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.

LIFE SENTENCES

European Convention on Human Rights article 5

The implications of articles 5 and 6 of the European Convention on Human Rights ('the convention') in relation to life sentences continue to be explored by both the domestic courts and in Strasbourg. Three recent Court of Appeal decisions have illustrated the difficulties that the domestic courts have in settling on the meaning and reach of article 5 in this area.

■ **R (Spence) v Secretary of State for the Home Department**
[2003] EWCA Civ 732

The Court of Appeal dismissed a challenge by a recalled mandatory lifer to the Home Secretary's decision to set his parole review at 18 months after the conclusion of his previous review, despite a recommendation by the Parole Board ('the board') that the review period should be just nine months. The decision under challenge had been made before the European Court of Human Rights (ECtHR) ruling in *Stafford v UK* (2002) 35 EHRR 1121.

However, by the time the case proceeded to the Court of Appeal, the effect of the interim arrangements introduced to comply with *Stafford* and following a reconsideration of the case, the review period was truncated to 12 months. The Court of Appeal rejected submissions that the interference with the review period by the executive was in breach of article 5(4) on the ground that this article only required a review of the necessity for detention to be determined by a court-like body, not the period between reviews. Similarly, the submission that 18 months did not constitute a 'speedy review' was also rejected on the ground that all relevant case-law required an individual assessment to be made on the facts of each case. This left just a merits challenge, which was rejected.

The Court of Appeal went on to make some observations about the need for the interval between reviews to be undertaken by a court-like body. It suggested that this was not a strict requirement of article 5(4) and while it may be desirable, as it was not provided for in legislation, there was nothing unlawful in the only mechanism for control being the internal application procedure and the possibility of applying for judicial review.

■ **R (Murray) v Parole Board and Secretary of State for the Home Department**
[2003] EWCA Civ 1561

In this case, the Court of Appeal expressed some doubt about the correctness of the observations in *Spence* (see above), as well as suggesting that article 5(4) might be more rigorous in its application than had previously been thought. This case was an appeal against the dismissal of a challenge to the interim arrangements. Murray argued that the interim arrangements introduced following *Stafford* amounted to a breach of article 5(4) in his case, as his last parole review had been completed just before the judgment was given, and he would not have an article 5(4) compliant review for a further two years. At first instance, Pitchford J had dismissed the application stating that the Home Secretary was entitled to a reasonable period of time in which to implement his new obligations and there was nothing special about Murray's case which justified exceptional treatment.

By the time the appeal was heard, the case was once again rendered academic, the board having recommended Murray's release just before the hearing. However, the court went on to consider the question of whether the interim arrangements were in breach of article 5(4) in general, given the importance of the issue to a large number of lifers. The court held that the original judgment did not follow the correct legal approach to the problem, since it had failed to appreciate that, as a result of *R (Noorkoiv) v Secretary of State for the Home Department and Parole Board* [2002] EWCA Civ 770, it was not permissible under article 5(4) to plead lack of resources as a defence to an excessive delay between reviews. While the courts may not be able to require a review to take place any earlier absent the relevant resources, it would still be open to the person affected to seek a remedy in damages.

The court also doubted whether the finding in *Spence*, that article 5(4) does not require a court-like body to determine the interval between reviews, was correct. It commented that allowing the executive to take this decision, and to then simply allow a judicial review of the same was not as satisfactory as the original court (the board in this case) taking the decision itself. The matter was left unresolved, but it is worth noting that an application to the ECtHR on this issue is currently awaiting a decision on admissibility.

■ **R (Cawser) v Secretary of State for the Home Department**
[2003] EWCA Civ 1522

The Court of Appeal was also asked to examine the extent to which the Home Secretary is under a duty, either at common law or under the convention, to provide offending behaviour programmes to enable lifers to be released on tariff. This case was brought by an automatic lifer who had waited 18 months for a place on a particular programme due to lack of places. His tariff was originally three and a half years and his inability to complete the course had led the board to refuse his release or recommend a move to an open prison. The background to the application was a number of first instance decisions which had concluded that access to offending behaviour courses was not a justiciable issue. Once again, the delays in the court's listing of the case meant that by the time the appeal was heard, it was rendered somewhat academic as Cawser had commenced the programme that he had been waiting to attend. Again, the court proceeded to hear the case to determine the general principles raised by the application.

Although the previous cases to look at this problem had established the principle that the provision of courses for prisoners in this position was not justiciable, in these proceedings, the Home Secretary accepted that it would be irrational to have a policy of making release dependent on the provision of courses without making reasonable provision for the courses themselves. This submission was accepted by the court and thus, while the application was dismissed, it does raise the prospect of prisoners being able to challenge the failure to place them on particular courses, which is some progression on the previous position.

A challenge under article 5(1)(a) was framed on the basis that detention could become arbitrary if courses were not provided, thus leaving prisoners at risk of being detained indefinitely without being able to address their risk factors and, at the same time, being unable to have any realistic prospect of release. While this was dismissed by the majority of the court, Arden LJ felt that there was a possibility of article 5(1)(a) being violated if the Home Secretary failed to provide a course where release is, in

practice, dependent on completing one. Her reasoning was that in a case where the continued detention arose not because of the original conviction or objectives of the sentence but because of the Home Secretary's refusal to allocate sufficient resources, there could potentially be a breach of article 5(1)(a).

The views of Arden LJ, while being a dissenting opinion, demonstrate the potential for further exploration of article 5(1)(a) in respect of the detention of lifers, given that the limits of article 5(4) now seemed to be better defined. The difficulty in such challenges, as has been shown by all of these cases, is the need for very strong facts which are not overtaken by the lengthy period it takes for the cases to be determined.

