law & practice

PRISONERS

Recent developments in prison law


Hamish Arnott (far left) and **Simon Creighton** continue the series of updates on the law relating to prisoners and their rights. This series of articles appears twice-yearly.

LEGISLATIVE CHANGES

Changes to the Prison Rules

The Young Offender Institution Rules 2000 SI No 3371 came into force on 1 April 2001 and consolidated the existing rules. There are no important substantive changes to the 1988 Rules as amended.

Race Relations (Amendment) Act 2000

The Race Relations (Amendment) Act 2000 from April 2001 extends the provisions of the Race Relations Act 1976 so that all the public functions of bodies such as the Prison Service will be covered (see April 2001 *Legal Action* 23). The Act prohibits race discrimination by public authorities in carrying out any of their public functions (new s19B of the 1976 Act).

Public authorities will include the Prison Service and private prisons – so decisions affecting, for example, security categorisation, discipline, segregation or access to facilities and privileges are covered. Both direct and indirect discrimination is outlawed. This means that prisoners who allege that they have been discriminated against in these areas will be able to take county court proceedings for compensation, and seek assistance from the Commission for Racial Equality in doing so. Up until now only the provision of 'goods, facilities and services' by public bodies has been covered.

This has meant that the 1976 Act has been of very little benefit to prisoners up to now – there appears to be only one reported case of a prisoner successfully using the old Act. This was *Alexander v Home Office* [1985] CLY 1669, where a prisoner was compensated for having been refused jobs in prison on racist grounds. This relied on an argument that the allocation of work was the provision of 'facilities or services'. There will be a continual problem of evidence in establishing discrimination, but the Act does have further provisions that should require more effective monitoring of discrimination.

PAROLE AND LIFERS

Tariffs

In *R (on the application of Anderson and Taylor) v Home Secretary* [2001] EWHC Admin 181, two mandatory lifers had their tariffs set by the Home Secretary at a higher level than that recommended by the judiciary. They sought declarations that Crime (Sentences) Act 1997 s29(1), which provides the statutory authority for the Home Secretary to set tariffs, after consultation with the Lord Chief Justice and trial judge, breaches article 6 of the European Convention on Human Rights ('the convention') on the basis that tariff setting is, in substance, the determination of the criminal sentence and should therefore be set by the judiciary rather than by the executive. The rationale for the tariff to be set by the Home Secretary has always been that the mandatory life sentence entails life-long punitive detention and that the decision to allow for a tariff to be set and for release on life licence is an executive power, all 'rights' having been extinguished following the conviction for murder (see, eg, *R v Home Secretary ex p Doody* [1994] 1 AC 531). The claimants argued that this rationale is no longer sustainable as it is now recognised that the mandatory life sentence is in fact comprised of two distinct parts, the first being the punitive part and the second being based on the need for public protection.

The application was rejected by the Divisional Court, the lead judgment being given by Rose LJ. He took the view that there was no jurisprudence from the European Court of Human Rights (ECtHR) to support the argument that article 6 was engaged, the court having specifically approved the argument that the sentence entailed life-long punitive detention in *Wynne v UK* (1995) 19 EHRR 333. Although the *Wynne* case was concerned with the release procedures for lifers under article 5(4), the rationale had been applied by the Commission in subsequent applications concerning tariff setting. He further held that a succession of decisions by the House of Lords throughout the 1990s had upheld the distinction between mandatory life sentences and the judicialised regime applied to discretionary lifers and persons detained at Her Majesty's pleasure.

Concurring judgments were given by Sullivan J and Penry-Davey J, although both expressed concern at the logic applied by the ECtHR. Sullivan J commented that, freed from authority, he 'would have had no hesitation in concluding that … the claimants' rights under Article 6 had been infringed'. He made specific reference to the *Wynne* judgment and doubted that the reasoning was valid. Leave to appeal has been given and the Court of Appeal is to hear the cases in October 2001.

An application for permission to move for judicial review by a family member of a murder victim was rejected by the Divisional Court in *R (on the application of Bulger) v Lord Chief Justice and Home Secretary* [2001] EWHC Admin 119, QBD (Admin Ct). The case was brought by the father of James Bulger who sought to challenge the length of tariff set for the two boys convicted of his murder which was set by the Home Secretary in line with a recommendation made by the Lord Chief Justice (LCJ) under the transitional arrangements introduced by the Home Secretary following the ECtHR decision in *Hussain v UK* (1996) 22 EHRR 1.

The claimant argued that the Home Secretary had fettered his discretion by agreeing to accept the recommendation made by the LCJ and that the recommendation itself was irrational, having applied too great a weight to factors favourable to the detainees. The application was dismissed, the court finding that the Home Secretary was obliged to introduce the procedures in order to comply with the convention and that, had he not accepted the LCJ's recommendation, he would have been acting in breach of the convention. The reasonableness challenge was considered to be unfounded.

