law & practice

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

In October 2002, the government announced the interim arrangements for the review of mandatory life sentenced prisoners following the *Stafford v UK* (App No 46295/99) judgment (see July 2002 *Legal Action* 34). The new arrangements provide that all parole reviews for mandatory lifers which are due to commence on or after 1 January 2003 should first be considered on the papers by the Parole Board ('the board'). If either the prisoner or the Home Secretary is not happy with the recommendation made, a request can be made by either party for an oral hearing (which will follow the discretionary lifer panel format). David Blunkett, the Home Secretary has also confirmed that, in most cases, he will accept any recommendation made by the board for release.

The arrangements are designed to ensure that all mandatory lifers approaching their tariff expiry do have a review which generally complies with article 5(4) of the European Convention on Human Rights ('the convention'). However, the system works less well for those lifers who have served over their minimum terms (or tariffs) as their entitlement to an article 5(4) review is dependent on the vagaries of the timing of their last scheduled review. Given that the test now to be applied on release is the 'risk of serious harm' rather than the 'risk of committing any imprisonable offence', these arrangements are unlikely to prove satisfactory to those mandatory lifers who have felt dissatisfied with their previous parole reviews. The other difficulty is that the arrangements still breach article 5(4) insofar as the final decision on release remains an executive one. In the recent case of **Benjamin and Wilson v UK** (App No 28212/95, 26 September 2002), the European Court of Human Rights (ECtHR) held that the Home Secretary's role in the release of two 'technical lifers' was in breach of article 5(4) as it was an executive rather than a judicial decision, and it mattered not that he claimed always to act in line with the recommendation of the Mental Health Review Tribunal. The ECtHR observed: 'This is not a matter of form but impinges on the fundamental principle of separation of powers and detracts from a necessary guarantee against the possibility of abuse ...' (para 36)

On a more positive note, the new practice introduced by the interim arrangements of allowing for a paper consideration to be followed by an oral hearing, if necessary, is very sensible. It will ensure the speediest possible determination for prisoners of their parole applications without diminishing their convention rights. It has been proposed to extend this system across the whole range of oral parole hearings to help deal with the huge, new demand that will be placed on the board.

The long-anticipated decision of the House of Lords in **R (Anderson) v Home Secretary** [2002] UKHL 46, found, as expected, that in light of the *Stafford* decision the setting of the minimum term for mandatory lifers is a sentencing exercise and, therefore, falls within the protection of article 6 of the convention. The judgment is remarkably succinct given its importance, essentially because the logic of applying article 6 to the minimum term was inescapable once it had been decided that article 5(4) applied to the release of such prisoners. This decision will now, in practice, end the distinction between the different types of life sentences for the purposes of sentencing and release.

The Lords unanimously held that Crime (Sentences) Act 1997 s29, which confers the power to set the minimum sentence on the Home Secretary, cannot be read compatibly with the convention and that the only option open to them was to make a declaration of incompatibility with the convention. While this was always a likely finding, particularly in light of the *Benjamin and Wilson v UK* decision (above), it does create enormous uncertainty for those lifers who had their tariffs increased over the judicial recommendation. The Home Secretary stated in response to the judgment that:

We will need to study the judgment carefully before finalising our proposals but I therefore intend to legislate this Session, to establish a clear set of principles within which judges will fix minimum tariffs in the future. These principles will be debated and agreed by both Houses of Parliament, and in setting minimum sentences a judge must, in open court, give reasons if the term being imposed is inconsistent with those principles. (Home Office statistics 041-02)

The indications are that the legislation will not be enacted until autumn 2003 and that it is highly likely to contain required bands for the setting of the minimum term with reference to the different categories of murder, and the various mitigating and aggravating features set out by Lord Chief Justice Woolf in his practice direction on life sentences. The effect of such legislation means that there is no certainty that the length of the minimum term will automatically be reduced to the judicial recommendation as a result of the reconsideration. The delay before this is to be resolved is highly problematic for lifers who have served longer than the judicial recommendation, but less than the term set by the Home Secretary. People in this position it seems are left with no domestic remedy to ensure the speedy determination of the proper length of their sentence and the only option is a complaint to the ECtHR which is unlikely to have any short term, practical benefits.

