PRISONERS

Recent developments in prison law – Part 2



Hamish Arnott, **Simon Creighton** and **Nancy Collins** continue the series of updates on the law relating to prisoners and their rights. This series will appear in January and February, and in July and August. Part 2 of this update reviews the recent developments in policy, legislation and case-law regarding prison discipline and conditions and segregation. Part 1 examined the recent developments in policy, legislation and case-law regarding life and determinate sentences and parole.

PRISON DISCIPLINE

Prison (Amendment) Rules 2005

The Prison (Amendment) Rules 2005 SI No 869, which came into force on 18 April 2005, introduced changes to the procedures for an appeal against a decision by an independent adjudicator. Until 18 April 2005, prisoners could appeal against such decisions to the Briefing and Casework Unit (BCU) of the Prison Service. The BCU had the power to overturn a finding of guilt, and/or remit the punishment given.

Under the new r55(B) of the Prison Rules 1999 SI No 728, where a prisoner is found guilty of a charge by an independent adjudicator, s/he has 14 days from the conclusion of the adjudication to ask the senior district judge to review the punishment, but not the finding of guilt. Governors retain the power to remit additional days awarded by independent adjudicators on the ground of the prisoner's subsequent good behaviour, and where a prisoner has not had a finding of guilt in the previous six months.

In addition, under r51(9), a new offence has been created of administering a controlled drug whether in prison or while on temporary release. Under r52(A), new defences have been introduced to the offence of being intoxicated by alcohol, or consuming alcohol. The defences include a prisoner not knowing or having no reason to suspect that s/he was consuming alcohol, or consuming it without his/her consent when it would be unreasonable for him/her to have resisted. Rule 50(B) sets out new procedures for compulsory testing for alcohol.

In *Ezeh and Connors v UK* [2003] 39 EHRR 1, it was established that where a determinate sentenced prisoner is charged with an offence against prison discipline, and the charge is so serious as to attract the punishment of additional days, it must be referred to an independent adjudicator to ensure compliance with article 6 (right to fair trial) of the European Convention on Human Rights ('the convention'). In *Whitfield and others v UK* App Nos 46387/99, 48906/99, 57410/00 and 57419/00, 12 April 2005, the court applied the decision in *Ezeh and Connors* in relation to four prisoners, who complained that they had suffered a violation of their right to a fair trial under article 6 at adjudication hearings at which they had been refused legal representation, and had been found guilty of the charges and punished with additional days.

The court rejected three of the applicants' claims for damages under article 5(5) on the basis that there was no causal link between the violation of their rights under article 6 and any damage that they suffered; it was not in a position to speculate about the outcome of the adjudication hearings had the applicants been legally represented. The fourth applicant had been refused permission to consult with his lawyer before the hearing and, consequently, the Prison Service had quashed the finding of guilt. In light of these circumstances, the European Court of Human Rights (ECtHR) awarded the applicant €3,000 in compensation for non-pecuniary damage.

The House of Lords considered a prisoner's right to damages following a breach of article 6 in *R v Secretary of State for the Home Department ex p Greenfield* [2005] UKHL 14. The appellant had been given 21 additional days for a drug offence. In light of the decision in *Ezeh and Connors*, the Home Secretary accepted that the proceedings against the appellant did involve a criminal charge within the meaning of article 6, and that he had been denied an independent tribunal and wrongly refused legal representation.

Lord Bingham confirmed the Lords' decision that the appellant was not entitled to damages on the basis that his complaints about the adjudication hearing had been '… vindicated by a finding in his favour at the highest judicial level based on a public concession by the Secretary of State'. This was considered to afford the appellant with just satisfaction and the award of damages was not considered necessary. Lord Bingham rejected arguments that the appellant should be awarded damages for loss of opportunity to achieve a different result had he been legally represented. He considered that the adjudication had been conducted with '… exemplary conscientiousness, patience and regard for the appellant's interests'. For similar reasons, Lord Bingham rejected the argument that the appellant should be awarded damages for anxiety and frustration: the appellant had no expectation that the adjudication hearing would be conducted in a manner other than that in which it was carried out, and he was treated no differently than anyone else.

■ **R (Francis) (2) (Tangney) v (1) Governor of HMP Elmley and (2) Secretary of State for the Home Department**

[2004] EWHC 2888 (Admin)

Moses J rejected the argument that life-sentenced prisoners should be entitled to adjudication hearings before independent adjudicators to ensure compliance with article 6 of the convention, and the common law requirements of fairness.

