



Neutral Citation Number: [2008] EWHC 171 (Admin)

Case No: CO/6174/2007

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/02/2008

Before :

LORD JUSTICE MAURICE KAY

and

MR JUSTICE BURTON

Between :

The Queen on the application of "C" (a Minor, by
his litigation friend MS)

Claimant

- and -

Secretary of State for Justice

Defendant

Mr Keir Starmer QC, Mr Duran Seddon (instructed by Bhatt Murphy) for the
Claimant

Mr James Eadie and Miss Sarah-Jane Davies (instructed by Treasury Solicitors) for
the Defendant

Mr Richard Hermer for the Children's Commissioner

Hearing dates: 4 + 5 December 2007

Approved Judgment

Lord Justice Maurice Kay :

1. This is the judgment of the Court to which both members have contributed.
2. Secure Training Centres (STCs) are the product of the Criminal Justice and Public Order Act 1994 ("the 1994 Act"). By section 7 of that Act, the Secretary of State may contract out the provision or running of a STC. Section 7(2) then provides:

"While the contract for the running of a [STC] ... is in force the centre ... shall be run subject to and in accordance with the Prison Act 1952 and in accordance with secure training centre rules ... "

3. Until July 2007, the relevant rules were the Secure Training Rules 1998 as amended by the Secure Training Centre (Amendment) Rules 2003. The part of the Rules with which this case is concerned is that dealing with removal from association, the use of force and physical restraint. In their original form, the relevant Rules provided as follows:

"36 (1) Where it appears to be necessary in the interests of preventing him from causing significant harm to himself or to any other person or significant damage to property that a trainee should not associate with other trainees, either generally or for particular purposes, the governor may arrange for the trainee's removal from association accordingly.

(2) A trainee shall not be removed under this rule unless all other appropriate methods of control have been applied without success.

(3) A trainee who is placed in his own room during normal waking hours in accordance with arrangements made under this rule shall ...

(c) be released from the room as soon as it is no longer necessary for the purposes mentioned in paragraph (1) above that he be removed from association ...

37 (1) An officer in dealing with a trainee shall not use force unnecessarily and, when the application of force to a trainee is necessary, no more force than is necessary shall be used.

(2) No officer shall act deliberately in a manner calculated to provoke a trainee.

38 (1) No trainee shall be physically restrained save where necessary for the purpose of preventing him from

- (a) escaping from custody;
- (b) injuring himself or others;
- (c) damaging property; or
- (d) inciting another trainee to do anything specified in paragraph (b) or (c) above,

and then only where no alternative method of preventing the event specified in any of paragraphs (a) to (d) above is available.

(2) No trainee shall be physically restrained under this rule except in accordance with methods approved by the Secretary of State and by an officer who has undergone a course of training which is so approved.”

4. On 13 June 2007 the Secretary of State, acting under powers conferred by section 47 of the Prison Act 1952 and section 7 of the 1994 Act laid before Parliament the Secure Training Centre (Amendment) Rules 2007 (the Amendment Rules). They came into force on 6 July 2007. They effected amendments to Rules 36 and 38. In Rule 36(1), after the word “necessary” the words “for the purposes of ensuring good order and discipline or” were added. In Rule 38(1), after the word “necessary” the same words – “for the purpose of ensuring good order and discipline or” – were added, as they were after the later words “no alternative method of”. Thus, removal from association and physical restraint have been rendered permissible “for the purposes of ensuring good order and discipline”, in addition to the purposes prescribed by the 1998 Rules. We shall refer to “good order and discipline” as GOAD.
5. In these proceedings the claimant seeks to challenge the lawfulness of the 2007 amendments. The grounds of challenge fall under three headings. First, it is said that the Amendment Rules were vitiated by a failure to consult at least the Children’s Commissioner (CC). Secondly, complaint is made about the fact that no race equality impact assessment was carried out before the amendment. Thirdly, human rights arguments are advanced by reference to Articles 3, 8 and 14 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). Before considering the grounds of challenge, it is appropriate to record that, whilst the claimant was remanded to a STC at the time when these proceedings were issued, the pending charges against him were later discontinued and he was released. Accordingly, he may be said to have no immediate interest in the furtherance of an application for judicial review. However, the points raised by this application are of general importance and the Secretary of State is content for the application to proceed. It is also of significance that the CC is represented as an interested party and is

anxious for clarification of his position as a consultee. His stance is entirely supportive of the claimant. In these circumstances, it is appropriate for us to continue to hear and to decide the case. It is first necessary to refer to a little of the factual background.

