HOUSE OF LORDS SESSION 2006–07
[2007] UKHL 3
on appeal from:

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Beggs (AP) (Respondent)
v.
Scottish Ministers (Appellants) (Scotland)

Appellate Committee

Lord Nicholls of Birkenhead
Lord Hope of Craighead
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Mance

Counsel

Appellants:
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ON
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HOUSE OF LORDS

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Beggs (AP) (Respondent) *v.* Scottish Ministers (Appellants) (Scotland)

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LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Rodger of Earlsferry. I agree with the observations made by him, and for the reasons he gives I would allow the appeal to the extent proposed by him.

LORD HOPE OF CRAIGHEAD

My Lords,

2. I adopt with gratitude the explanation which has been given by my noble and learned friend Lord Rodger of Earlsferry of the background to this appeal and of the circumstances which have narrowed the issues which need to be considered by your Lordships to dispose of it. For the reasons which he gives, with which I am in full agreement, I would allow the appeal and make the order that he proposes.

3. I should like to add a few observations on the question whether the First Division erred in law when on 11 March 2005 they ordered Mr Tony Cameron, Chief Executive, Scottish Prison Service, and Mr Ian D F Gunn, Governor of H M Prison, Peterhead, to attend when the case called By Order on 15 March 2005. Their Lordships did not give reasons at that stage for pronouncing an interlocutor in these terms. We

do know however that senior counsel for the Scottish Ministers made it clear during the hearing on 27–28 January 2005 that they took full responsibility for the fact that the undertaking that was given by them on 5 September 2003 had been breached, and that at no time did they attempt to devolve responsibility to civil servants for its breach and for any contempt of court that had been committed. We also know that the civil servants who were named in the interlocutor were in attendance at court during that hearing to hear the debate and to offer such assistance to agents and counsel as might be necessary. So, as Mr Dewar QC explained in the course of the hearing before your Lordships, they were aware of the circumstances which had led to the breach of the undertaking. But they were not parties to the undertaking, nor were they parties to the proceedings against the Scottish Ministers.

4. The interlocutor which was pronounced by the First Division on 15 March 2005 contains a finding that the Scottish Ministers were in contempt. No reference is made in that interlocutor to the two civil servants who were named in the interlocutor of 11 March 2005. The explanation for the order that was made in Mr Gunn's case is to be found in the opinion of the court which was delivered by Lord President Cullen: 2005 CSIH 25, 2005 1 SC 342. In para 46 of that opinion the Lord President said that the Scottish Ministers would be in contempt of court if civil servants, in discharging the Scottish Ministers' functions, failed to take reasonable steps to ensure that the undertaking was adhered to, and if that failure was so gross as to demonstrate a disregard for the importance which should have been attached to the undertaking. In para 50 he said that the conduct of the civil servants, and in particular of the Governor of HMP Peterhead, Mr Gunn, was such as to meet the test which he had set out in para 46. Elaborating on this point, he described the circumstances that led the court to the conclusion that the undertaking was not taken seriously enough by them and that the Scottish Ministers were in contempt of court.

5. In para 46 of the opinion the Lord President said that the general approach which the court was taking was similar to that adopted by Woolf LJ in *Attorney-General for Tuvalu v Philatelic Distribution Corporation Ltd* [1990] 1 WLR 926. He referred also to Lord Wilberforce's speech in *Heaton's Transport (St Helen's) Ltd v Transport and General Workers' Union* [1973] AC 15. In *Tuvalu* at p 936E-G Woolf LJ said that where a company is ordered not to do certain acts or gives an undertaking to the like effect and a director of that company is aware of the order or undertaking he is under a duty to take reasonable steps to ensure that the order or undertaking is obeyed, and that if he wilfully fails to take those steps and the order or

undertaking is breached he can be punished for contempt. In *Heaton's Transport* Lord Wilberforce examined the position of shop stewards within the Union in relation to the taking of industrial action in breach of injunctions granted by the Industrial Court. Having noted that they were agents rather than servants, he said that this was not an important factor in that case. In each case the test to be applied is the same: was the servant or agent acting on behalf of, and within the scope of the authority conferred by, the master or principal?

6. Mr Dewar did not seek to argue that the First Division had applied the wrong test when they concluded that the Scottish Ministers were in contempt because the civil servants, and in particular, the Governor of HMP Peterhead, did not take the undertaking seriously enough. But the fact that they applied this test suggests that when they ordered Mr Gunn to attend when the case called By Order on 15 March 2003 they assumed that he was in the same position as a servant or agent in relation to the undertaking which had been given by the Scottish Ministers.