More importantly, the court went on to express the opinion that the family of a victim does not have necessary standing to be heard on the issue of tariff setting. Rose LJ considered that whilst it was now accepted practice to obtain victim impact statements on the effect of the crime on victims, this did not extend to the victim having a right to be heard on the appropriate length of sentence. The only persons with sufficient interest in sentencing so as to have standing to be a party to proceedings are the state and the person convicted.

Parole reviews

The first domestic decision was made on the thorny issue of how often parole reviews must be conducted to meet the requirements of article 5(4) following the expiry of tariff in *R (on the application of MacNeil) v Home Secretary* (2001) 21 March, CA. A series of ECtHR decisions have found breaches of article 5(4) where parole reviews have taken place at two-yearly intervals, the most

recent being *Oldham v UK* [2000] Crim LR 1011, but these cases have usually been dependent on there being some unwarranted delay or a failure by the parole board to accept a recommendation. In *MacNeil*, the claimant argued that a parole board recommendation for a two-year review in his case breached article 5(4) but failed to establish that the facts of his case would have required an earlier review. In light of the unfavourable facts, which included a subsequent failure in open conditions, the Court of Appeal considered that the convention requirement for regular reviews had been met, whilst expressly declining to make any comment on the general principles as to the appropriate period between reviews. The case illustrates the difficulties in seeking to rely on convention points in a vacuum and the need for appropriate facts to substantiate such arguments.

In *R (on the application of Noorkoiv and Rogers) v Home Secretary* (2000) 15 December, QBD (Admin Ct), a challenge was made to the policy applied by the Prison Service which prohibited lifers serving short tariffs from progressing to open prison conditions prior to the expiry of their tariffs. The issue is of great importance as the general policy applied was that lifers could not progress to open conditions unless a recommendation had been made for such a transfer by the parole board and that lifers will not generally be released until they have been tested in open prison conditions (see also *R v Home Secretary ex p Stafford* [1999] 2 AC 38). There was a great deal of factual dispute in the case and the judge made an important factual finding that, prior to October 2000, the defendant had failed to implement a policy which allowed for lifers serving short tariffs to be transferred to open conditions prior to tariff expiry and that this did impact on their applications for release on licence. In light of the acceptance that a new policy had been put in place to meet the unfairness and to allow for transfer to open conditions in suitable cases, the court held that there was no requirement for a formal parole review to take place prior to tariff expiry.

PRISON DISCIPLINE

European Convention on Human Rights

Prior to the coming into force of the HRA 1998 it was widely expected that the existing prison disciplinary system would be found to breach convention rights. However domestic courts have recently held in two cases that prison disciplinary proceedings do not engage article 6 (right to a fair hearing). In *R (on the application of Carroll and Al-Hasan) v Home Secretary* [2001] EWHC Admin 110, QBD (Admin Ct) the two claimants were put on report for disobeying an order to squat during a strip search. Both asserted before the governor that an order to squat required the searching officer to have a reasonable suspicion there was something concealed in the anal or genital area and that they had not been told of the grounds of any such suspicion. Both were found guilty of the charges and one received a punishment of two additional days and 10 days' cellular confinement, and the other 15 days' stoppage of earnings and privileges (no additional days as he was a lifer). Both sought judicial review of the findings of guilt claiming that as article 6 applied to the disciplinary proceedings, they had unlawfully been refused legal representation (a right under article 6(3)(c)).

Article 6 applies to proceedings involving 'civil rights' or 'any criminal charge'. The court rejected a submission that the charges in question were 'criminal' within the meaning of article 6. Whether charges were criminal in this context depended on the threefold test set out in *Engel v Netherlands* (1979–80) 1 EHRR 647 – that is first how the charges are classified domestically, second the nature of the charges themselves, and third the nature and severity of the penalties imposed. The judge considered that the domestic classification was disciplinary rather than criminal, and that the particular charges of disobeying a lawful order were also disciplinary, not having any application to non-prisoners. The application of article 6 would therefore depend on the third criterion.

He rejected a submission that the change effected by the Criminal Justice Act (CJA) 1991, that prisoners were given 'additional days' rather than a forfeiture of remission as punishment, meant that such a punishment was now a loss of liberty rather than a privilege so as to conclusively engage article 6. He concluded that the right to be released on licence was not unconditional and the power to order additional days was founded upon the original sentence of the court. Accordingly, reviewing the Strasbourg authorities (*Campbell and Fell v UK* (1984) 7 EHRR 165, *Pelle v France* (1986) 50 DR 263, and *McFeely v UK* (1980) 3 EHRR 161) the judge decided that the punishments imposed were not excessive, and were appropriate for disciplinary offences. Whilst he did state that a mechanistic approach should be avoided he also concluded 'nor, having regard to the range of offences with which the prison authorities can be concerned, can the maximum penalties lead to a different conclusion'. The judge also rejected submissions regarding the alleged bias of the adjudicator under existing common law, and the right to legal representation under the *Tarrant* criteria.

