law & practice

PRISONERS

Recent developments in prison law


Hamish Arnott (far left) and **Simon Creighton** continue the series of updates on the law relating to prisoners and their rights. This series of articles appears twice-yearly.

PAROLE AND LIFERS

Recall

The legal requirements of the emergency recall procedure for mandatory lifers were examined in *R (on the application of Cummings) v Home Secretary* (2000) 3 November, QBD (Admin Ct). An emergency recall had been effected by the secretary of state under Criminal Justice Act 1991 s32(2). The Parole Board ('the board') considered the decision under this procedure, in advance of a full and more formal consideration of the necessity for recall which follows under Crime (Sentences) Act (CSA) 1997 s32(4) if the emergency recall is upheld. The board did not consider that there was a necessity for recall and recommended immediate release under the informal consideration procedures. The secretary of state rejected this recommendation and referred the matter for further consideration under the more formal provisions. An application for habeas corpus was rejected by the court which found that the recommendation did not place any special onus on the secretary of state to provide 'compelling' reasons for rejecting it. This decision does highlight a continuing anomaly with the recall procedures. The board has the power to direct immediate release after full consideration, the only time when the board has directive powers of release for a mandatory lifer. However, the courts have consistently construed this power very narrowly, rejecting any arguments that release recommendations which are not made precisely in accordance with this procedure have any directive effect.

When considering the recall of the mandatory lifer, in the full procedure, the board does have a discretion over the procedure adopted; this can include holding an oral hearing (see *R v Parole Board ex p Davies* (1996) 25 November). Despite requests from prisoners, the board has been extremely reluctant to allow oral hearings in the circumstances. However, recently the board has, for the first time, held a hearing for a recalled mandatory lifer. It agreed that this procedure was necessary in order to resolve the conflict of evidence regarding the reasons for recall. Under the Human Rights Act (HRA) 1998, the grounds for requesting an oral hearing will be stronger (see below).

Moves to open conditions

In *R (on the application of Gordon) v Parole Board* (2000) 3 November, QBD (Admin Ct), a decision made by the board not to recommend the transfer of a lifer to open conditions was quashed on the basis that the explanation given for the reason was inadequate and failed to demonstrate any real attempt to balance the risk posed by such a transfer against the benefit to the prisoner. The case had involved the assessment of the need to undertake the sex offender treatment programme (SOTP) in circumstances where the relevant offence was a minor case of indecent exposure and there were conflicting reports on the dossier as to whether it raised any real issues of sexual offending. The board had sought to justify the decision on the grounds that the offence appeared to have causal links related to the more serious index offence, but Smith J considered the reasoning to have been inadequate. This decision can be contrasted with that given by Gibbs J in *Dodson v Parole Board and Home Secretary* (2000) 3 October, QBD (Admin Ct). The board had given very sparse reasons for refusing to recommend a transfer to open conditions, basing the decision on the need for further time to test the progress apparently made. A similar decision was reached in *R v Home Secretary ex p Waldron* (2000) 11 July, QBD, where the court rejected an attempt to challenge a refusal to transfer a lifer from category B to C. The discrepancy in the decisions illustrates the extent to which challenges in such cases remain something of a lottery.

A further argument that the board should have the power to direct the transfer of lifers to open conditions on the basis that such a move is an essential precursor to release and is, therefore, within the ambit of article 5(4) of the European Convention on Human Rights ('the convention') has been rejected (*R (on the application of Burgess) v Home Secretary* (2000) *Daily Telegraph* 5 December, QBD (Admin Ct)). The case also re-examined the question of whether a 'minded to refuse' procedure is necessary in cases where such recommendations are rejected (see *ex p Draper*, June 2000 *Legal Action* 14). The court rejected the contention that movement to open conditions falls within the ambit of article 5(4), preferring the strict construction utilised under existing convention case-law which has consistently held that movement between categories of prisons does not raise any article 5 issues as liberty is an absolute concept (see, eg, *KM v UK* [1997] EHRLR 299). The argument about the necessity for a minded to refuse procedure was also rejected on the particular facts of the case, even though the secretary of state had relied on a further undisclosed report before reaching his decision. The judgment makes it difficult to envisage any circumstances where such a procedure will be deemed necessary.