The ECtHR delivered judgments in two cases brought by mandatory lifers arguing that there had been a breach of article 5(4) in their parole reviews, which had been completed before the *Stafford* judgment was given. In both cases, the ECtHR upheld the complaints.

■ **Von Bulow v UK**
App No 75362/01,
7 October 2003
In this case, a small financial award was made under article 5(5) for the distress suffered.

■ **Wynne v UK**
App No 67385/01,
16 October 2003
No claim for just satisfaction was made here.

The decision in *Wynne* is particularly interesting as the applicant had previously had such a case rejected in 1994, and yet the new decision seems to infer that the parole review process in his case had breached article 5(4) from the early 1990s. This does raise interesting issues about the effect of ECtHR decisions and whether they are prospective or retrospective.

Tariff setting

■ **Easterbrook v UK**
App No 48015/99,
12 June 2003
The ECtHR found a breach of article 6 in respect of the interim procedures contained in the Criminal Justice Act (CJA) 1991 for setting the tariff for discretionary lifers sentenced prior to the implementation of the Act. The interim procedures provide for the Home Secretary to receive advice from the Lord Chief Justice, and the practice was for the tariff to be set in line with those recommendations.

The breach of article 6 was, on the face of it, twofold. The first was the fact that the Home Secretary still sets the tariff, albeit that he agreed to be bound by the judicial recommendation. The second and more important finding was that the procedure did not allow for an oral hearing. The court found this to be a breach of the procedural guarantees concerning the passing of criminal sentences. The finding was made despite the facts that the applicant had challenged the tariff under domestic law to the Court of Appeal, and the ECtHR had decided that, in its opinion, an oral hearing would not have assisted the Lord Chief Justice in that case.

Although the case might seem to deal simply with an historical matter, the question of whether oral hearings are a necessary procedural safeguard when resetting minimum terms is one which is very much on the agenda at present. The Lord Chief Justice Lord Woolf has reset the minimum terms for a large number of HMP detainees over the past few years, and the CJA 2003 will set up a panel of High Court judges to reconsider applications made by mandatory lifers seeking a redetermination of their tariffs. The question of whether these groups of lifers are entitled to oral hearings is now very much to the fore.

However, despite the seemingly clear wording of the decision, the Divisional Court has interpreted *Easterbrook* as finding a breach of article 6 only in relation to the separation of powers, and not the fairness of the procedures followed (*R (Dudson) v Secretary of State for the Home Department and Lord Chief Justice* [2003] EWHC 2797 (Admin)). The reasoning of the court in *Dudson* appears to have been based not only on a misreading of the *Easterbrook* decision, but also on a misunderstanding of what the purpose of the reconsideration of the tariff represents. Strictly speaking, the decision is the first occasion on which the sentence is set in compliance with the requirements of article 6. However, in *Dudson* the court appears to have reached the view that the status of the decision is akin to an appeal. The European jurisprudence is more ambiguous about the need for an oral hearing in appeal proceedings. The Divisional Court has given permission to appeal and it is to be hoped that the Court of Appeal can address the issue more satisfactorily to prevent the need for even further clarification from Europe on the matter.

The new tariff-setting procedures contained in the CJA 2003 will be discussed in detail in the next recent developments in prison law article. However, in advance of their introduction, a number of challenges have been made to tariffs set under the old system, which have also explored the relationship of the old, and the anticipated new, decisions regarding this issue.

■ **R (Cole, Rowland and Hawkes) v Secretary of State for the Home Department**
[2003] EWHC 1789 (Admin)
This case was brought by three mandatory lifers seeking to argue that their tariffs should be redetermined by the Home Secretary in advance of the CJA 2003. Each applicant had a reason why it was important for his own tariff to be reconsidered. In Cole's case, his tariff had originally been set at 11 years, but after a retrial and reconviction it was set at 15 years. Based on judicial authority from determinate sentencing, he has a powerful argument that an increase in his prison term in these circumstances is unlawful. He argued that it was important for this error to be rectified by the Home Secretary so that he was not disadvantaged in his application to the High Court under the new legislation. Rowland and Hawkes were both seeking an order requiring the Home Secretary to determine applications that they had made for a reduction in tariff based on exceptional progress. Their concerns were that unless a decision on this point could be made under the Home Secretary's powers, there was a possibility that the new legislation would not allow the judiciary to make reductions on this basis.

All three applications were dismissed by the Divisional Court. On Cole's application, Rose LJ held that, as a matter of law, the decision on tariff made by the Home Secretary did not fall within the statutory definition of a sentence and, as such, it was incumbent on Cole to await the CJA 2003 and make his application to the High Court. Given that his tariff still had many years to run, this would not cause him any potential or actual prejudice.

The cases put by Rowland and Hawkes were dismissed, primarily because it was accepted that it would be unlawful for the Home Secretary to reset their tariffs without exceptional circumstances to justify the decision, as to do so would be in breach of article 6. On the more substantive issue concerning the power to take into account exceptional progress under the new legislation, Rose LJ accepted evidence that the Home Secretary did intend to allow this to remain as an option and he commented that:

> *It seems to me to be inconceivable, in human terms, that, if the legislation is enacted, as presently contemplated, in relation to prisoners serving a notified tariff, exceptional progress in prison will not be taken into account on the intended High Court review.*
> (paragraph 88)

This last comment, which will be of comfort to those prisoners hoping to apply to have their tariffs reconsidered under the CJA 2003, does raise some questions about precisely what exercise is to be undertaken when tariffs are reset. As it is the first occasion when a prison term is

set in line with the principles of article 6 of the convention, it remains debatable regarding whether it is a 'resetting', or actually the first, sentencing exercise. Although this somewhat technical matter may not be of importance in a large number of cases, it will undoubtedly raise issues in some cases relating to the extent to which people who are disadvantaged by the changes (as opposed to benefiting from them) are entitled to rely on policies and practices that were contemporaneous to their offences.

