lived in the UK for over two years. Currently, the habitual residence test applies only to claimants who entered the CTA in the last two years.

- Check whether clients could be exempt from the test – for example, as a worker, refugee, or a person with exceptional leave to remain in the UK.
- Confirm whether there are any benefits that clients may claim which are not conditional on the right to reside, for example, Disability Living Allowance, Attendance Allowance or non-contributory incapacity benefit.
- If clients are without any means of support, contact the local social services department for help.
- Get advice from specialist social security advisers before making any legal challenge.

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1 The common travel area comprises the UK, Republic of Ireland, Isle of Man and Channel Islands.
2 HB and CTB are not covered by EC Regulation 1408/71. For full details of the rules relating to this regulation, see CPAG's *Welfare benefits and tax credits handbook (6th edition) 2004/05*. To order please visit CPAG's website: www.cpag.org.uk or contact CPAG's office at 94 White Lion Street, London N1 9PF.

PRISONERS

# Recent developments in prison law



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

## LIFE SENTENCES

### Minimum terms

The Criminal Justice Act (CJA) 2003 received royal assent in December 2003, and two important provisions relating to life sentenced prisoners have now been enacted. Section 275 of the CJA 2003 confirms that the release of mandatory life sentenced prisoners is now to be decided by the Parole Board ('the board') rather than the Home Secretary (Crime (Sentences) Act 1997 s28 as amended).

Sections 267–276 of CJA 2003 also provide for the minimum term following a conviction for murder to be fixed judicially. The transitional arrangements contained in these sections divide existing mandatory lifers into two groups: those who have not yet had their minimum term fixed and those who have had a tariff set by the Home Secretary (CJA 2003 Sch 22).

As regards the first group, the Home Secretary is required to refer their cases to the High Court for the minimum term to be set by a judge (CJA 2003 Sch 21). The procedure in place now is that a new life imprisonment minimum term (LIMIT) section based at the High Court will, after receiving each reference, forward to a prisoner copies of all documents supplied by the Home Office. These papers will usually comprise the trial judge's report, any recommendations made by the Lord Chief Justice and, if in existence, a transcript of sentencing. A prisoner is required to notify the court whether representations will be submitted. A three months' time limit will be set for those representations. The case will then be referred to a High Court judge for consideration on the papers alone, although the final decision will be read out in open court.

In relation to the second group, ie, lifers serving a tariff set by the executive, the process is commenced by a prisoner's application to the High Court. A prisoner must complete a number of forms that require details of the original conviction. These forms are available from the LIMIT section. Once the forms have been submitted to the LIMIT section, they will be forwarded to the Home Office. The Home Office will supply any information that it holds relating to the setting of the original tariff and these details will be served on a prisoner. A prisoner is again given three months to submit any representations. The case is then decided on the papers with the final decision being pronounced in open court. Prisoners who have already served the term set by the Home Secretary (ie, tariff expired mandatory lifers) may not apply for a minimum term to be set (CJA 2003 Sch 21; s3(2)).

In both cases, the CJA 2003 requires the court to consider three factors when setting the minimum term:

- any judicial recommendations;
- any previously set tariff; and
- the new guidelines on sentencing for murder (see CJA 2003 Sch 21).

The CJA 2003 seeks to prevent any breach of article 7 of the European Convention on Human Rights ('the convention') by confirming that the new minimum term cannot exceed any previously set tariff. In cases where no tariff was previously set, the new minimum term cannot exceed the period that would have been specified by the Home Secretary under the practice followed by his office before December 2002. (This is the date when the House of Lords decided the Home Secretary should no longer set tariffs.) In all cases, there is the possibility of an appeal against any decision with leave of the Court of Appeal.

### Sentencing concerns and the CJA 2003

Two potential problems with the CJA 2003 have already been identified. The first possible difficulty may arise when a court seeks to reconcile the statutory requirement to balance the three potentially competing sentencing practices. It is difficult to see how a court can be required to give consideration to the new guidelines in Sch 21 – which are considerably more severe than any previous procedure – while it is statute-barred from increasing the sentence. It is also difficult to comprehend how a court can ensure that it will not exceed any term that would have been set by the Home Secretary before December 2002 when there are no published decisions on the tariffs imposed for murder. The only public guidance is available in the various practice directions issued by the Lord Chief Justice, but these are not the same as the Home Secretary's actual decisions.

■ **R v Riaz**

*[2004] EWHC 74 (QB)*

This case involved the first, and so far the only, minimum term to be set under the CJA 2003. *Riaz* was a reconsideration of a tariff where the trial judge had recommended a ten-year term; the Lord Chief Justice had suggested 16 years; and the Home Secretary had set the term at 20 years. Riaz had served more than 19 years of the term, and had a provisional release date from the board. His minimum term was reset, under the CJA 2003, at the time already served.

Hooper J commented that he found the CJA 2003 Sch 22 para 4 requirement for him to 'have regard to' the new guidelines, as

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well as to the previous recommendations and decisions made on the tariff, difficult to interpret: 'Unaided as I am by any representations from the Secretary of State as to how I should approach paragraph 4 and unaided by submissions in an oral hearing, I confess that I find paragraph 4 very difficult if not impossible to apply' (para 46).

■ **Flynn and others v HM Advocate**

*[2004] UKPC 18 March*

The Privy Council has examined the position of Scottish lifers who have their minimum terms set under similar legislation to the CJA 2003, which has been recently introduced in Scotland. The Scottish position differs in that mandatory lifers did not have tariffs set in the majority of cases. Instead, the decision on the date of release was connected to the risk assessment made on the suitability for discharge from prison. The appellants in this case had reason to believe that they were working towards particular release dates, but their minimum terms were subsequently set at longer periods.

