law & practice

PRISONERS

Recent developments in prison law – Part 1



Hamish Arnott, **Simon Creighton** and **Nancy Collins** continue the series of updates on the law relating to prisoners and their rights. This series will appear in January and February, and in July and August. Part 1 of this update reviews the recent developments in policy, legislation and case-law regarding life and determinate sentences and parole. Part 2 will be published in February 2005 *Legal Action*, and will review the recent developments in policy, legislation and case-law regarding prison discipline and conditions and categorisation, segregation and protected witness units.

LIFE SENTENCES

Policy and legislation

Parole Board Rules 2004

New Parole Board Rules were introduced on 1 August 2004 designed to provide a uniform review procedure for all life-sentenced prisoners. The new procedures have immediate application to all mandatory life-sentenced prisoners and will be extended to all lifer reviews from April 2005. The rules are not laid by statutory instrument and are available on the Parole Board's ('the board') website.[1]

The main purpose of the new rules is to make provision for a paper 'sift' procedure before the oral hearing takes place. The process allows for prisoners to submit representations within 28 days of the disclosure of their parole dossiers. The papers are then considered by a single judge who can recommend either open conditions, release, that the case proceed directly to an oral hearing or reject the application. Where either open conditions or release are recommended, the case will proceed to be considered on paper by a three-person panel that has the same range of options available to it. If either the prisoner or the Home Secretary is unhappy with the decision reached by the board on the papers, it is possible for any party to elect for an oral hearing to be convened.

Case-law

■ **R v Sullivan and others**

[2004] EWCA Crim 1762

The confusion concerning the transitional arrangements contained in the Criminal Justice Act (CJA) 2003 for the setting of minimum terms for persons convicted of murder was partially addressed in this case. The duty of the criminal courts to set the minimum term applies to all prisoners convicted after 18 December 2003, irrespective of when the offence was committed (s269). Schedule 22 para 10 of the CJA 2003 requires the court not to set the term at a longer period than would have been set by the Home Secretary before December 2002. The main concern has been to establish what was the relevant maximum period that would have been set by the Home Secretary had the law not been changed. This is a particular problem as 'tariff' decisions were not published and so there is no source of reference for comparison.

Although the Home Secretary's tariffs were not published, there have been a series of practice statements issued by Lord Chief Justices in respect of the appropriate sentences for murder. These include two statements issued by the current Lord Chief Justice, Lord Woolf (Practice Note: (juveniles: murder tariff) [2000] 4 All ER 831; [2000] 1 WLR 1655; 27 July 2000, and Practice Statement (crime: life sentences) [2002] 3 All ER 412; [2002] 1 WLR 1789; 31 May 2002) as well as a letter written by Lord Bingham CJ in February 1997. While it was recognised that the Home Secretary might set tariffs at a slightly higher level than the periods recommended by the judiciary, these practice statements were the closest contemporaneous record for relevant sentencing guidelines in existence. The difficulty they posed was that it appeared that the relevant starting point for murder sentences had varied over the years, from 14–15 years in 1997, to 14 years in 2000, and 12 years in 2002. Also, it was not clear from these directions whether the mitigating and aggravating features had changed over these periods. This had resulted in new guidance being issued in December 2003 (which had been incorporated into the Consolidated Criminal Practice Direction [2004] EWHC 2753 (Admin) highlighting the different tariff levels that had existed over that period).

Lord Woolf's analysis of the apparent conflicts between the different practice directions needs to be read in full by any practitioner who is preparing representations for a life-sentenced prisoner having a minimum term set under these transitional arrangements; not least for its detailed exploration of the factors that allow for a departure from the starting points. However, the overall conclusion was that there is, in fact, little difference between the various directions: the apparent discrepancies are accounted for by a change in emphasis on those factors that take cases outside of the usual starting points (para 34). As a result, the December 2003 amendments to the Consolidated Criminal Practice Direction were withdrawn and amendment number 8 was issued to reflect the findings of the court.

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

25 November 2004

This challenge to the transitional arrangements for setting minimum terms for lifers contained in CJA 2003 Sch 22 was decided by a full Divisional Court. The High Court had adopted a policy on not seeing any further minimum terms pending this challenge. The challenge was to the compatibility of Sch 22 para 11, which forbids the High Court from holding an oral hearing, with article 6(1) of the European Convention on Human Rights ('the convention'), which provides for a public hearing when setting sentences.