■ **R (McFetrich) v Secretary of State for the Home Department**
[2003] EWHC 1542 (Admin)

The extent to which article 7 of the convention applies to tariffs was examined by the Divisional Court. The case was factually complex, as the applicant was a prisoner who had transferred to England from Scotland, and whose tariff was subsequently set at a higher level than the recommendations made by the Scottish judiciary. The claim primarily failed because of a finding that no Scottish tariff had been set, and that the statute required the Home Secretary to approach the matter on the same basis as when setting an English tariff, even though the evidence demonstrated that such tariffs were generally harsher.

The court went on to consider whether article 7 prevented tariffs being set at a higher level than they would have been at the time the offence was committed, and reached the conclusion that the mandatory sentence of life imprisonment, not the tariff, is the penalty. This led the court to the conclusion that it was not possible to breach article 7 by 'increasing' the tariff.

The reasoning of the lead judgment of Scott Baker LJ is difficult to reconcile with the principled approach taken to the meaning of the mandatory life sentence by the ECtHR in *Stafford*. The ECtHR's finding that the mandatory life sentence is no different, in substance, from the discretionary one, would suggest that the tariff or punitive element of the punishment is the actual penalty. When the Court of Appeal examined transitional arrangements relating to discretionary life sentences back in 1994, it suggested that an increase in the length of the tariff over the norm, at the time, would be likely to breach article 7, Stuart Smith LJ enunciating the following principle:

It would be contrary to the spirit, if not the letter, of the European Court's decision in Thynne *that both parts of the sentence should be subject to judicial control independent of the executive; it would also probably be contrary to article 7(I) of the convention which requires that no 'heavier penalty shall be imposed than the one that was applicable at the time the criminal offence was committed'. It also seems to be contrary to the general intention manifested in s34 that the tariff part of the sentence is to be set by the judges and the risk part by the board.* (*R v Home Secretary ex p McCartney* [1994] COD 528)

McFetrich also appears to accept uncritically the proposition that the decision in *Stafford* does not have any retrospective effect, although there does not appear to be any argument specifically directed to this point. This is a matter which is currently under consideration by the Administrative Court, and there are powerful arguments that the *Stafford* judgment should be read in the same manner as the standard declaratory theory, which exists in domestic law as opposed to having only prospective effect. This is likely to be clarified in the near future.

The particular facts in *McFetrich* would potentially allow it to be distinguished from *McCartney*, but the proposition that article 7 does not apply to the length of the tariff is a problematic one. It may well be the case that this point was decided per incuriam and it should not be taken as a definitive authority on the subject or any future references under the proposed new scheme. The case is proceeding to an appeal.

DETERMINATE SENTENCES AND PAROLE

Length of licence conditions

The courts have generally held that the administration of determinate sentences within the sentence as a whole does not engage the convention. For example, a majority of the Court of Appeal (see *R (West) v The Parole Board* [2002] EWCA Civ 164) has held that the recall of determinate sentence prisoners does not engage article 5 or article 6, despite the fact that in such situations there is a factual loss of liberty. The rationale for this approach is that as long as there has been an article 6 compliant trial at which a total fixed term has been imposed as punishment, then any decisions during that period that affect the liberty of a prisoner can be made by the executive without any fresh convention issues arising (although see *Ezeh and Connors v UK* below).

Article 7 of the convention prohibits the imposition by criminal courts of a 'heavier penalty' than that which was available when the offence was committed. Is article 7 therefore infringed where a new statutory regime, applicable to those sentenced for offences committed prior to its coming into force, increases not the total sentence but the period an offender is subject to licence conditions within that sentence? Rather embarrassingly, the criminal and civil Courts of Appeal have come to different conclusions on this issue.

■ **R v BR**
App No 2003/0423/Y1, 25 July 2003

The appellant in this case was sentenced to two years' imprisonment for sexual offences, the last of which was committed in 1982. The sentencing judge ordered that the offender should be subject to licence supervision for the whole of the prison term, a power available under Powers of the Criminal Courts (Sentencing) Act (PCC(S)A) 2000 s86 (first enacted as CJA 1991 s44, which came into force in October 1992). The statutory regime at the time of the commission of the last, relevant offences contained no such power, there being a right to unconditional release from the sentence at the two-thirds point.

The court concluded that there was no breach of article 7, and in doing so held that another Criminal Court of Appeal decision on the point (*JT* [2003] WCA Crim 1011) was wrongly decided. It analysed the measures by reference to the criteria in *Welch v UK* (1995) 20 EHRR (a case involving confiscation orders). The conclusion reached was that the extended licence period was not in essence punitive, as it was aimed at the protection of the public and concerned with the administration of the total sentence, which remained unchanged.

■ **R (Uttley) v Secretary of State for the Home Department**
[2003] EWCA Civ 1130

The civil Court of Appeal came to a different conclusion five days later, in a slightly different context, and apparently in ignorance of the decision in *BR*. The appellant in judicial review proceedings was similarly convicted of sexual offences predating the CJA 1991 coming into force. Uttley challenged the automatic effect of the legislation that his licence conditions would expire at the three-quarters, rather than at the two-thirds, point available at the time he committed the last, relevant offence.

