PRISONERS' RIGHTS IN THE UK

Prison law and the rights of prisoners in the UK present something of a paradox. On the one hand, there is sophisticated legal machinery, supported by a legal aid scheme, that has jurisdiction over almost all aspects of prison life. On the other, the law appears to have very little reach into the daily lives of prisoners or the matters that cause them most concern in terms of their conditions of detention.

The classic statement in English law on this area, and the basis on which all subsequent actions have been laid was made by Lord Wilberforce in the case of *Raymond v Honey* in 1983[1]: "prisoners retain all rights save for those expressly or impliedly taken away by statute". This mirrors the view of the European Court of Human Rights in *Golder v UK*[2] that "justice does not stop at the prison gates". However, both statements beg the question of what rights are removed from detainees?

The classic view of the law and judicial intervention into prison life and the rights of prisoners in the UK has been to characterise it as a steady process of progression. This process has seen the courts – and in particular the Administrative Court – extend their jurisdiction into all aspects of prison life. However, whilst there has undeniably been an overall trend towards greater judicial scrutiny of the State in general and prisoners have benefitted from that trend, the law in the UK still provides very limited protection for the substantive rights of those in detention.

Unlike most European jurisdictions, the lack of a written constitution in the UK has proven to be a severe inhibitor for the courts when seeking to define what rights do survive imprisonment. The discrepancy that this has created between form and substance was noted at a very early stage by a respected academic, Professor Genevra Richardson. When she wrote about the first wave of cases about prisoners in the early 1980s she commented that:

[1] [1983] 1 AC 1
[2] (1975) 1 EHRR 524

> "Prisoners should possess special rights vis-à-vis the prison authorities in a sufficiently detailed form to promote effective supervision by the courts":[3]

It is arguably this lack of a written constitution that has resulted in the European Court of Human Rights and the domestic enactment of the Convention through the Human Rights Act 1988 having such a profound influence on the rights of those in detention. I would like to explore the three methods by which prisoners rights have come to be defined in this country. These are:

1. Domestic judicial intervention
2. The European Court of Human Rights
3. Non-legal interventions

I will avoid giving a linear history of prison litigation and will instead try and concentrate on a few key cases and events to illustrate the different results that arise from these sources.

Domestic judicial intervention

There is a highly developed formal system for prisoners to raise complaints in England. This comprises of:

1. An internal complaints system
2. The Prisons Ombudsman
3. Judicial Review of administrative decisions
4. Compensation claims for mistreatment

The two areas where the British courts have been most pro-active in relation to prison issues have been the right to legal advice and procedural parole rights. Although both areas of law have developed in tandem with European Court decisions on Articles 5 and 6, they have largely resulted in a settled view that:

- English common law recognises that the right to obtain confidential legal advice is an important aspect of the right of access to the courts and that it survives imprisonment in a manner that is reflected in Article 6
- Common law requires fairness in the parole and early release processes in a manner that is also reflected in Article 5

[3] ("The case for Prisoners' Rights", in McGuire et al, 'Accountability in Prisons', Tavistock, 1985, p 60).

The consequence of this is that there is a highly developed parole system with the right to legal representation. In consequence, the main area of prisoners' rights litigation in England and Wales concerns decisions made in relation to parole. However, this leads to frustration amongst prisoners that the courts fail to provide effective supervision of their treatment in prison.

The inability of the domestic courts to really grapple with substantive rights can be illustrated with examples of two areas. The first is in relation to segregation and the second in relation to the provision of treatment for prisoners.

Segregation or solitary confinement is recognised as the most severe punishment that can be imposed upon prisoners. In consequence, there are a highly developed set of procedural safeguards that accompany any decision to segregate prisoners. These involve not just the prison authorities but also a degree of oversight from Independent Monitoring Boards (part of the UK's National Preventative Mechanisms for the purposes of OPCAT). In a recent case, the Court of Appeal accepted that segregation could arguably fall within the ambit of a civil right for the purposes of Article 6 ECHR, and went on to state that the internal machinery of prison complaints and independent monitoring combined with the availability of judicial review was adequate to satisfy those rights[4]. The judgment concentrated on the very detailed policy documents setting out the basis upon which decisions should be taken and how they should be reviewed as providing an important safeguard in the process.

By contrast, cases that have sought to address the substantive rights that accrue to segregated prisoners have had little success. In the case of *Malcolm*,[5] a prisoner in segregation complained that a mandatory statutory requirement to allow prisoners one hour of activity including 30 minutes in the open air each day was not being followed. The prisoners' complaint was upheld by the Prisons Ombudsman who noted that the operational reasons relied upon by the prison governor for failing to comply should be the exception rather than the norm. However the prisoner did not succeed in persuading the English courts to award

[4] *King* [2012] EWCA Civ 376
[5] [2010] EWHC 3389 (QB)

him compensation.. The court held that the decision to limit the amount of time in the open air had sound operational reasons and that Article 8 was not engaged on the facts. In a similar vein, cases concerning a challenge to night time cell checks for category A prisoners and the restriction of a prisoner to a small unit were dismissed with great deference being shown to the needs of prison security[6].

