Marzari v Italy (1999) 28 EHRR CD 175) that duty had been met by the advice given and the offers of alternative temporary accommodation.

■ **Harrow LBC v Qazi**
[2001] EWCA Civ 1834, 3 December 2001[5]
The defendant had been a joint secure tenant of a council house that he had occupied since 1992. In 1999, the other joint tenant left and gave notice to quit thereby bringing the tenancy to an end. The council brought possession proceedings and the defendant relied on article 8 of the convention. In the county court, a recorder held that the defendant, having become a 'former tenant', had no legal or equitable interest in the house sufficient to claim that it was his 'home' for article 8(1) purposes. The Court of Appeal allowed an appeal. It held that:

■ 'home' had an autonomous meaning in the convention;

■ the test established by the ECtHR was one of fact (see *O'Rourke v UK*, above);

■ the relevant question was whether the property in question was a residence with which the occupier had sufficient and continuing links. *S v UK* (1986) 47 DR 274 (in which the European Commission had specified a legal right of occupation as essential to a finding of 'home') no longer represented the law of the convention.

On the facts, this was plainly the defendant's home. The case was remitted to the county court to determine whether the council could establish that the conditions in article 8(2) were met. Permission to appeal to the House of Lords was refused.

HOMELESSNESS

Suitability of accommodation

Where a local authority owes a duty to a travelling family to secure 'suitable' accommodation (eg, under HA 1996 ss188, 190(2), 193 or 200), must the form of accommodation offered enable the family to continue to enjoy its traditional way of life?

■ **Clarke v Secretary of State for the Department for Transport, Local Government and the Regions**
[2001] EWHC Admin 800, (2001) Times 9 November
The claimant, a Romany Gypsy, appealed against the refusal of planning permission to enable him to station a caravan for residential use on his land. The inspector took into account (against him) the fact that the claimant had been made an offer of conventional housing which had been refused. Burton J allowed a statutory appeal. He held that both the 'right to respect' in article 8 and the 'prohibition on discrimination' in article 14 of the convention would be infringed if the inspector could,in the case of a traditional Gypsy, take into account as 'suitable' alternative accommodation an offer of conventional housing which he refused to accept. He said:

It would be contrary to Articles 8 and 14 to expect such a person to accept conventional housing and to hold it against him or her that he has not accepted it,or is not prepared to accept it, even as a last resort factor (para 34).

It did not follow that planning permission had to be granted and the matter was remitted.

■ Jan Luba QC is a barrister at 2 Garden Court Chambers, London EC4. Nic Madge is a district judge.

1 Simon Mullings, Edwards Duthie solicitors, London.
2 Derek McConnell, Bobbetts Mackan, solicitors, Bristol.
3 Stephen Knafler, barrister, London.
4 Stephen Knafler, barrister, London.
5 Edward Fitzpatrick, barrister, London.

PRISONERS

Recent developments in prison law


Hamish Arnott, **Simon Creighton** and **Nancy Collins** continue the series of updates on the law relating to prisoners and their rights. This series of articles appears twice-yearly.

PAROLE AND LIFERS

Indeterminate sentences

The extent to which the Human Rights Act (HRA) 1998 will have an impact on regulating indeterminate sentences still remains unclear. Following the Criminal Court of Appeal's rejection of the appeal in *R v Lichniak and Pyrah* [2001] 3 WLR 933,which sought to argue that the mandatory life sentence breaches articles 3 and 5 of the European Convention on Human Rights ('the convention'), the Civil Court of Appeal has rejected the appeal of two mandatory lifers seeking to establish that the tariff-setting exercise should conform to the requirements of article 6 in *R (Anderson and Taylor) v Home Secretary* [2001] EWCA Civ 1698, thereby judicialising the process and removing the Home Secretary's role.

The Divisional Court had been sympathetic to the argument that tariff-setting is a classic sentencing exercise which should be a judicial function, but felt unable to apply article 6 as a result of previous European Court of Human Rights (ECtHR) decisions, most notably *Wynne v UK* (1994) 19 EHRR 333, which held that the mandatory life sentence authorised lifelong punitive detention. These views were shared by the Court of Appeal, with Simon Brown and Buxton LJJ explicitly stating that tariff-fixing is a sentencing exercise. Simon Brown LJ rejected submissions from the Home Secretary to the contrary commenting that setting the tariff is, 'in substance the fixing of a sentence, determining the length of the first stage of an indeterminate sentence – that part of it which … must be served in custody before any question of release can arise' (para 57). However, while the court recognised that the present situation in domestic law is not necessarily logical,two factors persuaded the court that it had no power to allow the applications.