Offending behaviour courses

The issue of attendance on relevant offending behaviour courses is a major problem for prisoners, especially in cases where the courses are either not available or the prisoner is deemed unsuitable for attendance. In *R v Home Secretary ex p Shaw* (2000) *Times* 16 March, QBD, a discretionary lifer was excluded from attending the SOTP based upon an assessment that he was ineligible by virtue of a diagnosis of a psychopathic personality disorder. The application to review the decision on the grounds of the failure to offer a rehabilitative programme and procedural unfairness was rejected, the court holding that there was no analogy with the mental health sphere and that the prison service's agreement to keep the position under review met the requisite standards of reasonable diligence in any event. A far bolder decision was made by Turner J in *R v Parole Board ex p Hart* (2000) 24 May, QBD, a case where the board had refused to recommend a progressive transfer for a prisoner who maintained his innocence. The prisoner, despite having many favourable reports, had received a negative post-course assessment following his attendance on the SOTP and the board had relied upon this in reaching its decision. Turner J relied upon the long line of cases which have held that maintaining innocence should not be a barrier to release on parole and concluded that the board had failed to make a proper assessment balancing the positive reports against the one negative assessment, rendering the decision both irrational and lacking in valid reasons.

The decision appears, to some extent, to have been influenced by the fact that the applicant was a post-tariff lifer. This seemed to give greater urgency to the need to treat him in a fair and balanced manner in the view of the court. The question of treatment for post tariff lifers is likely to be an area which will be investigated

further under the HRA 1998 with applications pending concerning the duty to provide treatment which will seek to overturn the findings of the court in *Shaw* (above). It is noteworthy that the importance of the length of tariff to assessments, even where the tariff has expired, appears to have been acknowledged following an agreement by the secretary of state to re-set that tariff in a case where the previous tariff which was under challenge had already been served (consent order agreed in case of *R v Home Secretary ex p Van Bulow* CO/1332/00).

The HRA and lifers

The challenges under the HRA 1998 to the administration of the life sentence are likely to begin being heard by the courts during the first part of 2001. The continuing discrepancy between the domestic view on the length of time that is considered reasonable between parole reviews and that which is required under article 5(4) was once again illustrated with the decision in *Oldham v UK* (2000) *Times* 24 October, where the European Court of Human Rights (ECtHR) awarded compensation of £1,000 to a discretionary lifer whose parole decision had set a two year review so that he could work on 'alcohol, anger and relationships'. The decision to award compensation appears to have been influenced by the fact that the applicant was released at the second review. The court also declared admissible a similar application from another discretionary lifer in March 2000, although it rejected an argument that the board was not sufficiently independent to meet the requirements of article 6 (*Hirst v UK* (2000) 21 March).

Following the Criminal Court of Appeal's decision in *R v Offen and others* (2000) *Times* 10 November, CA, where the Lord Chief Justice Lord Woolf set a new test for the imposition of automatic life sentences imposed under Crime (Sentences) Act (CSA) 1997 s2 following a conviction for a second serious offence, two challenges have been lodged to the compatibility of the mandatory life sentence for murder with the convention. In *Offen*, Lord Woolf LCJ accepted that absent sufficient discretion for the sentencing court, the imposition of a life sentence could be considered arbitrary and in breach of article 5 as well as raising issues about inhuman and degrading treatment under article 3. A new test was established under the existing statute which brings the sentence far closer to the old test for imposing a discretionary life sentence. The Court of Appeal has now given leave to two mandatory lifers seeking to make similar arguments in respect of the mandatory life sentence.

A case has been listed for hearing in February 2001 on whether article 6 rights should accrue to the setting of mandatory lifers' tariffs and, if this application is successful, it could mark the beginning of the judicialisation of the mandatory sentence.