The primary finding in this case was that the sentences had not been increased as no fixed term of years had ever been applied to the appellants. Instead, the sentences were of life imprisonment with the punitive term to be fixed at some future date. However, most members of the Privy Council took the view that if the tariffs had been fixed, it would have been a breach of article 7 of the convention to set them at a higher level now. The Privy Council concluded that the appellants' expectation of their release date was one of the relevant factors that a court must take into account when fixing the appropriate sentence. This had not been done in the instant cases.

The second problem identified with the CJA 2003 is the prohibition on the High Court's ability to convene oral hearings, either when reconsidering a tariff or setting a minimum term for the first time (Sch 22, para 11(1)). The primary objection to this provision is that as setting the sentence constitutes part of the criminal trial, the guarantees of article 6(1) of the convention suggest that this must be done by way of an oral hearing. The Home Office's view is that the requirements of article 6(1) are adaptable to particular circumstances, and that the prospect of an oral hearing on appeal is sufficient protection.

■ **R (Smith and Dudson) v Secretary of State for the Home Department**

*[2004] EWCA Civ 99*

In this case, the Court of Appeal looked at the system introduced by Criminal Justice and Courts Services Act 2000 s60 for resetting the tariffs for HMP detainees. The new system gives effect to the article 6 right for the tariff to be set by the judiciary and not the executive. The prisoners argued that the Home Secretary's decision to dispense with periodic reviews for HMP detainees after the tariff has been set was unlawful. This application was successful in the Divisional Court, and the Home Secretary's appeal was dismissed.

Dudson also appealed against earlier findings that he had no right to an oral hearing when his tariff was set, and had waived his right to such a hearing in any event. Master of the Rolls Lord Phillips, in giving the court's judgment, rejected the contention that the right to an oral hearing had been waived. He confirmed that a waiver of this right had to be clear and unequivocal. In terms of the right to the oral hearing, the judges agreed that, in principle, and following the European Court of Human Rights (ECtHR) decision in *Easterbrook v UK* App No 48015/99, 22 March 1999, sentencing should always be carried out at a public hearing. However, the judges found that exceptional circumstances can make this requirement unnecessary. The judicial workload imposed on the Lord Chief Justice in reviewing all HMP tariffs amounted to such an exceptional circumstance.

***Comment***: Petitions to appeal to the House of Lords have been lodged by both the Home Secretary and Dudson. It is possible, therefore, that this case will not resolve the issues once and for all. The Court of Appeal's finding that 'judicial workload' is a sufficiently exceptional circumstance to allow an article 6 right to be dispensed with, is somewhat surprising in the context of article 5 rights. Previously, the ECtHR has held that judicial workload is not sufficient for non-compliance.

■ **R (Nejad) v Home Secretary**

*[2004] EWCA Civ 33*

The applicant had received a discretionary life sentence for his part in the hostage-taking incident at the Iranian embassy in 1980. His tariff had been set at 25 years in line with the Lord Chief Justice's recommendation under transitional arrangements which had been put in place by CJA 1991 Sch 9.

Following the discovery of further substantial mitigating evidence, the matter was referred back to the Lord Chief Justice, who reduced the recommendation to 22 years. The Home Secretary, however, rejected this new recommendation and maintained the tariff at 25 years. The Court of Appeal considered that although the statute required the Home Secretary to set the tariff, it was intended that this decision should be based on an expression of the judicial views. It was not open to the Home Secretary to form a different opinion from the judiciary without good reason. The simple explanation that the Home Secretary took a different view from the Lord Chief Justice was not a good reason.

## Article 5(4) of the convention

Two cases have further explored the duties imposed on the review of life sentenced prisoners under article 5(4) of the convention. However, they have resulted in slightly contradictory conclusions.

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

*[2003] EWHC 2831*

The applicant was a tariff expired mandatory lifer whose last full parole review had taken place in 1999. It took one year for him to be transferred to an open prison. However, he was removed five months later for failing a drugs test. The case was referred back to the board for advice. It recommended that the applicant be returned to an open prison with a further review after 18 months. This was accepted, and he was returned to open conditions in June 2002. The applicant's first article 5(4) compliant parole review was scheduled for December 2003. He argued that the review's timing breached article 5(4): there would be a gap of four years between full parole reviews, and it would be 19 months before the applicant had a review that complied with the decision in *Stafford v UK* [28/5/02].

The court held that the reason the Home Secretary had not allowed an earlier review was based on the merits of the case, ie, the applicant's perceived need for an 18-month period in an open prison, as opposed to any practical or logistical difficulties in providing one. As the right to a 5(4) compliant review was not based on the merits of a case, the Home Secretary's decision was not acceptable. Therefore, the applicant was entitled to a declaration that there had been a breach of article 5(4).

Beatson J adjourned the resulting damages claim. However, he commented that as the applicant had once again been removed from open conditions, he doubted that there was any loss in the case. He also commented that any entitlement to damages would arise only from the date of *Stafford,* as ECtHR decisions do not have retrospective effect. The damages claim also had to take into account that the Home Secretary must be allowed sufficient time to put in place procedures to comply with that judgment.

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

*[2004] EWHC 93 (Admin)*

This case explored similar issues to those examined in *King*, but in a different context. The court arrived at different conclusions in this case. The applicant had been recommended for release

by the board in November 2001, six months before *Stafford*. He was not actually released until August 2002, because of an alleged problem with his behaviour and delays in implementing post-*Stafford* release procedures. The applicant claimed damages under article 5(5) of the convention for an alleged breach of article 5(4). He claimed that this breach was a result of the Home Secretary's failure to release him in compliance with the board's recommendation.