First, the mandatory life sentence system has been upheld on numerous occasions by both parliament and the House of Lords,despite long-standing criticism. Woolf LCJ felt that this was an area where the courts,including the ECtHR, had shown deference to the will of parliament. Second, the decision of the ECtHR in *Wynne* has not been overturned or distinguished and was in fact reaffirmed in *V and T v UK* (1999) 30 EHRR 121, as the basis for distinguishing the sentences of detention at Her Majesty's Pleasure (HMP) and the mandatory life sentence. The ECtHR has recently admitted the case of *Stafford v UK* (see below) and expects to reach a decision in 2002. The Court of Appeal felt that it should be bound by decisions of the ECtHR given that court's superior expertise in the interpretation of convention rights. It was appropriate,given that the ECtHR was to be seised of this matter shortly, to defer to its decision.

The judgment does have potentially important implications for public law decision-making outside of the narrow sphere of tariff-setting. The view that it is always appropriate to defer to ECtHR decisions, as opposed to simply taking account of them as required by HRA s2, is somewhat controversial. Although leave to petition the House of Lords was refused, the Lords may wish to entertain a petition on this ground alone.

In terms of the wider picture for lifers and tariff-setting, the judgment does not sit easily with that given in *R v Lichniak and Pyrah*. In that case, one of the factors which prevented the mandatory life sentence from contravening articles 3 and 5 was the fact that it does not – save in a

very few cases where a whole life tariff has been set – actually mean lifelong detention. However, the legal and philosophical basis for rejecting the article 6 argument is that the sentence does authorise lifelong punitive detention. The House of Lords has already accepted a petition in that case and it is to be hoped that the two cases can be joined.

The position is further complicated by the decision which is awaited from the ECtHR in *Stafford v UK* (App No 46295/99). The application was declared admissible on 29 May 2001, the complaint alleging that there has been a breach of article 5(4) in respect of the arrangements for the release of a recalled mandatory life sentenced prisoner. In the domestic courts, the House of Lords found that it was lawful for the Home Secretary to refuse the release of a mandatory lifer, if there were concerns that s/he would commit a non-violent, imprisonable offence, even if there was no evidence of danger to the public. This contrasts with the test applied to all other categories of indeterminate prisoner who must be released if they do not pose a danger to the physical safety of the public. In Mr Stafford's case, he had been released from prison and recalled for committing offences of fraud. He has complained that,as there was no causal link between his recall and his original offence of murder and no evidence that he was still violent, the test applied by the Home Secretary to re-determine his re-release breaches article 5(4). The argument that the release of a mandatory lifer should attract the safeguards of article 5(4) (as happens for HMP detainees and discretionary lifers) mirrors the tariff-setting argument. If *Stafford* should prove to be successful, it will end the illogical position that the sentence authorises lifelong punitive detention and as a result will, inevitably, result in tariff-setting falling within the ambit of article 6.

A procedural issue concerning the requirements of article 5(4) in respect of the timing of parole reviews for automatic life sentenced prisoners was raised in *R (Kelly) v Home Secretary* [2001] EWHC Admin 331. The court clarified that when the Home Secretary has referred a case to the Parole Board ('the board') for an oral hearing and the board is unable to fix a date for the hearing within a reasonable period of time, any challenge should be directed to the board as the Home Secretary has discharged his functions under article 5(4). The discrepancy between the reluctance of the domestic courts to intervene in ensuring that reviews are held 'speedily' in accordance with article 5(4) and the approach of the ECtHR was emphasised again in *Hirst v UK* (App No 40787/98). The ECtHR found a breach of article 5(4) in the case of a discretionary lifer where the usual two-year period had been set between reviews. The government's attempts to rely on the fact that the board had not recommended an early review were rejected as the court did not consider this point as decisive. The facts of Mr Hirst's case were not particularly exceptional and there was no doubt that further offending behaviour work was necessary. The finding of a violation in this case seems to demonstrate the widening gulf between the oversight of the domestic courts in this area and the close attention paid to it by the ECtHR.