Determinate sentences

In addition to cases concerning indeterminate sentencing, there have been a few cases looking at parole schemes for determinate sentenced prisoners. Although the cases do not raise any article 5 or 6 issues on the basis that parole in such circumstances is a privilege of early release from a punitive sentence, the requirements of article 8 have been raised to inform decision. In *R v Home Secretary ex p Smith* (2000) 18 May, QBD, the court upheld a refusal to grant compassionate release to a prisoner who was not 'imminently' at risk of death and considered that a three-month time limit was an acceptable guide, providing the other criteria were met. Another compassionate release case which cited article 8 considerations was settled in favour of the prisoner by consent (*R v Home Secretary and Parole Board ex p D* CO/2568/00) resulting in the release of the prisoner. He had argued that his return to the family home was needed to provide care for his son who suffered from severe behavioural difficulties attributable to chromosomal defects where the social services and psychiatrists concluded that the presence of the father was essential to preserve the family unit.

The general difficulty in challenging determinate parole decisions on the grounds of 'reasonableness' was again illustrated by the decision in *R v Parole Board ex p Blake* (2000) 23 February, QBD. The board refused to reconsider a decision to reject release based upon a finding that the prisoner had not attended a relevant offending behaviour course, even when confronted with a report from the probation service that the course was not necessary. Jackson J held that although it was not a decision he would have made, it was not one which was outside the board's discretion. Similarly, an application challenging a refusal to grant special remission to a prisoner on the grounds of meritorious conduct was rejected (*R v Home Secretary ex p Quinn* (2000) 5 September, QBD. The applicant had applied for the remission due to his calming actions during a riot, but this was refused as his behaviour after the incident was considered to have been poor. The court stated that in cases where prisoners were seeking a concession on a lawfully imposed sentence, the court would be very slow to interfere with executive decisions.

PRISON DISCIPLINE

Changes to the Prison Rules

The Prison (Amendment) Rules 2000 SI No 1794 came into force on 1 August 2000 and introduced four new disciplinary offences. These are racially aggravated assault, racially aggravated damage to property, using racist words or behaviour, and displaying racist words, drawings, symbols or other material (new Prison Rules 51(1A), (17A), (20A), and (24A)). A new Prison Rule 51A provides interpretation on what is 'racist' for these purposes. Guidance on the charges has been included in an amendment to the Prison Discipline Manual (PSI 51/2000). The Young Offender Institution (Amendment) (No 2) Rules 2000 SI No 1795 have made similar changes to the Young Offender Institution Rules 1988.

Lawful orders

Prisoners can be required to provide urine samples (Prison Act 1952 s16A) in three circumstances: where they are randomly selected, are subject to a frequent testing programme, or where there is reasonable suspicion that the prisoner has misused drugs. In *R v Home Secretary ex p Russell* (2000) *Times* 31 August, QBD, a prisoner was disciplined under the Prison Rules for disobeying a direct order to submit to a random test. He refused to accept that his selection was genuinely random. The governor found the charge proved at the disciplinary hearing, deciding that the only issue was whether the order was disobeyed, the randomness of the selection being irrelevant.

In the judicial review proceedings brought by the prisoner to contest the finding of guilt, the court accepted that an order to provide a sample for a random test could only be lawful if the test was genuinely random. Accordingly, once this had been raised by the prisoner any failure to investigate the matter would render the finding of guilt unlawful. During the course of the proceedings, the Prison Service indicated that, in future, it would be providing information to prisoners subjected to tests about how random selections are generated.

Another case where a prisoner challenged the lawfulness of an order was less successful. The Security Manual (PSO 1000) details the authorised manner of conducting strip searches. It states that prisoners can be

required to squat during a search if the searching officer has reasonable suspicion that an item has been hidden in the genital or anal area. A prisoner who refused to squat and was subsequently disciplined successfully complained to the Prisons Ombudsman. The ombudsman's recommendation that the finding of guilt should be quashed was based on the fact that the record of the disciplinary hearing showed no evidence that an inquiry had been made into whether a reasonable suspicion existed.

However, in a challenge to the director general's refusal to accept the recommendation (*R v Home Secretary ex p Simms* (2000) 22 May, QBD) the court admitted further witness evidence from the governor, produced more than a year after the hearing, that the issue had been considered at the hearing, even though there was nothing on the record, and no contemporaneous notes to support his contention.

Evidence

In *R v Deputy Controller of HMP Buckley Hall ex p Thomas* (2000) 20 June, QBD, a prisoner challenged a refusal by the adjudicator to disclose video evidence of an incident where he was alleged to have used abusive language. The adjudicator had viewed the tape in an adjournment and decided that as it was so blurred, and did not have sound, it was of no evidential value. The application for judicial review failed, the court deciding that the prisoner had suffered no real prejudice.

