PRISONERS

Recent developments in prison law – Part 2



Hamish Arnott, **Nancy Collins** and **Simon Creighton** continue the series of updates on the law relating to prisoners and their rights. This series appears in January and February, and in July and August. This article reviews the recent developments in case-law regarding prison discipline and conditions, categorisation and segregation. Part 1 of this article was published in January 2005 *Legal Action* 10, and reviewed the recent developments in policy, legislation and case-law regarding life and determinate sentences and parole.

PRISON DISCIPLINE

Following the decision of the European Court of Human Rights (ECtHR) in *Ezeh and Connors v UK* [2002] 35 EHRR 28; January 2004 *Legal Action* 17, further arguments based on article 6 of the European Convention on Human Rights ('the convention'), relating to the prison disciplinary system, have been put before the domestic courts.

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

[2004] EWHC 936 (Admin)

This case concerned a challenge to the Home Secretary's refusal to quash a finding of guilt that had been made at an adjudication hearing which took place before the ECtHR's decision in *Ezeh and Connors*. At the hearing, the prisoner requested legal representation. His request was refused and he was awarded additional days' imprisonment. The additional days were remitted following the decision in *Ezeh and Connors*, but the finding of guilt remained.

Goldring J rejected the claimant's arguments. He considered that the Home Secretary had acknowledged the breach of the claimant's convention rights, and afforded him sufficient redress by remitting the additional days. He noted that it was the nature and severity of the punishment available at adjudication hearings that had led the ECtHR to conclude that such hearings involved the determination of a criminal charge and, therefore, the provisions of article 6 should apply. Once the punishment had been remitted and the additional days no longer delayed the claimant's release date, Goldring J considered that the finding of guilt could properly be analysed as an administrative finding of fact based on evidence before the governor.

■ **R (Bannatyne) v (1) Secretary of State for the Home Department (2) The Independent Adjudicator**

[2004] EWHC 1921 (Admin)

The claimant sought to challenge the Home Secretary's refusal to quash a finding of guilt by an independent adjudicator. The claimant had been found guilty of assault. He argued that the finding was unreasonable/unlawful and that, under article 6 of the convention, the hearing before the independent adjudicator should have been held in public. He also argued that the differential treatment of prisoners faced with a loss of liberty to that of defendants facing summary criminal proceedings was in breach of article 14 when taken together with article 6.

Sullivan J did not consider that the finding of guilt was unreasonable or unlawful. He noted that there was a factual dispute between the evidence of the prison officers, and that of the prisoners. In such circumstances, the independent adjudicator was entitled to say no more than that s/he believed the officers' accounts rather than those of the prisoners. It was not possible to conclude that the decision was either perverse or contrary to the weight of evidence.

Furthermore, he did not consider that article 6 required prison disciplinary proceedings to be held in public. The ECtHR considered this argument in *Campbell and Fell v UK* (1984) 7 EHRR 165, and concluded that such a requirement would 'impose a disproportionate burden on the authorities of the state'.

Sullivan J concluded that this decision remains good law and that the issues of public order and security remain relevant considerations. He also considered it appropriate to consider the privacy rights of others: the holding of prison disciplinary proceedings in public would be problematic for witnesses who may wish to exercise their right to privacy.

Finally, Sullivan J noted that although prison disciplinary proceedings are not public, they are subject to monitoring by the Independent Monitoring Board, the Chief Inspector of Prisons and the Ombudsman. In addition, prisoners are entitled to legal representation and to receive a record of the adjudication, which could be made public. Having found no breach of article 6, Sullivan J did not consider the arguments under article 14.

PRISON CONDITIONS

Communications

A number of cases have recently considered the lawfulness of the restrictions imposed on prisoners' contact with the outside world. The challenges to the restrictions have been unsuccessful. They demonstrate the difficulty of establishing an unlawful violation of a qualified convention right when faced with evidence from the Prison Service that the breach is justified for the needs of prison security, discipline, or for the protection of the rights and morals of others.

■ **Nilsen v Governor of HMP Full Sutton and another**

[2004] EWCA Civ 1540

The Court of Appeal upheld the High Court's decision that the governor of HMP Full Sutton had acted lawfully, and in accordance with article 10 of the convention, in withholding Mr Nilsen's transcript of his autobiography. The Prison Service justified the decision by reference to Prison Standing Order (PSO) 5B paras 34(9)(c) and 40, which provide that correspondence containing material about a prisoner's crime or past offences will be withheld unless the material consists of serious representations about conviction or sentence, or forms part of serious comment about crime, the process of justice or the penal system. It was argued that the latter provisions did not apply in Mr Nilsen's case, and that the publication of the manuscript would be likely to cause distress to the surviving victims and victims' families, and outrage among the general public.