The judgment states that while article 6(1) guarantees should apply at first instance hearings, a compliant appeals process which existed in this case can remedy breaches of the article. Nonetheless, the court took the view that its duty under Human Rights Act 1998 s3 required it to prevent prospective breaches of the convention from occurring, and that the statutory prohibition on convening oral hearings in the High Court was such a breach. A declaration was, therefore, issued in the following terms:

> *... paragraph 11 should be read as subject to the implied condition that the High Court judge has the discretion to order an oral hearing, where such a hearing is required to comply with the rights under article 6 (1) of a prisoner who makes an application under paragraph 3 of Schedule 22 or whose case is referred under paragraph 6 of that Schedule.* (Para 34)

The judgment goes on to consider the necessity for oral hearings to be convened in the High Court, and expresses the view that these are likely to be the exception as opposed to a routine requirement. Procedurally, it is stated that in cases where a prisoner wishes to apply for an oral hearing, the application must be made in writing to the High Court at the same time as the written representations on the length of the minimum term are submitted.

The legal analysis by which this declaration has been reached is not especially compelling. The overall finding that an appeals procedure which complies with article 6(1) can rectify structural

deficiencies in first instance courts is not easily discernible from previous Strasbourg case-law. This case-law seems to indicate that while appeals' processes can cure breaches of the article, there remains a requirement on member states to organise their first instance proceedings to prevent those breaches from occurring. However, having made that finding, it is difficult to comprehend why the court considered that there was a need for it to intervene at this stage as opposed to allowing the Court of Appeal to address this matter on a case by case basis. The court's analysis was not helped by the confusing state of the law regarding the requirements that apply to the process of judicially resetting sentences previously fixed by the executive for life prisoners. This may be clarified by the House of Lords in a case concerning the resetting of tariffs for HMP detainees, which is due to be heard in 2005 (*R (Dudson) v Home Secretary* [2004] EWCA Civ 99).

■ **R v Raja**

11 August 2004, QBD[2]

In this case, the High Court reset the minimum term for a mandatory lifer in circumstances where, in January 2004, the co-defendant's term had been reduced to time served. In *Raja*, the trial judge had recommended a term of 16 years and the Lord Chief Justice suggested 21 years, but the executive had set the tariff at 25 years. The Home Secretary had maintained the 25-year period in the face of a number of legal challenges over the years.

After careful consideration of the various competing recommendations and statutory guidance on sentence, Stanley Burnton J considered that it was appropriate to reduce the minimum term to the period recommended by the Lord Chief Justice of the day:

… I can see no error in the approach of Lord Lane, the Lord Chief Justice. The term he recommended was greater than the then minimum referred to in the then statement of policy of the Home Secretary in relation to political murders. While it is not possible to see any reason for the Home Secretary to have fixed a minimum term below 20 years, conversely, it is not easy to see why Raja merited a minimum term in excess of that, given the facts as set out in the judgment of the Court of Appeal [in an appeal against a concurrent determinate sentence] … (Para 57)

… While I take account of the principles in schedule 21 of the Act, I do not think it fair, in the circumstances of this case, to apply those standards of minimum sentences to a crime committed so long ago … (Para 58)

■ **Roberts v Parole Board**

[2004] EWCA Civ 1031

The Court of Appeal upheld the High Court's decision that the board was entitled to adopt a 'special advocate' procedure, modelled on the Special Immigration Appeals Commission, to enable it to hear evidence that was relevant to deciding risk factors, but which could not be disclosed to either a prisoner or his/her lawyer if there were fears for the safety of the source of the material. The appellant had argued that it was not permissible for an inferior tribunal such as the board to adopt such a draconian procedure without some form of statutory authority sanctioning the process. This argument was founded, in part, on the requirements of the convention, but was also based on the fact that in all other areas where a special advocate procedure was deployed, it had first been sanctioned by parliament. The merits challenge advanced in the High Court was not continued on appeal.