The same panel of Lords contemporaneously gave judgment on the appeals against sentence in **R v Lichniak and Pyrah** [2002] UKHL 47 (see January 2002 *Legal Action* 18), where it was argued that the mandatory life sentence following a conviction for murder is arbitrary and breaches both articles 3 and 5(1) of the convention. The arguments for the appellants were largely based on the views of the Court of Appeal in *R v Offen* [2001] 1 WLR 253, where it was held that the imposition of the automatic life sentence following a second serious conviction was in breach of article 5 absent a power on the part of the sentencing court to consider the individual circumstances or dangerousness of the person convicted. In *Offen*, the Court of Appeal read that power into the statute.

Lord Bingham distinguished *Offen* on a number of grounds, including the fact that deference had to be shown to the long settled will of parliament, the mandatory sentence of detention at Her Majesty's Pleasure had not been criticized by the ECtHR and that it was understandable that society might want to mark a particular disapproval of the unique crime of murder. He did comment, however, that had the decision in *Anderson* been different, the appeals would have succeeded:

If the House had concluded that on imposition of a mandatory life sentence for murder the convicted murderer forfeited his

liberty to the state for the rest of his days, to remain in custody until (if ever) the Home Secretary concluded that the public interest would be better served by his release than by his continued detention, I would have little doubt that such a sentence would be found to violate articles 3 and 5 of the European Convention on Human Rights ('the convention') as being arbitrary and disproportionate. But Anderson, following earlier authority, makes plain that such is not the effect of the sentence. (para 8)

While the application of articles 5 and 6 of the convention to indeterminate sentencing has now been categorically established, the extent to which article 5 applies to any aspect of the parole process for prisoners serving determinate prison sentences is still open to debate. In **R (Giles) v Parole Board** [2002] EWCA Civ 951, the Court of Appeal overturned a finding by the Administrative Court that article 5(4) applied to the review of the need for the continued detention of persons serving longer than commensurate custodial sentences (imposed under Powers of Criminal Courts (Sentencing) Act 2000 s80(2)(b)) once the punitive term of the sentence has been served. These sentences are imposed in cases where it is considered that individual characteristics of the defendant, such as his/her mental instability or previous record, justify the conclusion that a longer than usual sentence is needed to protect the public, but where the offence is not serious enough in itself to justify an indeterminate sentence (*R v Chapman* [2000] 1 Cr App Rep 77).

Kennedy LJ gave the leading judgment and, somewhat surprisingly, held that article 5(4) was not engaged. Although he expressed some difficulty with the European Commission's reasoning in a case rejecting an identical argument (*Mansell v UK* [1997] EHRLR 664), he felt that the twin issues of retribution and public protection were inherent in all sentences and that the longer than commensurate sentence was fixed because the sentencing judge felt able to fix the appropriate term. Thus the trial process and right to appeal provided the necessary protection under article 5. 'In the type of case with which we are concerned a period of time is fixed precisely because the sentencing judge considers that he or she is in a position to fix it even though it is clear that in many cases the risk which an offender will present to the public is capable of fluctuating with the passage of time.'

This judgment does not really provide a definitive answer to this issue, particularly as previous authorities on it are inconsistent and do not provide a coherent body of case-law. This was perhaps recognised by the Court of Appeal which granted leave to appeal to the House of Lords where it is to be hoped, whatever the outcome, that there will be greater clarity on this matter.

Determinate sentences

The position of prisoners serving determinate sentences who are recalled to custody was also left in some confusion after the Court of Appeal decision below. Usually, prisoners serving a sentence of less than four years are released automatically on licence after serving one half of the sentence, but remain liable to be recalled to custody until three-quarters of the sentence has been served if it is considered that the licence conditions have been breached. The board has the power to direct release (Criminal Justice Act 1991 s39(5)) if it does not consider the recall to have been necessary.

■ **R (West) v Parole Board**
[2002] EWCA Civ 1641

It had originally been argued on behalf of the claimant that both articles 5 and 6 of the convention applied to the recall decision on the grounds that the board was being asked to make a determination of fresh factual issues about the need for the prisoner to continue to be detained after release had taken place. However, on appeal only, the article 6 argument was continued, the claimant arguing that once release had taken place, any decision to re-detain had the independent characteristics of a fresh criminal charge irrespective of the domestic definition of the process (relying largely on the ECtHR *Engel* criteria of the definition of criminal proceedings as applied in the case of *Ezeh and Conners v UK* (App Nos 39665/98 and 40086/98, 15 July 2002) concerning prison discipline (see below and also January 2002 *Legal Action* 21)).