The court at first instance dismissed the claim (see June 2003 *Legal Action* 12) and his reasoning was relied on in *R v BR* (above). It decided that the imposition of licence conditions was an integral part of the sentence as a whole, rather than merely one way of administering it. Therefore, the *Welch* criteria were irrelevant as they applied to stand-alone measures such as confiscation orders. The fact that the overall sentence might be the

same was described as a 'fiction' in light of the fact that, under the previous regime, release at the two-thirds point was unconditional, whereas under the CJA 1991 recall remained a possibility after that time.

The eventual result, if the matter is resolved by the House of Lords, is only likely to be relevant to a decreasing number of prisoners given the date of the related legislative change. As the two cases involve different aspects of the CJA 1991 (designed to 'make the whole sentence count' in the words of the white paper that led to its introduction), presumably each is currently authority for the relevant sections covered.

Release and recall arrangements for sentences with extended licences

The only occasion on which the courts have held that article 5 of the convention is engaged where a determinate sentence prisoner has been recalled to prison is in *Sim v Parole Broad and Secretary of State for the Home Department* [2003] EWHC 152 (Admin), where the prison term in question was the extended sentence 'proper', imposed under PCC(S)A 2000 s85 (see June 2003 *Legal Action* 11). This has been appealed to the Court of Appeal which, at the time of printing, has yet to deliver judgment. The Home Secretary in the Court of Appeal relied strongly on the following two judgments, which assert strongly the proposition that article 5 has no place in the administration of determinate sentences.

■ **R (Giles) v Parole Board**
[2003] UKHL 42,
31 July 2003

The House of Lords has now upheld the Court of Appeal's decision (see January 2003 *Legal Action* 11) that article 5 of the convention does not become engaged during the length of a longer than commensurate sentence (imposed under PCC(S)A 2000 s80(2)(b)). This is despite the fact that a longer sentence than the offence warrants is only ordered as a measure to protect the public, and so is in some ways analogous to indeterminate sentences, which similarly contain punitive and preventative elements.

The Lords, however, appeared reluctant to extend the principles applicable to indeterminate sentences to determinate ones. The justifications for the decision that article 5 did not apply in this context were that:

- the statutory regime does not require a judge to specify the punitive and protective periods,
- the usual early release arrangements for a determinate sentence prisoner applied to the whole sentence; and
- the period that a prisoner would be liable to detention was specified on sentencing by the judge and was not determined by the executive.

The Lords made no reference to extended sentences imposed under PCC(S)A 2000 s85.

■ **R (Smith) v Parole Board**
[2003] EWCA Civ 1269

In this case, a prisoner whose licence conditions were ordered by the judge to last for the whole of his sentence under PCC(S)A 2000 s86 (see *R v BR* above) was recalled to prison. The s86 power, as originally contained in CJA 1991 s44, was preserved only for offences that predated the coming into force of the relevant sections of the CDA 1998, which introduced the precursor to the extended sentence now contained in s85. The latter power is much wider, allowing a judge to impose a sentence composed of two distinct parts, ie, a custodial term and an extension period to be served under supervision.

The Court of Appeal rejected submissions that either article 5 or article 6 was engaged in this case. In relation to article 5, the claimant was relying primarily on decisions from Strasbourg relevant only to indeterminate sentences, which were clearly distinguishable. Article 6 was not engaged as the recall proceedings involved neither the determination of a criminal charge nor the civil right to liberty (which was forfeited for the entirety of the sentence).

The court confirmed that the common law duty to act fairly might require the board to hold an oral hearing to decide whether a determinate prisoner had been recalled properly. The test (see also *West*) being whether there is a disputed issue of fact that is central to the board's assessment and which cannot fairly be resolved without hearing oral evidence.

Breach of licence conditions

Where a prisoner has been told on the face of his/her licence that his/her supervision ends on a date long before the statutory licence expiry date, a decision to recall after that time will be unlawful if the reason relied on is purely breach of supervision (see *R (Rodgers) v Governor of Brixton and another* [2003] EWHC 1923 Admin, and June 2003 *Legal Action* 12). Although this would not prevent a decision to recall expressly based on a perceived risk to the public, notwithstanding the existence of supervision requirements, the *Rodgers* decision contains strong comments about the need for administrative decision-makers to give the 'right reasons at the right time', especially in a context where liberty is at stake.

■ **R (Jackson) v Parole Board and Secretary of State for the Home Department**
[2003] EWHC 2437 (Admin)

In this case where a short-term prisoner was recalled to prison, *Rodgers* does not appear to have been cited. The probation report on which the decision was based correctly referred to breaches of conditions on the licence that had been handed to the prisoner. However, the reasons for recall, which were prepared on behalf of the Home Secretary and given to the prisoner, stated that the decision had been made on the basis of a breach of a condition that was not included on the licence handed to him. The Home Secretary maintained that this was an error and that the real reasons for recall were those contained in the probation report.

A claim for judicial review of both the initial decision to recall, and the Parole Board's confirmation of this, was rejected. The judge held that although there was a statutory duty to give reasons for recall (CJA 1991 s39(3)(b)), this was not a context where the 'adequacy of the reasons is itself made a condition of the legality of the decision' (and he therefore distinguished cases such as *R v Westminster CC ex p Ermakov* [1996] 2 All ER 302). The judge considered that the reasons did not have to be given at the same time as the recall, and that therefore the contents of the probation report could be accepted as the best evidence of the real reasons for recall.