The Court of Appeal rejected these submissions. The court accepted the board's argument that CJA 1991 s32 gave it statutory authority to adopt whatever procedure it considered necessary and appropriate to decide cases referred to it by the Home Secretary. The court held that the board has an inherent jurisdiction to adopt whatever procedures it considers necessary to fulfil its statutory duty to assess risk in light of all the material before it, including the use of a special advocate procedure. The crucial part of the judgment was as follows:

In making these difficult judgments section 32 of the 1991 Act requires the board to have regard to all the evidence which is put before it. This is not surprising given its protective and preventative role. It is obvious that such evidence may come from a source who himself may be at risk of life or limb if his identity is known. It seems to me that the board must have inherent power to devise procedures to protect such a source. The risk to the witness may only justify external measures of protection such as those used to protect witnesses in criminal trials. But if the risk is sufficiently serious, I think the board must have the power to direct that the evidence should be withheld from the prisoner or his representatives altogether. Once it is accepted that the board does have such a power it must additionally have the power to mitigate the unfairness to the prisoner caused by the withholding of the evidence from him or his representatives. One obvious way of doing this is by the SAA [sic] procedure. (Para 29)

The judgment does not contain much in the way of legal analysis of the basis on which a special advocate procedure has developed, or the reasons why it is permissible for tribunals to adopt such a procedure without parliamentary authority. An intervention by legal and human rights organisation Justice pointing out the wide-ranging implications of the decision was not addressed in any detail. The immediate implications for the board have included a successful application by a determinate prisoner to have a special advocate appointed to see material that was withheld from him as part of a paper parole review. The House of Lords has now given permission for Mr Roberts to appeal.

■ **Blackstock v UK**

App No 59512/00, 12 May 2004

The European Court of Human Rights (ECtHR) considered a number of complaints by a discretionary lifer concerning the conduct of his parole review before his release. The Home Secretary had rejected recommendations by the board for a move to open conditions and on the timing of the next review. The applicant sought to argue that it was a violation of article 5(4) of the convention for the board not to have the power to direct a move to open conditions or set the period between reviews.

These two arguments were declared inadmissible by the ECtHR (although it did declare that the actual delay which occurred between reviews was potentially in breach of article 5(4) and permitted that part of the application to proceed). The reasoning of the ECtHR was that the concept of liberty protected by article 5 is an absolute one and does not relate to moves between various categories of prison, no matter how important such moves are to eventual liberty. A distinction was drawn with this situation and the violation the court had found in *Johnson v UK* (1997) 27 EHRR 296, where a decision to release the patient conditionally had been made. In relation to the timing between reviews, the court's view was that it is not a requirement for the body re-evaluating the legality of detention to fix the timing between reviews, but an obligation of the state concerned. Any executive decision on timing must be made in compliance with article 5(4), and would be subject to the usual judicial controls.

The decision of the ECtHR affirms a long line of domestic authorities where similar arguments have been rejected. It would appear that despite the acceptance that a move to open

conditions may be essential before release and will be approved in the vast majority of cases, this is still a transfer within the prison system rather than a form of conditional release. The extension of article 5(4) to the control of conditions of detention was clearly a step that concerned the court. While the decision does gloss over the realities of the life sentence system, it is easy to see why the court has decided to draw a line which restricts article 5 to an absolute concept of liberty as opposed to ancillary decisions which might impact on liberty. (See also page 31 of this issue.)

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

[2004] EWHC 1742 (Admin)

Shortly after *Blackstock*, a further attempt was made in the domestic courts to establish that article 5 required the board to have responsibility for setting the period between reviews. Although the court had sympathy with the submission, suggesting that the argument had a great deal of merit, as a matter of law the conclusion reached was that no such obligation existed. However, the court did issue a declaration that the period between reviews set by the Home Secretary in this case was unlawful. The judgment makes it clear that a *Wednesbury* analysis is not appropriate in such circumstances as the appropriate test is 'whether the decision provides for the lawfulness of the claimant's detention to be decided speedily by the Parole Board' (Para 55).