In a confusing judgment, the three appeal judges all gave different reasoning. Simon Brown LJ held that the original sentence authorized the fresh detention and that there was no new application of article 6 as the reason for the fresh detention was essentially protective rather than punitive.

In short, I accept Mr Crow's core submission that the rationale of prisoner recall is protective and preventive, not punitive and deterrent; the decision taken (initially by the Home Secretary and then by the board) is that, having regard to the risk now shown to exist, it is necessary for the protection of the public that the offender serve the balance of his existing sentence (up to the three-quarter stage) in prison rather than on licence, and thereafter be released conditionally instead of unconditionally. Unlike the position in Ezeh and Connors, the same sentence is being served and it is being served for the same offence. Ezeh and Connors, indeed, proves on analysis to provide no real help on the issue of classification under article 6; all it does is to apply the three part Engel test on its own particular facts. (para 30)

In contrast, Hale LJ was of the opinion that the recall decision has many similarities with the imposition of additional days onto a prison sentence. Her reasoning was based on the view that if the original conviction does not contain authority to allow further detention past the usual release date where allegations of breaches of prison discipline are made, it is difficult to import such authority into a physical return to prison custody following release where the return is based on new allegations of misbehaviour. She concluded her judgment with the following observation:

I recognise that this conclusion has serious practical implications. The problem lies in a system which imposes fixed terms of imprisonment and then entitles the prisoner to be released half way through irrespective of whether or not he is at that stage thought to be at risk of committing further offences. But once the prisoner has been released, the notion that he can be recalled to prison because of his subsequent behaviour without any form of hearing to defend himself is if anything more serious than keeping him in prison a little longer because he has offended against its necessary disciplinary code. (para 56)

Sedley LJ sided with Simon Brown LJ commenting that:

My reasons correspond with those set out by Simon Brown LJ. In short, at least under the ministerial guidance in force at the material time, recall is not the addition of a fresh period of imprisonment to one which is now spent; in the case of a short-term prisoner it results from an assessment of risk to the public in the light of new developments; in the case of the discretionary release of a long-term prisoner it represents a revision in the light of developments of the Boards earlier assessment of risk. (para 43)

Although the majority view was against the appellant prisoner, both Sedley LJ and Simon Brown

LJ expressed concern at the procedural standards of fairness applied when such recall decisions are made. Their judgments make it clear that the board must adopt a more flexible approach to the procedures adopted at recall hearings given the importance of the right at stake, and that fairness might require that an oral hearing is convened. The test that is applied by the board when deciding on the release of an indeterminate prisoner under article 5(4) was raised in **R (Hirst) v Parole Board** [2002] EWHC 1592 (Admin). The case was a pre-emptive challenge to the board seeking to clarify the test that should be applied when determining whether a discretionary lifer is safe to be released from prison custody.

The long-standing case-law on this issue is that release should be ordered where the prisoner does not pose a risk of serious harm to the public, but previous decisions have refused to engage fully in the question of whether the burden rests on the prisoner to prove s/he does not pose a risk or on the Home Secretary to prove that s/he does. The argument put forward by the claimant in this case relied strongly on the finding that, in the field of mental health detention, article 5(4) requires the Secretary of State for Health to prove the need for continuing detention (*R (H) v North London and East Region Mental Health Review Tribunal (Secretary of State for Health intervening)* [2001] 3 WLR 512).