In assessing whether prison disciplinary charges could be classified as criminal charges under article 6, in the case of *Ezeh and Connors*, the ECtHR applied the criteria laid down in *Engel v The Netherlands (No 1)* (1979–1980) 1 EHRR 647, to assess whether the disciplinary charges amounted to criminal charges within the meaning of article 6, ie,:

- The categorisation of the allegation in domestic law;
- The nature of the offence; and
- The severity of the penalty.

The ECtHR observed that the second and third criteria are alternative, and concluded that, because of the severity of the punishment of additional days, the charges could be classified as criminal.

It was argued for the claimants that, where a life-sentenced prisoner is found guilty of serious charges, the finding of guilt is likely to have an adverse effect on a Parole Board's decision concerning whether and when s/he should be released, and so is likely to have a consequential effect on a prisoner's liberty. It was, therefore, argued that the nature of the punishment was such as to bring the charges within the definition of criminal charges under article 6, with reference to the third *Engel* criterion.

Moses J rejected these arguments. He did not accept that findings of guilt and serious punishments imposed on life-sentenced prisoners amounted to a deprivation of liberty; it was speculative in relation to whether they would delay the date on which a life-sentenced prisoner would be released. He noted that a Parole Board's decision not to release a prisoner is not a punishment, but a conclusion based on an assessment of risk. A Parole Board was entitled to consider many reports when carrying out an assessment of risk, and it could not be said that each of those reports, which could impact on the date of release,

required adjudication by an independent body.

Furthermore, Moses J noted that the impact of disciplinary proceedings on a life- sentenced prisoner's release date may not be known for many years, and it is necessary for a governor to decide at the outset of an adjudication hearing whether an independent adjudicator is required. Finally, Moses J rejected the argument that the right to a fair hearing in common law carried with it a right to an independent adjudication in cases where fairness demanded it. An appeal is scheduled to be heard against the judgment at the end of June 2005.

■ **R v Secretary of State for the Home Department ex p Al-Hasan and ex p Carroll**

[2005] UKHL 13

The House of Lords considered an appeal by two prisoners against findings of guilt made at adjudication hearings held in HMP Frankland in respect of the charge of disobeying a lawful order. The prisoners had refused to comply with an order for a squat search: Mr Carroll on the basis that he had not been given proper reasons, and Mr Al-Hasan due to the absence of a reasonable suspicion to justify the search. They had previously based their appeals on breaches of articles 5(4) and 6 of the convention, and on the common law principle of natural justice. Their appeals had failed before the Administrative Court and the Court of Appeal. Following the decision in *Ezeh and Connor*s, their appeals before the House of Lords raised just one issue: whether the adjudication hearings at which they had been found guilty were unfair due to the apparent bias of the adjudicating governor.

It was argued that the adjudicating governor, Mr Copple, could not properly decide on the legality of the order for a squat search because he had been present when the governor approved the general order for the search. This fact had only become apparent when the adjudicating governor gave a statement in Mr Al-Hasan's case in July 2000. The Lords accepted this argument.

An order was made for the findings of guilt to be quashed and deleted from the appellants' disciplinary records. It was confirmed that the appeal was upheld on the basis of established principles of common law; both adjudications took place before the Human Rights Act 1998 came into force.

■ **R (Gleaves) v Secretary of State for the Home Department**

[2004] EWHC 2522 (Admin)

The claimant sought to challenge the Home Secretary's decision to uphold a governor's finding of guilt that he used 'threatening, abusive or insulting racist words or behaviour' contrary to Prison Rules 1999 r51(20A). The claimant was alleged to have called a female officer of German origin a 'Kraut'. He denied this, stating that he had used the term 'sauerkraut' in her presence and mimicked a sentence in a German accent because he was angry with her. The prison's race relations liaison officer acted as an expert witness. He confirmed that a racially derogatory comment is anything that an individual finds offensive, and that talking in a mimicked accent could be racially offensive as well as intimidating. The governor found the claimant guilty 'regardless of [his] intentions'.

The claimant challenged the finding of guilt on the basis that it was unclear whether the governor had found him guilty of calling the officer a 'Kraut', or solely on the basis of the mimicked accent. The claimant also argued that the finding of guilt should be quashed as the governor had failed to consider his defence properly, and had improperly relied on expert evidence to establish whether the language used by the claimant was offensive. He also sought permission to argue that he had been denied a fair hearing, as he was not allowed to examine witnesses directly.