It was argued, unsuccessfully, for Mr Nilsen that the Prison Act (PA) 1952 is concerned only with the administration of prisons and the control of prisoners within prison. Therefore, the Home Secretary has no power under the PA to prohibit the publication of a prisoner's autobiography.

The Court of Appeal rejected this argument; the powers conferred on the Home Secretary under the PA include the power to regulate what a prisoner can and cannot do. When considering the restrictions to be placed on a prisoner as part of the 'natural incidents of imprisonment', the Home Secretary was entitled to consider the expectations of the public. The court noted that freedom of expression included liberty to publish outrageous matter. However, here, the Prison Service was concerned, not with public outrage at the subject matter, but with public anger that a prisoner should be allowed to publish such material from his prison cell.

The Court of Appeal also rejected arguments relating to article 10 of the convention. It held that the provisions of PSO 5B complied with the requirement that interference with human rights must be 'prescribed by law'; the wording was clear and readily capable of application by a prison governor. Furthermore, Strasbourg jurisprudence suggests that it is not a disproportionate violation of article 10 for imprisonment to entail some restrictions on freedom of expression, such limitations being imposed with regard to the views of the public.

■ **R (Taylor) v Governor of HMP Risley**

[2004] EWHC 2654 (Admin)

The claimant challenged the lawfulness of the blanket application of the 'call-enabling' system at HMP Risley. He argued that the system amounted to a disproportionate interference with his article 8 rights.

The call-enabling system regulates a prisoner's telephone calls by restricting the numbers that s/he can call to 20 domestic and 15 legal telephone numbers, which have been authorised by the prison staff. It is more restrictive than the 'call-barring regime', which allows a prisoner to call any telephone number other than those that have been barred by prison staff.

PSO 4400, which is in draft form, details the use of the two systems. It provides, at para 3.16, that the call-enabling regime must be used for certain categories of prisoners, including category A prisoners and those who are subject to child protection measures. Paragraph 3.17 allows for the use of the call-enabling regime in prisons not holding such categories of prisoners, where there is an operational need to do so (for example, for prisons exclusively housing sex offenders), and for the use of both the call-enabling and call-barring systems in the same, or in parts of the same, prison.

McCombe J noted that Mr Taylor did not fall within the category of prisoners listed in para 3.16. Furthermore, HMP Risley is not a prison that exclusively houses sex offenders. However, he accepted the arguments put forward by the governor that the decision to place all prisoners at HMP Risley on the call-enabling regime was justified as part of the prison's anti-drug dealing strategy, and for public protection measures.

In relation to the latter point, it was argued that HMP Risley has an 'integrated regime' (ie, sex and non-sex offenders are not segregated), and the use of the call-enabling system aimed, in part, to ensure good order and discipline within the prison by preventing bullying or collusion between those prisoners subject to different telephone restrictions. Applying the proportionality test established in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, McCombe J considered that 'the evidence with regard to this prison (and I emphasise this prison) on this occasion (and I emphasise on this occasion) justifies the means employed'. He, thus, made it plain that the judgment should not be treated as a 'carte blanche' for the blanket application of the call-enabling regime throughout the prison estate.

■ **R (Szuluk) v (1) Governor of HMP Full Sutton (2) Secretary of State for the Home Department**

[2004] EWCA Civ 1426

The Court of Appeal allowed an appeal by the governor and the Home Secretary against the decision of Collins J that the restrictions placed on the claimant's correspondence with his NHS consultant were disproportionate and, therefore, unlawful. The court considered that the decision that Mr Szuluk's correspondence with his NHS consultant should be read by a healthcare officer did not infringe his rights under article 8 of the convention; the reading of the correspondence was necessary for the prevention of crime and the protection of the rights or freedoms of others. Also, it was the least invasive measure available to the prison service and was not excessive. The court further noted that the decision had been made with regard to the individual circumstances of Mr Szuluk; it did not result from the rigid application of a policy, and any risk of abuse had been minimised by ensuring that Mr Szuluk's correspondence was scrutinised only by the prison medical officer.

The court considered the issue of the 'deference', ie, the margin of discretion to be afforded by it to the Home Secretary as the rule-maker and author of the direction to the governor that Mr Szuluk's correspondence should be scrutinised. Sedley LJ stated that the court would ordinarily accept the executive's evaluation of risk, which involves no immediate issue of law. However, having done so, the court's role is then to assess whether the executive's evaluation demonstrates that there is a sufficiently pressing need to justify the interference with a fundamental right.