The court held that the application was premature, largely because it was impossible to establish that the claimant had been the victim of an unlawful act until the board had made a decision on the substantive parole hearing. Furthermore, Moses J found it impossible to make a determination without a factual matrix on which to make an assessment of the approach that the board adopted. Although he distinguished the basis for detention under the Mental Health Act (MHA) 1983 from detention following a conviction, he accepted that there was potentially a very important matter to be determined but, as risk assessment is so dependent on individual facts, it was impossible to exercise a judgment in a vacuum. The decision is not surprising given that the assessment of risk is so fact sensitive. Interestingly, in *Lichniak* (above), Lord Bingham commented that he doubted that the burden of proof rests on the prisoner because the duty of the board is to consider all available material and perform a balancing act between the interests of the individual and society. In the case of a person convicted of murder, he suggested that in any case of doubt the interests of society should prevail over the individual interest (para 16 of the judgment). These comments appear to cast a more restrictive approach to the problem than in *Hirst*, making future challenges on this point even more difficult.

A rather unusual case examined the interrelationship of the recall provisions with detention under the MHA, and went on to comment on the assessment of time spent unlawfully at large where a prisoner released on licence has the licence revoked.

■ **(R (S) v Secretary of State for the Home Department and Parole Board**

[2002] EWHC 2424 Admin

The claimant had been released on licence and while still subject to that licence, was detained in hospital under MHA compulsory powers. A decision was made to revoke the licence and recall him to prison custody, and even when it was established that he was in hospital, the recall procedure was continued to allow for further detention should he be discharged from the hospital. This decision was not conveyed to the claimant and, while still in ignorance of the revocation of his licence, he absconded from the hospital. He was arrested on the following day and taken into prison custody where he made representations contesting his recall which were eventually rejected by the board. The prisoner contested the legality of his recall while he was in detention subject to the MHA order and it was accepted in evidence that there had been no intention to physically recall him to prison prior to his abscond, but that the decision was more of a 'safety measure'.

The court held that the decision to recall the claimant to prison custody without consultation with the hospital was flawed given that he was detained in hospital for treatment. Furthermore, once the claimant was received into prison custody, immediate consideration should have been given to a transfer to hospital under MHA s47. Interestingly, the court went on to consider whether it was lawful for the claimant to be considered to be unlawfully at large from his prison sentence during the time between the revocation of the licence and his arrest. It was held that a person cannot be deemed to be unlawfully at large at a time when he is unaware that his licence has been revoked. This aspect of the judgment appears to have been based on the court's concern that the licence was revoked when the claimant was already detained in hospital and that it created the unfairness of 'double' detention.

The potential implications for the calculation of time spent unlawfully at large from prison custody in light of this finding are enormous. In cases where a person deliberately breaks a parole licence, for example, by fleeing the country, the licence is revoked and the individual will not usually be formally notified of that decision until the time of re-arrest. It would create major difficulties for the administration of parole licences if this period was not treated as being unlawfully at large as a person could effectively serve the remainder of their sentence while at liberty. While it is clear that the *S* decision was made with reference to the state's appalling behaviour regarding the issue of recall, it is difficult to see that this point of principle concerning the calculation of time spent unlawfully at large will survive on appeal.

PRISON DISCIPLINE

Following **Ezeh and Connors v UK** *15 July 2002, App Nos 39665/98 and 40086/98*, the Prison Service has made substantial changes to the Prison Rules 1999 SI No 728. The ECtHR ruled that, where the prisons' disciplinary process could result in the award of additional days, there is a presumption that the charge against the prisoner is a criminal charge for the purposes of article 6 (right to a fair trial) of the convention and, therefore, the provisions of article 6 will apply.[1] The amended prison rules,[2] which took effect from 15 August 2002, provide:

- that either prison governors or independent adjudicators can conduct adjudications (rule 53(2));
- before inquiring into a charge at an adjudication hearing, the governor must determine whether the charge is so serious that additional days should be awarded if the prisoner is found guilty of the offence (rule 53A(1));
- if the governor decides that awarding additional days is an appropriate punishment, s/he must refer the charge to an independent adjudicator (rule 53A(2)(a));
- if the governor decides that the charge does not merit the punishment of additional days, s/he can proceed with the adjudication (rule 53A(2)(b));
- the governor can also refer a charge to an independent adjudicator when a prison adjudication hearing is underway, or after the hearing, but before s/he has imposed a punishment, if it becomes apparent to him/her that additional days should be awarded due to the seriousness of the offence (rule 53A(3);
- other than in exceptional circumstances, an independent adjudicator must enquire into a charge within 28 days of the date on which the charge was referred to him/her (rule 53A); and
- where a charge is referred to an independent adjudicator, the prisoner must be offered the opportunity to seek legal representation (rule 54(3)).