6. The Youth Justice Board (YJB) describes STCs as

“... purpose-built centres for young offenders up to the age of 17. They are run by private operators under contracts, which set out detailed operational requirements. There are four STCs in England

- Oakhill in Milton Keynes, Bedfordshire
- Hassockfield in Consett, County Durham
- Rainsbrook in Rugby, Northamptonshire
- Medway in Rochester, Kent

STCs house vulnerable young people who are sentenced to custody or remanded to secure accommodation. They provide a secure environment where they can be educated and rehabilitated. They differ from Young Offender Institutions (YOIs) in that they have a higher staff to young offender ratio and are smaller in size, which means that individuals' needs can be met more easily. At the same time they remain large enough to be able to provide a range of facilities.

The regimes in STCs are constructive and education focused. They provide tailored programmes for young offenders that give them the opportunity to develop as individuals which, in turn, will help them stop reoffending.”

A STC can accommodate between 58 and 87 trainees.

7. The STCs' approach to behaviour management has, since February 2006, been set out in and bound by, a Code of Practice issued by the YJB for “*Managing the Behaviour of Children and Young People in the Secure Estate*” (the Code of Practice). The Code of Practice includes the following provisions of relevance to these proceedings:

“9. Removal from normal location

Removing children and young people from their normal location and separating them from their peers is a procedure used throughout the secure estate to assist in the management of certain types of behaviour. Although the language and some practical aspects of the process differ according to the type of

establishment, the following principles must underpin the process wherever it takes place.

9.1 The decision to remove a child or young person because of problematic behaviour must be made only on the basis of an assessment that:

- The continued presence of the child or young person in the normal location threatens the good order of the establishment, or
- ...

9.3 It must not be used as a punishment.

...

10. A system for restrictive physical intervention

10.1 Only staff who are properly trained and competent to use restrictive physical interventions should undertake them.

10.2 Restrictive physical interventions must only be used as the result of a risk assessment.

10.3 They must be mindful of the particular needs and circumstances of the child or young person being restrained (for example, medical conditions or pregnancy).

10.4 Restrictive physical interventions must not be used as a punishment, or merely to secure compliance with staff instructions.

10.5 Any intervention must be in compliance with the relevant rules and regulations for the establishment, and carried out in accordance with methods in which the member of staff has received training.

10.6 Restrictive physical interventions must only be used as a last resort, when there is no alternative available or other options have been exhausted.

10.7 Methods of restrictive physical intervention that cause deliberate pain must only be used in exceptional circumstances.

10.8 Restrictive physical interventions must be carried out with the minimum force, and for the shortest possible period of time.

- 10.9 The degree of physical intervention must be proportionate to the assessed risk.
- 10.10 Every effort must be made to ensure that other staff are present before the intervention occurs.”
8. STCs exist alongside Secure Children’s Homes run by local authority social services departments (LASCHs). According to the YJB, LASCHs
- “ ... focus on attending to the physical, emotional and behavioural needs of the young people they accommodate ... [they] provide young people with support tailored to their individual needs. To achieve this, they have a high ratio of staff to young people and are generally small facilities, ranging in size from 6 to 40 beds. [They] are generally used to accommodate young offenders aged 12 to 14, girls up to the age of 16 and 15 to 16 year old boys who are assessed as vulnerable.”
9. If one takes, for example, a 15 or 16 year old vulnerable male, he could be detained in a STC or a LASCH, the decision resting as much on matters of geography and place availability as on anything else. LASCHs are governed by different primary and secondary legislation. Pursuant to powers conferred upon him by the Care Standards Act 2000, the Secretary of State has made the Children’s Homes Regulations 2001. These Regulations, and in particular Regulation 17 which governs behaviour management, discipline and restraint, are structured differently from the Secure Training Centre Rules, and there is a distinct Good Practice Guidance issued in relation to LASCHs by the Secure Accommodation Network. It is common ground that removal from association and physical restraint purely for GOAD purposes are not permitted under the LASCH regime.
10. Two tragic events precipitated the 2007 amendments. On 19 April 2004 Gareth Myatt, a detainee in Rainsbrook STC, died whilst being restrained by staff. On 8 August 2004, Adam Rickwood, a detainee in Hassockfield STC, was found hanging in his room after he had been subjected to restraint by staff. At the inquest into his death, in May 2007, there was evidence that it was not at all unusual for restraint to be used for reasons other than those set out in Rule 38. In the three years between these two deaths and the promulgation of the Amendment Rules, many interested parties sought to address the issues. It is not surprising that, following the deaths of Adam Rickwood and Gareth Myatt, relevant statutory bodies and non-governmental organisations (NGOs) became involved in considering the problems and the ways in which they might be resolved. We have been referred to a great deal of material illustrating their involvement but it is not necessary to refer to much of it at this stage.
11. In October 2004, David Waplington, the former Head of the Juvenile Panel of the Prison Service, produced a report to the YJB referring to the widespread use of restraint in STCs for the purpose of securing compliance and in the absence of safety or security considerations. In November the issues were under active consideration by the Physical Control in Care (PCC) Review Panel which, by March 2005, was reiterating the view that restraint should not be used simply for securing compliance. In June 2005 the YJB began to consult widely on a new Code of Practice. By August

