment" for the purposes of section 64(1)(a).

55. The terms and the scheme of the legislation which led to this result were evidently attributable to an understanding at an earlier period that all mental conditions should be susceptible to treatment, so that when treatment had been concluded a patient could be allowed to leave a hospital environment without constituting any significant threat to the safety of others. The words "medical treatment", which are given an inclusive definition in section 125(1) of the Act, are open to a generous construction which might be thought to enable some mitigation of the potential problems which could arise. But the Scottish Ministers who took office in May 1999 were quick to appreciate the shortcoming of the existing legislation and although the new Scottish Parliament was only formally established on 1 July 1999 steps were taken with remarkable expedition to secure that some legislation was in place at an early date to guard against what was seen as a potential risk of danger to members of

the public. The result was the Act whose first section is the subject of the present challenge.

56. Subsections (1) to (4) of section 1 of the 1999 Act insert into each of sections 64, 66, 68 and 74 of the 1984 Act a provision in broadly similar terms relating to public safety together with certain ancillary provisions appropriate to the particular context. It is sufficient to set out section 1(1):

> "(1) In section 64 (right of appeal of patients subject to restriction orders) of the Mental Health (Scotland) Act 1984 (c 36) ('the 1984 Act') –
> (a) at the beginning there are inserted the following subsections –
> '(A1) Where an appeal to the sheriff is made by a restricted patient who is subject to a restriction order, the sheriff shall refuse the appeal if satisfied that the patient is, at the time of the hearing of the appeal, suffering from a mental disorder the effect of which is such that it is necessary, in order to protect the public from serious harm, that the patient continue to be detained in a hospital, whether for medical treatment or not.
>
> (B1) The burden of proof of the matters as to which the sheriff is to be satisfied for the purposes of subsection (A1) of this section is on the Scottish Ministers.
>
> (C1) Nothing in section 102 (State hospitals) of the National Health Service (Scotland) Act 1978 (c 29) prevents or restricts the detention of a patient in a State hospital in pursuance of the refusal, under subsection (A1) of this section, of an appeal';
>
> (b) in subsection (1), for the words from the beginning to 'order' there is substituted 'Where the sheriff has decided, under subsection (A1) of this section, not to refuse an appeal'."

It is also necessary to quote from section 1(5):

> "The amendments made by subsections (1) and (2) above have effect in relation to appeals proceeding under section 64, 65 or 66 of the 1984 Act in which the hearing takes place on or after 1 September 1999 …."

Article 5.1.e.

57. The challenge mounted by the appellants was based on the provisions of article 5.1.e. and article 5.4. of the Convention. I turn first to article 5.1.e. Its terms are as follows:

> "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:…(*e*) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants."

At the heart of the appellants' argument on this head was the proposition that article 5.1.e did not permit the deprivation of the liberty of a person of unsound mind where there was neither a genuine intention to provide medical treatment nor the possibility of any benefit from such treatment. Preventive detention of a person of unsound mind, that is to say detention for the social purpose of protecting the public from serious harm, did not fall within the scope of the exception permitted in article 5.1.e. The ingredient of treatability, the ingredient which in the case of *R v Secretary of State for Scotland* was held to be necessary at the stage of considering a discharge, was a necessary ingredient for compliance with the Convention. The attempt to introduce an additional ingredient in the shape of the risk to public safety ran counter to the terms of the article and to the Strasbourg jurisprudence. Counsel referred to article 18 of the Convention which states that "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed". The problem however is what purpose, if any, has been prescribed for the exception relating to a person of unsound mind.

58. I have not been persuaded that the appellants' basic proposition is sound. On the contrary counsel for the Scottish Ministers was in my view entirely correct in submitting that the proposition is supported neither by the terms of the article nor the jurisprudence. Indeed the jurisprudence seems to me to point strongly in the opposite direction.

59. I have already quoted the terms of the article. There is certainly no express reference to treatment as an essential ingredient in cases of persons of unsound mind. On the contrary there is an absence of any mention of the purpose for which such persons may be deprived of their liberty. That is the more significant when the article provides several

examples of excepted cases which are expressly defined in terms of the purpose of the confinement. Detention for the purpose of preventing the spread of disease is one example in the same subhead of article 1.5. Other examples can be found in the preceding subhead (*d*) relating to the detention of minors "for the purpose of educational supervision" and "for the purpose of bringing him before the competent legal authority".