■ **R (Motylski) v Secretary of State for Home Department and South Yorkshire Probation Service (interested party)**

[2004] EWHC 2166 (Admin)

A submission to challenge the recall of a life-sentenced prisoner was refused permission at a renewed application. The claimant had absconded after serving 21 years of a life sentence for murder and had subsequently been at large for 17 years, living in France. He was eventually returned to custody and then released on life licence. His licence conditions included the standard condition not to travel outside of GB without the prior approval of his probation officer.

Having been granted such permission for a short trip abroad, the claimant travelled to France but did not return, although he remained in contact with the probation services. The claim that an executive decision to recall him to custody (at which point his case would be considered by the board) was unlawful was rejected as being unarguable. The court found that the statutory power to instigate an executive recall was consistent with the convention, and that the claimant would need to make his case to the board.

DETERMINATE SENTENCES AND PAROLE

Early release of prisoners facing removal

■ **Secretary of State for Home Department v (1) Hindawi (2) Headley**

[2004] EWCA Civ 1309

The Home Secretary appealed against the Administrative Court's decision that the prohibition on discrimination in article 14 of the convention in conjunction with article 5 was breached by the Home Secretary's refusal to refer the cases of long term prisoners facing removal from the UK to the board for consideration of whether they should be released at the halfway point. In such cases, the Home Secretary makes the decision on release.

The Court of Appeal (Neuberger LJ dissenting) allowed the appeal, although the two majority decisions gave very different reasons for this. Kennedy LJ found that the complaint was not even within the ambit of article 5 and so no breach of article 14 could be made out. This was on the basis that there was authority that article 5 was not directly engaged in the administration of determinate sentences (*R (Giles) v Parole Board* [2004] 1 AC 1; *R (Smith) v Parole Board (No 2)* [2004] 1 WLR 41). Therefore, the fact that the sentencing court satisfied the article 5 rights of such prisoners meant that the decision about parole could not be within its 'ambit'. Kennedy LJ accepted that had the decision been within article 5's ambit there would have been a material difference in treatment amounting to discrimination, but that this would have been justified. This was on the basis that the report leading to the relevant legislation justified the difference in treatment on the basis that it would be problematic to refer to the board the cases of prisoners who were not to be supervised in this country.

Sedley LJ agreed that the decision was not within the ambit of article 5, but on a different and curious basis. He held that what was being sought under the statutory framework was merely the advice of the board on release. Such advice was too remote from rights under article 5 to come within its ambit, a conclusion that appears to put form over substance. If the decision had been within article 5's ambit, Sedley LJ stated that he would have had great difficulty in accepting that the discriminatory difference in treatment was justified, in light of the fact that the board performed the function of deciding whether it was safe to release lifers subject to removal.

In his dissent, Neuberger LJ held that the refusal to refer to the board was within the ambit of article 5, and agreed with the first instance decision regarding why it breached article 14. On the ambit of article 5 issue he noted that the House of Lords (in *R v Governor of Brockhill Prison ex p Evans (No 2)* [2001] 1 AC 19) has held that the failure to release a determinate sentence prisoner early, as required by the statutory scheme that provides for such release could give rise to a breach of article 5. Therefore, although *Giles* and *Smith* were authority for the fact that article 5 was not engaged directly in the administration of early release systems, this did not mean that if the legislature introduces such a scheme, which results in a prisoner being entitled to early release, article 5 is not engaged for article 14 purposes.

Recall to prison

■ **R (Buxton) v The Parole Board and Secretary of State for Home Department (interested party)**

[2004] EWHC 1930 (Admin)

The claimant in this case was a short term prisoner serving a 33-month sentence for drug-related offences. He was released on licence, but recalled to custody following an argument with his partner during which the police were called. He was charged with causing actual bodily harm, but the charges were dropped. Through his solicitors he made representations to the board about his recall. These representations included letters from his partner about the incident stating that her injuries were caused accidentally during the argument. The representations also informed the board that since the recall it had become clear that she was pregnant. There was also before the board a psychiatric report which stated that immediately before the recall the claimant was suffering from depression. The report raised concerns about his return to custody 'in terms of the significant impact on his mental health and the increased risk of suicide and self-harm'. The representations confirmed that psychiatric care was available in the community if the claimant were to be released.