■ **Watkins v Secretary of State for the Home Department and others**

[2004] EWCA Civ 966

In this case, the Court of Appeal upheld an appeal against a decision of Leeds County Court that, although prison officers had acted in bad faith when dealing with legally privileged correspondence, Mr Watkins had not suffered any loss or damage as a result of the officers' actions. Therefore, the tort of misfeasance in public office was not actionable.

The court held that the right maliciously infringed by the prison officers was of such importance that Mr Watkins's cause of action was complete without proof of special damage. It considered that Mr Watkins was entitled to nominal damages. However, Leeds County Court should decide the level of these, and the question of whether he was entitled to exemplary damages.

The facts of this case occurred before the coming into force of the Human Rights Act (HRA) 1998 in October 2000. The Court of Appeal noted that the HRA would now provide prisoners who experienced difficulties similar to those faced by Mr Watkins with an appropriate remedy.

SEGREGATION

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

[2004] EWHC 1418 (Admin)

The claimant, a young offender, challenged the conditions of her segregation. She complained that she had not been provided with 'purposeful activity' as provided for in PSO 4950 chapter 7 (regimes for young women under 18 years old). She also challenged the failure of the prison staff to provide her with an opportunity to make representations before her segregation.

Jack J held that there was no obligation on prison staff to provide the range of activities set out in PSO 4950 chapter 7 to young offenders held in the segregation unit. The governor had an obligation to comply with the requirements of chapter 7 only in so far as was consistent with the need to 'protect the prisoner concerned or to maintain the good order or discipline of the establishment'. This was made clear from PSO 1700, which specifies that 'normal regimes will not be provided to prisoners in the segregation unit', and that a flexible approach must be adopted according to available resources.

However, Jack J did consider that the claimant should have been given the opportunity to make representations before her segregation. The right of prisoners to make representations before their segregation was considered and rejected by the Divisional Court and the Court of Appeal in *R v Deputy Governor of HMP Parkhurst ex p Hague* [1992] 1 AC 58. Jack J noted that there had been considerable change in the management of young offender institutions and prisons since the decision in *Hague*. In particular, he noted the application of the Children Act 1989 to under 18-year-olds held in prisons/young offender institutions. He concluded that fairness required that the claimant should have been given the opportunity to make representations before her segregation. Furthermore, there was nothing on the facts of this case to demonstrate that she should not have been given this opportunity.

Inhuman and degrading treatment

■ **Robert Napier v the Scottish ministers**

[2004] 26 April Outer House, Court of Session

In this case, a remand prisoner ('the petitioner') challenged the conditions of his imprisonment in HMP Barlinnie in Glasgow. He argued that these conditions violated article 3 (prohibition on inhuman and degrading treatment) and article 8 (right to respect for private life) of the convention. He complained about being held with another prisoner in a cell designed for one: he argued that his living space was inadequate in terms of space, light and ventilation. He also complained about the sanitary arrangements, which involved 'slopping out', and that he was excessively confined to his cell. A medical report stated that he suffered from an acute exacerbation of atopic eczema as a result of his conditions of imprisonment.

The court held that the petitioner had suffered a violation of article 3. Lord Macfadyen noted:

> *to detain a person along with another prisoner in a cramped, stuffy and gloomy cell which is inadequate for the occupation of two people, to confine them there together for at least 20 hours on average per day, to deny him overnight access to a toilet throughout the week and for extended periods at the weekend and to thus expose him to both elements of the slopping out process, to provide no structured activity other than daily walking exercise for one hour …, and to confine him to a 'dog box' for two hours or so each time he entered or left the prison was, in Scotland in 2001, capable of attaining the minimum level of severity necessary to constitute degrading treatment and thus to infringe article 3.* (Para 75)

Lord Macfadyen went on to consider the personal circumstances of the petitioner: he noted, in particular, the petitioner's serious outbreak of eczema, which the judge considered to be of 'crucial importance' to his finding of a violation of article 3 in this case. The court also found that the petitioner's detention in squalid conditions, together with the slopping out arrangements, amounted to an infringement of article 8. The infringement could not be justified under article 8(2): to confine the petitioner in such conditions was not 'necessary in a democratic society' for any of the purposes set out in article 8(2), including ensuring public safety or preventing disorder and crime. Lord Macfadyen accepted that the requirement for prisoners to share cells could be justified as an interim measure because of the increase in the prison population. However, he argued that steps should have been taken to adjust the regime and prioritise the elimination of slopping out.