60. It is in my view a somewhat surprising proposition that a requirement for treatment should be built into the exception enabling the detention of persons of unsound mind. One of the immediate concerns which one has about such persons is that of public safety and one might well assume that one object of this exception is that of the protection of the public. To construe the provision as not permitting the detention of persons of unsound mind who constitute a danger to the public if released into society because they are not susceptible to treatment does not seem to me to accord with common sense. It attributes to the authors of the Convention the same view of the treatability of mental disorders which bedevilled the mental health legislation in Scotland and gave rise to the difficulties in *R v Secretary of State for Scotland*. While exceptions to the liberty of the individual must be construed restrictively, it would be wrong to assume that the authors of an international Convention were proceeding under a like error. A consideration of the case-law confirms the view that treatability is not an essential ingredient under article 5.1.e as regards the detention of person of unsound mind.

61. The principle analysis of the requirements to be satisfied for a person to qualify as of unsound mind was set out in *Winterwerp v The Netherlands* (1979) 2 EHRR 387, 403, para. 39 in these terms:

> "In the court's opinion, except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of 'unsound mind'. The very nature of what has to be established before the competent national authority – that is, a true mental disorder – calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder."

These three minimum conditions have been referred to in later cases (eg *Luberti v Italy* (1984) 6 EHRR 440, 449, para 27 and *Ashingdane*

v United Kingdom (1985) 7 EHRR 528, 540, para 37). A summary of the substance and purpose of article 5(1)(*e*) can be found in *Johnson v United Kingdom* (1997) 27 EHRR 296, 322, para 60:

> "The court stresses, however, that the lawfulness of the applicant's continued detention under domestic law is not in itself decisive. It must also be established that his detention … was in conformity with the purpose of article 5(1) of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary fashion and with the aim of the restriction contained in sub-paragraph (e). In this latter respect the court recalls that, according to its established case law, an individual cannot be considered to be of 'unsound mind' and deprived of his liberty unless the following three minimum conditions are satisfied: first, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, and of sole relevance to the case at issue, the validity of continued confinement depends upon the persistence of such a disorder."

The court has also recognised that national authorities have a certain discretion when deciding on the detention of a person of unsound mind. They have to evaluate the evidence put before them (*Herczegfalvy v Austria* (1992) 15 EHRR 437, 479, para 63).

62. Counsel for the first and second appellants sought to spell out of the second of the three *Winterwerp* requirements, that the kind and degree of the condition should warrant compulsory confinement, the requirement for treatment. But the text is quite neutral in that regard. The words would equally fit the case where the confinement is required simply for the protection of the person from himself or the safety of the public. In *Luberti* (6 EHRR 440, 449, para 28) the court noted that the domestic court had satisfied itself on that second requirement as regards the applicant, and continued: "it found that he did, at that time, present a real danger, to such a degree that it deemed it necessary to order the provisional implementation of its decision". There is no suggestion there that the second requirement embodies some consideration of treatment.

63. Further consideration of the case law seems to me rather to support the respondents than assist the appellants. In *Ashingdane* (7 EHRR 528, 543, para 44) the court stated "article 5(1)(*e*) is not in principle concerned with suitable treatment or conditions". In *Guzzardi v Italy* (1980) 3

EHRR 333, 366, para 98, which concerned an alleged vagrant, the court threw further light on the purposes lying behind article 5(1)(*e*):

> "In addition to vagrants, sub-paragraph (*e*) refers to persons of unsound mind, alcoholics and drug addicts. The reason why the Convention allows the latter individuals, all of whom are socially maladjusted, to be deprived of their liberty is not only that they have to be considered as occasionally dangerous for public safety but also that their own interests may necessitate their detention."

That line of thought was followed in *Litwa v Poland* (App No 26629/95), 4 April 2000, paragraph 60, where the court identified a link between all the categories of people noted in article 5(1)(*e*) "in that they may be deprived of their liberty either in order to be given medical treatment or because of considerations dictated by social policy, or on both medical and social grounds". In paragraph 61 the court stated that:

> "under article 5(1)(*e*) of the Convention, persons who are not medically diagnosed as 'alcoholics', but whose conduct and behaviour under the influence of alcohol pose a threat to public order or themselves, can be taken into custody for the protection of the public or their own interests, such as their health or personal safety."