Lightman J considered evidence from the governor that she had agreed to direct questions from the claimant to the female officer through herself to minimise the officer's feelings of intimidation. In her evidence, the governor confirmed that she was satisfied that the term 'Kraut' and the mimicry were objectively racially offensive and subjectively intimidating to the officer, and that the race relations liaison officer's advice merely confirmed her views. The governor also confirmed that she had been satisfied that the charge had been proved beyond reasonable doubt. The information provided in the governor's evidence had not been recorded on the adjudication transcript. However, while noting the importance of ensuring that governors do keep a detailed record of adjudication hearings, Lightman J accepted the governor's evidence as consistent with the full facts, and the record of the adjudication. He, therefore, concluded that he could accept and rely on the governor's evidence in accordance with the guidance on the acceptance of late reasons for decisions set out in *R (Nash) v Chelsea College of Art and Design* (2001) *Times* 25 July.

PRISON CONDITIONS

Segregation

■ **Secretary of State for the Home Department v SP**

[2004] EWCA Civ 1750

In this case, the Home Secretary appealed unsuccessfully against the decision of Jack J that a young offender, SP, should have been given the opportunity to make representations before an order for segregation was made, unless reasons of good order, discipline or urgency required that the order should be made without her having that opportunity.

The Court of Appeal considered that contemporary standards of fairness and Prison Service Order (PSO) 4950 *Regimes for juvenile*s, which includes the principle of dealing with prisoners 'fairly and openly', required that SP should have been given an opportunity to make representations before the order was made to remove her to the segregation unit. Furthermore, obtaining a young offender's views about the reasons for his/her segregation would be consistent with the principle that 'safeguarding a child's welfare is of paramount importance' *(R (Howard League for Penal Reform) v Secretary of State for the Home Department* [2002] EWHC 2497 (Admin)). It considered that the opportunity to make representations should be refused only where necessary for reasons of good order, or discipline, or urgency (or other relevant circumstances).

The court considered the authorities relied on by the Home Secretary in support of his appeal and, in particular, *R v Deputy Governor of Parkhurst Prison ex p Hague* [1992] 1 AC 58, in which it was held that there was no requirement to allow prisoners to make representations before segregation. The court considered that it was not bound by this decision. It considered that the practical difficulties envisaged by the Divisional Court in *ex p Hague* could be overcome as follows:

■ The policy on segregation set out in PSO 1700 could be amended to allow governors to ask for comments from prisoners before segregation to ensure 'good administration'; and

■ The qualified right to make representations could be drafted so as to avoid subsequent questioning of decisions to refuse representations.

In considering the decision of the Court of Appeal in *ex p Hague*, it was noted that the current PSOs demonstrate a considerable change in policy in relation to the management of young offenders and, with regard to PSO 1700, also in relation to adult prisoners.

However, Hooper LJ confirmed it was not necessary to resolve whether *ex p Hague* is '… still binding … in the case of someone over the age of 18. The resolution of that may well require the kind of detailed analysis of the relevant PSOs which I have tried to undertake in this case as well as consideration of the ECHR [the convention]'. He noted, therefore, that the court's conclusion applied to inmates in a Young Offender Institution 'who are under the age of 18 and who are removed to the segregation unit for reasons of good order and discipline'.

Release on compassionate grounds

■ **R (Spinks) v Secretary of State for the Home Department**
[2005] EWCA Civ 275

The appellant, a mandatory life-sentenced prisoner, challenged the decision of Elias J to uphold the Home Secretary's refusal to release him on compassionate grounds. The appellant suffers from terminal cancer, and his life expectancy is very short. It was argued that the failure to release the appellant violated his rights under article 3 of the convention (prohibition on inhuman and degrading treatment), and that in cases where there is an arguable breach of article 3, the Home Secretary should be required to refer a prisoner's case to a Parole Board. The Parole Board would then have a duty to investigate whether a breach of article 3 had occurred and, if so, to make appropriate recommendations for the prisoner's release. If it was not accepted that the Parole Board should play this role, then the court was asked to investigate the appellant's case, and order his release if his continued detention was found to be in breach of article 3.

The court rejected the argument that the Parole Board should investigate the question of release. It noted that Crime (Sentences) Act (C(S)A) 1997 s30(1) gives the Home Secretary a power to release a prisoner on licence if he is satisfied that circumstances justify that decision. If the Home Secretary concludes that a prisoner should be released, he must consult the Parole Board under C(S)A s30(2). The court noted that the Home Secretary's decision not to release a prisoner amounted to a violation of article 3, and the proper remedy for that breach would be his/her release from prison, rather than an investigation of the violation by an independent body. A refusal to release could be challenged by way of judicial review and, in these circumstances, it would be for the court to establish whether there was a continuing breach of article 3.