The Prison Rules 1999 have also been amended to allow new,

harsher punishments to be imposed. In addition to existing punishments, prison governors now have the power to punish adult prisoners with a maximum of: 21 days' cellular confinement; 84 days' stoppage of earnings; and removal from the wing or living unit for 28 days. The periods are shorter for young offenders. Independent adjudicators can punish adult prisoners with any punishment including the award of up to 42 additional days for adult prisoners, and 21 additional days for young offenders (Rules 55 and 55A).

Another repercussion of the judgment in this case has been the remission of all additional days imposed by prison governors after the introduction of the Human Rights Act (HRA) 1998 on 2 October 2000 (see below).

■ **R (Rogers) v Secretary of State for the Home Department**
[2002] EWHC 2078 (Admin)
The decision not to remit days awarded before 2 October 2000 was recently challenged in this case. Here, the claimant argued that, following the decision in *Ezeh and Connors*, the Home Secretary was obliged to remit all of the additional days that had been awarded to him since his imprisonment in 1997.

In rejecting the claimant's application, Jackson J referred to the case of *R v Lambert* [2001] 3 WLR 206. In this case, the House of Lords held that, apart from the limited exception in HRA s22(4) (which allows a person to rely on convention rights in proceedings instigated by a public authority no matter when the act in question took place), the provisions of the HRA were not intended to apply to events that took place before the Act came into force. Jackson J noted that, in the case of *R v Kansal* [2001] 3 WLR 1562, the majority of the House of Lords considered that the decision in *Lambert* was mistaken, but must be followed. Therefore, Jackson J concluded that the award of additional days prior to the introduction of the HRA was not unlawful, and in each case prisoners must serve those days unless they are remitted in accordance with the Prison Rules 1999.

Furthermore, Jackson J did not accept that when deciding whether to remit additional days awarded prior to the introduction of the HRA, the Home Secretary is making a fresh decision and, therefore, is bound by HRA s6. Nor did he accept that the Home Secretary was bound by article 6 of the convention prior to the introduction of the HRA owing to the fact that the UK had ratified the convention. Instead, the Home Secretary is entitled to exercise his/her discretion when deciding whether to remit additional days awarded prior to the introduction of the HRA. Therefore, a prisoner will have to serve additional days imposed prior to 2 October 2000, unless s/he successfully applies for their remission under the procedures set out in the *Prison discipline manual*. The Court of Appeal reserved judgment in this case.

Adjudication hearings

Two recent cases have addressed the nature and admissibility of evidence considered at prison adjudication hearings.

■ **R (Gibson) v Governor of HMP Garth**
[2002] EWHC 1429 (Admin)
The court considered the procedures to be followed at a prison adjudication where a prisoner had been charged with being in possession of fermenting liquid. The claimant, who had been found guilty of this charge, challenged the fairness of the adjudication and argued that it fell foul of the procedures set out in the *Prison discipline manual*. He argued that he should have been given the opportunity to arrange an independent analysis of the liquid at his own expense, and that the governor had not acted impartially by smelling the liquid, thereby, giving evidence on which the claimant was found guilty.

Collins J dismissed these arguments. He considered that the claimant did have a proper opportunity to present his case and that it was for him or his legal advisers to state that they wished to pay for independent testing of the liquid, rather than leaving it up to the governor to make such a suggestion. Furthermore, he rejected the argument that independent tests on fermenting liquids should be allowed as a matter of course, (such independent tests are allowed in the case of controlled drugs). He also rejected the notion that the governor acted as a witness. He noted that, on smelling the liquid, the governor had carried out an analysis of the evidence rather than giving evidence.

■ **R (Barnsley) v Secretary of State for the Home Department**
[2002] EWHC 1283 (Admin)
The claimant had been found guilty of denying prison staff access to a cell by barricading himself with other prisoners in a cell. He was granted permission to apply for judicial review on two grounds. First, that there was insufficient evidence to sustain the deputy governor's finding that the claimant took part in the denial of access. Second, that the deputy governor had wrongly refused to receive evidence concerning intercom communications from the cell, which took place after the officer had locked the cell door on being denied entry.