The case of *Koniarska v United Kingdom* (App No 33670/96), (unreported) 12 October 2000, contains an observation by the court which is particularly relevant to the present appeals since the case concerned a person suffering from a psychopathic disorder which could not be treated. The court referred to the link which was identified in *Litwa* and which they considered applied to the case before them They continued:

> "The applicant has been diagnosed as suffering from a psychopathic disorder, and there is no suggestion that, at the time of the making of the secure accommodation orders, that disorder no longer existed. Further, the applicant's detention was found, at the making of each order, to be needed as there was a danger of her injuring herself or other persons. There could thus be said to be both medical and social reasons for her detention."

In *Johnson v United Kingdom* 27 EHRR 296, 322, para 61 the court recognised that where the third of the *Winterwerp* conditions was no longer satisfied an immediate and unconditional release did not necessarily follow:

> "Such a rigid approach to the interpretation of that condition would place an unacceptable degree of constraint on the responsible authority's exercise of judgment to determine in particular cases and on the basis of all the relevant circumstances whether the interests of the patient and the community into which he is to be released would in fact be best served by this course of action."

After noting that the assessment of the disappearance of the symptoms of mental illness is not an exact science the court under reference to *Luberti* recalled, p 323, para 62, that the release of a person previously found to be of unsound mind and to present a danger to society "is a matter that concerns, as well as that individual, the community in which he will live if released". It may be added that in *R (H) v Mental Health Review Tribunal North and East London Region* (unreported) 28 March 2001 Lord Phillips MR giving the judgment of the court expressed the view (paragraph 32) that once it was established that a person was of unsound mind the Convention does not restrict the right to detain a patient in hospital to circumstances where medical treatment is likely to alleviate or prevent deterioration of the condition. I agree with that view.

64. Another strand of the appellants' argument was that there required to be a relationship between the purpose of the confinement and the place of confinement. Confinement in hospital must be to serve the purpose of treatment and if the condition is not susceptible to treatment then the person should not be confined in a hospital. In *Aerts v Belgium* (1998) 29 EHRR 30, 85, para 46 the court stated that:

> "there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the 'detention' of a person as a mental health patient will only be 'lawful' for the purposes of sub-paragraph (*e*) of paragraph 1 if effected in a hospital, clinic or other appropriate institution."

This passage might seem to give some support to the appellants' argument, but the final four words of it show that what matters is that the place of detention must be appropriate, whether it be a hospital or some other institution. In that case the applicant had been detained in the psychiatric wing of a particular prison, a place not appropriate for the detention of persons of unsound mind, where they were not receiving regular medical attention or a therapeutic environment. It was held that the proper relationship between the aim of the detention and the

conditions in which it took place was therefore deficient. It does not follow that detention in Carstairs is inappropriate, even although the purpose is for public safety rather than treatment.

65. Counsel for the appellant Doherty sought to distinguish his position from that applicable to the other two in respect that, as I have already mentioned, the result of a successful application to the sheriff in his case would not be that he would be released into society, but instead would be returned to prison. But it does not follow that he would not be a cause of danger to others if he was released from Carstairs and moved to a prison. The safety of the inmates and the staff of the prison are, like other members of the public, entitled to protection and there may be a very real question whether the prison to which he might be sent, if successful otherwise in his application, was sufficiently organised to deal with the potential risk which he represents. That would be a matter for consideration by the sheriff, but it certainly cannot be assumed that in his case there would be no need to protect the public from serious harm.

Article 5.4

66. The appellants also sought to found upon article 5.4 of the Convention. That 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."

The attack as presented by counsel for the first and second appellants was to the effect that what was required here was a review of a decision, and that under the provision introduced by the 1999 Act there was no decision to be reviewed; the sheriff was himself being called on to make the decision. He was thus a primary decision-maker, and not performing the function of review.

67. In my view this argument takes too strict and technical an approach to the article. The process is not stated to be an appeal from a decision. Essentially what is to be provided is a means of access to a court for any person detained so that the lawfulness of his detention can be determined. It is a safeguard against the continuation of any arbitrary detention. It secures for the person detained that he has the opportunity of an independent tribunal before which he can argue the unlawfulness of his detention. What the court is doing is not reviewing a decision, but

reviewing the lawfulness of the detention. In *De Wilde, Ooms and Versyp v Belgium (No 1)* (1970) 1 EHRR 373, 407, para 76, the court stated that while at first sight one might think that the article required there to be supervision by a court of a previous decision:

> "it is clear that the purpose of article 5(4) is to assure to persons who are arrested and detained the right to a judicial supervision of the lawfulness of the measure to which they are thereby subjected."