Compensation

Where prisoners have served the 'additional days' given as a punishment, and the finding of guilt is subsequently quashed, is there any right to compensation? In one case, a prisoner challenged a finding of guilt in judicial review proceedings but was refused bail and so served the additional days. Permission was granted (*R v Governor of HMP Bullingdon and Home Secretary ex p Oatway* CO/2232/99) and the finding of guilt was subsequently quashed. The prisoner sought compensation for the 21 additional days spent in prison. The Prison Service settled the claim for £2,000 without admitting liability.

Article 6 of the convention

There is a strong argument that where prisoners face serious charges and receive punishments that amount to a loss of liberty ('additional days' which put back the prisoner's release date by the number of days awarded), article 6 should apply. This would give prisoners the right to publicly funded representation and to an impartial tribunal. Cases on this point will be brought domestically under the HRA, but the ECtHR will be considering a case on the point in January 2001 (the first time the court will have looked at disciplinary systems since the landmark case of *Campbell and Fell* v *UK* (1985) 7 EHRR 165, which predates the amendment of the system to its current form).

CLOSE SUPERVISION CENTRES, CATEGORY A AND ESCAPE LIST PRISONERS

Changes to Prison Rules

The Prison (Amendment) Rules 2000 also amended Prison Rule 46 to allow a direction that a prisoner is to be placed in a close supervision centre (CSC) to continue when the prisoner is transferred to another prison. It also further defined CSCs to include cells that had been designated as such by the secretary of state. He has designated two cells each in Frankland, Full Sutton, Long Lartin, Wakefield and Whitemoor. This change was introduced over concerns about the legality of subjecting prisoners to the CSC regime where they had been transferred out of the prisons containing the CSCs 'proper' (Woodhill and Durham).

Category A 'gists'

Decisions to place or keep prisoners in Category A are notoriously difficult to challenge legally as courts are highly deferential to security considerations. Prisoners are only given the 'gist' of the reports used in making the decision when making representations (see *R v Home Secretary ex p Duggan* [1994] 3 All ER 277, DC). The poor quality of gists is a common problem highlighted by two recent cases. In *R v Home Secretary ex p Grove* (2000) 18 May, QBD, a prisoner challenged a decision to maintain his category A status as the gist wrongly described his offence, contained unparticularised allegations of bullying and drug use, and recommended that he complete a course unavailable in category A conditions. The court rejected the application on the basis that the error as to the description of the offence did not taint the decision, that the decision-maker had stated that the allegations as to conduct had not been taken into account, and that although the prisoner could not do the course mentioned in the gist, he had been recommended to do a similar course available in category A conditions. The judge did, however, conclude that 'gist documents are to be more carefully prepared and these documents should be as full as is practicable'.

By contrast, a court did quash a category A decision where the gist included the trial judge's comments that although the prisoner had been convicted of manslaughter, in his view he 'was more deeply involved than the verdicts showed and that his evidence that he did not know in advance that anybody was going to be killed was frankly incredible'. The court (*R v Home Secretary ex p Daly* (2000) 21 June, QBD) held that it was wrong to include the comments in the gist. The gist's purpose was to summarise those matters of fact and opinion which are to be taken into account by the decision-maker. These could not go behind the findings of the jury and so to include such prejudicial and irrelevant comment was irrational and unreasonable in the *Wednesbury* sense.

Escape list

As well as being placed in one of the four security categories (A to D), prisoners regarded as being an escape risk can be placed on the 'E list' and subject to special security measures. Such decisions, as with category A, will often be based on secret security information.

A prisoner's challenge to being placed on the E list failed (*R v Governor of HMP Dartmoor ex p Brown* (2000) 5 May, QBD), the judge refusing to order disclosure of the security information used to make the decision. The judge stated that such disclosure would only be ordered in exceptional circumstances in the interests of justice, for example, where 'there is strong evidence of bad faith'.