In considering the first ground, Mr Justice Jackson noted that none of the officers who gave evidence at the adjudication had seen the claimant at any stage during the incident. There was no evidence about whether or not the claimant took part in the denial of access, nor was there any evidence about whether he offered any encouragement to those prisoners barring the cell door. Accordingly, Jackson J agreed with the claimant that there was insufficient evidence to uphold the finding of guilt. He stressed the need for prison governors and the courts to be cautious before regarding the mere presence of a prisoner as sufficient evidence that s/he had participated in an offence, which other prisoners were committing. Jackson J rejected the claimant's second ground for judicial review. He noted that the cell communications took place after the incident for which the claimant was charged, and that the claimant did not himself speak into the communication system. Therefore, he agreed with the decision that such evidence was irrelevant.

PRISON CONDITIONS

In domestic law, there have still not been any cases in which the court has held that prison conditions in themselves breach the prohibition on inhuman or degrading treatment under article 3 of the convention. Cases at Strasbourg continue to show how high the threshold is for establishing such a breach. In *Kalashnikov v Russia* (App No 47095/99, 15 July 2002) the applicant spent nearly four years on remand in a severely overcrowded cell designed for eight prisoners, where the state accepted that each bed was used by two or three prisoners and so it was necessary for them to sleep in shifts. The evidence was that at any given time there was 0.9 to 1.9 square metres per prisoner in the cell, set against the recommendation contained in the *European Committee for the Prevention of Torture's second general report* that cells should provide at least seven square metres per prisoner. This severe overcrowding in itself was, the ECtHR held, sufficient to raise issues under article 3.

In addition, there was inadequate ventilation, the cell was infested with pests and the applicant contracted various skin diseases and fungal infections. Other prisoners with infectious diseases such as tuberculosis were also kept in the cell. The cell also contained an unscreened toilet which had to be used by the prisoners in each others' presence. The ECtHR found that the conditions constituted degrading treatment within the meaning of

article 3, taking into account their cumulative effect (see *Dougoz v Greece* (App No 40907/98)) and the fact that the absence of any evidence of intention to debase or humiliate did not preclude the finding of a breach of article 3 (see *Peers v Greece* (App No 28524/95)).

In a separate case, *Mouisel v France* (App No 67263/01 14/11/02) the ECtHR also found a breach of article 3 where a prisoner suffering from leukaemia and Hodgkin's disease was handcuffed on the occasions he was moved from prison to hospital for treatment. The court held that, on the facts of the case, the use of handcuffs was disproportionate to the needs of security and constituted inhuman and degrading treatment.

In the domestic courts, a prisoner unsuccessfully sought permission to bring a claim for judicial review of conditions in HMP Wakefield alleging a breach of article 3. He was a category A prisoner who was required to move between single cells every three months (which the prison stated was because of wing refurbishment). He claimed that the cells were in a disgusting condition. The prison also refused to install modesty screens to prevent the possibility of prisoners being observed using the toilet when being checked by staff. The judge in refusing permission (*R (Broom) v Governor of HMP Wakefield* [2002] EWHC 2041 Admin) stated that the conditions fell 'far below the threshold of degradation' necessary to establish a breach of article 3.

As domestic courts do not, unlike the ECtHR, consider cases from all Council of Europe countries, it may have been expected that the 'minimum level of severity' needed to breach article 3 would be lowered in cases brought here, to reflect the fact that conditions are generally of a higher standard. There is no evidence that this has been the case, and breaches are still more likely to be found where especially vulnerable prisoners are involved such as people with disabilities or children (see below), or where prisons are adopting punitive regimes.

Detained children

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

[2002] EWHC 2497 (Admin)

In the culmination of a long campaign, the Howard League for Penal Reform has succeeded in a judicial review claim in establishing that the Children Act (CA) 1989 does directly apply to those under 18 in prison establishments. This decision will require more direct involvement by local authority social services departments to assess and help meet the needs of children in custody. The judge expressed grave concern on the evidence, including that from the former and current chief inspectors of prisons, that some Young Offender Institutions are not matching up to what the CA requires. He also commented that such degrading treatment as described by the Chief Inspector of Prisons would be likely to result in findings of a breach of article 3 of the convention.