2005, the Howard League for Penal Reform had instructed Lord Carlile of Berriew QC to produce a report on physical restraint and related issues. On 1 November 2005 the Parliamentary Under-Secretary at the Home Office told the House of Commons that physical restraint would be used only in strict conformity with Rule 38. In January 2006 Lord Carlile produced his report and recommendations and the YJB published its Code of Practice. In July 2006, in response to the Carlile Report, the YJB accepted that monitoring of the use of punishments of children from ethnic minorities needed to be improved.

12. On 25 May 2007, the YJB wrote to all STC Directors making it clear that, notwithstanding section 9 of the 1994 Act, restraint was only to be used for the purposes set out in Rule 38. It is apparent from the correspondence that the YJB had received legal advice to this effect. Thereafter, various bodies, including the CC and the Lancashire Safeguarding Children Board, approached the Ministry of Justice (MOJ) requesting consultation in respect of any proposed amendment of the Rules.
13. On 13 June 2007, the Secretary of State laid the Amendment Rules before Parliament. The evidence establishes that, before laying the 2007 Rules before Parliament, the Secretary of State engaged in very limited consultation, involving only the YJB and the Directors of the STCs. On 25 May 2007, the Chief Executive of the YJB wrote to all STC Directors saying:

“I want to reassure you that the YJB has been working closely with the Ministry of Justice and previously the Home Office to amend the STC Rules in line with the previous consultation with yourselves.”

14. The picture that emerges is that, prior to the deaths of Adam Rickwood and Gareth Myatt and notwithstanding the provisions of Rules 36 and 38, removal from association and restraint were commonly used in STCs in circumstances which did not fall within the limited permissible situations set out in the Rules. It seems that, within STCs, the view was that Rules 36 and 38 took effect subject to section 9 of the 1994 Act, the relevant parts of which provide:

“(3) A custody officer performing custodial duties at a contracted out secure training centre shall have the following duties as respects persons detained in secure training centres, namely –

- (a) to prevent their escape from lawful custody;
- (b) to prevent, or detect and report upon, the commission or commission by them of other unlawful acts;
- (c) to ensure good order and discipline on their part; and
- (d) to attend to their well-being.

- (4) The powers ... arising by virtue of subsection (3) above shall include power to use reasonable force where necessary.”

However, whilst on the face of it and standing alone, paragraph (c) appears to permit the use of reasonable force where necessary in the performance of the duty to ensure GOAD, the fact is that it never did stand alone. Section 7(2), which is set out in paragraph 2 of this judgment, requires that STCs be run “subject to and in accordance with the Prison Act 1952 and in accordance with secure training centre rules” and unamended Rules 36 and 38 contained express limitations on the purposes for which removal from association and restraint could be deployed. They did not extend to GOAD. Accordingly, and to put it at its lowest, there was a lack of clarity in the statutory provisions. We now turn to the grounds of challenge.

1. Consultation

15. In a written Parliamentary Answer on 3 July 2007, the Minister of State at the MoJ, having been asked who was consulted prior to the introduction of the statutory instrument, said:

“The Youth Justice Board and the Directors of STCs.”

16. The case for the Claimant is that there was a legal obligation to consult more widely. In particular, it is said that there ought to have been consultation with the CC, Local Safeguarding Children Boards (LSCBs), Physical Control in Care (PCC) Review Panels and various NGOs which had recorded their interests. It seems to us that it will be appropriate to concentrate on the CC and LSCBs because, if the Claimant cannot make good his case against at least one of them, he will not be able to substantiate a duty to consult at all. On behalf of the Claimant, Mr Starmer QC seeks to establish a duty to consult (1) by reference to statute and/or (2) at common law. The latter submission includes but is not limited to reliance on a *Wednesbury* analysis.

(1) A statutory duty to consult

17. The power to lay the Amendment Rules before Parliament is provided by section 7 of the 1994 Act and section 47 of the Prison Act 1952. Neither provision includes an express duty to consult anyone. The Amendment Rules were stated to come into force on 6 July 2007, subject to the negative resolution procedure. In *BAPIO v Secretary of State for the Home Department* [2007] EWCA Civ 1139, Maurice Kay LJ said at paragraph 58:

“... as a matter of principle, where Parliament has conferred a rule-making power on a Minister of the Crown, without including an express duty to consult, but subject to a Parliamentary control mechanism such as the negative resolution procedure, it is not generally for the courts to superimpose additional procedural safeguards.”