Thus the article would be satisfied by the intervention of one organ "on condition that the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question". If the article can be satisfied by the work of one single organ, as where the court may itself be making the decision, it is clear that the process need not necessarily involve a review of a prior decision by someone else. Moreover, in addition to this, it is to be noticed that the decision of the sheriff under section 64 or notification or recommendation under section 65 may, under section 66A, as inserted by the 1999 Act, be appealed to the Court of Session. That appeal may open up issues of fact as well as law and seems to me to provide a sufficient safeguard to the detainee, even if there was any question as to the adequacy of the proceedings before the sheriff.

68. Counsel also sought to support his approach on the basis that the detainee must be informed of the reasons for his detention and so there must be a decision of which he is aware before he makes his challenge before the court. In *Van der Leer v The Netherlands* (1990) 12 EHRR 567, 574, para 28, the court stated:

> "Any person who is entitled to take proceedings to have the lawfulness of his detention decided speedily cannot make effective use of that right unless he is promptly and adequately informed of the reasons why he has been deprived of his liberty."

But that does not seem to me to advance the appellants case in the present circumstances. The appellants were restricted patients and would know from that fact the reasons for the loss of liberty. They would also know from the terms of the 1999 Act of the extra condition of public safety.

69. Counsel for the appellant Doherty presented a distinct argument which looked in particular to article 5.4. He submitted that it was incompatible with the Convention that the sheriff should be entitled to refuse a discharge where one of the necessary criteria for admission, that is the criteria set out in section 17(1), was not satisfied. This argument is to an extent based upon the recognition in *R v Secretary of State for Scotland* 1999 SC(HL) 17 that in order to comply with the Convention a provision for recourse to the sheriff was embodied in the legislation and that provision provided criteria which broadly matched those required for admission. But it does not follow that that provision was the only way in which the Convention could be satisfied, nor that the Convention would necessarily be breached if a provision was added which did not match the entry criteria. The appellant sought to insist that the criteria for admission must control the criteria for release. But that proposition is not supported by the reasoning in *R's* case, where the correspondence between the criteria for entry and release was used as a guide to interpretation of the earlier legislation. It does not follow from that case that the criteria must correspond in order to satisfy the Convention. Nor do I find anything in the Convention which requires that such a correspondence must exist.

Arbitrariness

70. The detention must of course be "lawful". That requires that it is in conformity with the national law and also with the purposes and restrictions permitted by article 5(1). A detention which is arbitrary cannot be regarded as lawful (*Ashingdane v United Kingdom* 7 EHRR 528, 543, para 44). The appellants submitted that the amendment introduced by the 1999 Act was bad as being arbitrary. It was pointed out that it applied only to restricted patients, not to those, even of unsound mind, who were in detention but not subject to the statutory restrictions. It applied only to a small group of people who had at an earlier stage been seen as susceptible to treatment but had now been recognised as untreatable. That appears as matter of fact to be true. It is thought that there are some 12 people who are likely to be directly affected by the amendment. But the essence of the vice of arbitrariness is the lack of the restraints and controls of legal powers. In the present context the amendment is embodied within procedural measures. More critically, if it itself complies with the substance of the domestic law and the Convention rights, then it is difficult to see how it can itself be an

arbitrary measure. Simply because a small number of people are directly affected should not suffice.

71. On a broader view the provision has the legitimate aim of protection of the public and seeks to remedy a mischief which the earlier legislation had failed to identify and cover. Nor can the measure be seen as arbitrary on the ground that criteria for detention are not now mirrored by the criteria for release. Such a correspondence was found to exist in the earlier legislation and formed part of the thinking in *R v Secretary of State for Scotland*. But the fact that there was such a correspondence in the former regime does not mean that such a correspondence must always exist in any legislative provisions in this field. And the fact that the Parliament has added to the criteria which have to be satisfied for release and has left the criteria for admission as they were does not mean that the amendment is arbitrary, nor that the new provision is contrary to the Convention. The view which I expressed in *R's* case about the construction of section 64(1)(*a*) still stands in relation to that provision, although the significance of it has been overtaken by the new express provision which applies whether the detention is for medical treatment or not. Moreover, while the matter of treatment has ceased to be an essential criterion for release, the matter of public safety, albeit linked with the need for treatment, remains as an ingredient in the provisions for admission. Section 17(1)(b) requires that "it is necessary for the health or safety of that person or for the protection of other persons that he should receive such treatment …."