The board rejected these representations. It highlighted the claimant's long offending history, his history of substance abuse, and the fact that he proposed that he should be released to his partner's home given the events leading to the recall. However, the board's reasons did not mention that the claimant's partner was pregnant, or that there was medical evidence expressing concern over the impact of recall on the claimant's mental health.

The decision was challenged on the basis that the board misdirected itself regarding the manner in which it could take into account personal circumstances when considering recall. The relevant statutory directions on recall issued under CJA 1991 s32(6) require the board, among other things, to consider whether a

prisoner's release 'would present an unacceptable risk to the public of further offences being committed'. The claimant argued that in deciding whether a risk was 'unacceptable', the board was required to consider compassionate personal circumstances which may not, in themselves, impact on the level of risk that a prisoner was assessed as posing. He argued that this interpretation was supported by the fact that the directions also stated that, in deciding the issue, the board was required to take into account the question of whether a prisoner was 'likely to commit further offences': this requirement would be redundant if 'unacceptable' referred to an unvarying level of assessed risk.

The claimant argued further that such compassionate factors as existed in his case had to be taken into account, as there could otherwise be a breach of articles 8 or 3 of the convention. The impact of a return to custody on the claimant's mental health could interfere with his article 3 right not to be subjected to inhuman or degrading treatment (by analogy with *Keenan v UK* [2001] 33 EHRR 38). There was also a possibility that, in light of his partner's pregnancy, his article 8 rights to private and family life may be similarly infringed. While it was accepted that the board was the primary decision-maker regarding these issues, nothing in its reasoning indicated that they had properly been taken into account.

The court rejected these arguments. It held that, applying the directions, the board had to decide whether the risk of further offending was 'unacceptable', and that personal compassionate factors would only be relevant insofar as they impacted on the level of risk: they were not to be balanced against the assessed risk.

The convention arguments were similarly rejected. The judge held that article 3 was not engaged in relation to the decision about whether to revoke the licence (relying on the admissibility decision in *MH v UK* App no 22162/93). He took into account that the Prison Service was required to meet prisoners' medical needs in custody. The fact that the claimant was a serving prisoner was also seen as restricting his article 8 rights to the extent that as long as there was no breach of article 5 (the right to liberty) there could be no breach of article 8. This was despite the existence of clear authority that rights under article 8 are not lost through imprisonment (eg, *R (P and Q) v Secretary of State for Home Department* [2001] EWCA Civ 1151). The board's reasoning could not therefore be criticised.

■ **R ((1) Francis (2) Clarke) v Secretary of State for Home Department and the Parole Board (interested party)**

[2004] EWHC 2143 (Admin)

These cases involved the situation where a short term prisoner:

- is released on licence;
- is then charged with a criminal offence and recalled to prison under CJA 1991 s39;
- and then makes representations to the board for re-release (under s39(4)) which are rejected;
- is then found not guilty of the criminal charge; and so
- seeks to make fresh representations to the board.

The question addressed was whether, in this situation, there is a legal duty on the Home Secretary to refer the matter back to the board. The claimants submitted that there was nothing in the legislative scheme to restrict a prisoner to one set of representations which could generate a referral to the board.

The Home Secretary contended, first, that the statutory scheme rendered the board as having no further official authority or legal effect once it had considered the initial representations, and that if that was wrong that he was only obliged to refer further representations if, in his view, they demonstrated a material change of circumstances.

The court rejected the claimants' case that the statutory scheme permitted multiple sets of representations to be made against recall, which would have to be referred to the board no matter how unmeritorious they were. However, the court was troubled by the possible unfairness in a situation where the board was restricted to making a 'once and for all' decision. Therefore, the judge concluded that s39 was flexible enough to allow the Home Secretary to refer a recall case back to the board where further representations demonstrated a material change of circumstances. This view was supported by the fact that, in lifer cases, a similar test had been held to apply to the board's decisions (*R v The Parole Board ex p Robinson* 29 July 1999, unreported). Whether the representations met this threshold should be the Home Secretary's decision applying the test regarding whether they showed 'a material change in circumstances such as to admit of a realistic prospect that a different view might be taken by the parole board' (para 49).