The court established two points of principle in favour of the applicant. The first was that *Stafford* had retrospective effect and, therefore, any entitlement to damages ran from the date of the board's decision rather than the date of the *Stafford* judgment. In a very lengthy judgment, Silber J held that the ECtHR works on the usual declaratory theory of law operated by the domestic courts unless it states expressly that its judgments are only to have prospective effect. The judge was persuaded, in part, by the fact that the ECtHR in *Stafford*, and in the subsequent cases of *Von Bulow v UK* App No 75362/01, 7 October 2003, and *Wynne v UK* App No 67385/01, 16 October 2003 (see January 2004 *Legal Action* 12) had found breaches of article 5(4) from the date of the expiry of tariff, and not just from the date of the *Stafford* judgment.

The second point of principle that the court found was that even where detention is lawful in domestic law, as in this case, if there has been a breach of article 5, a right to compensation which can be enforced through a court application must be available to the victim. The legal argument is somewhat complex as it required a careful examination of the precise workings of the Human Rights Act (HRA) 1998 in respect of such claims, but the final principle enunciated by Silber J is fairly straightforward:

*In those circumstances [where Article 5 has been breached], I consider that the claimant can obtain either an assessment by the court of the appropriate level of compensation payable by the defendant and a mandatory order that he pays such sums or damages under Article 5(5) of the convention, provided that he can show first that he has suffered some form of damage and second, that he can establish a breach of Article 5, on which he can rely* … (para 45).

***Comment***: Silber J's findings in *Richards* are very important, even though he went on to dismiss the claim for damages on the basis that there was no actual proof of loss on the facts. His judgment disagrees not just with the obiter comments made in *King*, but also with the views of Pitchford J in *R (Middleton) v Secretary of State for the Home Department* [2003] EWHC 315 Admin (see June 2003 *Legal Action* 10). The correctness of the judgment in *Richards* on the legal issues appears to be further demonstrated by the recent ECtHR decision in *Hill v UK* App No 19365/02, 27 April 2004, where the court once again found a breach of article 5(4), in respect of a mandatory lifer, which dated back to his tariff expiry.

■ **R (Payne) v Secretary of State for the Home Department**
*[2004] EWHC 581 (Admin)*
This case was a renewed application for permission to challenge the policy of referring lifers' cases to the board when they still had three years' imprisonment to serve before the expiry of their tariff. The application was rejected. The policy allows for exceptional circumstances, and requires expressly that individual circumstances be considered. The applicant had argued that the evidence in her case was that she would benefit from a longer period in open conditions, and that the policy was overly restrictive by prohibiting such a transfer. Moses J considered that the policy was lawful and that, on the particular facts of the case, it was appropriate to consider issues such as the risk of absconding and the length of the punitive term.

■ **R (P) v Secretary of State for the Home Department**
*[2003] EWHC 2953 (Admin)*
This case involved a further attempt to reopen the problems confronting life sentenced prisoners who have been made the subject of an order under Mental Health Act (MHA) 1983 ss47 and 49 and placed in a special hospital. The particular problems that confront such detainees are that while subject to a MHA order, they are not entitled to have their cases considered by the board. Furthermore, even if the Mental Health Review Tribunal (MHRT) discharges such detainees, they will face a delay while the board decides their suitability for release from the life sentence. Previously, the courts had upheld this regime, but in this case a new approach was adopted by arguing that the MHRT and board should convene as one body to decide on the prisoner's suitability for release from both the life sentence and MHA order.

The application was dismissed, primarily on the finding that it was no breach of article 5(4) to suspend the right to a board hearing when a detainee is detained lawfully under separate legislation. On a pragmatic approach, the court also found that it would be difficult to justify the expense and difficulty of convening joint hearings when the limited evidence before it, in this case, suggested that there would be few occasions where such hearings would make any practical difference.

## DETERMINATE SENTENCES AND PAROLE

The CJA 2003 also comprehensively overhauls general sentencing principles, the range of sentences available, and the kind of early release provisions applicable to determinate sentences. A key distinction will be made between the treatment of violent and sexual offenders who are deemed to pose a risk to the public, and the regimes applicable to other offenders. However, to date, only the provisions relating to intermittent custody orders are in force. It is currently unclear when the other provisions will be implemented. There are also doubts about how the new early release provisions will interact with existing law; the transitional provisions will be set out in statutory instruments. They are not included in the CJA 2003.

■ **R (AT) v Parole Board and Secretary of State for the Home Department**
*[2004] EWHC 515 (Admin)*
The claimant was a long term prisoner serving a ten-year sentence for sexual offences. He was refused parole but, in line with the CJA 1991, released on licence at the two-thirds point of his sentence. Despite the fact that he had pleaded guilty at trial, the degree to which the claimant accepted his guilt for the offences fluctuated greatly. On release, the claimant was required to attend a Sex Offender Treatment Programme (SOTP) in the community. This was consistent with the standard licence condition to comply with requirements reasonably imposed by his supervising probation officer to address sexual offending. The claimant was recalled to prison for breaching this requirement as he had been removed from the SOTP because of his disruptive behaviour.

The board gave brief reasons for upholding the recall. The claimant sought judicial review of its decision and challenged the adequacy of the reasons for it. Furthermore, he maintained that it had been unreasonable to require him to attend the SOTP as when he was released initially he denied that he was guilty of the offences. On the day of the judicial review's full hearing, a report that had been before the board about the claimant's attendance on the SOTP was disclosed for the first time. The judge, while doubting that it was unreasonable to require him to attend the SOTP, allowed the claim on the basis that the failure to disclose

the report rendered the board's decision procedurally unfair.