The issue of licence conditions for released mandatory lifers was examined in some detail in *R (Craven) v Home Secretary and Parole Board* [2001] EWHC Admin 850. The claimant sought to challenge the necessity for certain conditions to be placed on his licence which prevented him from coming into contact with the family of his victim. The facts of the case were complex but, as Burton J stated, the judgment simply applied previous authority. The key points to emerge were:

- The licence conditions of a released mandatory lifer fall within the ambit of article 8.
- Restrictions can be placed on freedom of movement through those licence conditions pursuant to article 8(2).
- While victims and their families have no role to play in deciding on the release or licence conditions of prisoners, their views and, in particular, any wishes expressed to prevent contact between them and the released prisoner are legitimate concerns in a democratic society.
- Obtaining the views of the victim's family is not the same as refusing release on the grounds of 'public acceptability'.

Determinate sentences

The application of article 5(4) principles to prisoners serving determinate prison sentences was considered in *R (Giles) v Parole Board and Home Secretary* [2001] EWHC Admin 834. The application was made by a prisoner serving an extended sentence pursuant to Criminal Justice Act (CJA) 1991 s2(2)(b) (which has now been replaced by Powers of Criminal Courts (Sentencing) Act (PCC(S)A) 2000 s80 (2)(b)). The statute empowers the sentencing court to impose a sentence that is longer than is commensurate for the offence committed on the grounds of public protection. In Mr Giles' case, a total sentence of seven years was imposed on the grounds that he had a personality disorder which might be amenable to treatment.

Mr Giles argued that the imposition of a longer than usual sentence on 'protective grounds' was virtually identical to the imposition of a discretionary life sentence and that, following the expiry of his punitive term, he should be entitled to an oral hearing to determine his release under the provisions of article 5(4). The major obstacle to this apparently straightforward argument is that the European Commission ('the commission') rejected an identical complaint by an English prisoner several years ago (*Mansell v UK* (App No 32072/96) – this case having also been dismissed by the Court of Appeal). The court, on this occasion, felt able to depart from previous Court of Appeal decisions and to reject the views of the commission on the grounds that it was now explicit that the extended sentence specifically contained an identifiable punitive and protective element. The clarification that the sentence had two clearly identifiable parts had been obtained by the Court of Appeal in *R v Chapman* [2000] 1 Cr App R 77 (a case where the previous Lord Chief Justice had quashed a life sentence and imposed an extended sentence in its place).

The court granted leave to appeal to the defendants and it is likely that this issue will come to be decided by the Court of Appeal. The one issue which remains unclear at present is at which precise point of the sentence article 5(4) rights are engaged. The declaration granted is perhaps worth repeating in full as this provides the best guidance to that calculation:

Where a person has been sentenced pursuant to section 80(2)(b) of the Powers of Criminal Courts (Sentencing) Act 2000 (or its statutory predecessor),once he is detained in circumstances where he would have been released but for the imposition of the additional element of the sentence imposed by virtue of that subsection,his continuing period of detention shall be subject to Article 5(4) of the European Convention on Human Rights such that it will need to be reviewed periodically at reasonable intervals by a procedure compliant with Article 5(4) to determine whether the continued detention remains necessary to protect the public from serious harm.

It is also worthy of note that, in cases where prisoners serving sentences with extended licence periods under PCC(S)A s85 are recalled to prison following release on licence, the Prison Service and the board have already accepted that an oral hearing is required.

In *R (McCalla) v Parole Board* [2001] EWHC Admin 396, Burton J dismissed a challenge to a

refusal by the board to conduct a special review for a prisoner who had been refused parole on his last scheduled parole review. The claimant had been refused parole because, inter alia, he had not been able to complete a particular course. The fault lay with the Prison Service that had failed to make it available to him. After he had completed the course, the board refused to reconsider his case on the grounds that there was no 'exceptional change in his circumstances'.