18. Rimer LJ agreed (at paragraph 65). There is an Appendix to the judgments in *BAPIO*, explained by Sedley LJ (at paragraph 46), listing modern statutes which do include an express power or duty to consult.

19. Although, in *BAPIO*, Maurice Kay LJ acknowledged the limitations of the negative resolution procedure, in the present case it gave rise to an informed debate in the House of Lords, in which Lord Carlile led a challenge to the proposed amendments. In the end, he did not press the challenge to a vote because he and others accepted that the MOJ had embarked on a review of the issues on 12 July. The inference is that the Amendment Rules may prove to be a stop gap measure, pending further amendment. On 26 July the terms of reference of the review body were published and, on 28 September, following what had been said in the debate in July, full consultation was extended to all relevant interested parties.
20. Mr Starmer is correct in submitting that the above passage from *BAPIO*, does not say that a statutory duty to consult can never arise absent an express requirement. The use of the word “generally” was deliberate. This leads Mr Starmer to submit that the present case falls outside the general rule. His point is that, whatever may have been the position at the time when the 1952 Act and the 1994 Act created the rule-making power, the position changed when the Children Act 2004 established the CC and the LSCBs. He submits that it is now implicit in the statutory scheme as a whole, reading the three statutes together, that the Secretary of State will consult the CC and the LSCBs in circumstances such as those which have arisen in the present case. On behalf of the CC, Mr Hermer strongly supports these submissions.
21. The Children Act 2004, section 2 provides:
 - “(1) The Children’s Commissioner has the function of promoting awareness of the views and interests of children in England.
 - (2) The Children’s Commissioner may in particular under this section –
 - (a) encourage persons exercising functions or engaged in activities affecting children to take account of their views and interests;
 - (b) advise the Secretary of State on the views and interests of children ...
 - (3) The Children’s Commissioner is to be concerned in particular under this section with the views and interests of children so far as relating to the following aspects of their well-being –
 - (a) physical and mental health and emotional well-being;
 - (b) protection from harm and neglect ...
 - (9) Any person exercising functions under any enactment must supply the Children’s Commissioner with such information in that person’s possession relating to those functions as

the Children's Commissioner may reasonably request for the purposes of his function under this section (provided that the information is information which that person may, apart from this subsection, lawfully disclose to him) ...

(11) In considering for the purpose of his function under this section what constitutes the interests of children ... the Children's Commissioner must have regard to the United Nations Convention on the Rights of the Child."

22. LSCBs are also the product of the Children Act 2004. They are local, multidisciplinary bodies with a wide membership which includes representatives of the Youth Offending Team for the area and directors of local STCs (section 13). The objective of a LSCB is defined by section 14(1) as

“(a) to coordinate what is done by each person or body represented on the Board for the purposes of safeguarding and promoting the welfare of children in the area of the authority by which it is established; and

(b) to ensure the effectiveness of what is done by each such person or body for those purposes.”

23. Section 14(2) provides that a LSCB is to have such functions in relation to its objective as the Secretary of State may by regulations prescribe. We have not been referred to any such regulations.

24. Although Mr Starmer's submissions are attractive, we have come to the conclusion that they are unsustainable for three reasons. First, just as an express duty to consult could have been written into the 1994 Act (for example, a duty to consult “such persons as the Secretary of State considers appropriate or representative of the interests of children”), so one could have been written into the Children Act. It could have cross-referred to or amended the earlier legislation. In fact, it did none of these things. Instead, it provided the CC with powers to promote, advise and encourage and, to assist him in those tasks, it imposed an obligation on others, including the Secretary of State, to provide him with appropriate information. However, it stopped short of providing an express right to be consulted. We do not consider that, in these circumstances, the case falls outside the general principle expounded in *BAPIO*. Secondly, (and, in a way, this is just another way of explaining the first reason), we do not consider that earlier legislation which self-evidently imposed no duty to consult can take on a different meaning as a result of later legislation which neither amends nor refers to it – at least, not in the circumstances of this case. Thirdly, and again drawing on *BAPIO*, it is difficult to infer a statutory duty to consult without some steer as to its ambit. It is conceded on behalf of the Claimant and on behalf of the CC that the claimed duty to consult could not extend to every proposed measure which could affect children. The suggestion on behalf of the CC, adopted by Mr Starmer, is that it only arises where the proposed change is (i) profound, (ii) directed to the most vulnerable and (often) most disadvantaged children, (iii) is in potential breach of the

United Nations Convention on the Rights of the Child and (iv) impacts on their rights to bodily integrity. In our judgment, this submission contains the seeds of its own destruction. A statutory duty to consult can only arise in defined circumstances which can be easily understood by those upon whom the duty is imposed. One of the factors that was fatal to the alleged duty in *BAPIO* was its vagueness and unpredictability (see Sedley LJ at paragraph 47; Maurice Kay LJ at paragraph 58; and Rimer LJ at paragraph 65). The criteria proffered by Mr Starmer and Mr Hermer in the present case are self-selected and, in part, vague and unpredictable. For all these reasons we reject the submission that the interplay of the three statutes has given rise to a statutory duty to consult the CC, the LSCBs or anyone else.