7. The court's practice where an allegation of contempt is made in the High Court of Justiciary against a newspaper or broadcaster is set out in Part B of the Memorandum by the Lord Justice General of Contempt of Court which came into force on 1 April 2003. It is the practice for representatives of the newspaper or broadcaster, such as the editor or the producer or other senior employees, to be ordered to appear in court to answer the allegation. But, as para 2 of Part B explains, an order for the personal appearance of the editor or producer should only be made where the alleged contempt is of a kind where his appearance in person is thought to be necessary so that an adequate explanation can be given or with a view to deciding what punishment is appropriate. The advice that is given in the Memorandum was not directly applicable to this case. These were civil proceedings, brought at the appellant's instance, to which different considerations apply. But it seems likely that their Lordships' familiarity with the practice in the High Court played a part in their decision to order Mr Gunn to appear. As the Lord President said in para 51, the order for his attendance was made on the basis that he was responsible for the failure to take reasonable steps to ensure that the Scottish Ministers' undertaking was complied with.

8. In my opinion two points require to be made in the light of this background. The first is that the status of civil servants is different from that of employees or agents of a body such as a company or a trade union. Civil servants are servants of the Crown, not of the ministers

who are answerable to Parliament for the departments in which they serve: see *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560. The status of civil servants in Scotland was not affected by the devolution settlement. The Scottish Ministers are answerable to the Scottish Parliament, and to the court for any undertakings that they may give or any peremptory orders that may be made against them, for the actions of officials within the various branches of the Scottish Executive. But the officials are not their servants or agents. It is the fact that they perform their functions under direction and control of the Scottish Ministers that makes the Scottish Ministers answerable for what they do or fail to do.

9. Ministerial responsibility for acts and failures of civil servants in their departments cannot be delegated. So where an undertaking is given such as that by the Scottish Ministers in this case, responsibility to the court for its observance is that of the Scottish Ministers, not of the officials or other civil servants within the Scottish Executive. It is the Scottish Ministers, not the civil servants, who are answerable for any breach of the undertaking. This principle applies without exception, irrespective of the various ways in which the breach may attract public criticism or penalty. The effect of the interlocutor of 11 March 2005 was to require the Mr Gunn to attend personally and in public when the court delivered its opinion in which his conduct was criticised, under pain of punishment if he failed to do so. This was a breach of the principle which places the responsibility for such acts and failures exclusively on the ministers.

10. The second point is a necessary corollary to the first. While the mere fact that an undertaking has been given to the court by the Scottish Ministers does not expose the officials or other civil servants to liability should it be breached, they do not enjoy a complete immunity from the consequences of their own actions. This was the point which was explored by Woolf LJ in *Attorney-General for Tuvalu v Philatelic Distribution Corporation Ltd* [1990] 1 WLR 926, 936-938. The director of a company who is aware of the order or undertaking and wilfully fails to take the steps which are necessary to give effect to the order or undertaking can be punished for contempt. In that event it is his own culpable conduct which exposes him to that liability.

11. I would apply the same principle to civil servants who, in the knowledge that an order has been made against or that an undertaking has been given by ministers, wilfully act or fail to act in breach of it. Such conduct in wilful and knowing breach of the order or undertaking

exposes them to the risk of being held in contempt. But basic rules of fairness require that they must be given an opportunity to answer the allegation before any steps are taken against them personally. Service on them of the minute alleging breach and the opportunity to be separately represented when answering the allegation are minimum requirements. Neither of those steps were taken in Mr Gunn's case.

12. In para 46 of the court's opinion the Lord President said that it was not necessary in this case for it to be shown that the civil servants acted with the intention of the undertaking being breached. That was an accurate statement of the law as it affected the position of the Scottish Ministers. But the fact that their Lordships approached the case in this way serves only to underline the point that it was not open to the court to order Mr Gunn to attend when it was delivering its judgment on the allegation of contempt against them. The fact that the undertaking had been breached was, of course, a very serious matter. It was important that the authority of the court to which the undertaking was given should be fully and clearly recognised. Their Lordships' concern that this fact should be brought to the notice of the civil servants whose conduct had led to this regrettable situation was entirely proper and understandable. But an assurance that this would be done could have been sought from counsel for the Scottish Ministers, and I do not think that it could properly have been withheld in this case. The error in Mr Gunn's case lay in the fact that the court subjected him to an order for which, as he was not a party to the proceedings and no allegation of contempt had been made against him personally, there was no lawful authority.