Burton J made it clear that the provision for special reviews in exceptional circumstances was a wide one and the board's evidence in the proceedings – that it would only agree to reconsider cases where it had made an error of fact or law – was too narrow. However, despite this general evidence, he found that the evidence relating to the particular case indicated that the board had considered the individual circumstances of the case and had reached a conclusion that the change in circumstances was not exceptional enough to justify reconsideration. He pointed out that if the completion of a course was deemed to be an exceptional change in circumstances, this could arguably apply in every case where there was a change in circumstances and this would make the system of annual reviews (as provided for in statute) unmanageable. It is unsurprising that the court should find in the board's favour on what was, ultimately, a *Wednesbury* challenge. But it does highlight the wider problem that prisoners face in obtaining places on courses for which they have been recommended. The judgment illustrates the need for prisoners to challenge managerial decisions which prevent them from attending relevant offending behaviour courses contemporaneously and before the board comes to consider their case.

CATEGORISATION

The difficulties faced by category A prisoners in seeking to challenge decisions were again illustrated in the cases of *R (Sunder) v Home Secretary* (unreported, 5 May 2001), where permission was refused and *R (Williams) v Home Secretary* [2001] EWHC Admin 516. In *Sunder*, it was argued that articles 5(4) and 6 apply to the category A review process on the basis that it has a direct impact on the prospects of release. The court rejected these submissions on the grounds that categorisation was simply part of the administration of a sentence which had been lawfully imposed by the courts (thereby lawful under article 5(1)(a)) and did not engage any further rights under article 5(4). Similarly, article 6 was not considered to be relevant as the decision cannot be viewed as a 'criminal charge'.

In *Williams*, the question of whether article 5 is engaged was more relevant as it related to a categorisation decision made in respect of a post-tariff discretionary lifer. He sought a declaration that full disclosure of all reports relating to risk should be made for all post-tariff discretionary lifers. In his case,his last discretionary lifer panel had taken the view that the claimant should be downgraded and commented on the impasse that appeared to have developed. Further arguments were put forward including an allegation of possible bias as the claimant had successfully escaped from custody earlier in his sentence causing enormous embarrassment to the Prison Service.

Richards J rejected the claim, relying on the decisions in *R v Secretary of State for the Home Department ex p McAvoy* [1998] 1 WLR 790, where the Court of Appeal had approved the current procedures for determinate prisoners and *R v Secretary of State for the Home Department ex p Burgess* (unreported, 3 November 2000), where it was held that security classification, unlike parole, does not attract the protection of article 5(4). While the judgment is fairly forceful in its conclusion, its analysis is fairly short and does little to engage in the complexities of the arguments put forward. The Court of Appeal has now granted leave and it is to be hoped that the difficult issues will now be addressed more thoroughly.

PRISON DISCIPLINE

In July 2001, the Court of Appeal heard the conjoined appeals of *R (Carroll, Al-Hasan and Greenfield) v Home Secretary* [2001] EWCA Civ 1224 (see June 2001 *Legal Action* 10 for discussion of the cases in the Divisional Court). Woolf LCJ gave the court's judgment,which primarily considered the applicability of article 6 of the convention to prison disciplinary hearings.

Two of the appellants had been charged under the Prison Rules 1964 with disobeying a lawful order to squat during a strip search. They were found guilty of the charge and received various punishments including in one case two additional days' imprisonment. The third was charged with taking a controlled drug after failing a mandatory drug test (MDT) and was punished with 21 additional days' imprisonment.

Woolf LCJ, as had the Divisional Court, rejected submissions that these disciplinary charges gave rise to issues under article 6. If they were 'criminal charges' within the meaning of the convention then the prisoners would be entitled to legal representation and a hearing before an impartial tribunal. The key issue was the effect of the punishment of imposing additional days. The court rejected an argument that the Criminal Justice Act 1991 fundamentally changed the nature of this punishment from loss of a privilege,to one of a fresh period of imprisonment. This was crucial, as the ECtHR has almost always characterised charges where the punishment is loss of liberty as 'criminal' within the meaning of the convention.

Woolf LCJ held that the sentence pronounced in court following conviction is 'the actual period of the sentence … [t]he awards of additional days to be served by each of the appellants did not have the effect of adding to their sentence. It was not a fresh sentence of imprisonment'. He thus upheld the Prison Service's own characterisation of the effect of additional days as a deferral of release dates within a lawfully imposed sentence, rather than as a fresh loss of liberty.