Visits

■ **R (Hoogstraten) v Governor of HMP Belmarsh**

[2002] EWHC 1965 Admin

The importance the courts will attach to a prisoner's right of access to a lawyer of their choice was demonstrated in this latest case. The claimant was convicted of manslaughter and was held as a category A prisoner. He had changed his legal team before sentencing. Under Prison Rules 1999 rule 38, legal visits with the lawyer he instructed, an Italian 'avvocato' with no English legal qualifications, were refused on the basis that the avvocato was not a 'legal adviser' within the meaning of the rules. Rule 2 defines 'legal advisers' as 'counsel or solicitor, and includes a clerk acting on behalf of a solicitor'.

The court held that the interpretative obligation to read legislation to give effect to convention rights in HRA s3(1) required rule 2 to be read in a manner that conforms with prisoners' rights under article 6(3) of the convention, namely, to instruct a lawyer of their own choosing who is entitled to represent them in criminal proceedings. Sections 27 and 28 of the Courts and Legal Services Act 1990, read with the European Communities (Services of Lawyers) Order 1978, provide that Italian avvocatos can conduct litigation in English courts. It followed that the lawyer was entitled to legal visits with the claimant under rule 38, and the decision to refuse such visits was quashed. The court rejected any suggestion that it was entitled to consider the prisoner's motives for instructing an Italian lawyer as this was clearly a matter for him.

■ **R (Wilkinson) v The Home Secretary**

[2002] EWHC 1212 (Admin)

This case involved social visits and the court considered the proportionality of a total ban on a visitor. The claimant was a high-risk category A prisoner who received visits from a woman he had begun a relationship with since being in prison. She was removed from the list of approved visitors for the claimant and banned from visiting him because of security information that she may have been involved in plans for the escape of another category A prisoner.

Although the claim was rejected because, by the time judgment was given, the visitor had indicated she no longer wished to continue visits, the judge found in favour of the claimant, in principle. Notwithstanding the intelligence relied upon by the prison authorities, the judge was not convinced that the legitimate objective of stopping the passing of illicit information or items could not be met by the imposition of monitored, closed visits (where there is no physical contact) rather than a total ban. The decision, therefore, fell at the first of the two-stage test of what proportionality requires as described by Dyson LJ in *R (Samaroo) v Secretary of State for the Home Department* [2001] EWCA Civ 1139, namely, whether the legitimate aim could be met by less restrictive means. This strict application of proportionality is a welcome change from cases involving visits where much greater deference is regularly shown to the prison authorities.

CATEGORISATION, SEGREGATION AND PROTECTED WITNESS UNITS

Category A status is retained for those prisoners whose 'escape would be highly dangerous to the public or the police or to the security of the state' (see Prison Service Order 1000 Part 9). In 1994, the Prison Service added a qualification to the definition that, by contrast with the lower security categories, actual likelihood of escape was irrelevant if a prisoner otherwise met the definition. Accordingly, prisoners whose escape would be highly dangerous would qualify 'no matter how unlikely that escape might be'.

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

[2002] EWHC 1018 Admin

An elderly prisoner in poor health and in respect of whom there was no evidence that he had any ability or inclination to escape, who admitted he was highly dangerous, challenged this aspect of the policy. He did so on the basis that the failure to consider downgrading a prisoner where there was evidence that the escape risk could be managed in conditions of lower security was irrational, and also represented an unlawful fettering of discretion. The court reviewed case-law regarding the need for policies to allow for individual consideration, concluding that the degree to which policies were required to allow for exceptions would depend on the context.

The court accepted that the Prison Service was entitled to have a policy to make the escape of highly dangerous prisoners as nearly impossible as could be devised. Given the fact that only a minority of prisoners would fall into this category, individual consideration of their cases was required. However, acceptance of

these issues did not require the escape risk of individual prisoners within that group to be excluded from consideration. Accordingly, if escape risk could be capable of management in conditions of lower security, then for the policy or practice of the Prison Service to preclude consideration of this was unlawful. The Prison Service is yet to reformulate the policy in light of this judgment.