The judge also upheld the board's decision confirming recall on the basis that its function was not solely to examine the validity of the Home Secretary's reasons for recall, but to come to its own view regarding whether a prisoner should remain detained. This proposition he derived from *R v Parole Board ex p Watson* [1996] 1 WLR 906, a case involving a recalled discretionary lifer.

It is difficult to reconcile the reasoning in this case with that in *Rodgers* where there was express approval of the application of *Ermakov*-type principles to the recall context, and this is surely correct where decisions have such serious consequences. Furthermore, in *Rodgers* the recall was held to be unlawful notwithstanding the fact that it had been confirmed by the board, although it does not appear that *Watson* was referred to.

Release of long-term determinate sentence prisoners

Although the power to release all determinate prisoners on parole licence is the Home Secretary's by primary statute, the board's recommendation is binding (by the operation of secondary legislation) for all prisoners serving a sentence of less than 15 years.

■ **R (Clift) v Secretary of State for the Home Department**
[2003] EWHC 1337 Admin

This statutory framework was challenged in this case. The pris-

oner was serving a sentence of 18 years. The board recommended his release, but the Home Secretary rejected this recommendation. The prisoner challenged the decision primarily on the basis that the statutory framework breached article 14 of the convention (the prohibition of discrimination) in conjunction with article 5 (right to liberty). The court adopted the four-stage approach of *Wandsworth LBC v Michalak* [2002] EWCA Civ 271, in deciding whether article 14 was breached.

It was accepted for the purposes of the hearing that the facts of the case were within the 'ambit' of article 5(1) (notwithstanding judgments such as *West*). As the decision regarding release fell to a different decision-maker depending on the length of sentence, the judge also held that there was differential treatment of the relevant comparators. Furthermore, he held that the comparators were in an analogous situation. The claim fell at the fourth stage, as the judge decided that there was an objective and reasonable justification for the discrimination. The situation of determinate prisoners was distinct from those serving indeterminate sentences, and it did not infringe convention principles for the Home Secretary to reserve to himself the decision about whether those serving long sentences should be released on parole. This was despite the fact that the fixed cut-off point of 15 years may result in some arbitrariness.

Parole Board hearings and evidence

Although board hearings have been held for discretionary lifers for over ten years, there have been very few judicial reviews examining the quality of evidence that is properly admissible at such hearings. Following *Sim* (see June 2003 *Legal Action* 11) – which held that contested hearsay evidence was not, in principle, inadmissible although fairness, in some circumstances, may require the chance to cross-examine witnesses – two further cases have looked at the issue. Both concluded that the board's duty of public protection weighs heavily against a prisoner's entitlement to procedural fairness.

■ **R (Pearson) v Parole Board**
[2003] EWHC 1391 Admin
The prisoner in this case was recalled from an extended sentence imposed under PCC(S)A 2000 s85. The sentence in question was for indecent assault on young boys. One of the allegations leading to the recall was that he had taken three young boys to a bonfire in breach of his licence conditions. This was denied. The panel of the board that considered the case confirmed the recall on the basis of oral evidence of social workers and police officers (who had no direct knowledge of the event in question), and hearsay statements of the boys involved. The challenge to this decision was refused on the basis that, although there was only hearsay evidence of the key allegation leading to the recall, the hearing had been fair in light of the impracticalities of calling child witnesses to such a hearing, and the fact that the professional witnesses had expertise in assessing the credibility of child testimony.

■ **R (Brooks) v Parole Board and Secretary of State for the Home Department**
[2003] EWHC 1458 Admin
The claimant was a discretionary lifer convicted of rape who challenged the decision of the board to confirm his recall, as the panel had made its decision on the basis of a written, and therefore hearsay, allegation of a further rape. All sides accepted that the requirements of fairness under domestic law were the same as under article 5(4) of the convention. While the court reiterated the principle in *Sim* that, exceptionally, there will be occasions when fairness requires an opportunity to challenge crucial evidence that is relied on to justify recall, on the facts of this case, the public protection role of the board took priority over the need to be fair to an offender.

In light of this balance, the judge held that where a witness was unwilling to attend the hearing, it would be hard to envisage circumstances where the board would not be entitled to consider hearsay evidence (the issue being weight rather than admissibility), whereas the requirements of fairness could be breached where a witness was available and willing to give evidence, but was not called by the board.

Category A reviews

■ **R (Lord) v Secretary of State for the Home Department**
[2003] EWHC 2073 (Admin)
The court's judgment in this case has resulted in significant changes to category A reviews, and has provided category A prisoners with the ability to make meaningful representations for their downgrading to category B. The claimant was a category A prisoner who made an application under the Data Protection Act (DPA) 1998 to obtain full disclosure of the reports on which the gist prepared for his category A review was based. In response to his request, the claimant received a substantial amount of information, but not the relevant category A reports. In his application for judicial review, the claimant sought a quashing order in respect of all decisions not to disclose his category A reports, and a mandatory order requiring the Prison Service to disclose the reports under the terms of the DPA 1998. In relation to DPA 1998 s15(2), an order was made directing the Home Secretary to serve the category A reports on the court, but not the claimant, and inviting the judge to read them in advance of the parties' skeleton arguments and submissions.

Having read the reports, Munby J expressed his concern at the inaccuracy of the gist, which did not refer to the report's writers' differences of opinion, and in particular the positive recommendations for recategorisation. Munby J considered evidence submitted on behalf of the claimant that gists in category A cases tend to be standardised in format and formulaic in their terms, and that they rarely contain anything other than a standardised view. Munby J also noted that the claimant had been provided with a copy of his parole reports, some of which were written by the same people who wrote reports for his category A review.