(2) A common law duty to consult

25. If no statutory duty to consult arose, the next question is whether such a duty arose at common law. Mr Starmer seeks to advance two possibilities: (i) legitimate expectation, and (ii) a *Wednesbury* deficit in the decision not to consult.

(i) Legitimate expectation

26. Mr Starmer seeks to place this case in the fourth category of legitimate expectation explained by Simon Brown LJ in *R v Devon County Council, ex parte Baker* [1995], All ER 73, at p.89:

“ ... cases in which it is held that a particular procedure, not otherwise required by law in the protection of an interest, must be followed consequent upon some specific promise or practice. Fairness requires that the public authority be held to it. The authority is bound by its assurance, whether expressly given by way of a promise or implied by way of established practice.”

27. Mr Starmer does not suggest that there was a promise of consultation in this case. His submission is that there was an established practice of consultation from which the Secretary of State unfairly departed.
28. This submission is unsustainable. There was no consultation by the Secretary of State prior to the promulgation of the original Rules in 1998, nor when they were first amended by the Secure Training Centre (Amendment) Rules 2003. It is true that the YJB did consult widely in connection with its Code of Conduct and in relation to a wide-ranging review of strategy in the youth secure estate. However, those occasions did not relate to legislation, with its susceptibility to Parliamentary scrutiny, nor did they relate to consultation by the Secretary of State. The YJB cannot be equated with the Secretary of State. By section 41 of the Crime and Disorder Act 1998, the YJB is a body corporate and is not to be regarded as the servant or agent of the Crown. If the Claimant had wished to conjure a legitimate expectation of consultation by reference to an established practice of the YJB, he would have had to make it good in proceedings against the YJB. As it is, it is difficult to see how, even so, it could have been established in relation to this amendment of delegated legislation which had not originally been the subject of such consultation. The Claimant's case on legitimate expectation is hopelessly vague at every turn, there being no established practice as to either subject or object.

(ii) The *Wednesbury* challenge

29. This is a challenge of some subtlety. In a nutshell, it can be expressed in this way. The Secretary of State accepts that if the Amendment Rules had reflected a change of policy, there would have been wider consultation, in particular with the CC. However, his case is that there was no change of policy, certainly not a significant change, and that, absent a statutory duty, he was not obliged to consult. The *Wednesbury* challenge is that the Secretary of State failed to have regard to a material consideration, namely that the Amendment Rules *did* reflect a significant change of policy.
30. As to the fundamental premise – that the Secretary of State would have consulted if there had been a significant change of policy – the supporting evidence has strengthened since the conclusion of the hearing before us. We have been informed by a post-hearing note that on 29 October 2007, Andrew Dismore MP, Chair of the Joint Committee on Human Rights, wrote on behalf of his colleagues to the Minister of State at the MOJ with a number of questions about physical control. One such question was:

“Why were the Children’s Commissioner and the Ministry of Justice’s own panel of experts (the PCC Review Panel) not consulted before the Rules were amended? In addition, what prevented wider public consultation with lay stakeholders on the Rules?”

31. The reply was:

“Any consultation exercise would require a policy proposal on which consultees could comment. As we did not intend to change Government policy on the use of physical restraint (that policy is outlined in the Youth Justice Board’s Code of Practice *Managing Children and Young People’s Behaviour in the Secure Estate*) we did not consider such an exercise was possible. Had we consulted, we would of course have consulted the Children’s Commissioner. As to the Review Panel: it should be understood that the Panel does not have a continuous existence. In fact, a number of panels have been convened over the years to make recommendations on PCC techniques. There was no Panel in existence at the time in question. Perhaps more importantly, the Panel’s role is to advise whether individual techniques are safe, not when restraint should or should not be used.”

32. The answer ignored the question about “wider consultation with lay stakeholders”. Nevertheless, the first part of the answer is consistent with the primary way in which Mr Eadie puts this part of the case: there was no consultation with the CC because the proposed amendments did not reflect a change of policy. Thus, the important question becomes: was there a significant change of policy?