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

*[2004] EWCA Civ 514*

In this case, the Court of Appeal upheld the Divisional Court's decision that there is no discrimination – within the meaning of article 14 of the convention in conjunction with article 5 – where the statutory framework allows the board to direct release in relation to prisoners serving under 15 years, but reserves the decision to the Home Secretary in relation to longer sentences. The court rejected an argument that there is no rational basis for distinguishing between prisoners serving a sentence of up to 15 years and those serving a sentence of 15 years and over. It accepted that the Home Secretary's involvement is justified on the basis of the gravity of the crime committed by those who are serving such long sentences.

## Prisoners liable to removal

The court arrived at a different conclusion to that reached in *Clift* (above) in relation to a similar distinction which applies to foreign national prisoners.

■ **R (Hindawi and Headley) v Secretary of State for the Home Department**

*[2004] EWHC 78 (Admin)*

Foreign national prisoners, who are liable to removal when serving a sentence of four or more years, do not, at the halfway stage, have their cases referred to the board for it to consider whether release is appropriate. Such prisoners' applications are considered solely by the Home Secretary (CJA 1991 ss 35(1) and 46(1)).

In this case, the claimants challenged this scheme on the basis that it discriminated unlawfully against prisoners who are liable to removal. The judge held that the facts fell within the ambit of article 5 of the convention. Even though the courts have held that, in relation to usual determinate sentences, administration of the sentence does not engage article 5 directly, this did not dispose of the question about whether these facts were within its ambit. The judge further held that the statutory scheme constituted differential treatment. Those prisoners who were liable to removal were in an analogous situation to persons serving sentences of similar length who were not liable to it.

The only consideration left was about whether there was objective and reasonable justification for the differential treatment. The Home Secretary maintained that he was better placed than the board to decide which prisoners who were liable to removal should be released. Such prisoners would not be released on licence into the community in the UK. The judge held that this was insufficient justification for the differential treatment as in *R v Parole Board ex p White* 16 December 1994, DC, unreported, the court had held that the 'protection of the public' test applied by the board in lifer cases was not restricted to the public in the UK only. In the absence of any further justification for the regime, the current scheme does breach article 14 in conjunction with article 5. This case is subject to an appeal.

## Extended sentences

■ **Secretary of State for the Home Department v (1) Sim (2) Parole Board**

*[2003] EWCA Civ 1845, [2003] 1 WLR 705*

The Court of Appeal upheld the Administrative Court's judgment (see June 2003 *Legal Action* 11). Accordingly, article 5 of the convention applies to the recall of those serving extended sentences imposed under Powers of Criminal Courts (Sentencing) Act 2000 s85. This requires the board, when applying the statutory test for release contained in CJA 1991 s44A, notwithstanding its wording, to be satisfied positively of the existence of the requisite level of risk. The board must start from a presumption that a prisoner is entitled to liberty.

This analysis reflects the court's recognition that the extended sentence is distinct from both usual indeterminate and determinate sentences. While this judgment is important, its limitations in respect of the benefits that it provides for prisoners facing recall have recently been demonstrated in the following case.

■ **R (Jarvis) v Parole Board**

*[2004] EWHC 872 Admin*

In this case, the extended sentence prisoner was recalled initially on an allegation of indecent assault which was not proceeded with. Furthermore, evidence of this accusation was not presented to the board. Instead, the allegation was that he had been associating inappropriately with children. It was maintained that this claim demonstrated that the risk posed by the prisoner could not be managed in the community.

On judicial review of the board's decision to uphold the recall, the judge held that the applicability of article 5 did not require it to make a finding that the risk to the public had increased since the initial imposition of the sentence, in order to maintain a 'causal connection' between the sentence and ground for recall. The board's task was to apply the statutory test and come to a view about whether the risk posed by a prisoner was manageable in the community after taking into account all the evidence before it.

## Evidence and procedure in board hearings

The Court of Appeal's decision in *Sim* (above) also rejected the prisoner's appeal about the degree to which hearsay evidence may be admitted in oral hearings where article 5 of the convention is engaged. The court confirmed the view of Elias J in the Administrative Court (see June 2003 *Legal Action* 11) that neither the convention nor domestic principles of procedural fairness prevented the board from taking hearsay evidence into account. The issue was weight rather than admissibility, although in the words of Keene LJ: 'I can envisage the possibility of circumstances where the evidence in question is so fundamental to the decision that fairness requires that the offender be given the opportunity to test it by cross-examination before it is taken into account at all.' What this criterion means in practice was quickly put to the test when the Court of Appeal considered the following case.

■ **R (Brooks) v Parole Board**

*[2004] EWCA Civ 80*

The prisoner appealed from the Administrative Court's decision (see January 2004 *Legal Action* 15). At issue was the degree to which the board could take into account a contested allegation of rape that had led to the recall of a discretionary life prisoner, where the complainant was not called to give direct evidence. In principle, it is hard to imagine a situation where the test set out by Keene LJ was more starkly met.

While Keene LJ's test was approved by the court, it decided, by a majority, that the board was entitled to make a finding on the allegation without primary evidence from the complainant. Kennedy LJ came to this conclusion through an analysis of the various parties' attempts to get the witness to attend. He also took into account that there came a stage where the prisoner, perhaps for tactical reasons, had decided to proceed with the hearing in the witness's absence. Wall LJ agreed with this analysis. He concluded that the witness's non-attendance did not render the hearing unfair, not least because there was sufficient other evidence before the board to enable it to decide, even in the face of the witness's denial that the alleged rape had occurred, that she was not telling the truth.