Woolf LCJ went on to consider whether prison disciplinary charges could be criminal by application of the well-known three-fold test set out in *Engel v Netherlands* (1976) 1 EHRR 647. This test looks first, at the categorisation of the charges in domestic law. Here, the charges were classified as disciplinary rather than criminal. However, the key criteria were the second and third, namely, the nature of the offence and the severity of penalty imposed. Looking at these, Woolf LCJ considered that in the 'disobeying a lawful order' cases they pointed 'uncontestedly' to no criminal charge being involved. The nature of the offence was disciplinary with no criminal equivalent, and the penalties imposed were relatively small.

He considered that the MDT case was stronger as there was an analogous criminal offence (possession of a controlled drug) and there was a larger actual penalty and a greater risk of the maximum 42 additional days being imposed. However, as the appellant only received half the maximum punishment, and the charge retained a 'disciplinary connotation', Woolf LCJ again found that article 6 was not engaged. Unlike the Divisional Court,however, Woolf LCJ did not rule out the possibility of a finding that article 6 may apply in the appropriate case. Commenting on the 21 additional days given for the MDT case, he stated that 'the power of punishment was not disproportionate for a disciplinary offence although it is close to the borderline which divides disciplinary punishment from that which is appropriate in the case of a crime'. Clearly, this suggests that in a case where the charge in question is clearly also criminal, such as assault, and there is a punishment of close to the maximum additional days, that the courts may find that article 6 is engaged.

This issue will not,however, be decided domestically before the ECtHR gives judgment in the case of *Ezeh and Connors v UK*, which is expected imminently at the time of writing. In one of these cases, the prisoner concerned was charged with using threatening language and was given 40 additional days as a punishment. Here, the charge has a clear criminal equivalent and the punishment is just below the maximum. Leave to appeal to the House of Lords in the MDT case, ie, *Greenfield* was adjourned pending the decision in *Ezeh and Connors*.

The Court of Appeal also rejected other arguments regarding the fairness of the disciplinary hearings concerned, and also considered the legality of requiring prisoners to squat during a strip search without being given the reasons for the requirement. The Divisional Court had accepted that interference with a fundamental right was at issue. Therefore, it maintained that such a search, as it was not expressly authorised by statute, could only be carried out where there was a substantial objective justification amounting to a compelling need. It found such justification on the facts. On the issue of reasons, Woolf LCJ in the Court of Appeal held that reasons need not be given to the prisoner, but if squatting was required on an individual basis then the officer should record the reasons. If there was 'group suspicion' then the order should be given by a governor grade. In upholding the legality of the searches, he commented that 'prisoners are sent to prison by the courts, not for punishment but as a punishment. Nonetheless, loss of liberty, security and control are essential parts of the disciplinary process of a prison'.

PRISON CONDITIONS

The commission and ECtHR have generally been highly reluctant to find breaches of article 3 of the convention, ie, the prohibition on inflicting torture, inhuman or degrading treatment because of conditions alone. However, in *Dougoz v Greece* (ECtHR 6 March 2001), the court did find that the conditions that a detainee was held in pending removal from the country were bad enough to breach the article. The applicant had been held in grossly overcrowded accommodation where there were no beds or bedding, for about 17 months. The court found that the conditions amounted to degrading treatment after taking into account the cumulative effect of the conditions, the fact that the government did not dispute the allegations of overcrowding and lack of bedding and criticisms of the detention centres in question by the Committee for the Prevention of Torture.

In another case before the ECtHR, *Price v UK* (ECtHR 10 July 2001, App No 33394/96), a woman who was a wheelchair user and four-limb deficient due to the drug Thalidomide, complained about the conditions in which she was held in police detention and thereafter at New Hall prison. She had been committed to prison for four days for contempt of court in civil proceedings. The police cell in which she spent one night was unadapted for her needs, it was also too cold, and she could not use the bed. No efforts were made to move her although she was given painkillers and a 'space blanket'. She was then held for two nights in the healthcare centre of New Hall prison where again her cell was un adapted and she had problems using the bed and accessing the toilet. By the time of her release, the applicant had to be catheterised because the lack of fluid intake and problems in getting to the toilet had caused her to retain urine. Prior attempts to move her to an outside hospital had failed,as she was not suffering from any particular medical complaint.

The court commented 'that to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty, constitutes degrading treatment contrary to Article 3'. An award of £4,500 compensation was made (see page 11 of this issue).