Munby J concluded that the gist in the present case did not accurately convey the overall prison recommendation. The gist was significantly misleading and wrong, and did not comply with the common law requirements of fairness. He considered that the claimant's case was unlikely to be the only one of its kind, and that both the claimant and other category A prisoners had been deprived of any meaningful ability to make worthwhile representations on their continued status as category A prisoners. Munby J saw no reason why the gist could not have contained, as a minimum, confirmation that views on the claimant's recategorisation were divided, and the substance of each of the reported views.

Munby J then turned to the DPA 1998. He first considered the argument put forward by the Home Secretary that there was no requirement to disclose category A reports, they fell within the exemption on disclosure set out in s29(1), ie, such reports contained personal data processed for the prevention or detection of crime, or the apprehension or prosecution of offenders. He accepted arguments made on behalf of the claimant that s29(1) exempts the Home Secretary from his obligation to make disclosure of the category A reports only to the extent to which disclosure would be likely to prejudice either the prevention or detection of crime or the apprehension or prosecution of offenders, and that it could not be used to justify a blanket policy of non-disclosure.

Nor did Munby J consider that such a blanket policy of non-disclosure was a necessary safeguard to protect the identity of report writers, which could be

justified under DPA 1998 s7(4). This section seeks to protect the rights of individuals who might be identified from the disclosure of personal information. It requires a balance to be struck between the rights of report writers and the right to liberty of category A prisoners. Munby J accepted that a policy of targeted non-disclosure of category A reports would properly protect report writers from the risks presented by such prisoners who could be shown to pose a threat to them, and would ensure the integrity of the category A review system. Such a policy of targeted non-disclosure of category A reports is already adopted in relation to the parole process.

Finally, Munby J rejected an argument made under DPA 1998 s8(2)(a) that the requirement to provide category A reports would involve 'a disproportionate effort'. He considered that the effort involved in checking the reports to identify any material that should not be disclosed under the DPA 1998 would be no greater than that currently required when preparing a gist. Furthermore, when deciding whether any effort was proportionate, it is necessary to consider the significance of the information and its use. In this case, the purpose of the information related to the claimant's liberty, which would outweigh any argument put forward under s8(2)(a).

In light of the above, Munby J made an order for disclosure of the claimant's category A reports in full. As a result of this judgment, category A prisoners should be provided with copies of their reports on request. The reports should be disclosed in full, subject to the exemptions on disclosure set out in the DPA 1998.

The duty to investigate under article 2

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

[2003] UKHL 51, 16 October

This case concerned the murder of Zahid Mubarek by his cellmate, Robert Stewart, at Feltham Young Offender Institution (YOI), and the need for a public inquiry into the circumstances surrounding Mubarek's death. Stewart had been placed in a cell with Mubarek despite extensive evidence of his dangerousness arising from his previous violent behaviour in custody, volatile mental state, and racism. Following Mubarek's death, investigations were carried out by the police, the Prison Service and the Commission for Racial Equality (CRE). However, Mubarek's family was not significantly involved in these investigations. There was no inquest into the death, and the Home Secretary refused the family's request for a public inquiry.

The family sought judicial review of, inter alia, the Home Secretary's refusal to hold a public inquiry. Hooper J upheld the family's claim, and ordered that an independent public investigation allowing for the involvement of the family must be held to satisfy the obligations imposed by article 2 of the convention. The Home Secretary appealed against this decision, which the Court of Appeal allowed. The family challenged the Court of Appeal ruling, and sought to restore Hooper J's order for a public inquiry.

Finding in favour of the family, the House of Lords stressed the particular duty owed by the state to those held in its custody, and the need to protect such people from violence or abuse at the hands of state agents, self-harm, and the risk of avoidable harm from others. It noted that the duty to investigate is secondary to the duties not to take life unlawfully and to protect life, but stressed the importance of this procedural obligation.

The House of Lords accepted that when selecting the means of conducting an investigation into a breach of article 2, there must be a measure of flexibility. However, it held that the ECtHR in its case-law, and in particular in the cases of *Jordan v UK* (2001) 37 EHRR 52 and *Edwards v UK* (2002) 35 EHRR 52, has laid down minimum standards which must be met, whatever form the investigation takes. These minimum standards include the requirements of public scrutiny and the involvement of the next-of-kin, which are reflected in long-established domestic standards.

The House of Lords considered that where a breach of article 2 arises as a result of a systematic failure by the state to protect the lives of detainees, the need for an investigation which fulfils the minimum requirements specified by the ECtHR is as great, if not greater, than where a breach occurs as a result of deliberate lethal acts by state agents. It was noted that the requirements of public scrutiny and the involvement of the next-of-kin had not been fulfilled by the police or Prison Service investigations or by the CRE's investigation. There had been no inquest into the death, and Stewart's trial was limited to establishing his mental responsibility for the killing, which he had admittedly carried out. The House of Lords considered that there are many unanswered questions, which require a fresh inquiry. Lord Steyn noted that it is not necessary for the family to justify the need for such an inquiry by establishing its benefits in advance.

In this judgment, the Lords note the current limitations of inquests and coroners' powers. Referring to the *Death certification and investigation in England, Wales and Northern Ireland: the report of a fundamental review*,* Lord Bingham said, 'no doubt that report is receiving urgent official attention' (paragraph 33). It is clear that swift action must be taken to address the continuing failure of the state to hold independent public inquiries into deaths in custody, to ensure compliance with the convention, and to relieve individuals of the need to fight for such inquiries.