The petitioner was awarded damages of £2,000 for distress and psychological symptoms and their impact on his physical health.

CATEGORISATION

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

[2004] EWHC 2069 (Admin)

In this case, Forbes J upheld a decision by the category A Review Team (CART) not to recategorise a category A prisoner, and to transfer him to a high security prison ('the decision'). The claimant is a mandatory life sentenced prisoner. He gave evidence at the trial of a fellow prisoner who had made admissions to him regarding the rape and murder of prostitutes. The prisoner was subsequently convicted.

Before the decision, the claimant had been held in local category A prisons due to concerns about his safety in the high security estate. However, the claimant had been advised that he might have to return to a high security prison in order to address his offending behaviour. The CART considered that the claimant should remain a category A prisoner, and be transferred to a high security prison to complete courses to address outstanding offending behaviour issues. In particular, it considered that he should complete the core sex offenders' treatment programme, which is only available in high security prisons.

The claimant alleged that the Prison Service had assured him that, due to the evidence he had given against a fellow prisoner, he would not be placed in a high security prison and his security category would be downgraded. However, the Prison Service disputed this. No application for cross-examination was made on the claimant's behalf to resolve this factual dispute.

Forbes J, therefore, held that the claimant had failed to prove that the assurance had been given. The judge also rejected the claimant's argument that the decision was flawed due to the CART's failure to consider the alleged assurance, and because it had breached the claimant's legitimate expectation that he would not be recategorised. Forbes J also rejected the claimant's argument that the decision violated his rights under article 2 of the convention. Article 2 protects the right to life, and imposes positive obligations on the state to take reasonable steps to protect an individual where it is established that there is a real and immediate threat to his/her life. Forbes J did not consider that the claimant had established that there was a risk to his life sufficient to engage article 2. The Prison Service had considered the claimant's concerns, and had carried out a careful risk assessment before transferring him to a high security prison. Furthermore, there was no evidence of any actual or immediate risk to his life or safety.

Forbes J concluded that the correct procedures had been followed, and that the decision was not irrational, perverse or unlawful. The CART and the deputy director general had properly applied the decision in *R (Pate) v Secretary of State for the Home Department* [2002] EWHC 1018 (Admin). Consequently, having considered the relevant circumstances relating to the claimant, they were entitled to conclude that he fell within category A, in terms of the risk that he would present to the public if he escaped and that, therefore, it was necessary to hold him in category A conditions.

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

[2004] EWHC 1817 (Admin)

The claimant challenged the decision to recategorise him from D to C and then from C to B. He challenged the basis for the decisions, and argued that he should have been given the opportunity to submit representations before they were made.

The decision to recategorise the claimant from D to C was based on:

- an outstanding compensation order, non-payment of which it was thought could result in the imposition of a default sentence;
- the possibility of this order being increased; and
- the possible public and press interest in his case.

The prison later also sought to justify this decision on the basis of the claimant's solicitor's attempt to hasten the claimant's transfer to open conditions.

The decision to recategorise the claimant from C to B was based on:

- the claimant's unsuccessful appeal against the compensation order;
- the possibility of a further compensation order being imposed as a result of civil action being taken against the claimant;
- the claimant's apparent access to unlimited financial resources and many criminal associates; and
- the claimant's application for a position in the garden, which gave him access to the perimeter fence.

Collins J considered that the prison could not justify its assessment of the claimant's increased escape risk for the reasons given. The governor had been made aware that the compensation order was covered by funds made available and in court. He had been informed that the figure by which he thought the compensation order would be increased

was exaggerated. The claimant had shown no signs of trying to escape and was unlikely to do so a year before his parole eligibility date. There was nothing to demonstrate that the claimant's request to work in the garden was linked to a desire to escape, and he had not been questioned about this. Furthermore, it was reasonable for the claimant's solicitor to try to expedite his transfer to open conditions.

Collins J did not accept that determinate prisoners should be given the right to make representations before recategorisation decisions were made. Such a requirement would place too great an administrative burden on prisons. A prisoner's right to appeal a recategorisation decision having been provided with reasons for the decision, and information relating to it, fulfilled the requirement of fairness.