The court went on to conclude that the appellant's continued detention did not amount to a violation of article 3. It referred to *Mouisel v France* (2004) 38 EHRR 34, where the ECtHR found that a violation of article 3 had occurred by the continued detention of a prisoner who was suffering from leukaemia, and the use of handcuffs during his hospital visits.

The extent of the appellant's physical and psychological suffering was not considered to be as severe as Mr Mouisel's, and it was noted that he does not require full-time treatment in a hospital or a hospice. In relation to the use of handcuffs, it was noted that a risk assessment had been carried out on the appellant which justified their use; the absence of such a risk assessment had contributed to the ECtHR's decision in Mr Mouisel's case. Finally, it was noted that the appellant's situation would be kept under review, and should his condition deteriorate he would be released on life licence.

Attempted suicide

■ **R (D) (a patient by the Official Solicitor his litigation friend) v Secretary of State for the Home Department**
[2005] EWHC 728 (Admin)

This case examined the procedural obligation imposed on the prison authorities, under articles 2 and 3 of the convention, to carry out an effective investigation where a prisoner sustains life-threatening injuries, or raises an arguable claim of serious ill treatment by prison officers. To be compliant with this procedural obligation an investigation must be:

- independent;
- effective;
- reasonably prompt; and
- allow for a sufficient element of public scrutiny; and
- involve the next of kin to an appropriate extent.

(See, inter alia, *R (Wright) v Secretary of State for the Home Department* [2001] EWHC Admin 520; [2001] UKHRR 1399). The case highlights the inadequacies of the existing powers of the Prisons and Probation Ombudsman (the PPO) in his role as the investigator of deaths in custody.

D, a 22-year-old prisoner held on remand at HMP Pentonville, hanged himself in his cell. He was discovered before he died, but suffered irreversible brain damage. He had a history of self-harm, and before his attempted suicide a broken razor and a noose had been found in his cell. He had been on suicide watch, and the prison's healthcare observation book observed that staff should be extra vigilant.

A senior investigating officer in the Prison Service investigated the circumstances surrounding D's suicide and prepared the *Draper investigation and report* (the Draper report) containing 11 recommendations. However, some of the most important documentation relating to D and the Draper report have been mistakenly lost or destroyed by the Prison Service.

The Home Secretary accepted that D was known by the prison authorities to be 'a real and immediate suicide risk', and that this – together with the seriousness of the incident and its consequences and the question of whether more could have been done to deal with the risk – triggered the procedural obligation under articles 2 and 3. It was also accepted that the Draper report did not satisfy this obligation; the report was not published, and D's representatives played no part in its compilation. It was, therefore, suggested that the PPO should carry out a further investigation into the incident. The Home Secretary considered that this new investigation, taken together with the Draper report and a potential claim for personal injury, would fulfil the procedural obligations under articles 2 and 3.

Relying on both domestic and ECtHR's judgments, Munby J did not accept that the possibility of civil proceedings should be taken into account to establish whether the state's investigative obligation would be fulfilled (see, for example, *Edwards v UK* (2002) 35 EHRR 487 and *R (Wright)*. Furthermore, he considered that the Draper report made only a minimal contribution towards the satisfaction of this obligation.

In considering whether the PPO's proposed investigation would comply with the convention's requirements, Munby J identified several defects as put forward by the claimant:

- First, the inquiry would not be held in public. Munby J noted that while it might be necessary for some of the evidence to be held in private, any argument for this would have to be made out on convention-compliant grounds.
- Second, the PPO would not have the power to compel the attendance of witnesses. It was not enough that any prison officers currently employed might be in breach of the conditions of their employment if they failed to attend; the same would not apply to other witnesses such as ex-prison officers, prisoners, or ex-prisoners.
- Third, D's representatives would not be able to attend when the PPO questioned the witnesses, nor would they be able to require questions to be put to, or to cross- examine, the witnesses themselves.
- Finally, while some funding was available for D's legal representatives, the provision of that financial backing would be at the Home Secretary's discretion.

In reaching his conclusion that the PPO's inquiry would not meet the state's investigative obligations under the convention, Munby J confirmed that the type of inquiry required by the circumstances of D's case would not be necessary in every case of attempted suicide in custody, let alone in every case of non-suicidal self-harm.

■ Hamish Arnott and Simon Creighton are solicitors at Bhatt Murphy solicitors, and Nancy Collins is the senior solicitor at the Prisoners' Advice Service (PAS). The PAS is at PO Box 46199 London EC1M 4XA. Tel: 020 7253 3323. Fax: 020 7253 8067. E-mail: admin@prisonersadviceservice.org.uk. Website: www.prisonersadviceservice.org.uk.