13. Different considerations apply in Mr Cameron's case. I agree with Lord Rodger, for the reasons that he gives, that it was within the powers of the court to order a senior civil servant to attend court to represent the Scottish Ministers when it was delivering its judgment in proceedings brought against them for contempt. But a compulsory order should not be made against a civil servant, or indeed anyone else, unless there is a good reason for doing so. The court misdirected itself when it said that Mr Cameron should be regarded for its purposes as representing the alter ego of the Scottish Ministers. Responsibility for breach of the undertaking lay with the Ministers alone and not with him, and he was not a party to the proceedings. The court was, of course, entitled to look for an assurance that its judgment would be brought to the personal attention of the Scottish Ministers. Mr Cameron was the obvious person, as the Chief Executive of the Prison Service, to whom to look for this to be done. The making of an order against him would have been justified if the court was satisfied that this was needed to ensure his attendance when the judgment was delivered and to ensure

that, through him personally, its contents would be brought to the attention of the Scottish Ministers. But his willingness to do take these steps without being ordered to do so was never tested at a hearing at which he was represented, as it should have been, before the order was made for his attendance. This was a misuse of the power, and the court erred in law when it exercised it in these circumstances.

LORD SCOTT OF FOSCOTE

My Lords,

14. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Hope of Craighead and Lord Rodger of Earlsferry and for the reasons they give, with which I am in full agreement, I would allow the appeal to the extent proposed by Lord Rodger.

LORD RODGER OF EARLSFERRY

My Lords,

15. In September 2001 William Beggs, the respondent in this appeal, was convicted of murder and sentenced to life imprisonment. He appealed against his conviction and sentence but, the House was informed, his appeal has yet to be heard.

16. In terms of his sentence the respondent has been detained, for the most part, in HM Prison Peterhead and, for shorter periods, in HM Prison Edinburgh. In connexion with his appeal against conviction and sentence the respondent has corresponded with his legal advisers. He has also corresponded with solicitors about judicial review proceedings relating to the conditions of his detention in prison. In addition he has lodged complaints about those conditions with the Scottish Prison Complaints Commissioner ("the Commissioner") and this has resulted in correspondence between the respondent and the Commissioner.

17. On a number of occasions, starting in about February 2003, letters from the respondent's legal advisers and from the Commissioner were opened by prison officers at Peterhead, even though, as the Scottish Ministers ("the Ministers") admit, they should not have been. Although the respondent received official apologies and assurances that it would not happen again, the incidents continued. In September 2003 the respondent therefore lodged a petition for judicial review in which he sought, inter alia, interdict and interim interdict against "the Scottish Ministers and the Governor of HM Prison Peterhead from requiring the petitioner, during his present period of detention in the said prison, to open or have opened in the presence of a prison officer or prison officers, except on due cause shown, all and any privileged correspondence sent to him while detained in HM Prison Peterhead."

18. On 5 September 2003 the judicial review petition called before the Lord Ordinary (Lord Johnston). In the course of the hearing counsel for the Ministers, who are the appellants in the present appeal, gave an undertaking to the court. The relevant part for present purposes was in these terms:

> "The Scottish Ministers hereby undertake that, until the date on which the first hearing is commenced in the present petition:-
>
> > …
> >
> > (B)(i) letters or packages sent to the petitioner at HMP Peterhead by the Scottish Prisons Complaints Commissioner bearing the Commission's logo shall not be opened by any officer of the Scottish Prison Service and (ii) the petitioner shall not be required by any officer of the Scottish Prison Service to open such letter or package in the presence of any such officer."

The Lord Ordinary granted an order for service and assigned a date for the first hearing, but refused the motion for interim interdict on the ground that interdict against the Crown was not competent in the light of the decision of the Second Division in *McDonald v Secretary of State for Scotland* 1994 SC 234 on the effect of section 21 of the Crown Proceedings Act 1947 ("the 1947 Act"). In any event, having regard to the undertaking, the balance of convenience would not have favoured granting interim interdict. The Lord Ordinary granted leave to reclaim and on 23 September 2003 the Second Division held that the case was suitable for early disposal.