A matter of days after judgment in this case, the Divisional Court (Latham LJ and Potts J) gave judgment in *R (on the application of Greenfield) v Home Secretary* [2001] EWHC Admin 129, QBD (Admin Ct). In this case, the claimant was put on report for failing a mandatory drugs test. His defence was that he had smoked cigarettes that had been spiked with opiates. Legal representation was refused and the claimant was found guilty and given 21 additional days.

In deciding whether article 6 applied the court again applied the *Engel* criteria, and relied on the very old Commission decisions of *McFeely* and *Pelle* (see above). The case of *Benham v UK* (1996) 22 EHRR 293 where loss of liberty of 30 days was held to come within article 6 was distinguished as it did not involve a 'disciplinary context'. The court, taking into account that the charge involved could have founded a charge of possession of a class A drug, and attracted a maximum of 42 additional days, was satisfied that the procedure involved was 'properly described as disciplinary' and so 'at least so far as the offences in question are concerned do not amount to criminal charges so as to require the protection of Article 6. A contrary conclusion would, in our judgement, produce serious difficulties for the prison service in maintaining a swift and effective discipline system'.

The court also rejected an argument that article 6 applied as the punishment of additional days was a loss of liberty, which could constitute a 'civil right' under the convention (the claimant relying on *Aerts v Belgium* (1988) 29 EHRR 51). The court adopted the same analysis of the CJA 1991 as the court in the *Carroll and Al-Hasan* case, namely that the power to give a punishment of additional days was an aspect of the administration of the original sentence, and not a fresh loss of liberty. This therefore also prevented there being any application of article 5 in this case, as the detention during the additional days would be justified under article 5(1)(a) – that is as following the original conviction.

Both these cases have been granted leave to appeal to the Court of Appeal and will be heard together later in the year. The ECtHR has also recently considered whether the prison disciplinary system engages article 6 – for the first time since the changes to the system brought in by the CJA 1991. In January the court declared admissible a case involving two prisoners (*Ezeh and Connors v UK*) one of whom was

charged with assaulting an officer and received seven added days, and one charged with making threats to kill who received 40 added days. Whilst the admissibility decision does not give much indication of how the court will find on the merits, there is some hope that it may take a different approach to the domestic courts, given that the charges in this case are clearly criminal in character and that one of them attracted a punishment close to the maximum.

The Prison Service will have to make some changes to the disciplinary system in light of another decision of the ECtHR in *Keenan v UK* (2001) 3 April, App 27229/95. Here the court considered that the use of disciplinary proceedings against a schizophrenic and suicidal prisoner who took his own life when in the segregation unit following an adjudication contributed to its finding of a breach of article 3, the prohibition on inhuman and degrading treatment. Moreover the court also found a breach of article 13, the right to an effective remedy, in relation to the procedures in place for reviewing the adjudication. The prisoner had been given seven days' segregation and 28 added days as a punishment for an assault. The court commented that no remedy at all was available to him which would have offered him the prospect of challenging the punishment imposed within the seven-day segregation period or even within the period of 28 days' additional imprisonment. Judicial review could not have been concluded within this time. Similarly, the internal avenue of complaint against adjudication to the prison headquarters (under Prison Rule 61) took an estimated six weeks.

The fact that he may not have been in a fit mental state to make use of any remedy pointed to the need for the automatic review of an adjudication in these circumstances. The prisoner had been punished in circumstances disclosing a breach of article 3 and had the right, under article 13, to a remedy which would have quashed that punishment before it had either been executed or come to an end. In light of this judgment the Prison Service will have to review its procedures for reviewing findings of guilt where cellular confinement and additional days are given as punishments.

Witnesses

In *R (on the application of Maloney) v Governor of HMP Rochester* (2000) 14 December, QBD (Admin Ct), the claimant sought judicial review of a refusal of the governor to call witnesses during an adjudication on a charge of using threatening words or behaviour. On the conduct report, on which the claimant also recorded his witness requests, he had asked for four witnesses. At the substantive hearing of the charge the record kept by the governor (Form F256) only recorded a request for one witness, who was called. The claimant submitted that he had asked for the other witnesses but this was disputed in evidence by the governor and another officer present.

In the judicial review the claimant submitted that the adjudication had been unfair in that the witnesses were not called, and even if it was accepted that only one witness had been requested at the hearing, it was incumbent on the governor to call any relevant witnesses in the absence of the prisoner's request. The judge refused the application, accepting the evidence of the governor that only one witness had been requested and called, and that he was unaware of the previous request for more witnesses. In the event the claimant had not been denied an opportunity to call witnesses and so *R v Blundeston Board of Visitors ex p Fox Taylor* [1982] 1 All ER 646 could be distinguished.