Protected Witness Units

It is a well established principle that prisoners who are lawfully detained enjoy no 'residual liberty' whereby detention can become unlawful, for example, through segregation in breach of the Prison Rules 1999, or through poor conditions (*R v Deputy Governor of Parkhurst Prison ex p Hague* [1992] 1 AC 58, HL). Following the coming into force of the HRA, challenges to categorisation decisions that directly raise issues under article 5 (the right to liberty) have been rejected (*R (Burgess) v Secretary of State for the Home Department* 3 November 2002, DC, unreported; although see *R (Williams) v Secretary of State for the Home Department* June 2002 *Legal Action* 12).

In the MHA context, a detainee recently attempted to establish that unnecessary seclusion (a process analogous to segregation under rule 45) of an otherwise lawfully detained patient constituted false imprisonment and engaged article 5 (*S v Airedale NHS Trust* [2002] EWHC 1780 (Admin)). The court, relying on *Hague*, rejected this argument. On the article 5 issue, it held that the ECtHR had similarly drawn a distinction between the legality of detention and the method of its execution, including location and conditions (*Ashingdane v UK* (1985) 7 EHRR 528). The latter would only breach article 5 if there was no relationship between the ground of permitted deprivation of liberty relied on, and the place and conditions of detention (if, for example, a person detained on mental health grounds was not in an appropriate institution).

Two recent cases have examined procedures affecting entry to and removal from perhaps the most closed parts of the prison system, the Protected Witness Units (PWUs). Entry to such units, where all prisoners are referred to as 'Bloggs', is governed by Prison Service Instruction 71/2000. Prisoners' allocation is highly exceptional and made only after conviction, and only if supported by the Crown Prosecution Service and a police officer of at least the rank of an assistant chief constable.

■ **R (DF) v Chief Constable of Norfolk and Secretary of State for the Home Department**
[2002] EWHC 1738 (Admin)

A prisoner who had been held in a PWU on a previous sentence claimed the refusal to do so on a subsequent sentence was unlawful. The court held that the state's positive obligation to protect life under article 2 of the convention was clearly engaged. The applicable test in this situation was held to be the requirement on the authorities to do all that could be reasonably expected of them to avoid a 'real and immediate' risk to life of which they have or ought to have knowledge (*Osman v UK* (1998) 29 EHRR 245). This situation was distinguished from that in *R (A) v Lord Saville of Newdigate and others* [2002] 1 WLR 1249, where a much lower threshold of risk will engage article 2 where the risk is associated with some action that an authority is contemplating putting into effect itself. The court held that admission to a PWU was not such an action as contemplated in that judgment.

On the facts of this case, the court held that the Prison Service was not entitled to take into account the fact of re-offending in deciding whether to admit the prisoner to a PWU, and it was also held that category A status should not preclude entry. Furthermore, where a prisoner has previously been admitted to a PWU, it is incumbent on the Prison Service to satisfy itself that the risk is no longer such to require admission; the risk assessment relied on in these proceedings was inadequate. Accordingly, the decision to refuse admission was quashed and a new decision required, which took into account an updated risk assessment.

■ **R (Bloggs 61) v Secretary of State for the Home Department**
[2002] EWHC 1921 Admin

The prisoner challenged a decision to remove him from a PWU where the authorities contended that the risk he faced made such an allocation unnecessary. His initial claim was that the police had promised him such status for life. Although there was evidence that only two or three prisoners had been moved from a PWU to a mainstream prison in a seven year period, including those moved voluntarily, the court held that a promise by the police could not give rise to a legitimate expectation that would bind the Prison Service.

Approaching the human rights argument, the court adopted a much more deferent approach to the authorities. It held that the Prison Service was entitled to remove the prisoner from the PWU on the basis of a decision that the level of risk he faced in a mainstream prison no longer met the *Osman* test. Although there were some similarities in this case with the soldiers in the *Lord Saville* case (see above), in that a positive step was being proposed that would, to a degree, create a risk, the position here was that the state was not forcing the claimant to do something he would not otherwise do. Rather, he was being managed by the Prison Service within the broad discretion it retained about the manner of that management, subject to the heightened scrutiny of the courts given the right engaged.

■ 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.

1 The UK government has been granted the right of appeal to the Grand Chamber.
2 A new prison discipline manual has been issued to reflect these changes. Copies can be downloaded from the Prison Service's website at: www.hmprisonservice.gov.uk.