SENTENCE CALCULATION

Periods in custody during trials

The Court of Appeal has recently considered whether time spent in cells during a criminal trial during which the defendant is otherwise on bail can be considered as a 'relevant period' for the purposes of the Criminal Justice Act (CJA) 1967, and so be taken into account when calculating any sentence imposed. In the county court (see June 2000 *Legal Action* 14) the judge decided that where the prisoner was ordered to attend court by 9.30 am and to remain until 30 minutes after the proceedings ended, but had to remain in the cells when the court was not sitting, that the periods in the cell should count.

The Court of Appeal (*Burgess v Home Secretary* (2000) *Times* 14 November, CA) decided otherwise. The court considered that although CJA s67 covered periods where the defendant was 'committed to custody by order of a court', periods when confined to cells for the 'orderly and efficient conduct of the trial' did not come within the section. A previous case (*R v Governor of HMP Kirkham ex p Burke* (1994) 18 March, QBD) had suggested such periods could count. However, this was based on a concession by the Home Office that was explicitly withdrawn in the current case. While *Burgess* at least provides certainty in this area, it is unfortunate that this is at the expense of prisoners.

Compensation

The House of Lords has confirmed that where a sentence is wrongly calculated, even where the calculation is based on an accepted view of the law at the time, the prisoner is entitled to compensation for the period of wrongful detention. In *R v Governor of HMP Brockhill ex p Evans (No 2)* [2000] 3 WLR 843, HL, the Lords stated that the key issue was whether the detention was lawful, and that fault was not an element of the tort. Once the courts had declared what the correct interpretation of the law was, this had retrospective effect. In the context of the liberty of the subject this was also supported by article 5(5), which guarantees compensation for unlawful detention.

Repatriation

A prisoner who was sentenced to six years' imprisonment in Italy was repatriated under the Convention on the Transfer of Sentenced Prisoners. The statutory scheme for repatriation (Repatriation of Prisoners Act 1984) applies the early release provisions under the CJA 1991 to the 'balance to serve' rather than the sentence imposed by the foreign court. This resulted in the prisoner's non parole release date being some six months later than it would have been had the provisions applied to the Italian sentence. Applications for judicial review and habeas corpus were refused (*R v Home Secretary ex p Oshin* [2000] 2 All ER 955, QBD), the court holding that it was not surprising that the statutory provisions for repatriation did not have the same effect as if the sentence was imposed here. They were designed to ameliorate the effects of being sentenced abroad by allowing some of the sentence to be served here, and furthermore informed consent to its terms was a precondition of transfer.

RIGHTS, PRIVILEGES AND COMMUNICATIONS

Changes to the Prison Rules

The Prison (Amendment) (No 2) Rules 2000 SI No 2641 came into force on 24 October 2000 and revised Prison Rule 34, which provides authorisation for interference with prisoner communications. The old rule was in very general terms. The new one, obviously with the HRA 1998 in mind, states that interference with communications should only take place where there is no interference with a convention right, or where necessary in the interests of national security, the prevention of crime, the interests of public safety, to maintain good order and discipline, the protection of public health and morals, the protection of the reputation of others, to maintain the authority and impartiality of the judiciary, or to protect the rights and freedoms of other persons (r34(3)). The new rule also states that any interference must also be proportionate to the aim pursued (r34(2)(iii)). It does not change anything in practice as the Prison Service maintains that existing restrictions contained in standing and Prison Service orders are already convention compliant. It presumably hopes that the new rule will bolster that assumption.

The rules also introduce other measures such as a power to keep a permanent log of all communications by or to a prisoner (r35B) and one which allows observation of prisoners by means of an overt closed circuit television system (r50A). Such observation can only be undertaken if necessary for the prisoner's own health or safety or that of another prisoner; the prevention, detection or investigation of crime; or maintaining good order and discipline. Again, any use of this measure must be proportionate.

The power to ban visitors under Prison Rule 73 is amended to impose a requirement that such bans should only be made when necessary on the same grounds as set out in the new r34(3), and any prohibition must be proportionate.

The Young Offender Institution (Amendment) (No 3) Rules 2000 SI No 2642 brought in similar changes to the Young Offender Institution Rules.