CONDITIONS

European Court of Human Rights

In *Keenan v UK* (2001) 3 April, App 27229/95, ECtHR, the case was brought by the family of a prisoner who committed suicide in Exeter prison and contended that his treatment in prison had breached articles 2 and 3 and that the lack of availability of any civil proceedings for the bereaved family breached article 13.

The background to the case was that the deceased had been admitted to prison on a relatively short sentence suffering from severe psychiatric problems. Although he initially received some specialist psychiatric support, this was not maintained and a prison medical officer changed his medication which resulted in his behaviour deteriorating and eventually in disciplinary charges which added 28 days to his sentence. He hanged himself while serving the additional days.

The court found that there had been violations of articles 3 and 13 but, perhaps surprisingly, found no violation of article 2. The article 3 violation was based upon the cumulative treatment of the deceased prior to his death and the suffering and degradation that this had caused him. Sedley J, who was the English judge at the court, commented that he personally would have preferred to find a breach of article 2 but did not wish to dissent from the remainder of the court. The court did consider that the inquest was an appropriate forum to inquire into the circumstances of the death but went on to find a breach of article 13 on the grounds that the inquest was unable to apportion responsibility for the death and that given the lack of availability of any civil proceedings (the deceased having no dependants) there was no forum for the family to establish responsibility for the death or to recover compensation for their non-pecuniary loss. A further finding of a breach of article 13 in respect of the disciplinary procedures is discussed above.

By contrast, in *Kudla v Poland* (2000) 26 October, App 302010/96, ECtHR, the applicant – who contended that the state had failed to provide adequate psychiatric care for him in prison and so had breached his rights under article 3 – had been held in a remand centre for about three years between 1993 to 1996. He submitted that the lack of care had resulted in repeated suicide attempts. The court, reversing the majority decision of the European Commission of Human Rights, held that there had been no violation of article 3. In coming to this decision the court reiterated that treatment had to reach a minimum degree of severity before breaches of article 3 would be established, and in this case the state put forward evidence that, although it was accepted that the applicant suffered from mental illness, he had been adequately monitored and from the beginning of 1995 to his release he had been seen by a psychiatrist monthly. Accordingly, the court held that the applicant's treatment was not of a severity to come within the scope of article 3.

Searches

In *R (on the application of Carroll and Al-Hasan) v Home Secretary* (see above) the claimants also challenged the legality of the policy that prisoners can be required to squat during strip searches where there is a suspicion that something is concealed in the anal or genital area (contained in para 18.15 of PSO 1000, the Prison Service's Security Manual).

The judge (Newman J) accepted that if an officer had been informed by a senior officer that it was necessary to impose squat searches for a class of prisoners, then this was all the knowledge the searching officer required. It was not therefore necessary to inform prisoners of the detailed reasons as to why the squat search was required. The context of prison life was to be distinguished from those cases where persons otherwise at liberty were being searched, where reasons had to be given (see *Christie v Leachinsky* [1947] AC 573).

As to the legality of squat

searching *per se* it was accepted that this involved interference with a fundamental right. Therefore the power to conduct such searches conferred by Prison Act 1952 s47 could only be exercised where substantial objective justification amounting to a compelling need for its exercise existed (see *R v Home Secretary ex p Simms* [2000] 2 AC 115). The judge decided that the existing common law test under *Simms* made it unnecessary to consider whether article 8 of the convention had been breached. After reviewing a range of international authorities the judge concluded that it was not unlawful to require prisoners to squat. It was proportionate to the needs of security. Although it was an 'affront to dignity … under the Act and the Prison Rules, and according to the Manual, squat searches are not carried out routinely. They are only carried out when reasonable grounds exist to suspect that the prisoner is concealing an item in his anal or genital areas. Further, the Prison Rules require that all searches should be carried out in as "seemly" a manner as possible'.

Security categorisation

In an unsurprising decision, a prisoner who argued that the current procedures for reviewing category A decisions breach articles 5 and 6 of the convention was unsuccessful. The claimant (*R (on the application of Manjit Singh Sunder) v Home Secretary* (2001) 5 April, QBD (Admin Ct)) was made category A – high escape risk. It was alleged that he played an 'active role in fermenting terrorist activity in India'. In accordance with the normal procedures – upheld as meeting the requirements of procedural fairness by the Court of Appeal in *R v Home Secretary ex p McAvoy* [1998] 1 WLR 790 – he was given a short 'gist' of the security reports upon which to make representations.

The claimant contended that *McAvoy* was no longer good law now that articles 5 and 6 were part of domestic law. The judge held that article 5 (the right to liberty) was of no relevance. A decision to make a prisoner category A may impact on his/her entitlement to parole and therefore delay release. However, the fact was that the claimant's loss of liberty for the length of his sentence was 'after conviction by a competent court' and so was covered by article 5(1)(a). There were a number of domestic and Strasbourg decisions that confirmed that decisions to recategorise prisoners, altering the conditions of lawfully imposed detention, did not engage the right to liberty under article 5.