Clarke LJ, who was in the minority, adopted a more robust approach. He concluded that given the clear importance of the witness's evidence, all reasonable steps should have been taken to attempt to secure her attendance. This would have included obtaining a witness summons (see below), which none of the parties considered prior to the board hearing. For these reasons, his view was that the decision should be quashed.

The judgment gives guidance

about what procedural steps should be adopted in this situation. Kennedy LJ's guidance is that if a prisoner requires the attendance of a witness to facilitate cross-examination where there are serious contested allegations, the procedure would be to request, in advance of the hearing, that the board should make a direction under Parole Board Rules 1997 r9, that the Home Secretary obtains a witness summons from a court under Civil Procedure Rules 34.4 (witness summons to aid a tribunal). The Parole Board Rules are to be revised later this year, and it is anticipated that they may include fresh provisions about securing witnesses' attendance.

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

*[2003] EWHC 3120 (Admin)*

This case looked at whether it is lawful for the board to appoint a special advocate, modelled on the Special Immigration Appeals Commission procedure, to represent a mandatory lifer at his/her parole review. In *Roberts*, the prisoner had received a parole dossier of reports, but had subsequently been told that the Home Secretary had passed material to the board which he would not be allowed to see. An earlier application for judicial review held that the decision about how the material should be dealt with was a matter for the board and not the Home Secretary. The board subsequently decided that in order to protect the source of the material, it should be disclosed only to a specially appointed advocate, who would be allowed no further contact with the prisoner or his legal representatives.

Roberts argued that the use of a special advocate was only permissible in cases involving national security, unless parliament had given specific approval to such a scheme. The prejudice that arose by adopting such a procedure to establish primary issues of fact was so great that the probative standard adopted in criminal trials should be applied. Given that the Parole Board Rules provide a complete scheme for dealing with disclosure, it was further argued that the decision was ultra vires and, in any event, irrational.

The court dismissed the challenge, and upheld the board's power to adopt this procedure in exceptional circumstances. The court held that the board has the power to take on such procedures that it considers necessary to ensure a fair outcome in each case. The board is not confined to the procedures contained in the Parole Board Rules. On the facts of this case, the board's decision was neither irrational nor disproportionate.

***Comment***: The judgment is relatively brief in its legal analysis given the gravity of the issues raised in the application. One of the main difficulties in dealing with the individual merits of this case is that closed material was supplied to the court, which then delivered a closed judgment. The open judgment is, therefore, only able to address general points of principle as opposed to the particular circumstances and facts which justify the 'exceptional' measure of appointing a special advocate. Indeed, the judgment does not even describe the general circumstances when this course of action might be appropriate. An appeal has been scheduled, in July, before the Court of Appeal.

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

*[2004] EWHC 784 (Admin)*

This case was a further attempt to argue that the burden of proof at parole hearings for lifers should rest with the Home Secretary, and was rejected by the court. The applicant sought to challenge the board's refusal to direct his release on the ground that it had erred in placing the 'burden of proof' on him. As a result, the applicant had to satisfy the board that the risk he posed was low enough to allow his release, rather than the Home Secretary having to convince it that the risk was sufficiently high to justify the applicant's continued detention. The applicant relied on the judgment in *Sim* (above), which held that such a position did relate to extended sentence prisoners who were recalled to custody. The parties accepted that the concept of a burden of proof would not be of value in the majority of cases as it is difficult to translate such a test to risk assessment. However, where a case was finely balanced, the concept could be decisive.

Sullivan J held that this was not a 'borderline' case, and that the board's decision was very clear. As such, Sullivan J stated that he did not consider that the 'burden of proof' issue arose properly. He dismissed the claim. The judge went on to look at the arguments from a theoretical perspective, and expressed the opinion that it would not breach article 5 of the convention for the burden to remain on prisoners in lifers' cases. That said, he acknowledged that his analysis was somewhat cursory given the complexity of the issues, but did not feel obliged to go further as he had already dismissed the claim on its facts. This judgment leaves open the possibility of further arguments on this issue given the appropriate facts.

## Home detention curfew

■ **R (Cross) v Governor of HM YOI Thorn Cross**

*[2004] EWHC 149 (Admin)*

The claimant challenged a refusal to grant early release on Home Detention Curfew (HDC) or 'tagging' under CJA 1991 s34A. He had been refused because of a policy decision, contained in an amendment to the HDC policy in Prison Service Order (PSO) 6700, that made prisoners convicted of certain offences, including possession of offensive weapons, ineligible for HDC without exceptional circumstances. The claimant was serving a sentence of three years six months, comprising a number of sentences forming a single term (under CJA 1991 s51). Only one sentence was for possession of offensive weapons, and that was for only one month.

The court rejected the submission that there were exceptional circumstances in this case. Even though the offence was minor and only attracted a short sentence, the single term provisions meant that the presumption against suitability for HDC applied to the whole sentence. Furthermore, the court held that the policy was clearly drawn to maintain public confidence in the HDC system. It stated specifically that neither the circumstances of an offence, nor the risk that a prisoner is assessed as posing, should be taken into account in establishing the existence of exceptional circumstances. The Home Secretary, who was best placed to judge what was necessary to maintain public confidence in the scheme (see *Re Findlay* [1985] AC 333), had introduced this policy change. Such circumstances, therefore, will be peculiar to an offender rather than an offence. Consequently, it is not incumbent on governors to examine the facts of every presumed unsuitable offence to see whether exceptional circumstances are present.