19. Despite the undertaking, it appears that a further incident occurred in September 2003 and, when the respondent was transferred to HM Prison Edinburgh in May 2004, letters were opened there. The terms of the undertaking did not cover that gaol. On 19 May 2004 the Ministers gave a further undertaking, covering HM Prison Edinburgh and also concerning what would happen if the respondent were moved to a prison other than Peterhead or Edinburgh. The details are not material for present purposes. By 8 June 2004 the respondent had returned to Peterhead and the minute of proceedings of a By Order hearing on that date recorded that counsel for the appellants had "confirmed that undertaking given in respect of Peterhead was still extant." This was confirmation that the Ministers regarded themselves as still bound by the undertaking relating to Peterhead given to the Lord Ordinary on 5 September 2003.

20. On 26 November 2004, however, a prison officer at Peterhead opened a letter from the Commissioner to the respondent in the presence of the respondent. The envelope bore the Commissioner's logo. When the respondent complained, the officer concerned confirmed that the letter had not been opened in error but that, as far as he was aware, he was entitled to open it since it did not come from a solicitor. A further complaint by the respondent was rejected in inappropriately dismissive terms. The officers concerned were unaware of the existence or terms of the undertaking which the Ministers had given to the court on 5 September 2003. This was because the Governor-in-Charge at Peterhead, Mr Gunn, had taken a positive decision not to make the terms of the undertaking widely known to staff other than "the management team". As a result, the staff who were actually responsible for sorting and delivering privileged mail to the respondent and other prisoners did not know about the undertaking.

21. In December 2004 the respondent enrolled a motion to allow a minute of amendment to his petition for judicial review, dealing with the events of 26 November, to be received. At the hearing of the motion in the Single Bills on 15 December counsel for the Ministers admitted that the undertaking had been breached on 26 November, explained the circumstances and tendered an apology on behalf of the Ministers. The First Division allowed the minute of amendment to be received and to be answered within 14 days and appointed the case to call By Order on 6 January 2005. The Ministers duly lodged answers to the minute of amendment (No 23 of Process).

22. In the meantime, however, the respondent lodged a separate minute (No 24 of Process) craving the court, first, "to ordain the Scottish Ministers to appear personally to answer their breach of undertaking", secondly, "to find the Scottish Ministers in contempt of court" and, lastly, to find them liable in the expenses of the minute. The schedule sought service in common form on the Ministers as respondents and on the Governors of HM Prisons Peterhead and Edinburgh as interested parties.

23. When the case called By Order on 6 January, both sides were represented. The First Division allowed the new minute for breach of the undertaking to be received and, presumably because the Scottish Ministers were represented in court, the Division did not make any order for service but simply appointed the Ministers to lodge answers, if so advised, by 24 January 2005. The Ministers lodged answers (No 25 of Process) and a hearing on the minute and answers was held on the summar roll of the First Division (the Lord President (Lord Cullen of Whitekirk), Lord Macfadyen and Lady Cosgrove) on 27 and 28 January.

24. At that hearing counsel for the Ministers stated that, without prejudice to any argument as to whether the breach of undertaking could constitute a contempt of court, the Ministers accepted responsibility for any failure on the part of civil servants, such as the Governor of HM Prison Peterhead, to establish a system of mail handling which was sufficient to prevent the undertaking from being breached. He also drew attention to the fact that, as a sign of how seriously the Scottish Ministers regarded the situation, both Mr Cameron, the Chief Executive of the Scottish Prison Service, and Mr Gunn, the Governor of Peterhead Prison, were present in court.

25. At the end of the hearing on 28 January the First Division made avizandum. On 11 March 2005 they pronounced the following interlocutor:

> "The Lords, *ex proprio motu*, appoint the case to call By Order on Tuesday 15 March 2005 at 10.15 am and order the attendance thereat of Mr Tony Cameron, Chief Executive, Scottish Prison Service, and Mr Ian D F Gunn, Governor of HM Prison, Peterhead."

The court told agents for the parties that the opinion of the court would be available for counsel and agents to see on 14 March 2005, but that it was not to be shown to other persons prior to 15 March 2005. Mr Cameron and Mr Gunn took their own legal advice. It appears that the court subsequently informed them that they could indeed see the opinion on 14 March and they in fact did so.

26. On 15 March the two men were present in court at the By Order hearing. The Lord President read out a short summary of the court's opinion of that date and noted that Mr Cameron and Mr Gunn had appeared in person, as ordered by the court. On the same day, the court pronounced the following interlocutor:

> "The Lords, having resumed consideration of the Minute and Answers, and the case having called By Order, Find [the Ministers] in contempt and make no order in furtherance of this finding, and decern; and continue the case By Order until Friday 18 March 2005."