Similarly, article 6 (right to a fair hearing) was not engaged as the categorisation decision did not involve the determination of the prisoner's 'civil rights' or of a 'criminal charge'. Although the allegations mentioned in the gist were criminal offences, the Category A Review Committee's decision was again one affecting only the conditions of detention. The judge also relied on the recent domestic decisions holding that disciplinary proceedings where additional days were given as punishment do not engage article 6 (see above).

The Court of Appeal illustrated the need for the highest standards of fairness to be applied in the administration of the life sentence when it upheld the appeal of a discretionary life sentenced prisoner in *R (on the application of Hirst) v Home Secretary* (2001) *Times* 22 March, CA.

The prisoner had been transferred from category C conditions to a category B prison and claimed that as this move had a detrimental effect on his parole prospects, he was entitled to be given reasons for the decision to transfer and an appropriate period in which to make representations in respect of the decision. The LCJ accepted that there may be cases where operational requirements mean that such a transfer has to take place prior to this process but that, as a matter of principle, fairness requires a more formal and open review process to be implemented.

'Schedule 1' status

In *R (on the application of N) v Governor of HMP Dartmoor* [2001] EWHC Admin 93, QBD (Admin Ct), the claimant challenged a governor's decision to make him subject to the provisions of IG 55/1994 (notification procedures in relation to those convicted of the offences against children listed in Children and Young Persons Act 1933 Sch 1). He had been convicted in 1992 of gross indecency with a child, but his current sentence was in relation to drugs offences. He contended that as the previous conviction was spent under the Rehabilitation of Offenders Act 1974 (he received a sentence of four months that was spent after seven years), it should not have been taken into account when determining whether he should be subject to the provisions in IG 55/1994.

The application was refused by Turner J. He held that, viewed from the point of view of social services' responsibilities towards children, it would, in general terms, be 'absurd' if they were to be denied access to information necessary to them for the proper exercise of their statutory functions, including those under the Children Act 1989. Accordingly the judge held that the terms of s4(1) of the 1974 Act do not prohibit the communication of specified information relating to the claimant's spent conviction by the governor to the appropriate department of social services. The court also decided, when considering whether the prisoner's right to privacy under article 8 of the convention had been breached, that when balancing the claimant's rights against the high need of children for protection, the balance was in support of the governor's decision.

RIGHTS AND PRIVILEGES

Electoral rights

R (on the applications of Pearson and Martinez) v Home Secretary (2001) 4 April, QBD, challenged the disenfranchisement of prisoners claiming that this breached the right to free elections protected by article 3 of protocol 1 to the convention. The claimants contended that the article protected the right to participate in elections and that there was no legitimate justification for voting rights to be removed from prisoners based on the 'minimum interference' test that must be applied to the removal of rights from those held in custody. They further argued that the infringement was arbitrary, as it was a matter of chance whether a prisoner would be in custody when an election was held.

A number of Commission decisions had, however, upheld the right of the state to disenfranchise prisoners and during recent parliamentary debates on electoral legislation, the government had taken the view that disenfranchisement was part of the punitive penalty of imprisonment. There was little assistance to be drawn for the claimants from other jurisdictions. Unsurprisingly, the court dismissed the applications, holding that article 3 permitted disenfranchisement in pursuit of a legitimate aim and that the aims expressed by parliament linking this to the punitive element of a custodial sentence were legitimate. Kennedy LJ noted that the UK does not have the most severe restrictions on this issue and falls somewhere in the middle of the spectrum.

The one area which was not satisfactorily resolved in the judgment was the position of post-tariff life sentenced prisoners who have completed the punitive element of their sentence. Given the punitive rationale for the legislation, it is difficult to understand the justification for the right to vote being removed from this group, despite the court's view that it was the imposition of a prison sentence and the continued fact of imprisonment that is decisive. On a more general note, the case once again illustrates the problems that will be encountered in commencing convention challenges against the background of unhelpful case-law and where there has been no wider concern over the legislation

under challenge. It demonstrates the severe limitations of the law as a mechanism for promoting social change as opposed to the law reflecting changes in social attitudes.

Privacy

The High Court granted injunctions to two young offenders convicted of murder to protect their identities on release. The judgment in *Venables and Thompson v News Group Newspapers Ltd and others* [2001] 2 WLR 1038 relies heavily on the Human Rights Act (HRA) 1998 but, contrary to much media speculation, it is unlikely to have many wider implications for other prisoners. The claimants sought protection on the basis that if they were identified, there would be a serious risk to their life and limb. The court was satisfied that identification would engage articles 2 and 3 and that it had a duty under HRA 1998 s6 to take positive steps to protect the claimants. Although the press had a legitimate argument that freedom of expression entailed the right to publish under article 10, it was important that article 10 is a qualified right whereas 2 and 3 are absolute.