This case demonstrates the difficulties that can be caused by the board proceeding to make a decision on recall pending criminal proceedings against the prisoner. While the board maintains that it may be able to come to a view on recall on the basis of an offender's behaviour surrounding a criminal charge, rather than by taking any view about whether s/he is guilty of the charge itself, this is clearly an artificial distinction that risks real unfairness in individual cases.

■ **R (Morecock) v Parole Board**

[2004] EWHC 2521 (Admin)

The claimant was a long term prisoner serving a 12-year sentence for burglary with intent to rape and other offences. He was released on licence, as required by CJA 1991 s33(2), at the two-thirds point of the sentence. He was still assessed as being a high-risk offender.

He was recalled to prison under CJA 1991 s39 on the basis that he had breached his licence conditions by contacting his ex-partner, who also alleged that he had assaulted and intimidated her, and by failing to reside at a hostel. The probation report on which the recall was based also referred to the facts that he had been driving his car illegally and had been summonsed for driving without a licence and without insurance; these matters were not referred to in the reasons for recall. The representations against recall confirmed that the claimant's ex-partner had withdrawn the allegations against him, denied that he had not resided at the hostel, but admitted the driving matters.

The board, in its reasons for rejecting the representations against recall, accepted that the claimant's ex-partner had withdrawn the allegations against him, and that there was no proof that he had failed to reside at the hostel. However, the board stated that, in light of the admissions over the driving matters, the claimant had breached the requirement in the licence 'to be of good behaviour'.

In response to representations, the board accepted that the driving offences were not imprisonable, but stated that they demonstrated a pattern of 'prolific and entrenched' offending. The board was also satisfied that the claimant had failed to be of good behaviour as required by his licence, and that there was, accordingly, an unacceptable risk of further offences being committed. It noted that the directions to the board did not require the risk of future offending to be restricted to imprisonable offences.

The claimant challenged the decision on the basis that it was irrational for the board to recall him (potentially for several years) because of a risk of future offending which, in itself, would not attract a prison sentence. The court rejected this argument: the directions to the board stated explicitly that recall could be justified on the basis of a risk of offending that does not involve a 'risk to public safety'. Furthermore, as a breach of licence conditions could justify recall

under the directions, it could not be said that only a risk of a certain level of offending could justify recall.

A second challenge was on the basis that the board's decision had relied on matters not mentioned in the initial recall decision, and that this breached the requirement to give the 'right reasons at the right time' (see *Rodgers v (1) The Governor of HMP Brixton (2) Secretary of State for Home Department* [2003] EWHC 1923 (Admin)). This argument was also rejected on the basis that the board's function is not limited to deciding whether the recall was correct, but also to establishing whether an offender posed an unacceptable risk for release at the time of its decision (by analogy with *R (Sim) v Parole Board and another* [2004] 2 WLR 1170). *Rodgers* was distinguished on the basis that the challenge was to the Home Secretary's initial decision to recall, the unlawfulness of which, on the facts of that case, was not cured by the referral to the board.

Comment: These cases demonstrate the precariousness of the position of determinate prisoners on licence, especially since the directions to the board on their recall were changed in 2002 to state explicitly that there did not need to be any 'risk to public safety' to justify recall. While there has been criticism of this change because a recall to prison where there is no risk to the public may not be a justifiable deprivation of liberty, the decisions stating that article 5 rights for determinate sentence prisoners are satisfied once and for all by the sentencing court – notwithstanding the existence of early release schemes (eg, *Smith* above) – mean that there does not have to be a fresh 'causal link' between the grounds for recall and the original sentence.[3] Therefore, unlike with lifers and those serving extended sentences, there does not have to be a risk of the commission of the kind of offence that led to the sentence being imposed in the first place. If the executive is left to establish release criteria, this clearly raises a concern that prisoners may be recalled for wholly disproportionate amounts of time in relation to the risk posed to the public.

The House of Lords has now heard *Smith* together with *West* [2004] EWCA Civ 1641. The prisoners argued that determinate prisoners are entitled to consideration of their recalls at oral hearings before the board, under articles 5 and 6 of the convention. They also claimed that the requirements of fairness under common law have developed to the point that the factual loss of liberty in the recall context is a matter that should be considered at a hearing, notwithstanding the applicability of the convention. Judgment is expected by early 2005.