At the By Order hearing on 18 March the court found the Ministers liable in the expenses of the minute and answers on an agent and client, client paying, basis and granted the Ministers leave to appeal to your Lordships' House.

27. It will be recalled that the reclaiming motion, which was the setting for the proceedings for contempt of court, was against the Lord Ordinary's refusal of interim interdict against the Ministers, on the ground that such an interdict was not competent, having regard to section 21 of the 1947 Act. The hearing of that reclaiming motion had been due to take place on 27 and 28 January 2005, but it was cancelled to await the outcome of the appeal to this House in *Davidson v Scottish Ministers* 2006 SC (HL) 41. The hearing dates allocated for that reclaiming motion were in fact used for the hearing on the minute and answers on breach of the undertaking and contempt of court. On 15 December 2005 your Lordships' House allowed Mr Davidson's appeal and held that section 21(1) of the 1947 Act did not prevent the grant of interdict or interim interdict or specific performance in proceedings for judicial review. As had been anticipated, that decision was relevant to the issue on which the reclaiming motion had been marked by Mr Beggs in the judicial review proceedings in September 2003.

28. In the Statement of Facts and Issues in the present appeal, arising out of the minute and answers on contempt of court, counsel for both parties had identified four issues for determination. Nevertheless, the Ministers and their advisers had to take account of any implications which your Lordships' decision in the *Davidson* case might have for the arguments which they had been intending to advance in this appeal. When the Ministers eventually lodged their case in November 2006, having regard to the decision in *Davidson* and subject to a qualification to which I shall come in a moment, they in effect abandoned their appeal on the first three of the four issues identified in the Statement of Facts and Issues. This left the fourth issue:

> "In any event and in all the circumstances, did the First Division err in law when, by interlocutor dated 11 March 2005, they ordained Messrs Cameron and Gunn to appear before them?"

29. The qualification to the Ministers' position was this. While they now accepted that it had been competent for the court to make a finding of contempt against them, they were concerned "that certain parts of the reasoning of the First Division in the present case should be clarified, in particular concerning the First Division's view that proceedings against the [Ministers] are not proceedings against the Crown." In *Davidson v Scottish Ministers* the House had not gone into that point which it had expected to be argued more fully in the present case. The Ministers considered that it would therefore be helpful if the House were to address the issue, even though they were no longer pursuing their appeal against the finding that they had been in contempt of court.

30. The result of all these developments was that, by the time of the hearing before this House, an appeal which had been widely expected to raise a range of issues and which had been set down for a three-day hearing had shrunk to an appeal against the order, now spent, requiring Mr Cameron and Mr Gunn to appear before the First Division, and a request for clarification of a point of law discussed by the First Division in relation to a decision against which the Ministers were no longer appealing. Even more curiously, the appeal against the order concerning Mr Cameron and Mr Gunn was not a point in which the respondent felt any direct interest since he had not sought any order against the two men and the interlocutor ordering their attendance at court had been pronounced by the First Division *ex proprio motu.* Mr O'Neill QC, who appeared for the respondent, insisted that, for these reasons, his main concern was to ensure, first, that no additional expense was caused to

the Legal Aid Fund by a hearing in an appeal in which he no longer had any interest, but, secondly, that the respondent's legal representatives would be duly paid for their appearance before the House. In the event, Mr O'Neill's submissions on the points raised by counsel for the Ministers were brief.

31. It may be convenient to turn straightaway to the point in the reasoning of the First Division, about civil proceedings "against the Crown", which the Scottish Ministers ask this House to address. The first thing to notice is that the First Division recognised, 2005 1 SC 342, 350-351, para 21, that any comment which they made about interdicts against the Crown was strictly speaking obiter since the present proceedings actually concerned a breach of an undertaking given by the Ministers, rather than a breach of interdict. As the court had already recorded, 2005 1 SC 342, 348-349, para 16, the Ministers did not dispute that such a breach of an undertaking could constitute a contempt of court: *Graham v Robert Younger Ltd* 1955 JC 28. Secondly, since the decision of this House in *Davidson v Scottish Ministers*, it is clear that section 21 of the 1947 Act does not apply to judicial review proceedings. The present proceedings are judicial review proceedings and, for that reason, section 21 does not apply to them. In these circumstances it would be inappropriate for the House to embark on an exposition of the scope of the phrase "civil proceedings against the Crown" in that section in the context of Scots law, especially since it would almost certainly involve detailed consideration of the speech of Lord Woolf in *M v Home Office* [1994] 1 AC 377 without the benefit of oral argument on both sides or from the Advocate General. For these reasons, recognising that anything I say is obiter, I would confine myself to the following very limited remarks.