The decision, important as it is, is unlikely to have any wider implications for other prisoners as it turned very much on the unique facts of the case. The court accepted that the case had attracted an unprecedented level of media interest and that there was genuine threat to the safety of the claimants. Furthermore, given their extreme youth at the time of conviction which meant that they would not be readily identifiable as young adults, it was actually possible to provide protection from identification, but this would be unlikely to ever be practical for persons convicted as adults.

Artificial insemination

The Court of Appeal (*R v Home Secretary ex p Mellor* (2001) 4 April, CA) recently upheld the decision at first instance (see February 2001 *Legal Action* 13) that a refusal to allow facilities for artificial insemination to a serving prisoner was lawful. The court rejected a submission that to interfere with the fundamental right to start a family for reasons other than those pertaining to the need to maintain good order and discipline in prisons was unlawful.

In the absence of exceptional circumstances the refusal could not be seen as a breach of either the claimant's rights under articles 8 (right to family life) or 12 (right to found a family) of the convention, nor of the 'principle of legality' in *R v Home Secretary ex p Simms* (see above). The approach under the Strasbourg jurisprudence and under English domestic law was considered to be the same. The consequences that a punishment of imprisonment has on the exercise of human rights are justifiable provided that they are not disproportionate to the aim of maintaining a penal system designed both to punish and to deter. When the consequences are disproportionate, special arrangements may be called for to mitigate the normal effect of deprivation of liberty. In the circumstances of this case the Home Secretary was entitled to start from the premise that facilities for artificial insemination should only be allowed in exceptional circumstances, and he could take into account a wide range of considerations, including public perception, when considering such applications.

Access to computers

Prisoners' access to computers has been an issue of increasing concern, especially where prisoners conducting their own litigation require such facilities to be able to have proper access to the courts. The Prison Service has recently issued guidance (PSI 2/2001) which states that prisoners should be allowed access to computers for legal purposes where there is a 'real need' – that is if there would be a risk of prejudice to the proceedings (eg where the prisoner is acting in person, the case is complex or where essential material is held on disk).

A prisoner with dyslexia who was a litigant in a number of cases issued a judicial review of a refusal to allow him a computer in possession on the basis that this unlawfully interfered with his fundamental right of access to the court, and his rights under article 6 of the convention (*R (on the application of Ponting) v Governor of HMP Whitemoor and Home Secretary* (2001) 26 March, QBD (Admin Ct)). His case was stayed pending the Prison Service's review of this area which resulted in the issuing of PSI 2/2001. Following this he was offered access to a computer on the understanding he would sign a 'compact' as to its conditions of use. He refused to sign and pursued the judicial review on the basis that he had a right to a computer and that the conditions set out in the compact were unreasonable.

The judge (Newman J) considered two questions. First whether the refusal (absent the offer following the policy review) to provide IT facilities to the prisoner breached his rights under article 6. And second, whether the conditions of the offer of IT facilities either breached the article or were unreasonable. On the first question, taking into account the way in which the claimant had been able to conduct this case, and on the basis of only very limited knowledge of his other litigation, he doubted whether any breach of article 6 had occurred on the facts of this case.

Going on to consider the offer of facilities that had been made, the judge considered that the claimant's case was hopeless. An offer of IT facilities had been made and his complaint was that the facilities 'are not quite of the order which he says he should have'. Such a distinction was not sufficient to engage article 6. On the rationality point the compact only allowed the computer in possession between 7.30 pm and 8 am. The claimant contended this only allowed him three hours' work a night taking into account his need for sleep, and there was no reason why he should not be allowed it at other times when he was locked up. He also complained that he was only allowed 10 floppy disks which were insufficient for his needs, that he was not allowed a password, and that he had to print out documents in the presence of a prison officer. He also contended that he should be allowed to use his own computer which was in storage.

The judge refused a submission that the conditions were irrational as they were directed at issues of prison security, and also to prevent unauthorised use by other prisoners. The claimant, acting in person, was refused permission to appeal but signalled an intention to apply to the Court of Appeal for permission.

SENTENCE CALCULATION

Recalls to prison

The complicated relationship between the power of the Home Secretary to recall prisoners who breach their licences, and of the court to order a 'return' to prison when sentencing for further criminal offences committed on licence continues to generate litigation. In *R (on the application of Akhtar) v Home Secretary* [2001] EWHC Admin 38, QBD, the claimant challenged a decision to recall her under CJA 1991 s39 for breaching her licence (she had been released on licence from a short-term sentence of 18 months). She had already been sentenced for a further offence, and been ordered to return to prison for a month under Powers of the Criminal Courts (Sentencing) Act 2000 s116 (which replaced CJA 1991 s40).