■ **R (O'Rourke) v Secretary of State for the Home Department**

*[2004] EWHC 157 (Admin)*

This case was a challenge to the change in HDC policy (see *Cross* above), and failed at the permission stage. The court rejected the argument that a prisoner had any substantive legitimate expectation about his/her eligibility for release on HDC that survived the policy change. Here, again, *Re Findlay* was relied on as the leading case in relation to legitimate expectation in the prison context. Furthermore, the change of policy did not breach article 7 of the convention as it did not impose an additional penalty, but merely a potential restriction on the right to early release on HDC within the term of the sentence imposed by the court. Nevertheless, HDC procedures must meet the requirements of procedural fairness (see, for example, *R v Secretary of State for the Home*

*Department ex p Allen* [2000] COD 179). This was recently affirmed in the following cases.

■ **R (Price) v Governor of HMP Kirkham**

*[2004] EWHC 461 (Admin)*

In this case, a refusal to grant HDC was quashed where a report which gave reasons for an amended assessment of risk had been taken into account by the governor, but was not disclosed to the prisoner. This decision breached the requirements of procedural fairness as, although the HDC policy allowed for non-disclosure to protect third parties, this provision did not apply here as it was known that the prisoner was fully aware of the allegation that had led to the amended risk assessment. He was, therefore, entitled to make representations on the document that was used to take that allegation into account in the HDC process.

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

*[2004] EWCA Civ 491*

The Court of Appeal has, unsurprisingly, held that where a prisoner is recalled to custody from an HDC licence, the time spent at large unlawfully (ie, between the revocation of the licence and return to custody) is, under Prison Act 1952 s49(2), added to the automatic conditional release date of a short term prisoner, and subsequent licence and sentence expiry dates. This policy did not result in double counting, as the time spent at large unlawfully merely shifted forward all relevant days by the appropriate amount. There was, therefore, no difference (and no reason for any) between prisoners recalled on HDC licence and other recalls.

## PRISON CONDITIONS

### Category A prisoners

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

*[2004] EWCA Crim 679*

The claimant was a category A prisoner serving a mandatory life sentence with a tariff of 17 years. He sought to challenge a Category A Review Team's decision, on 20 May 2003, that he should remain a category A prisoner.

The claimant argued that the category A decision was unreasonably reliant on his denial of guilt, and refusal or inability to participate in offence-focused courses. It was also argued that the review team had failed to give due weight to other factors such as the claimant's good behaviour. Elias J rejected these arguments. He considered that, in reaching its decision, the review team had considered the claimant's good behaviour and other relevant matters properly. He noted that the review team must assume a prisoner's guilt, and then assess risk in the event of an escape. Where a prisoner's offence is grave, the review team can justifiably require cogent evidence of a reduction in the risk of escape through his/her participation in offending behaviour courses.

Elias J accepted that where a prisoner is unable to undertake such courses due to his/her denial of guilt, the task of the review team will be more difficult and, in some cases, practically impossible. It was clear that this would have a detrimental impact on a prisoner's right to parole. However, Elias J did not accept that the review team should consider the implications of its decision on the parole process. The claimant had not yet had a board review, and the review team could not be required to anticipate potential difficulties between a prisoner's category A and board reviews.

Finally, the judge rejected an argument that the review team had acted improperly by excluding from its consideration any assessment of the claimant's escape potential. In *William Pate v Secretary of State for the Home Department* [2002] EWHC 1081 (Admin), a physically frail prisoner had argued successfully that it was unlawful for the Category A review team to place him in category A without reference to the fact that he was not in a position realistically to escape. However, this was an exceptional case, and Elias J considered that it was proper for the review team to say that if there was nothing unusual about a category A prisoner's case, there was no need to analyse, in detail, his/her risk of escape.

### Adjudications

■ **Napier v Secretary of State for the Home Department**

*[2004] EWHC 936 (Admin)*

The claimant in this case was a determinate sentenced prisoner. In March 2002, he threw a bucket of excrement and urine over an officer and was charged with assaulting a prison officer. His request for legal representation at the adjudication hearing was refused. He was found guilty of the charge, and punished with 35 additional days' imprisonment. Following the decision of the ECtHR in *Ezeh and Connors v UK* [2002] 35 EHRR 28, the Home Secretary remitted the award of additional days imposed by governors after 2 October 2000, including those awarded to the claimant. The claimant sought to argue that the Home Secretary should also have remitted the finding of guilt.

Goldring J noted that in establishing whether the adjudication hearings constituted the determination of a 'criminal charge' within the meaning of article 6 of the convention, the ECtHR had considered the threefold test set out in *Engel and others v the Netherlands* 8 June 1976, Series A No 22. He considered that the decisive factor that led to the proceedings falling within the ambit of article 6 was the third criterion in this test, ie, the nature and severity of the punishment awarded. He suggested that if additional days had not been awarded, article 6 would not have applied.

Goldring J, therefore, considered that the Home Secretary had acknowledged his breach of the claimant's convention rights, but had given him sufficient redress by the remission of additional days. He considered that as the finding of guilt had not delayed the claimant's release date, it could properly be analysed as an administrative finding of fact based on the evidence before the governor. The finding of guilt could be used to make sensible and informed decisions regarding the management of the claimant in prison. Moreover, he considered that the claimant had received just satisfaction for the non-pecuniary loss that he had suffered. Therefore, the claimant could not argue that he should be put in the position that he would have been in had the breach of his article 6 rights not occurred.

### Prisoners' monies

■ **Duggan v (1) Governor of HMP Full Sutton (2) Home Office**

*[2004] EWCA Civ 78*

The Court of Appeal upheld Hart J's decision that Prison Rules 1999 r43(3) does not impose a trust on monies paid into an account under the control of the governor under that rule. The court considered that no intention to impose a trust could be found in the language of r43(3). Instead, the rule's purpose was the need to control a prisoner's access to cash within the prison. This was achieved by paying the money into a bank account. The requirement in r43(3) that 'the prisoner shall be credited with the amount in the books of the prison', suggests that the relationship between the prison and prisoner was one of banker/customer. This is reflected in the procedures that are adopted for allowing prisoners access to cash, as set out in Prison Service Instruction (PSI) 79/1997 and PSO 7500. Furthermore, the Court of Appeal considered that there would be little practical benefit to a prisoner if a trust were to be created. In addition, it would impose a disproportionate administrative burden on the prison authorities.