32. The effect of section 53 of the Scotland Act 1998 was to transfer the functions specified in subsection (2) from Ministers of the Crown to the Scottish Ministers, so far as the functions are exercisable within devolved competence. Section 52(1) of the same Act allows statutory functions to be conferred on the Scottish Ministers by name and subsection (2) provides that the statutory functions of the Scottish Ministers, the First Minister or the Lord Advocate are to be exercised on behalf of Her Majesty. By subsection (3) statutory functions of the Scottish Ministers are exercisable by any member of the Scottish Executive, as defined in section 44. The overall intention and effect of these provisions is that, so far as matters are within devolved competence, the relevant powers are transferred from the Ministers of the Crown to the Scottish Ministers and so, in these respects, the Scottish Ministers are to be in the same position as the Ministers of the

Crown. More particularly, in respect of those matters the Scottish Ministers are now to be in the same position as the Secretary of State before devolution.

33. So far as remedies against the Crown under the 1947 Act are concerned, the effect of the transfer of functions from Ministers of the Crown to the Scottish Ministers is accordingly neutral. Mutatis mutandis, and substituting the Scottish Ministers for the Ministers of the Crown, what constituted "civil proceedings against the Crown" in section 21(1) of the 1947 Act under the law of Scotland, properly understood, before devolution still constitute "civil proceedings against the Crown" after devolution.

34. It is also unnecessary in the present case to determine the scope in Scots law of section 21(2), concerning interdicts or orders "against an officer of the Crown". Again, that would raise wider issues. What can be said, however, is that, in this respect too, the effect of the transfer of functions under the Scotland Act is neutral. So the scope and purpose of section 21(1) of the 1947 Act remain essentially the same, even though paragraph 7(2) of Schedule 8 to the Scotland Act has added "a member of the Scottish Executive" to those servants of Her Majesty, including Ministers of the Crown, who are included in the definition of "officer" in relation to the Crown under section 38(2) of the 1947 Act.

35. I turn now to the appeal against the order requiring the attendance of Mr Cameron and Mr Gunn at the By Order hearing on 15 March 2005. At the end of para 50 of their opinion the First Division found that the Scottish Ministers were in contempt of court. They then continued, 2005 1 SC 342, 359, paras 51 and 52:

> "[51] In the circumstances of the present case we do not consider it is appropriate for us to impose any penalty on the respondents. The finding of contempt is of itself a matter of great importance. Accordingly we do not require to be addressed in regard to mitigation. However, we consider that we should make an order for appearance so that the court can make a formal finding of contempt in open court.
>
> [52] It is not necessary or appropriate for us to accede to the motion by senior counsel for the minuter that the court should order the appearance of one or more of the Scottish Ministers. It is, however, right that it should order the

> appearance of the chief executive of the Scottish Prison Service and the governor in charge of HMP Peterhead. We order the attendance of the chief executive on the basis that he is the civil servant who should be regarded for present purposes as representing the alter ego of the respondents. We order the attendance of the governor in charge on the basis that he is responsible for the failure to take reasonable steps to ensure that the respondents' undertaking was complied with."

36. The court had in mind different reasons for ordering the attendance of the two men and it is therefore appropriate to consider them separately.

37. So far as Mr Cameron is concerned, he was, in effect, being ordered to attend as the alter ego of the Ministers, cf *R v Secretary of State for the Home Department, Ex p Oladehinde* [1991] 1 AC 254, 284A per Lord Donaldson of Lymington MR. The court had concluded that it was not necessary for any penalty to be imposed on the Scottish Ministers for their contempt of court in failing to comply with their undertaking. The court had also concluded that they would not grant the respondent's crave that the Ministers should appear personally to answer for their breach of undertaking. Nevertheless, the court concluded that, while the Ministers should not be required to attend personally, a civil servant of appropriate seniority should attend in their place – as, in effect, representing the Ministers.

38. Once the Division had decided that the Ministers were in contempt of court, it was for their Lordships to decide the appropriate way to deal with the situation. Having decided not to impose a penalty, they could none the less have decided to order the Ministers, or one of them, to appear personally, as the respondent had craved. But they judged that this more serious step was unnecessary and that it would be enough if the Ministers were represented by an appropriate official when the judgment of the court was announced. That was a step which they were, in principle, entitled to take, having regard to the position of ministers and civil servants as identified in *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 and subsequent decisions. But the way the First Division went about it was inappropriate and produced unfortunate results.