Licence conditions

■ **R (Carman) v Secretary of State for Home Department**
[2004] EWHC (Admin) 2400

In this case a doctor received an 18-month sentence for three counts of indecent assault. The Court of Appeal had quashed the convictions in another six counts. When he came to be released at the halfway point of his sentence the Probation Service decided that he should be required to reside at a hostel so that his ongoing risk to the public could be assessed and monitored. The claimant challenged this requirement on the basis that his article 8 rights were breached by this condition as, in addition to residing at the hostel, he had to report every two hours and this made it more difficult for him to see his family.

It has been held that the imposition of licence conditions on those serving sentences in the community is a matter that potentially engages an offender's right to private and family life under article 8 (see *R (Craven) v Secretary of State for Home Department and The Parole Board* [2001] EWHC Admin 850). This means that where licence restrictions interfere with article 8 rights, they must do so only insofar as it is necessary (eg, to prevent contact with victims) and must be proportionate.

The judge in this case, while accepting the possible infringement of article 8 rights by licence conditions, stated that such challenges would be extremely rare because

> *… licence conditions and assessments of risk to the public, on which they are based, are matters of fine judgment for those in the prison and probation service experienced in such matters not for the courts. The courts must be steadfastly astute not to interfere save in the most exceptional case.* (Para 33)

The challenge to the Probation Service's entitlement to require the claimant to live in a hostel with reporting requirements was therefore rejected on the basis that the imposition of such a requirement was clearly within the service's power, as it was tied to its intention to assess and monitor his risk to the public. The Probation Service had made clear that the requirements were imposed for an initial period and would be subject to review.

However, the judge quashed the licence condition requiring the claimant to reside at a hostel on other grounds. The initial risk assessment document had been produced before the Court of Appeal's decision to quash some of the convictions and, therefore, the court had proceeded on the basis that the claimant had been convicted of more than three offences. As the risk assessment was flawed, the condition could not stand pending the Probation Service's reassessment of risk. The judge reached this conclusion with no enthusiasm and reiterated that challenges to licence conditions would be unusual and should not be made without reference to his judgment.

Article 7 and sentencing

■ **R v Secretary of State for Home Department ex p Uttley**
[2004] UKHL 38, 30 July 2004

The House of Lords examined the ambit of article 7 of the convention in respect of the changes brought about to the release of prisoners by the CJA 1991. Before the enactment of the CJA 1991, prisoners were eligible for release on parole after serving one-third of their sentence and were automatically released with no form of licence after serving two-thirds. The CJA 1991 changed the position so that prisoners serving sentences of four years or more became eligible for parole after one-half of the sentence, and were then released on a licence at the two-thirds point; the licence ran until the three-quarters point of the sentence. In 1995 Mr Uttley was convicted of offences that he had committed in 1983. He fell to be sentenced under the terms of the CJA 1991, and received a 12-year prison term. He was released on licence having served two-thirds of the sentence.

The Court of Appeal had held that the imposition of a sentence, which included a period of supervision in the community on licence, amounted to a more severe penalty than a prison term which carried no such statutory requirement. Accordingly, it held that since a more severe punishment had been imposed than had existed at the time of the offence, article 7 had been breached.

At the appeal hearing in the House of Lords, the appellant put forward a new argument based on a decision of the ECtHR suggesting that article 7 was only concerned with protecting people from increases in the maximum available sentence as opposed to changes in the range of sentences within the maximum (*Coeme and others v Belgium* App No 32492/96; 22 June 2000). The Lords considered that the key word in article 7(1) was the prohibition on the imposition of a heavier penalty than the one 'applicable' at the time. The interpretation placed by the Lords on the word 'applicable' was that it referred to the maximum penalty available. Thus, in this case, the maximum penalty at the time that the offences were committed was life imprisonment, and this remained the upper limit of the term available at the time of conviction and sentencing. As there had been no increase in the maximum sentence available, and since a 12-year sentence had actually been imposed, it was held that there had been no breach of article 7.

As a result of this finding, the Lords did not feel the need to reach a decision on the original appeal point, ie, whether licence conditions amounted to a penalty. However, a criminal appeal in which this is the main point has been granted leave by the Lords and may provide the answer (*R v R* [2004] 1 WLR 490).