### Incentives and earned privileges scheme

■ **R (Green) v (1) Governor of HMP Risley (2) Secretary of State for the Home Department**

*[2004] EWHC 596 (Admin)*

This case concerned a challenge to the Prison Service's refusal to place the claimant on the enhanced regime of the incentives and earned privileges scheme (IEPS). The claimant was con-

victed of indecent assault, and sentenced to eight years' imprisonment. He had been told that he must complete a SOTP as part of his sentence plan. However, the claimant was ineligible to complete the SOTP because he denied that there was any sexual element to his offences. Unless the claimant complied fully with this requirement of his sentence plan, he would be ineligible for the enhanced level of the IEPS.

It was argued, on the claimant's behalf, that the decision to refuse him enhanced status was flawed. It was claimed that too much weight was placed on his refusal to attend the SOTP without sufficient consideration of other matters that pointed in favour of enhanced status. Collins J rejected this argument. He noted that the Prison Service had considered the various assessments of the claimant's behaviour, all of which were good. The judge also referred to *R (Potter and others) v Secretary of State for the Home Department* [2001] EWHC, where Moses J held that the prison management was entitled to reward only those prisoners who addressed their offending behaviour. There was no basis for criticising the weight attached to the single requirement to attend a SOTP.

## The detention of children in prisons

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

*[2004] EWHC 13 Admin*

The claimant challenged the lawfulness of her detention when, aged 16 years, she was held at HMP Eastwood Park. The claimant was moved to Eastwood Park from a local authority's secure children's home (LASCH). This was as a result of the lack of availability of spaces in such homes and in secure training centres. She was moved after she had completed her GCSEs. The authorities took account of the need for her to be close to her parents.

Hooper J held that the decision to move the claimant from the LASCH was not irrational. It was based on the decline in her behaviour; age; allegations of bullying; and a comment from her Youth Offending Officer that she would benefit from the move. However, he did not accept that the decision was in the claimant's best interests: there had been a failure to consider her vulnerability and the regime at HMP Eastwood Park, which had been severely criticised by HM Inspector of Prisons. Furthermore, Hooper J held that the placement of girls aged 16 and under in prisons was not contrary to the Home Secretary's policy (see ministerial statement in 1999, Hansard vol 327, col 29, 8 March 1999 and PSO 4960). Nor did he consider the decision to be inconsistent with the obligations owed under the Children Act 1989, as set out in PSO 4960 Annex A. These duties require that when making decisions about a child, the primary consideration must be to safeguard his/her welfare. He noted that article 3 of the UN Convention on the Rights of the Child requires that 'the best interests of the child shall be a primary consideration'. However, this is not the only consideration, particularly where a child has committed a serious offence. He also noted that the UK has entered a reservation to this article that allows children to be accommodated with adults where there is a lack of suitable accommodation for an individual, or where mixing adults and children is deemed to be mutually beneficial. Finally, he rejected the arguments put forward under article 8 of the convention.

Hooper J concluded that as the courts can scrutinise carefully the placement of a 16-year-old in prison in keeping with the principles of judicial review, and in light of his general conclusions in this case, the decision to enable the Home Secretary to send a 16-year-old to prison is a matter for parliament and not the courts. He also noted that the Youth Justice Board had announced that, by the end of 2003, all females under 17 years old would be taken out of the Prison Service estate.

## Mother and baby units

■ **Claire F v (1) Secretary of State for the Home Department (2) Lia-Jade F (a minor by her litigation friend the Official Solicitor)**

*[2004] EWHC 111 (Fam)*

This case concerned a female prisoner, Claire, and her child Lia-Jade, who was born after her mother's imprisonment for six years (which was reduced to five years on appeal), for a drug-related offence of aggravated burglary. Claire wanted to keep her daughter with her for as long as possible, and at least until Lia-Jade reached 18 months old. A Separation Care Plan Meeting (SCP meeting) decided that Lia-Jade should be separated from Claire at nine months old, and go to live with her grandparents. The Home Secretary upheld this decision.

Munby J confirmed that, in cases such as this, the court's role was not to exercise a 'best interests' jurisdiction. Instead, the court's function was limited to reviewing the Home Secretary's decision in the manner indicated in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532. The court must subject the Home Secretary's decision to intense and anxious scrutiny on an objective basis, while also recognising and allowing him a significant margin of discretion.

Munby J considered, in detail, the development of the Prison Service's policy on mother and baby units. The current policy is set out in PSO 4801, which confirms that, in most cases, the upper age limit for children to live with their mothers in prison is 18 months. The lawfulness of this policy was upheld by the Court of Appeal in *R (P) Secretary of State for the Home Department*; *R (Q and another) v Secretary of State for the Home Department* [2001] EWCA Civ 1151. Munby J rejected the challenges to the lawfulness of the policy made on behalf of Claire and her daughter. He considered that the policy meets all the requirements of article 8 of the convention, and respects properly the human rights of both the mother and baby. The judge also held that the Home Secretary's decision in this case was made in line with the policy and requirements of article 8.

However, Munby J concluded that the decision could not stand due to the fact that Lia-Jade's interests were not represented properly at the SCP meeting. The representative from the local authority, Ms B, was said to be woefully unprepared to represent Lia-Jade's interests: Ms B first become involved with the child on the day of the SCP meeting, and was confused about the relevant facts (for example, the length of Claire's sentence). Munby J rejected other arguments relating to the decision-making process.