33. Even before one considers the contemporaneous evidence, there is something unattractive about the stance of the Secretary of State. It embraces the proposition that the previous use of removal from association and restraint for GOAD purposes was in accordance with Government policy, even if it contravened Rules 36 and 38. Nevertheless, it is necessary to investigate what the policy really was. On 2 February 1998, a month before the Home Secretary laid the original STC Rules before Parliament, he received the following advice from a civil servant in connection with Cookham Wood STC:

“The contract for Cookham Wood stipulates that physical restraint may only be used as a last resort when no alternative is available and only to prevent a child from escaping, from harming him/herself or others, from damaging property, or to prevent a child from inciting another to do any of these things. The use of physical force for any other purpose, including to secure compliance with staff instructions, is prohibited. These requirements will be reflected in the STC Rules.”

34. The Rules came into force on 16 April 1998. The model contract issued by the Home Office contained virtually the same language as that in the advice of 2 February, as indeed did the actual contract for Hassockfield STC dated 29 April 2002. Although it became apparent following the deaths of Adam Rickwood and Gareth Myatt that staff in STCs had taken a different view of the permissible use of removal from association and restraint, we cannot escape the conclusion that, on this “sensitive issue” (the words of the civil servant on 2 February 1998), the policy of the Home Office, repeated in the advice, its model contract and the actual contract for Hassockfield, was that the boundaries of permissible use were not simply defined by the prohibition on the mere securing of compliance with staff instructions, later set out in the Code of Practice at paragraph 10.4 (paragraph 7 above). It was limited to the purposes expressly set out in Rules 36 and 38 and they are not coterminous or synonymous with GOAD. The July 2006 Response by the YJB to the Carlile Report’s Recommendation (18) that “restraint should not be used primarily to secure compliance” was that:

“Our behaviour management Code of Practice makes it clear that restraint should only be undertaken on the basis of a risk assessment that harm is likely to occur if a physical intervention is not employed.”

This did not address the precise form of wording subsequently adopted in the Amendment Rules nor the reference to GOAD in s9(3) of the 1994 Act.

35. We do not doubt that the maintenance of discipline in a STC is never easy and we accept that the borderline between different categories – for example, “injuring himself or others ... damaging property” (original Rule 38), “for the purposes of ensuring GOAD” (amended Rule 38) and “to secure compliance” – may become blurred as an actual situation develops on the ground. Mr Eadie relies heavily on the fact that the Code of Practice has remained unchanged, with its prohibition upon the use of restraint merely to secure compliance, and he submits that, as there has been no

change in the Code of Practice, thus there has been no change in the policy. However, the Code of Practice at paragraph 10.5 refers to the Rules, and the Rules have, by virtue of the amendment, changed. The "sensitive issue" was resolved in a particular, limited way in the 1998 Rules and, in our judgment, it was resolved in broader, less limited ways by the Amendment Rules in 2007. We unhesitatingly characterise that as a significant change of policy and we do not consider that the Secretary of State, if he had applied her mind to it, could reasonably have seen it in a different way. For these reasons we conclude that, so far as consultation with the CC is concerned (and we do not feel able to reach the same conclusion about any other potential consultee), the *Wednesbury* challenge succeeds in substance, although it will be necessary to return to the question of relief.

2. Race equality impact assessment

36. The Claimant is black. This second ground of challenge criticises the Secretary of State for promulgating the Amendment Rules without having undertaken a prior assessment of any potential discriminating impact. The Secretary of State accepts that there was no such assessment. Section 71(1) of the Race Relations Act 1976, as amended, provides:

"Every body or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions, have due regard –

(a) to eliminate unlawful racial discrimination"

37. Ministers of the Crown and government departments are specified in paragraph 1 of Schedule 1A. The way in which these provisions impact on ministers was demonstrated in *Elias v Secretary of State for Defence* [2006] EWCA Civ 1293 [2006] 1 WLR 321 and *BAPIO* at first instance [2007] EWHC 199 (Admin). In *Elias*, Arden LJ said (at para 274):

"It is the clear purpose of section 71 to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement, and this provision must be seen as an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation."

38. As one would expect, the Home Office and the Department of Constitutional Affairs (DCA) (parts of each of which were brought together to form the MOJ) have published Race Equality Schemes. The Home Office document makes it clear that each new policy is the subject of a race equality impact assessment, unless the policy has no relevance to equality. The document issued by the DCA contains a similar provision, albeit limited to "each major new policy".
39. In the present case it is common ground that, when policy changes, or at least when it changes significantly, it is incumbent upon the Secretary of State to ensure that the potential discriminating impact has been assessed and considered. It is also common

ground that there was no such assessment or consideration in advance of the Amendment Rules. The case for the Secretary of State is that none was required because there was no change, *a fortiori* no significant change, in policy. We have rejected this submission when dealing with the first ground of challenge. In our judgment there plainly was a significant change of policy (see para 35, above). For this reason, we are satisfied that the failure to carry out a race equality impact assessment in advance of such change (*Elias* at 274) involved a breach of duty on the part of the Secretary of State. This ground of challenge is substantiated. Again, we shall return to the question of what, if any, relief should follow.