DEATHS IN CUSTODY

In *Orange v Chief Constable of West Yorkshire Police* [2001] 3 WLR 736, the Court of Appeal considered the scope of a custodian's duty of care to protect people detained in custody from the risk of committing suicide. The appellant was Mr Orange's wife. He had committed suicide by hanging himself with his belt in a police cell. She sought an appeal of the decision of Finnerty J to dismiss her claims, on the ground that the police officers dealing with Mr Orange had no reason to believe that he presented a suicide risk and, therefore, had no duty of care to protect him from the risk of suicide. The appellant argued that the court should recognise that those who have been taken into custody, whether in police stations or in prison,are at increased risk of committing suicide, and that those responsible for prisoners owe a duty of care to all prisoners to take steps to reduce the risk of suicide.

In dismissing the appeal, the court held that while custodians have a duty to take reasonable care of the health and safety of prisoners, this duty does not mean that each prisoner should be treated as though s/he were a suicide risk. Rather, this duty requires custodians to take reasonable steps to identify whether or not a prisoner presents a suicide risk. The specific obligation to take steps to prevent a prisoner from taking his or her own life only arises where a custodian knows or ought to know that an individual prisoner presents a suicide risk.

The key requirements of investigations following deaths in custody, as required under article 2 of the convention have recently been considered by the High Court in two important cases. These cases also demonstrate that, in principle, since the coming into force of the HRA, a remedy is now available in the domestic courts to enforce the state's procedural obligation under article 2.

In *R (Wright and Bennett) v The Home Office* [2001] All ER (D) 204, proceedings were brought by the family of a prisoner who died from an asthma attack while locked in his prison cell. The family argued that his treatment in the period leading up to his death constituted a breach of articles 2 and 3, and that the Home Office's failure to investigate the death was a continuing breach of the procedural obligation to enquire into breaches of those articles.

Jackson J considered that Mr Wright's treatment did amount to a breach of articles 2 and 3 (the medical treatment given to him was seriously deficient and in the moments leading up to his death he would have endured considerable pain and suffering). Furthermore, the court held that the defendant's duty to investigate Mr Wright's death had not been discharged by the inquest,or proceedings brought under the Fatal Accidents Act 1976. In assessing whether the authorities had carried out an effective investigation, the court referred to the requirements set out in *Jordan and others v UK* (App Nos 24746/94, 28883/95, 30054/96 and 37715/97),which identified the following features as being necessary to ensure an investigation is compliant with article 2:

- the investigation must be independent;
- the investigation must be effective;
- the investigation must be reasonably prompt;
- there must be a sufficient element of public scrutiny; and
- the next of kin must be involved to the appropriate extent.

The court held that these requirements had not been met in this case and concluded that the claimants were entitled to an

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order that the Home Secretary set up an investigation into the circumstances of Mr Wright's death. The Home Secretary is not appealing against this decision.

The case of *R (Amin) v Home Secretary* [2001] EWHC Admin 719, concerned the death of a 19-year-old man,Zahid Mubarek, in Feltham Young Offenders Institution (YOI),who was bludgeoned to death in an horrific attack by his violent and racist cell-mate (see January 2001 *Legal Action* 6). The thrust of the challenge in this case concerned the failure to hold an open and public investigation,in which the family could participate in a meaningful manner, into why Mr Mubarek was sharing a cell with his assailant on the night of the murder. Following the decision in *Wright* and with reference to the *Jordan* case, the court rejected the Home Secretary's argument that the procedural requirements of article 2 had been fulfilled, stating that neither the internal inquiry nor the criminal trial constituted an effective investigation for the purposes of the procedural obligation in article 2. Accordingly, the court has ordered the Home Secretary to set up an independent investigation. The Home Secretary is appealing against this decision.

ARTICLE 8 OF THE CONVENTION

Mother and baby units

In *R (P and Q) v Home Secretary* [2001] 1 WLR 2002, two serving prisoners appealed against the decision of the Divisional Court on 17 May 2001 to dismiss their challenges to the lawfulness of aspects of the Prison Service's policy in relation to mother and baby units,and the application of that policy in these two cases. In the Divisional Court, Woolf LCJ had held that the policy was a legitimate interference with article 8 rights on the grounds that the Prison Service is entitled to have a system of priorities for the allocation of places in mother and baby units.