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

[2004] EWHC 2251 (Admin)

In this case, two prisoners challenged the application of a revised Prison Service policy on the categorisation of prisoners as category D. In January 2004, the Prison Service reconsidered the categorisation of 22 prisoners (then categorised as category D and held in open conditions) who had over five years left to serve. This action followed an incident when a long-term prisoner absconded from open conditions and subsequently died. All of the prisoners were moved to closed conditions; 20 of them were then recategorised as category C prisoners, and so retained in closed conditions.

The claimants argued that the decisions to recategorise them were unlawful because they failed to take account of their individual circumstances: it was submitted that nothing had happened since they were granted category D status to justify an increase in their risk levels, and that no account had been taken of their good behaviour. The claimants argued that they had legitimate expectations to be treated in accordance with the published policy in PSO 900 (categorisation and allocation) and to retain their category D status provided that they complied with the regime applicable to them.

The judge decided, first, that the Home Secretary is entitled to adopt a revised policy at any given time. The length of time that a prisoner has left to serve is relevant in decisions about categorisation. Also relevant is the potential undermining of public confidence in the justice system by the placement of prisoners, with a long period to serve, in open prisons many years ahead of their release dates. Although the claimants would have a factual expectation that they would remain in open conditions provided they observed the relevant rules, they had no legitimate expectation that a revised policy could not be extended to them. Rather, their only legitimate expectation was that their cases would be considered individually in light of any lawful policy then adopted. A past decision under a previous policy does not prevent a further decision under a new policy (*Re Findlay* [1985] 1 AC 318). The judge also accepted that although the decision letters were in the same terms, which did not give confidence that the cases had been considered on their individual merits, the evidence before the court indicated that the specific circumstances of the claimants had been taken into account. However, the claimants were able to demonstrate that the policy was applied with inflexibility as follows:

- standard form reasons were given;
- two of the four prisoners were recategorised to category C despite being close to the five-year cut-off period, and returned to open conditions shortly after they passed that time;
- the evidence demonstrated that it was expected that most of those involved would be changed to category C; and
- the evidence did not indicate that the conduct of the claimants, both generally and since their categorisation as category D prisoners, had been taken into account, whereas it is clearly a relevant factor under the policy statements.

Accordingly, the judge decided that an unfair process had been followed in that the Home Secretary had not shown that he had taken into account the claimants' conduct. The decisions to recategorise them were set aside with a direction that they be reconsidered on the basis of the material available at the date of the fresh decision.

The Prison Service has now issued a new policy on the recategorisation of prisoners to category D (Prison Service Instruction 45/2004). The new policy confirms '… the importance of weighing time left to serve in the assessment for category D and in particular the extent of any impact on public confidence should a long sentence prisoner abscond'. It also confirms that 'Cases must be decided on their individual merits but to help those making the decisions the guidance is that prisoners must not normally be allocated to open prison any sooner than two years before their Parole Eligibility Date and more than five years before their Non Parole Date …'.

■ **R (TB) (by his mother and litigation friend LB) v Secretary of State for the Home Department**

[2004] EWHC 1332 (Admin)

This case concerned a challenge to the decision to hold TB, who was 16 years old at the relevant time, as a provisional category A prisoner. The categorisation decision was based on the information then available to the Home Secretary, and the nature and circumstances of TB's alleged offences (abduction and attempted murder). TB was held on the medical wing and was not allowed to associate with either young offenders or adult prisoners. He spent the majority of his days alone in his cell. Shortly before his 17th birthday, he was moved to the young offenders' wing on normal location with access to a normal and full regime.

It was argued that, by deciding to classify TB as a provisional category A prisoner and place him on the medical wing, the Home Secretary had acted in breach of his own policy which, it was claimed, prevented under 18-year-olds from being categorised as category A or provisional category A prisoners.

Having examined details of the policies on categorisation (PSO 0900) and on regimes for young offenders (PSO 4950), Charles J rejected this argument. He did not consider that PSO 0900, the Prison Security Manual or PSO 4950 prevented juveniles from being categorised as provisional category A prisoners or from being held in category A conditions. PSO 4950 concerns the regimes to be implemented in establishments where juveniles and young offenders are held, rather than applying to such inmates themselves wherever they are held. Furthermore, a service level agreement between the Home Secretary and the Youth Justice Board recognised that it would not always be possible to hold prisoners in the adult male estate under the regime standards set out in PSO 4950.

■ Hamish Arnott and Simon Creighton are solicitors at Bhatt Murphy solicitors and Nancy Collins is a solicitor at the Prisoners' Advice Service (PAS). The PAS is at Unit 210, Hatton Square, 16/16A Baldwin Gardens, London EC1N 7RJ. Tel: 020 7405 8090.