3. Human rights

40. The Claimant's case is that the Amendment Rules are offensive to Articles 3 and 8 of the ECHR, and, by virtue of the distinction thus created between the practice in STCs and that in LASCHs, also to Article 14.
41. It is common ground that Rules 36 and 38 of the Amendment Rules operate subject to the Code of Practice, and in particular the paragraphs of the Code of Practice set out in paragraph 7 above. It is also common ground that, notwithstanding, or in the light of, *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546 (paras 11-12, 37) and *YL v Birmingham City Council and Others* [2007] 3 WLR 102, STCs constitute public authorities for the purposes of s6(1) of the Human Rights Act 1998 and are subject to the provisions of the ECHR.
42. The Claimant relies primarily upon two propositions to establish a case in this regard:
 - i) that the purposes of GOAD are too uncertain to comply with the requirements of protection from arbitrariness under Article 8(2) ECHR "*in accordance with law*" see e.g. the approach of the European Court of Human Rights to binding over to be of *good behaviour* in *Hashman and Harrap v UK* [1999] 30 EHRR 241 at paragraphs 21-43.
 - ii) that conduct apparently legitimised by the Amendment Rules would be bound to offend against Article 3 and/or 8 of ECHR.

We are not persuaded by either of these propositions.

Uncertainty

43. GOAD is well established in legislation and does not in our judgment cause a difficulty or create ambiguity particularly where, as here, it is limited by the express terms of paragraphs 10.1 – 10.10 of the Code of Practice. It is adopted, as Mr Eadie points out, in much if not all of the relevant legislation relating to prisons, young offenders' institutions and indeed educational establishments, without any indication, at any rate in any reported case, of any difficulty in understanding or enforcement:
 - i) See section 9(3) of the 1994 Act, the primary governing legislation in relation to the powers and duties of custody officers.

- ii) The maintenance of GOAD is an express justification for removal from association in Rule 45 of the Prison Rules 1999 and Rule 49 of the Young Offenders Institution Rules 2000.
- iii) The power to use reasonable force where necessary to ensure GOAD is expressly given to prisoner custody officers in contracted-out prisons in sections 82(3)(5) and 86(3)(4) of the Criminal Justice Act 1991.
- iv) Section 93 of the Education and Inspections Act 2006, re-enacting section 50(A) of the Education Act 1996 with minor changes, empowers staff members to use such force as is reasonable in the circumstances to secure the maintenance of GOAD at the school or among any pupils receiving education at the school, whether during a teaching session or otherwise.

Breach of Articles 3 and/or 8

44. The authorities upon which Mr Starmer relies relating to force that is not “*strictly necessary*” are all cases in which actual conduct infringing the Articles is complained of: *Tomasi v France* [1992] 15 EHRR 1, *Ribitsch v Austria* [1996] 21 EHRR 573, *Raninen v Finland* [1997] 26 EHRR 563, *Z and Others v UK* [2002] 34 EHRR 3, *Vasilev v Bulgaria* [2007] Application 48130/99, 12 April 2007, and *Kucheruk v Ukraine* [2007] Application 2570, 6 September 2007. Mr Starmer accepts that the European Court of Human Rights will not as a matter of principle rule *in abstracto* on the validity of domestic legal rules, though he relies upon and refers to the conduct found in the above authorities to be infringing. In *A v UK* [1999] 27 EHRR 611 the justification for the treatment of the applicant was said to be the defence of reasonable chastisement, as to which the European Court said, at paragraphs 23-24 of its judgment:

“23. The Court recalls that under English law it is a defence to a charge of assault on a child that the treatment in question amounted to ‘reasonable chastisement’. The burden of proof is on the prosecution to establish beyond reasonable doubt that the assault went beyond the limits of lawful punishment. In the present case, despite the fact that the applicant had been subjected to treatment of sufficient severity to fall within the scope of Article 3, the jury acquitted his stepfather, who had administered the treatment.

24. In the Court’s view, the law did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3. Indeed, the Government have accepted that this law currently fails to provide adequate protection to children and should be amended.

In the circumstances of the present case, the failure to provide adequate protection constitutes a violation of Article 3 of the Convention.”

It is plain that the conclusion was reached “in the circumstances of the present case”.