The claimant argued that, the magistrates' court having exercised its jurisdiction under s116, it was not open to the Home Secretary to exercise his jurisdiction under s39 of the 1991 Act based on the same facts upon which the magistrates had acted in coming to their decision.

The court refused the applica-

tion on the basis that the respective jurisdictions of the magistrates' court in sentencing under s116 (see *R v Home Secretary ex p Probyn* [1998] 1 All ER 357), and the Home Secretary in deciding on recall under s39 (see *R v Sharkey* [2000] 1 Cr App R 409) were different – the sentencing power being triggered by commission of an offence, and the recall power being based on a risk assessment.

Accordingly the Home Secretary was legally entitled to order recall. However, given the overlapping natures of the jurisdictions it was obviously important that neither the sentencing court, nor the Home Secretary, ignored each other's decisions when exercising their functions.

The claimant had been granted bail under the High Court's inherent jurisdiction for 17 days pending resolution of her judicial review. As she had lost her case, the court in separate proceedings (*R (on the application of Akhtar) v Governor of HMP New Hall and Home Secretary* [2001] EWHC Admin 175, QBD) was asked to consider whether she should be required to serve the 17 days as part of her sentence. The problem arose because bail was granted in the exercise of the courts' inherent jurisdiction and not pursuant to any statutory power. Where statute gives the power to grant bail, there is always an express provision to the effect that a period spent on bail granted pursuant to that power shall not count as part of any term of imprisonment.

The claimant argued that the days should count towards her sentence. The court rejected this submission, accepting the defendants' argument based on a construction of CJA 1991 s33. The claimant was not 'serving her sentence' during the 17 days on bail for the purposes of the Act, as to be 'serving' a sentence requires a person to be under the control of the prison authorities – and so a period on bail was to be distinguished from, for example, a period on temporary licence.

Special remission

A prisoner serving a four-year sentence, and so a long-term prisoner, was granted 32 days special remission (a reduction of sentence length by exercise of the royal prerogative). As a result he was informed of his amended release dates. Long-term prisoners (those serving four or more years) are entitled to release at the two-thirds point of the sentence whereas short-term prisoners are released at the halfway point. The document indicated that his release dates had been brought forward, but they were still expressed as his parole eligibility date and non-parole release date.

The prisoner (in *R (on the application of Ghartey) v Home Secretary* (2001) 7 March, QBD) contended that the document, despite its 'mixed message', gave him a legitimate expectation that the reduction of sentence should result in his being treated as a short-term prisoner. The court rejected this submission, holding that such a mixed message was not an adequate basis upon which to found a legitimate expectation, and in any event the warrant that effected the granting of remission made it clear that the prisoner was to remain a long-term prisoner notwithstanding the fact that his release date was to be brought forward.

DETERMINATE PAROLE

Release decisions

In *R (on the application of Nicholas) v Parole Board* [2001] EWHC Admin 46, QBD (Admin Ct) the claimant had been sentenced to 13 years' imprisonment for armed robberies. Prior to his second parole review he was moved to Latchmere House resettlement prison but lost his category D status having failed a breathalyser test on return from a period of release on temporary licence. The parole board refused parole including in its reasons the comments that, 'It is of concern that he shows little awareness of the potential problems of alcohol consumption, especially as his previous convictions were drink related. His behaviour also raises concern about his impulse control and decision making. The abuse of trust raises an issue about his ability to abide by licence conditions during a long licence period'.

He sought judicial review claiming that since the index offences were not drink related, and given that the board had proceeded on the incorrect factual basis that previous convictions were drink related, it had given undue and disproportionate weight to the incident at Latchmere House. The court noted that both probation officers had not recommended release on parole, and that the claimant did as a matter of fact have two convictions (albeit minor) that were drink related. In light of this, and in view of the fact that judicial review was not a review of the merits of the decision, the court held that the board was fully entitled to come to the conclusions set out in its decision. In particular the weight to be given to any particular factor was a matter for the board. It was not required, given that its reasons were not to be read in a legalistic way, to state that some rather than all of the claimant's previous convictions were drink related. The application was therefore refused.

Denial of guilt

The entitlement to parole of prisoners who deny their guilt has been frequently considered by the courts. The position, most recently confirmed by the Court of Appeal in *R v Parole Board ex p Oyston* (2000) *Independent* 17 April, is that deniers cannot be refused parole solely because they deny guilt because the board's function is to assess the risk the prisoner poses to the public. However continued denial will, especially in cases involving violent or sexual crimes, mean that risk to the public will inevitably remain high or cannot be properly assessed. In a recent case a prisoner who denied his guilt for a number of indecent assaults was refused parole. The reason was that 'he has not participated in any offending behaviour and is said to show little understanding of victim issues. The panel did not feel the risk of reoffending had changed in any way and that it must be considered too high for release'. The court (*R (on the application of Callaghan) v Home Secretary* (2001) 23 February, QBD (Admin Ct)) refused to quash the decision. The board had not strayed too close to refusing parole on the basis of denial as it had focused on the question of risk, which in its view had not altered.