39. It will be remembered that, while Mr Cameron had indeed been in court during the hearing of the contempt proceedings, he was not himself a respondent to the minute for breach of the undertaking and contempt of court and service of that minute on him had never been sought. In those circumstances, naturally enough, neither Mr Cameron himself nor anyone representing his interests had taken any active part in the hearing. And there is no suggestion that he was criticised during that hearing. Despite this, the court subsequently pronounced an order for his attendance – and, more particularly, an order which did not explain why this was required. Moreover, initially at least, the position adopted by the court was that Mr Cameron could not even be shown the judgment before the By Order hearing and so could not be shown the explanation which it contained for the order requiring his attendance. Especially given that proceedings for contempt of court can result in imprisonment or a fine, an order coming out of the blue for his attendance must have been alarming - and, to begin with, even though that alarm was in fact unjustified, that was not apparent on the face of the order and it looked, indeed, as if no-one was going to be able to explain the position to him before the hearing without defying the ban on revealing the contents of the judgment. This was wholly unacceptable. It is an elementary requirement of justice that anyone confronted with an order of the court requiring his attendance has a right to know the reasons for that order and what is liable to happen when he attends. Only in that way can the person concerned take proper steps to assert his rights and protect his interests.

40. In my view, while the court could competently order a senior civil servant to attend court to represent the Ministers, nevertheless, if they were contemplating doing so, the judges should have raised the matter with counsel for the Ministers and should have explained what they had in mind and why. Preferably, this would have been done at the contempt hearing itself but, if the point occurred to the court only later, they should have put the case out By Order with a view to raising the point then. In either event, as counsel for the Ministers accepted in the hearing before the House, it is likely that in practice there would have been no difficulty in identifying a suitable civil servant to attend court in order to represent the Ministers at the kind of hearing which the First Division had in mind. If the matter were discussed in advance in this way, the civil servant in question would not be taken by surprise. It would also avoid any practical difficulties which might arise if, say, a particular official had retired or had moved to another ministry or would be abroad, whether on official business or on leave, at the time of any By Order hearing. Any interlocutor pronounced by the court should then explain the reason why the civil servant is being required to attend the court hearing.

41. Unfortunately, the First Division did not take any of these steps in this case. I am accordingly satisfied that, in these circumstances, they were not entitled to pronounce the order requiring Mr Cameron's attendance in the manner in which they did.

42. The position of Mr Gunn was different in certain respects. When the respondent lodged his minute for breach of the undertaking and contempt of court, as Governor of HM Prison Peterhead, Mr Gunn was one of the individuals on whom he sought service as interested parties. But no order for service on him was in fact pronounced and he did not enter the proceedings. It appears that he was scheduled as an interested party because he was the governor of the prison where, despite the Ministers' undertaking of 5 September 2003, the system in place was such that the officer wrongly opened the letter from the Commissioner to the respondent on 26 November 2004 and the respondent's subsequent complaints were rejected in terms which the Ministers admitted were unacceptable. In their answers to the minute for contempt the Ministers referred to the results of an internal inquiry carried out by the Scottish Prison Service which had identified certain shortcomings in the system for handling prisoners' correspondence. In particular, the Ministers referred to the decision of the Governor of Peterhead Prison, Mr Gunn, not to inform junior members of staff about the undertaking on 5 September 2003 which the Ministers had given to the court about the respondent's correspondence.

43. At the hearing on the minute and answers before the First Division, counsel for the Ministers accepted that the undertaking to the court had been breached by the opening of the respondent's correspondence from the Commissioner on 26 November 2004. But the Ministers denied that there had been any contempt of court. The Division held, 2005 1 SC 342, 357-358, para 46, that the Ministers

> "would be in contempt of court if civil servants in discharging the functions of the respondents failed to take reasonable steps to ensure that the undertaking was adhered to, and if that failure was so gross as to demonstrate a disregard for the importance which should have been attached to the undertaking.... [W]e consider that in the case of the doing of an act prohibited by a court order or an undertaking given to the court, it does not require to be shown that civil servants acted contumaciously, that is to say with the intention of the undertaking being breached."