72. It is recognised that in making the new provision applicable to hearings taking place on or after 1 September 1999 the Parliament was intruding into existing legal processes. In the cases of Anderson and Doherty the application to the sheriff had already been made but the hearing was yet to be held. As a result of the intervention by the Parliament these two appellants found themselves subject to a legislative regime which was more burdensome than that which prevailed when they made their applications to the sheriff and which they may well have anticipated would govern the disposal of their cases. The Strasbourg jurisprudence does not readily admit the propriety of retrospective legislation. It requires that the reasons for such a course must be treated "with the greatest possible degree of circumspection" (*The National & Provincial Building Society v United Kingdom* (1997) 25 EHRR 127, 181, para 112). The point was summarised in*Zielinski v France* (2001) 31 EHRR 19 in these words at para 57:

> "The court reaffirms that while in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in article 6 preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute."

The question is whether in the present case there were compelling grounds of the general interest.

73. I am persuaded that there were such grounds. The legislation was aimed not just at the two appellants Anderson and Doherty, but at all those who, like them, had committed crimes of the most serious kind, including in particular homicide, and had a history of mental disorder which might be held to be untreatable. As the law stood these persons would be entitled to be discharged into the society of others giving rise to a potentially serious danger for those who came into contact with them. The risk was an imminent one and if a remedy was to be provided it was necessary to provide it speedily. Furthermore it should be noticed in this context that the new provision is so worded as to impose a fairly high test for a continuation of detention. The decision rests upon the sheriff being "satisfied" that the conditions are met. The patient must be suffering from a mental disorder. The effect of that disorder must be such that his detention in hospital is necessary; the standard is one of necessity, not merely desirability or convenience. The necessity must be in order to protect the public from serious harm. So there must be a risk not just of harm, but of serious harm. Moreover the burden of proof of this part of the proceedings is expressly laid on the Scottish Ministers by subsection 64(B1). Given the importance of the objective it does not seem to me unreasonable or disproportionate for the Parliament to have so designed the solution as to make it applicable to those who had not yet obtained a ruling from the sheriff even if they had already applied for one. In my view there were compelling grounds in the general interest for them making the new provisions apply to any future hearings and no valid criticism of the legislation can be made on this ground.

74. The balance between the rights and interests of a person of unsound mind to enjoy freedom from restraint and the opposing rights and interests of members of the public to live free from the fear of being

assaulted or injured by persons whose mental condition is such as to give rise to a risk of such unsocial conduct may be a delicate one to draw in practice. But in principle it cannot be right that the public peace and safety should be subordinated to the liberty of persons whose mental states render them dangerous to society. Of course safeguards must be provided by recourse to a court of law to protect the detainee from unlawful detention. But I find nothing in the Convention which gives the rights of the detainee who is a danger to society a priority over the rights of the citizen to live in peace and security. The provision which the Scottish Parliament has introduced in section 1 of the Act of 1999 seems to me to comply with the Convention and does not fall to be challenged as being "not law".

75. On the other hand that conclusion does not mean that the law in this area is necessarily in its best or most appropriate shape. The 1999 Act was passed as an immediate measure to deal with a perceived emergency. Since then there has been produced the work of the MacLean Committee and the Millan report on the Review of the Mental Health (Scotland) Act 1984. There may well be room for improvements in the present legislation, although as was pointed out by counsel for the Scottish Ministers, no more effective alternative solution has so far been suggested for resolving the problem created by the small group of patients which prompted the legislation in 1999. It is sufficient for the purposes of the present appeals to hold that the law as it presently stands, subject to improvement as it may be, does at least comply with the requirements of article 5 of the Convention so far as the matters canvassed in these appeals are concerned.

76. I would dismiss the appeals. The referred questions should be answered in the negative.

Lord Hutton

77. I agree that for the reasons given by my noble and learned friends Lord Hope of Craighead and Lord Clyde, these three appeals should be dismissed.

Lord Scott of Foscote

78. For the reasons given by my noble and learned friends, Lord Hope of Craighead and Lord Clyde, with which I am in complete agreement, I too would dismiss these three appeals.