Comment: The Lords' finding in this case is not straightforward and was reached without the benefit of any real body of jurisprudence on the ambit of article 7. The few cases that have looked at article 7 have tended to be in the context of sentences of life imprisonment, but the Lords considered that these did not help because of the special nature of the life sentence in this country.

Nevertheless, in *Sullivan* (above), Lord Woolf CJ commented that the transitional arrangements in the CJA 2003 for setting minimum terms – which prohibit longer terms being set than would have been imposed at the time the offence was committed – had been introduced to prevent breaches of article 7(1). Lord Woolf's remarks certainly represent what had been the generally understood position before *Uttley*. Interestingly, all legislation passed since the CJA 1991 has proceeded on the assumption that changes to sentencing powers and the lengths of licences can only apply to people who commit offences after the legislative change. However, the Lords felt that it was too artificial to try and construct what sentence would have been imposed when an offence was committed. The Lords were persuaded that the changes to the parole and early release schemes had been accompanied by supplementary changes in sentencing practice so as to mitigate any unfairness to defendants. Given the very radical and novel interpretation given to article 7, it is highly likely that the ECtHR will revisit this issue in due course.

The Lords' suggestion that life sentences cannot be used as a basis for understanding the position for determinate sentences is indefensible.

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1 Available at: www.paroleboard.gov.uk/publications/paroleboard rules 04.htm.
2 Transcript available only on the Court Service website at: www.courtservice.gov.uk/cms/10354_12277.htm.
3 See, for example, *Prison law*, Stephen Livingstone, Tim Owen QC and Alison Macdonald, 3rd edn, OUP, 2003, p427.

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The Freedom of Information Act 2000 explained

In January 2005 a new era of public access to government-held information begins. The Freedom of Information Act (FIA) 2000, which received royal assent in November 2000, will come fully into force, creating a general right of access to information held by public authorities. In future, when an individual demands information from a public authority, such as a central government department, the police or an NHS Trust, that authority will be under a duty to confirm or deny the existence of that information and to supply it to the applicant, unless it is able to rely on a specific exemption. In this article, **Guy Vassall-Adams** explains the new Act's main provisions and gives examples of how it is likely to work in practice.

Introduction

Historically, the UK has been afflicted by a culture of secrecy in government and in recent decades we have been overtaken by both mature and emerging democracies, which have seen freedom of information as an indispensable safeguard in maintaining democratic transparency and accountability. The FIA has the ambitious aim of inducing a change of culture, from the current philosophy of 'need to know' to a new acceptance of the 'right to know'.[1] In addition to providing members of the public, campaigning organisations and journalists with a new means of accessing information on issues of public interest, the Act will be a powerful tool for lawyers seeking information of relevance to their cases.

Overview

The scheme of the Act is to introduce a general right of access to information held by public authorities, also referred to as a 'right to know', balanced against a series of specific exemptions relating to the subject matter of the request. Most of these exemptions apply a public interest test to decisions about disclosure; even if the exemption applies, the information must be disclosed if the wider public interest outweighs the need to maintain the exemption. Public authorities themselves will naturally take the initial decisions about disclosure, but where disclosure has been refused there is a series of safeguards for applicants designed to ensure that information that should have been disclosed reaches the public domain. The four stages are: (1) a mandatory internal review of the decision by the public authority concerned; (2) an appeal to the Information Commissioner; (3) an appeal to the Information Tribunal and (4) an appeal to the Divisional Court on a point of law.

The FIA has already been partially implemented, with a rolling programme requiring public authorities to adopt and maintain publication schemes that must have been approved by the Information Commissioner.[2] Publication schemes are guides to the types of information routinely published by the authority, the formats in which that information is published and whether the information is available free of charge or whether payment must be made. Access to information published under a publication scheme does not require an applicant to exercise his/her right to know under the Act; this right is to be used to access information that has not been published.

The rights defined

Section 1(1) of the FIA provides that any person making a request for information to a public authority is entitled:

■ to be informed in writing by the public authority whether it holds information of the description specified in the request, and

■ if that is the case, to have that information communicated to him/her.

The Act therefore places public authorities under dual duties: (1)

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