## Right to respect for private and family life

■ **Wainwright and another v Home Office**

*[2003] UKHL 53*

This case was an appeal to the House of Lords. The claimants were the mother and half-brother of a prisoner held at HMP Leeds. The prisoner was suspected of dealing drugs. Therefore, orders were given that any visitor who wanted an open visit with him had to be strip-searched first. In 1997, Mrs Wainwright and her son, Alan, visited the prison. They were subject to strip searches that were not carried out in line with the prison's internal rules. Both claimants found the experience very distressing: Mrs Wainwright suffered from emotional distress, and Alan, who suffered from physical and learning difficulties, suffered from post-traumatic stress disorder.

The claimants argued that, in order to enable the UK to conform to its international obligations under the convention, there should be a declaration that there is a tort of invasion of privacy under which the searches were actionable, and damages for emotional distress recoverable. The Lords considered that

the English courts had so far refused to formulate a general principle of invasion of privacy, and that such a doctrine could only be achieved through legislation.

The Lords further held that there was nothing in the jurisprudence of the ECtHR which suggests that a high level of privacy was necessary to comply with article 8 of the convention. In addition, the HRA weakened the argument for saying that a tort of invasion is needed: ss6 and 7 provided that if a public authority has infringed a person's rights, then s/he will have a statutory remedy.

## Confidential medical correspondence

■ **R (Szuluk) v Governor HMP Full Sutton**

*[2004] EWHC 514 (Admin)*

In this case, Collins J held that, in exceptional circumstances, a prisoner should be entitled to correspond on a confidential basis with external doctors. The claimant was a category B prisoner, held at HMP Full Sutton with category A prisoners. His correspondence was subject to routine reading consistent with the procedures set out in PSO 1000, chapter 36.21.

The claimant had suffered from a brain haemorrhage in April 2001, and during his imprisonment experienced difficulties with being taken to hospital appointments and getting the necessary treatment to monitor his condition. The claimant wished to correspond with his specialist to ensure that he was able to get the treatment and supervision that he required while he was in prison.

Collins J considered that as the claimant was suffering from a life-threatening condition; undergoing treatment outside hospital; and was in need of continual medical care, the prison should implement special procedures to allow him to correspond, on a confidential basis, with his specialist and other external doctors involved in his care. In recognition of the fact that the claimant had been moved from HMP Full Sutton and may be moved again, Collins J made an order that the governor of any prison where the claimant was held subsequently should make a decision on the issue of his correspondence in keeping with the principles set out in the judgment.

## Freedom of expression

■ **Nilsen v (1) Governor of HM Prison Full Sutton (2) Secretary of State for the Home Department**

*[2003] EWHC 3160 (Admin)*

The claimant was a life sentence prisoner serving six life sentences with a whole life tariff. In 1992, he started to write his autobiography and, in 1996, he handed a manuscript to his solicitor. Several years later, the claimant's solicitors sought to return a copy of the manuscript to him. The authorities examined it and, by a letter dated 23 October 2002, the Prison Service concluded that the manuscript would not be handed to the claimant. The service maintained that it was intended for eventual publication, contrary to Standing Order 5B para 34(9)(c) (SO5B). Paragraph 34(9)(c) provides that general correspondence may not contain material which is intended for publication if it is about an inmate's crime or past offences except where it consists of serious representations about conviction or sentence or serious comments about crime, the processes of justice or the penal system.

Maurice Kay J rejected an argument that SO5B was incompatible with article 10 of the convention. He considered that the regulatory powers exercisable by a prison governor were not confined to good order and discipline or to security. These powers could lawfully be extended to consequential effects outside prison. Therefore, a governor could justify interference with a prisoner's freedom of expression to meet the legitimate aims set out in article 10(2), including the protection and morals of others, and the prevention of disorder or crime. The interference set out in SO5B was not disproportionate to these aims. Maurice Kay J considered that article 10 did not confer special status on autobiographical writings. The application of para 34(9)(c) to the claimant's manuscript was not disproportionate or irrational.

## Prisoners' right to vote

■ **Hirst v UK**

*App No 74025/01*

In this case, the ECtHR held that the applicant, a post-tariff discretionary life sentenced prisoner, had suffered a breach of article 3 of Protocol 1 of the convention as a result of his disenfranchisement under Representation of the People Act (RPA) 1983 s3. European court case-law has established that article 3 of Protocol 1 guarantees individual rights, including the right to vote and stand for election. Although central to democracy and the rule of law, these rights are not absolute. Contracting states are granted a wide margin of appreciation in relation to these rights. The court noted the divergences in law and practice within contracting states.

The court questioned whether the disenfranchisement of prisoners pursued a legitimate aim. It also doubted the validity of the aims put forward by the government, ie, the prevention of crime and punishment of offenders, and the enhancement of civil responsibility and respect for the rule of law. In any event, the court considered that the restriction imposed under RPA s3 was disproportionate to any aim that it sought to achieve. It noted that s3 does not apply to prisoners on remand, those imprisoned for default in paying fines or detained for contempt of court. Furthermore, the restriction is lifted as soon as a prisoner is released. However, s3 applies to a large category of prisoners irrespective of the length of their sentence, and the nature or gravity of their offence. It could not be argued that the applicant's disenfranchisement formed part of his punishment as he had served the tariff part of his life sentence.

However, the court accepted that it was for a contracting state to establish the parameters of any restrictions on prisoners' voting rights. The court would not speculate whether the applicant would still have been deprived of the right to vote even if a more limited restriction had been applied consistent with the requirements of article 3 Protocol 1.

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