The Court of Appeal disagreed with this view, having been strongly influenced by issues of child welfare. While it held that the Prison Service was entitled to have a policy of the kind under challenge, the court considered that it was not entitled to operate the policy in a rigid fashion. Thus, the Prison Service should not insist that all children must leave the unit by the age of 18 months at the latest (give or take a few weeks if the mother is about to be released) regardless of how catastrophic the separation might be in any particular case, how unsatisfactory the alternative placement available for the child and how unattractive the alternative solution of combining day care outside prison.

The court reached this conclusion for two reasons. First, the stated aim of the policy is to promote the welfare of the child. The court noted that it would be contrary to this policy if the effect of separating the child from its mother at 18 months had catastrophic effects on a child's welfare. Second, on the proper application of article 8 of the convention, there might be rare exceptions where the interests of the child outweigh any other considerations arising from the fact of the mother's imprisonment and the implications of any relaxation of policy on the individual prison and the Prison Service generally. On the individual facts of the two cases,one appeal was allowed and one was rejected. The judgment emphasised the importance of having coherent and compelling evidence to support any argument that the policy should be not be followed in any given case. The court also suggested that in applications of this type, arrangements should be made to ensure that a judge from the Family Division could hear the case.

Assisted prison visits

In *R (McManus) v Head of Assisted Prison Visits* [2001] EWCA Civ 966, the applicant sought leave to appeal the refusal of permission to challenge the limitation of the amount that the Assisted Prison Visits Unit was prepared to allow him to visit his son in prison. He relied on article 8 of the convention. Permission to appeal was refused. The judge recognised that the applicant's ability to visit his son in prison formed part of the applicant's family life, and that his right to respect for his family life was being interfered with. It was suggested that an unwarranted ban on prison visits might amount to a breach of article 8 rights. However, the judge was reluctant to enter into a debate about how much state assistance should be provided to enable people to travel to prisons to visit relatives, and suggested that much more evidence was required than that put forward by the applicant to show the current amount of 11 pence per mile was insufficient.

RIGHTS AND PRIVILEGES

Electoral rights

The Court of Appeal refused permission to appeal the Divisional Court's decision to dismiss two applications challenging Representation of People Act (RPA) 1983 s3(1), which prevents prisoners from voting in parliamentary or local elections (*R (Pearson and Martinez) v Home Secretary* [2001] EWCA Civ 927). The appeal was refused on the basis that it did not have any real prospects of success. The judge stated his belief that RPA s3(1) did not breach the convention, and that parliament alone could abolish that section or narrow it, as it deemed appropriate.

DETENTION IN CUSTODY

Unlawful discrimination

In *R (SR) v Nottingham Magistrates'Court* [2001] EWHC Admin 802, a 16-year-old boy made an application for judicial review of the decision to remand him in custody pending sentence in Onley YOI. He also sought a declaration that Crime and Disorder Act (CDA) 1998 s98 is incompatible with the convention because it unlawfully discriminates against 15- and 16-year-old boys in contrast with girls of the same age, when they are remanded in custody pending trial. He argued that this was a process in which their article 5 rights are engaged.

In considering the question of discrimination, the court took note of the defendant's argument that the justification for the apparently discriminatory effect of CDA s98 was based on the need to protect the article 8 rights of 15- and 16-year-old girls. It was argued that the discriminatory policy could be justified by the legitimate objective of detaining all juvenile defendants on secure remand in appropriate accommodation within reasonable visiting distance of their homes. When the policy decision was made there were too few juvenile females remanded in custody to allow a network of specialist juvenile YOIs to be developed to provide secure accommodation for female juveniles close to their homes. It was therefore decided that girls should be given preference with regard to being held in the limited local authority secure units available at that time.

Accepting these arguments, the court held that CDA s98 was not incompatible with the claimant's convention rights. However, the court noted the evidence put forward by the Howard League for Penal Reform which highlighted findings of high incidences of suicide and self-harm of 15- to 17-year-olds held in custody. The Howard League suggested that this phenomenon arises due to the remand regimes, which tend to be extremely limited, involving little or no education and being locked up for long hours. The court stated that this evidence provides grounds for concern that there is discriminatory treatment between 15-year-old boys and 15-year-old girls remanded in custody, which might not be so easy to justify. Permission to appeal has been granted.

■ Hamish Arnott and Simon Creighton are solicitors at Bhatt Murphy solicitors and Nancy Collins is the 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.