Artificial insemination

A life-sentenced prisoner developed a relationship with a woman while in prison and they married. By the time of his earliest release he will be 35 and she will be 31 years old. The prisoner applied for access to artificial insemination facilities so that they could start a family while he was still in prison. The application was refused, the Prison Service's policy being that applications will be refused unless there are exceptional circumstances. The basis of the policy is that it is an inevitable consequence of imprisonment that prisoners will not be able to become parents until they can be either permanently or temporarily released, although account would be taken of evidence that conception by normal means would not be possible on release.

The prisoner challenged the refusal (*R v Home Secretary ex p Mellor* (2000) *Times* 5 September, QBD). However, the judge accepted the Prison Service's argument that neither domestic law nor the convention provided a prisoner with a right to artificial insemination. Article 8 afforded respect to family life where it existed, and article 12 (right to marry and found a family) did not impose any obligation on the state to facilitate the conception of a child (*X v UK* (1975) 2 D & R 105). The judge therefore held that what was being requested was a 'privilege', and neither the policy itself nor the way it had been implemented in this case could be characterised as irrational.

Visits

In 1998, the Prison Service introduced restrictions on who could visit prisoners identified as presenting an 'ongoing risk to children' (PSO 4400). These were designed to prevent paedophiles 'grooming' potential victims. The measures state that prisoners identified as a risk should only receive visits from their own children unless the governor exceptionally believes it would be in the best interests of a child not in that category to visit. The special hospitals have an analogous, but more restrictive policy (HSC 1999/160). A patient whose visits from his nephews and nieces were stopped under this policy challenged the decision as breaching article 8 of the convention (*R v Secretary of State for Health ex p ML* (2000) *Times* 26 October, QBD (Admin Ct)).

The judge refused the application primarily on the basis that on the facts the visits from nieces and nephews did not even come within 'family life' under article 8 (the judge commented there was 'minimal evidence' about the relationships). In any event, he held that the policy was proportionate and did not breach article 8 as 'the Secretary of State has to achieve a difficult balance between the interests of the patients and the interests of children. Article 8 entitles him to do this'. In coming to this conclusion, he took into account that when applying the proportionality principle state authorities are still accorded a discretionary area of judgment which will be wider where the convention explicitly requires a balance to be struck (*R v DPP ex p Kebiline* [1999] 3 WLR 972, HL).

The case will obviously be relevant if the Prison Service policy is ever challenged, but also demonstrates (as does *Mellor* above) the importance of obtaining evidence to establish that a convention right is engaged. It is also worrying as it suggests that the 'margin of appreciation' will be replaced domestically with a 'discretionary area' that will allow courts to avoid looking closely at the substance of Prison Service policies which may breach the convention.

Education

Over recent years 'sentence planning' has become more determinative of how prisoners are

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allowed to pass their time. The sentence plan is used to identify risk factors and paragraph 2.1 of the Sentence Planning Manual (PSO 2200) states that the assessments in the sentence plan should 'form the basis of subsequent decisions about all aspects of a prisoner's sentence'. A prisoner who had been convicted of sexual offences while studying mathematics at university (his victims were young women) applied to do a maths degree with the Open University while in prison. The governor refused on the basis that this might increase his risk to the public on release as it could enable him to access higher education establishments in, for example, a teaching capacity.

This was challenged as irrational in a judicial review (*R v Governor of HMP Frankland and Home Secretary ex p Willoughby* (2000) 12 May, QBD). The prisoner argued that the suggested increase in risk was highly speculative and remote, that the decision ignored the fact that as he was a lifer he would not be released until the Parole Board decided it was safe to do so, and in any event the refusal to allow him to study created as many possible opportunities to offend (such as by studying for the degree on release) as it would close off. The judge refused all these arguments holding that the prison was entitled to conclude that risk of re-offending could be increased by facilitating the possibility of the prisoner obtaining work in a university environment, and that the board's duty to assess suitability for release did not prevent the prison making its own assessment.

CONDITIONS

European Court of Human Rights (ECtHR)

The ECtHR has repeatedly stated that ill-treatment must meet a minimum degree of severity before it will find breaches of article 3. Another problem is establishing evidence of alleged mistreatment. However, in a recent case where the court found no breach of article 3 in relation to treatment itself because of lack of evidence, it decided that the article was breached because of a lack of a thorough and effective investigation into the prisoner's allegations (*Labita v Italy* App 26772/95 (2000) 6 April).