Death row conditions

■ **Poltoratskiy v Ukraine**

App No 38812/97, 29 April 2003

The prisoner was sentenced to death in 1995 following his conviction for murder. In 2000, his sentence was commuted to life imprisonment when the death penalty was abolished. There had been a moratorium on the death penalty since 1997. He complained about the conditions of his imprisonment while he was on death row, which he argued breached his rights under articles 3, 8 and 9 of the convention.

The applicant complained that he was prevented from enjoying privileges granted to other prisoners, and was subject to special provisions set out in an instruction issued for death row prisoners, which was not made available to the public. In particular, he complained that his visits and correspondence with his family and lawyer were limited or prohibited, and that his request to see a priest had been denied. He also complained that he was denied exercise in the open air, and was prevented from watching television, buying newspapers and receiving food parcels from his family. Furthermore, he complained that he was held in a dirty cell without natural light or proper toilet facilities and that he had been beaten and humiliated. The government denied the applicant's allegations.

Due to the dispute over the facts in this case, the ECHR investigated the conditions of the applicant's imprisonment. Noting the outcome of the commission's investigation, the ECtHR held unanimously that there had not been a violation of article 3 in relation to the applicant's complaint that he had been beaten, tortured and humiliated. However, the court held that there had been a breach of the state's positive obligation to carry out an effective investigation into the applicant's complaint that he had suffered such treatment. The court criticised the delay in carrying out a medical examination of the applicant, the lack of contemporaneous records of the investigation that was carried out, and the absence of any external authority's role in the investigation.

Despite the lack of evidence to suggest that there was a positive intention to humiliate or debase the applicant, the court found unanimously that there had been a breach of article 3 in respect of his conditions of imprisonment. It noted that the applicant's situ-

ation was worsened by the fact that he was subject to a death sentence. The court noted that the conditions had improved in May 1998, but also noted that at that date the applicant had been detained in harmful conditions for 30 months, including eight months after the convention came into force in the Ukraine. The court noted the serious socio-economic problems and lack of resources suffered by the Ukrainian authorities. However, it concluded that lack of resources could not justify prison conditions which are so poor as to breach the requirements of article 3.

The court also found unanimously that there had been a breach of the applicant's article 8 rights. The court also noted that the special provisions in place for death row prisoners were not made public, and instead were set out in an internal and unpublished document. Therefore, the interference with the applicant's article 8 rights was not 'in accordance with the law' as required under article 8(2). For the same reason, the court held unanimously that the applicant's right to freedom to manifest his religion or belief had been interfered with in breach of article 9, and that such interference could not be justified under article 9(2). In a dissenting judgment, Sir Nicolas Bratza argued that the complaint concerning the failure of the prison authorities to carry out an effective investigation into the applicant's allegations of assault should have been examined under article 13, rather than under the procedural aspects of article 3.

Protected Witness Units

■ **R (Bloggs 61) v Secretary of State for the Home Department**
[2003] EWCA Civ 686
The prisoner in this case appealed the first instance decision refusing the challenge to his removal from a Protected Witness Unit (PWU) (see January 2003 *Legal Action* 15). The Court of Appeal confirmed that as the decision to locate the prisoner in a PWU was the Prison Service's, no legitimate expectation arose due to a promise from the police that such an allocation would be arranged. This was especially so as the relevant police circular prohibited officers from making such promises. The court further held that the unfair way the prisoner had been treated did not vitiate the decision, although ways of ensuring that police officers did not make misrepresentations to potential informants should be examined.

In relation to the claim that the decision breached the prisoner's article 2 rights by exposing him to unacceptable risks, the court followed *R (A and others) v Lord Saville (No 2)* [2002] 1 WLR 1249, in declining to specify a formula of general application that would describe the risk to life that would engage article 2 (such as the 'real and immediate' test of *Osman v UK* (1998) 29 EHRR 245). The proper approach was to consider, in light of all the relevant facts, whether the decision infringed the prisoner's right to life. The court, when reviewing the Prison Service's decision, would still show some deference to a decision-maker despite the unqualified nature of the article involved. The court would not therefore conduct a complete merits review. On the facts, the decision did not breach article 2.

■ **R (Smith) v Secretary of State for the Home Department**
[2003] EWHC 2131 (Admin)
The claimant (using a pseudonym for the proceedings) had given information that he had heard another prisoner confess to a serious crime. He requested and was transfered to a PWU. He was subsequently removed when the Prison Service conducted a further risk assessment which took into account the fact that his account of the circumstances of the confession could not be true. No prosecution had resulted from the information provided, and it was therefore unlikely that he would be at risk. The court held that the Prison Service's risk assessment could not be criticised, and therefore there were no grounds for challenging the decision.

PRISON DISCIPLINE

■ **Ezeh and Connors v UK**
App Nos 39665/98 and 40086/98,
9 October 2003
The Grand Chamber of the ECtHR has now given its decision confirming the court's earlier ruling that article 6 is engaged in prison disciplinary proceedings where there is a risk of additional days being awarded as punishment. This now clears the way for the House of Lords to hear the petition in *Greenfield* [2001] EWCA Civ 1224, when the domestic courts will have to follow suit.

PRISON CONDITIONS

Transfers

■ **R (De Hoghton) v Secretary of State for the Home Department)**
[2003] EWHC 1496 Admin
(Permission hearing)
A category A prisoner serving a life sentence sought to challenge the refusal of the Home Secretary to locate him in a prison closer to a hospital with an accident and emergency department or intensive care unit. The claimant is currently held at HMP Long Lartin, and wished to be transferred to HMP Woodhill. He complained that, although the medical facilities at HMP Long Lartin are excellent, in the past there has been a significant delay, for security reasons, in the admission of an ambulance to the prison to take him to an outside hospital.