Where the parole board refuses parole, it has the power to decide what conditions should be put on the prisoner's licence when s/he is released on his/her 'non-parole' date – at two-thirds of the way through the sentence. Generally speaking, offending behaviour courses are not available for those who deny their offence. Clearly, as prisoners can have their licence revoked for breaching its conditions, there are concerns about the reasonableness of requiring prisoners to attend offending behaviour courses as a licence condition if they deny guilt.

In *R (on the application of Wilkes) v Home Secretary* (2001) 15 March, QBD (Admin Ct) the court considered the position where the board, in refusing parole to a prisoner who denied guilt, directed that the non-parole licence should include a condition to 'comply with any requirements reasonably imposed by your supervising officer for the purposes of ensuring that you address your sexual offending behaviour'. The claimant argued that to impose this condition was unreasonable as he could not attend a sex offender treatment programme as he denied his guilt, and so he either had to admit guilt or face inevitable recall.

The Probation Service provided evidence that what the condition would mean in practice was that the claimant would be required to be assessed by a psychologist on release. What would be expected of him following this would depend on the assessment but the possible options included no treatment due to

unsuitability, or a groupwork programme. Following the grant of permission the proposed licence condition, on prompting from the judge, was amended to read that the prisoner should comply with requirements reasonably imposed 'for the purpose of assessing the risk you may present and subsequently comply with such treatment, if any, which may be identified as appropriate at the assessment stage, taking into account your denial of guilt'. The claimant pursued the application on the basis that the proposed condition remained unlawful as it left too much discretion to the probation officer.

The application was refused. The condition explicitly stated that any requirements imposed would have to be reasonable, and was framed in 'broad and flexible terms' and did not require the prisoner to admit guilt or face recall. This was as true of the original condition as it was of the revised version. If any requirements were unreasonably imposed by the probation officer and the prisoner recalled, he furthermore had the right to make representations against recall both to the Home Secretary and to the parole board.

PERSONAL INJURY

The High Court gave an important judgment in awarding compensation for two claimants who had complained of serious assaults following an escape attempt from Whitemoor in 1994 (a third claimant failed in his case). In *Russell, McNamee and McCotter v Home Office* (2001) *Daily Telegraph* 13 March, QBD it was alleged that, following their re-arrest, the claimants had been subjected to unprovoked and unnecessary violence by prison officers. The court found that the treatment endured by the prisoners was sufficiently serious to be in breach of article 3. In this context Crane J acknowledged that the state has a positive obligation under article 3 to prevent torture, inhuman and degrading treatment. The positive obligation requires the state to ascertain the facts, identify and punish the perpetrators. However, in assessing whether an award of exemplary damages was necessary to meet these positive obligations, Crane J was mindful of the fact that the state had extended public funding to enable the court to ascertain the facts and to judge the issues that arise. That fact-finding exercise and the apportionment of blame were themselves important aspects of the positive obligations imposed upon the state by article 3. In Crane J's opinion on the particular facts of this case, he need not go further and award exemplary damages to punish the defendant. Notwithstanding the disappointing approach to the award of exemplary damages, the following comments concerning liability are of general importance to prisoners:

> *Some people may take the view that if a group of armed prisoners escape from prison, they should not be entitled to complain about any violence to them in the course of their recapture. Some people may say that the present action should not have been publicly funded. However, the duty of the Court is clear: To ascertain the facts and to judge the issues that arise. Those who break the law do not forfeit its protection.*
> *(paragraph 16)*

In *Thompson v Home Office* [2001] EWCA Civ 331, CA, the claimant sought compensation in respect of injuries sustained when he was attacked by another prisoner at HMYOIU Swinfen Hall in November 1996. The claimant gave no evidence about the identity of the attacker but the judge found that there had been an unprovoked attack with a razor blade. The judge found in the claimant's favour and awarded £7,650 compensation. The Home Office appealed. The Home Office denied that there was a breach of duty in that the system for issuing razor blades in operation at the institution at the time of the attack was reasonable, and alternatively that causation had not been proved. The court, mindful of the fact that 'prison governors, and especially those in charge of Young Offender Institutions, have to make balancing judgments between tight security and a regime aimed at rehabilitation in which the inmates are required to exercise responsibility' allowed the appeal. The court was not satisfied that deficiencies in the system in operation would have supported the claimant's case on causation. Accordingly the claim could only succeed if it was shown that the system itself had been negligently adopted. The claimant had not established this on the facts. The court explicitly confined its decision to the facts as relating to Swinfen Hall in November 1996.

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