Another applicant was a wheelchair user who was kept for one night in a police cell after being committed to prison for contempt of court, where she had to sleep in her wheelchair, the toilet was inaccessible, the light and emergency switches were inaccessible and the cell was too cold. She was then moved to a prison where she was kept in the healthcare centre which she stated was unadapted to her needs. The court (*Price v UK* App 33394/96 (2000) 12 September) declared her complaints admissible.

Provision of food

Two prisoners in a high security prison refused to wear prison clothes in the segregation unit on the grounds that it was demeaning and not required at two other high security prisons. The prison had a policy that prisoners could not collect their meals from the servery unless they wore prison clothes, and if they did not they would only have one meal a day taken to their cell.

In a challenge to the policy (*R v Governor of HMP Frankland ex p Russell and Wharrie* [2000] 1 WLR 2027, QBD) the court found it unlawful. It failed to give effect to Prison Rule 24, which required the governor to provide adequate food. The judge also considered that given its blanket (it applied to all affected prisoners regardless of circumstances), arbitrary and indefinite character the policy may well breach article 3 of the convention.

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CRIMINAL LAW

Public order review

Jo Cooper continues his six-monthly series, reviewing trends and significant developments in public order and arrest cases. Practitioners are encouraged to submit details of cases for inclusion.

CRIMINAL DAMAGE

Criminal Damage Act 1971 s1

■ **Hutchinson v Newbury Magistrates' Court** *(2000) 9 October, DC*

Mrs H used bolt cutters to cut through the chain link perimeter fence of Aldermaston Atomic Weapons Establishment which makes nuclear warheads for Trident submarines. She succeeded in causing £2,400 worth of damage but was dismayed to have been interrupted when she was, because her immediate goal had been to cause damage worth more than £5,000 in order, she said, to have the chance of a jury trial. Ultimately, she wanted to halt the production of atomic warheads at Aldermaston (which she succeeded in doing, at least temporarily) and to end the nuclear submarine programme. She was charged with criminal damage and tried summarily. On conviction she appealed to the Crown Court and then to the Divisional Court.

H argued that the activity at Aldermaston was unlawful in customary international law, as demonstrated by an advisory opinion of the International Court of Justice in 1996. She argued that it followed that the Aldermaston activities were unlawful in English domestic law. She submitted that her acts were designed to impede or prevent that activity and were thus excusable under English law; that she had acted reasonably; that she had acted with lawful excuse; that she had used force to prevent the commission of a crime (Criminal Law Act (CLA) 1967 s3); that on account of fears of radiation contamination from the establishment, eight miles from her home, she had acted in defence of herself and others; that she had acted under duress of circumstance; that she had acted out of necessity. Furthermore, in cutting the fence she had been expressing an opinion, in accordance with article 10 of the European Convention on Human Rights ('the convention'), and her prosecution was an unacceptable infringement of this protected right.

The Divisional Court gave detailed reasons for rejecting each of the appellant's arguments. The conviction for criminal damage was upheld.

Comment: Rather than rejecting each proposition as unarguable or inapplicable on the facts, the court seems to have given the appellant's legal team a stimulating, if not entirely sympathetic, workout which gave a hearing to an extraordinary range of sources and arguments. The result is a judgment which purports to be a comprehensive and definitive rejection of each of these approaches but which is more likely to serve as a point of departure for the properly prepared advocate, whetting the appetite perhaps for yet further novel fare.

The problem with the Divisional Court's approach of robust engagement is that the judgment will stand up only if it is both comprehensive and definitive in relation to each and every one of the points argued. As the court laments, it had invited submissions on a range of additional points, and some matters went simply unanswered. It can be no criticism of the legal team that they sought to develop a doctoral thesis in the space available for an interesting essay, but it is possible that more learning still could be brought to bear in support of these fundamental and fundamentalist defences, perhaps on another day and with an appropriate case.

This interesting judgment is required reading for those who wish for inspiration in running the full range of English, European and international defences to a domestic criminal charge. It also demonstrates how dearly some defendants yearn for trial by jury.