45. In *R (Munjaz) v Mersey Care Trust* [2006] 2 AC 148, at paragraph 29 of the speech of Lord Bingham of Cornhill and in paragraphs 79 to 82 of the speech of Lord Hope of Craighead, it is clear that the risk of subjection to treatment prohibited by Article 3 can and should be considered. Enforcement of the Amendment Rules and the Code of Practice will be subject to the provisions of Articles 3 and 8 of the ECHR. No conduct which offends against Article 3 or Article 8 is legitimised by the Amendment Rules. We are not satisfied that the Amendment Rules, with the significant overlay of the Code of Practice, are themselves offensive to Articles 3 and/or 8. Whether conduct and/or treatment complained of in a future case is contrary to Articles 3 and/or 8 will depend on all the circumstances.

Article 14

46. The Claimant further submits that the Amendment Rules would lead to a different regime being adopted in STCs from that in LASCHs, as appears from paragraph 8 above. The Good Practice Guidance for LASCHs there referred to remains unchanged and is in all material respects identical to the old unamended Rules. We have not heard full argument as to whether it can be said that such a distinction between the Rules applicable to a young person detained in a STC and one detained in a LASCH is a relevant difference within Article 14 (see *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484, particularly at paragraph 28 in the speech of Lord Bingham of Cornhill). However, as we have concluded that Articles 3 and 8 are not engaged, Article 14 does not arise, as it has no independent existence (*Steck v UK* [2005] 41 EHRR SE295 cited in *Clift* at paragraph 12).
47. We are therefore satisfied that there is no separate ground for challenge to the Amendment Rules by reference to the ECHR. No doubt issues by reference to Articles 3 and 8 of the ECHR and, if and insofar as relevant, the United Nations Convention on the Rights of the Child relied upon by the CC, will inform the review now being carried out.

4. Relief

48. The Claimant has succeeded on the *Wednesbury* challenge to the failure to consult the CC and on the failure to carry out a race equality impact assessment but not otherwise. The question that now arises is whether it is appropriate to grant relief, particularly in the form of an order quashing the Amendment Rules. It is, of course, a matter of discretion. Mr Eadie accepts that an unlawful failure to consult can give rise to an order quashing secondary legislation: see *Regina v Secretary of State for Health, ex parte United States Tobacco International Inc* [1992] 1 QB 353. However, he submits that the present case ought not to have that result. He refers to *Regina v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities* [1986] 1 WLR 1, in which Webster J said (at p.15):

“... it is not necessarily to be regarded as the normal practice, where delegated legislation is held to be *ultra vires*, to revoke the instrument, but ... the inclination would be the other way, in the absence of special circumstances making it desirable to revoke that instrument ... in principle, I treat the matter as one of pure discretion.”

49. Each of those authorities was concerned with the breach of an express statutory duty to consult. In the former, *certiorari* was granted; in the latter it was refused. Properly read, they are no more than examples of the exercise of discretion. It would be wrong to find in them a presumption either way. We accept the written submission of Mr Starmer (in a post-hearing Note) that the discretion to quash is not limited in law to cases involving an express statutory duty to consult; see *Regina (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2007] EWCA Civ 498, [2007] 3 WLR 768 per Waller LJ at paragraph 104-105. We are satisfied that, in principle, once a public law infraction has been established, the Court has a discretion to quash secondary legislation which has been enacted on the back of that infraction, whether it was substantive or procedural. It nevertheless calls for a careful examination of the circumstances of each case before deciding to make a quashing order.
50. In the present case, Mr Eadie refers to a number of factors which, he submits, militate against the grant of such relief. He places particular reliance on the following: (1) the fact that, unusually in a negative resolution case, there was a substantial, informed debate about the Amendment Rules prior to their coming into force and Parliament was aware of the limited nature of the consultation that had taken place; (2) although the CC and others were denied formal consultation, Parliament was aware that he and they had concerns that were being overridden; and (3) in the event, Lord Carlile did not press his motion to annul the Amendment Rules in the House of Lords because he and others accepted that the Secretary of State has established a wide-ranging review of the issues which is expected to result in a report in April 2008, in the light of which the position will receive further consideration. These three points are all documented in the *Hansard* report of proceedings in the House of Lords on 18 July 2007, cols 281-311.
51. In our judgment, these are all important considerations. They lead us to the conclusion that it would not be appropriate to quash the Amendment Rules on the application of a claimant who is no longer at risk of action against him for the purpose of ensuring GOAD and in circumstances where the whole issue is receiving active consideration in good faith within a reasonable timescale. That reconsideration enables the legal deficits (failure to consult, in particular, the CC and failure to carry out a race equality impact assessment) to be remedied. The good faith of the Secretary of State is not questioned in these proceedings. Moreover, it is pertinent to note that, since the hearing, he has taken steps to suspend two of the restraint techniques which were the subject of recommendations by the Coroner in the Inquest into the death of Gareth Myatt: see *The Guardian*, 20 December 2007, p.7.

Conclusion

52. It follows from what we have said that, although two of the grounds of challenge are made out, we do not propose to quash the Amendment Rules.