Applying that test – which was not challenged in the hearing before the House - the First Division concluded, 2005 1 SC 342, 358-359, para 50, that "the conduct of the civil servants, and in particular the governor in charge at HMP Peterhead," amounted to contempt of court and added:

> "It is hard to understand how the governor in charge could have thought it was not necessary to inform staff, and the manager who was to carry out the review, of the existence and terms of the undertaking. As it was, he approved a system in which there was a mismatch between the process map and the written instructions. It was a flawed system which sooner or later would lead to error. The prison officer who handled the letter from the commissioner was unaware of the privilege attaching to such letters. For that there appears to be no satisfactory explanation. The undertaking was simply not taken seriously enough. We have been provided with a full explanation of the circumstances. In our opinion the respondents were in contempt of court."

44. From this passage it is clear that the court attached particular blame to Mr Gunn's conduct as Governor of Peterhead. They were, of course, fully entitled to do this in the light of the material placed before them. It was, moreover, relevant for them to make this assessment of his conduct for the purposes of applying the test for contempt of court by the Ministers which they had formulated. And, applying that test, they found that the Ministers were in contempt.

45. That finding did not directly affect Mr Gunn, even though his conduct was one element on which it was based. More particularly, of course, a finding of contempt of court on the part of the Ministers was not a finding of contempt of court by Mr Gunn. So, while it would have been open to the court to impose a penalty on the Ministers, it would not have been open to the court to impose any penalty on Mr Gunn for contempt. Indeed, the only persons against whom an order was sought by the respondent in his minute were the Ministers. And Mr Gunn was not separately represented at the hearing of the minute. By contrast, if there had been any question of him being found guilty of contempt of court and penalised as an individual, not only would he have had to be made a party to the proceedings, but he would have had to be given the opportunity of instructing counsel to appear on his behalf.

46. Despite the fact that Mr Gunn had not been treated differently from the other civil servants whose acts fell to be considered by the court, the First Division singled him out and ordered his attendance at the By Order hearing "on the basis that he is responsible for the failure to take reasonable steps to ensure that the respondents' undertaking was complied with": 2005 1 SC 342, 359, para 52. In other words, unlike Mr Cameron, Mr Gunn was not required to attend as a representative of the Ministers, but on the basis of his own failure to take reasonable steps to ensure that their undertaking was complied with. It is unclear what exactly the Division had in mind in making this order, but it is hard not to conclude that they were intending to mark their particular disapproval of his conduct. In other words, the order was in the nature of a penalty or sanction, albeit of the mildest kind, for that conduct. In my view, it was not proper to impose even that mildest of sanctions on Mr Gunn in proceedings where he had not been warned that the court had it in mind to single him out in this way and where he had been given no opportunity to defend himself and to make submissions before the order was pronounced. As in the case of Mr Cameron, the impact of the court's order was greatly exacerbated by the way in which it was pronounced without Mr Gunn being able, initially, to find out the basis of the order and what might happen to him at the hearing.

47. I am therefore satisfied that, in these circumstances, the First Division were not entitled to pronounce the order requiring Mr Gunn's attendance in the manner in which they did.

48. For these reasons I would allow the appeal and recall the interlocutor of 11 March 2005 in so far as it ordered the attendance at the By Order hearing on 15 March 2005 of Mr Tony Cameron, Chief Executive, Scottish Prison Service, and Mr Ian D F Gunn, Governor of HM Prison, Peterhead.

49. As I have already explained, the respondent did not oppose the only ground of appeal which the Ministers argued. It was none the less appropriate for him to be represented at the hearing and, indeed, your Lordships called on his counsel to address the House, albeit briefly, in relation to the points argued by counsel for the Ministers. In these unusual circumstances I would find the Scottish Ministers liable to pay the respondent's costs in this House, including the costs of the hearing and the costs of two junior counsel.

LORD MANCE

My Lords,

50. I have had the advantage of reading in draft the judgment prepared by my noble and learned friend Lord Rodger of Earlsferry. I agree with his reasons for concluding that the appeal should be allowed and the interlocutor of 11 March 2005 recalled to the extent he identifies in paragraph 48, as well as with his reasoning and the order he proposes in paragraph 49 in relation to costs.

51. When the House in 2005 determined the appeal in *Davidson v. Scottish Ministers* [2005] UKHL 74; 2006 SC (HL) 41, it was envisaged that the present appeal might require consideration of the true scope of section 21(1) and (2) of the Crown Proceedings Act. In the event this has not been so, and I do not wish in the circumstances to add anything to the observations which I made in my judgment in paragraphs 100 to 104 in *Davidson v. Scottish Ministers*.