Stanley Burnton J held that on the facts, and in particular given the medical facilities available at HMP Long Lartin, the refusal of the Home Secretary to transfer the claimant did not amount to an arguable breach of article 2 or article 3 of the convention. Furthermore, due to their qualified nature, the rights conferred by article 8 did not add to the rights conferred by common law. Stanley Burnton J concluded that the refusal to transfer the claimant was not unreasonable, taking into account his medical condition, the need for him to be held in a high security prison, and the needs of other prisoners. He noted that HMP Woodhill is primarily a local prison and is not an appropriate long-term location for sentenced prisoners. Stanley Burnton J highlighted his concern about the delays in the admission of ambulances to HMP Long Lartin, and asked this matter be brought to the attention of the governor in the interests of the claimant and other prisoners.

Visits

■ **R (K) v Secretary of State for the Home Department**
[2003] EWCA Civ 744
The Court of Appeal considered an appeal against a refusal of permission for judicial review from a prisoner who had been held in a YOI, and who complained about the lack of visits she was allowed with her parents. At the time of the appeal, she had been released from custody. She complained that the lack of visits amounted to a breach of her right to respect for her private and family life under article 8 of the convention. She made a claim for damages suffered as a result of lack of contact with her parents.

It was accepted that article 8 was relevant to the claim. The government argued that the restriction on the appellant's article 8 rights was a reasonable and proportionate restriction, given the burdens and requirements of running a YOI. However, it was argued for the appellant that, so far as was consistent with the conditions of her imprisonment, there should be unimpeded access to her, and any restrictions on access for operational and security reasons must relate to her own position.

Buxton LJ considered that there were two key reasons why it was inappropriate to grant the application for permission for judicial review. First, because it would require the court to carry out a detailed investigation into the way in which the governor

should have exercised a statutory power, given to him in the Young Offender Institution Rules 2000 SI No 3371, to exceed the statutory usual rule on visiting. Second, because the appellant claimed only damages, and did not seek any relief, declaration or statement of practice that went beyond her own case. The application for judicial review was therefore dismissed.

Legal visits

■ **Cannan v Secretary of State for the Home Department and Governor of HMP Full Sutton**
[2003] EWHC 98 Admin

Sedley LJ considered the policy in place at HMP Full Sutton for passing out and receiving documentation during legal visits. The policy required legal documents to be checked by prison staff in the presence of the prisoner, before being received or handed out on a legal visit. In exceptional circumstances, where prior authority had not been obtained, the senior officer in charge of visits could authorise the removal or receipt of documents at legal visits.

Sedley LJ noted the well-established importance for prisoners of the rights of access to a court, legal advice and to communicate confidentially with a legal adviser. Procedures can interfere with these rights only if they are appropriate, lawful and proportionate in the context of maintaining the security and safety of the prison. He found that the decision to require prior authorisation for handing out legal documents could properly be characterised as a proportionate response to the problems caused both by security requirements, and the need to run prisons efficiently.

Sedley LJ further observed the importance of clarifying, in writing, the policy on 'exceptional circumstances', and expressed a hope that it would be unnecessary to use a threshold as high as 'exceptional circumstances' when a prisoner needed to hand a document directly to a solicitor. Nonetheless, he held that the policy was not disproportionate or outside the range of reasonable responses.

Legal correspondence

Two recent judgments from the ECtHR have highlighted the long-established importance of a prisoner's right to confidential correspondence with legal advisers and courts.

■ **Cotlet v Romania**
App No 38565/97

■ **Goral v Poland**
App No 38654/97

The court found that there had been an unlawful interference with the applicants' correspondence and thus a violation of article 8 of the convention. In both cases, the violation arose due to the absence of clear and accessible domestic laws, which clarified the scope of the discretion to interfere with prisoners' legal correspondence, and the manner in which such discretion would be exercised by the authorities.

In *Cotlet*, the court also held that the government had breached the applicant's article 8 rights by failing to provide him with paper and envelopes. The court noted that article 8 can impose a positive obligation on a state to take steps to protect an individual's rights under this article. Such a positive obligation arises where there is a sufficiently close relationship between the demands on the state made by an individual and his/her right to respect for private and family life. The ECtHR accepted that there was such a relationship in the applicant's case between his request for writing materials and his right to respect for his correspondence, as protected under article 8.

Prisoners' money

■ **John William Duggan v (1) Governor of HMP Full Sutton and (2) Home Office**
[2003] EWCH 361 (Ch)

A life sentence prisoner argued that monies held for him by the prison governor or Home Office should be invested in an interest bearing account. This included cash that he was deprived of when he arrived in prison, and money which had subsequently been sent to him and that he had earned while in prison. The claimant sought consequential relief in the form of accounts in respect of such interest.

Rule 43(3) of the Prison Rules 1999 provides that monies handed to a governor are paid into the general bank account of the establishment at which a prisoner is held and credited to him/her in the books of the prison. The question before the court was whether rule 43(3), read in the light of Human Rights Act 1998 s3(1) and Protocol 1 article 1 of the convention imposed a trust on the governor.

Hart J held that preventing prisoners having access to cash while in prison was justified in the public interest. The claimant did not lose his right to be reimbursed for the money, and was entitled to be credited in the prison's books and to draw the eligible amounts under the incentives and earned privileges scheme. Hart J held that these arrangements were not incompatible with the claimant's rights under the convention, and in addition the policy was not disproportionate to the public interest requirement that prisoners should not have cash in prison.

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* Available at: www.official-documents.co.uk or from TSO, £26.50. See also September 2003 *Legal Action* 21.