A case which further illustrated the inability of the domestic courts to come to grips with the substance of prison life and the enormous deference shown to the authorities in relation to the management of prisons concerned the practice of "slopping out". This is a system peculiar to the old Victorian prisons where prisoners do not have access to the toilet when confined to their cell and have to urinate and defecate in buckets which are then washed out when the cell is unlocked. The judgment is probably impenetrable to anyone not familiar with the English prison system. However, in essence it dismissed all evidence that pointed towards the adverse health effects of the system – such as faecal matter having been found on tables in cells and an outbreak of nono-virus – in favour of the state's observations that such matters could not be conclusively related to the sanitation system. As such, the claims for compensation and for breaches of Articles 3 & 8 were dismissed.

The current impact of the European Court

In recent years, there have been a number of direct examples of the contrast in approach to prisoners' rights between the English courts and the ECtHR. The case of *James and others v UK*[7] addressed what is probably a uniquely English problem. The case concerned the impact of the sentence of Imprisonment for Public Protection ("IPP") – a life sentence in all but name – on the prison system. This sentence was first introduced in 2005 when the lifer population of English prisons stood at around 4,000. Almost overnight, this increased to 11,000 and the system simply could not cope. For those of you not familiar with the life sentence, it comprises of two distinct parts: the first is the punitive or tariff period

[6] R (mcKenzie) v Governor of HMP Wakefield [2006] EWHC 1746 (Admin); R (Bary) v SSJ [2010] EWHC 587 (Admin)

[7] James, Wells and Lee v United Kingdom (Application Nos 25119/09, 57715/09 and 57877/09) 18 September 2012

that must be served before release can be considered. The second is the preventative period when the prisoner is eligible for release but only if the Parole Board considers that the risk of harm is low enough. Article 5 is re-engaged at the end of the tariff period and a fresh review of detention is required by a court like body. The problems that arose included a lack of places on courses, a lack of spaces at resettlement prisons and gridlock at the Parole Board who were unable to hear the large volume of cases. The result was that many prisoners with fairly short tariffs, sometimes as short as year but often between 3-5 years, were simply stuck in the prison system with no hope of progression or release. The question for the courts to answer was essentially, what rights do life sentenced prisoners have when there are so many of them that the authorities cannot provide treatment or meaningful parole reviews?

When the case reached the House of Lords in England, the Lords all expressed grave concerns at the manner in which the sentence of IPP had been introduced, noting that the numbers receiving the sentence had been far higher than expected and that the prison system and Parole Board were ill equipped to deal with them. However, they did not consider that the manifest defects in the system rendered the post-tariff detention of the applicants arbitrary and so in breach of Article 5(1). Whilst they recognised that such a breach could occur if an IPP prisoner was "allowed to languish in prison for years without receiving any of the attention which both the policy and the relevant rules….require" (Judge LCJ, para 128), they did not consider that this position had been reached. The judgment effectively concluded that the right to a parole review amounted to no more than consideration of the case by the Parole Board without any guarantee about the quality of the information to be provided to the Board or the treatment of the prisoner in advance of the parole hearing.

The case proceeded to the European Court of Human Rights. The first question for the Court in these cases was whether the detention of these prisoners in the post tariff period was compatible with Article 5(1)(a). The Court reiterated that the purpose of Article 5(1) is to ensure that no-one is deprived of liberty in an arbitrary fashion (para 187). Whilst they confirmed that they will normally refer to national law to determine whether detention is lawful, they set out four situations in which detention may be (or may become) arbitrary:

- Where there is an element of bad faith or deception by the authorities (para 192)
- If national law does not genuinely confirm to the permitted purposes of Article 5(1) (para 193)
- In cases of continued deprivation of liberty, that there is a continued relationship between the ground of detention and the place and conditions of detention (para 194)
- That there is a relationship of proportionality between the ground of detention and the detention in question.

One of the matters considered relevant to the assessment of these factors was the fact that the IPP sentence was, at least in the early days, mandatory and so removed judicial discretion to assess dangerousness in individual cases. Whilst this was not in itself unlawful, it did heighten the Court's scrutiny of the correlation between the aim of the detention and the detention itself. The Court considered that the legislative history of the sentence made it clear that it was intended to include an element of treatment and that the requirements of international law confirmed that prison sentences must include treatment with the aim of reform and rehabilitation. It noted the trenchant criticism made by the Lords of the failure to make adequate provision and while it did not consider that there had been any bad faith by the authorities, the failure to allow access to appropriate rehabilitative courses after the expiry of the tariff did render the detention during that period arbitrary (para 221).

There have been a number of other cases that illustrate the tension between substance and form which exists between the English courts and the European Court of Human Rights. Perhaps the most notable is the issue of prisoners' voting rights and the current impasse that exists between the legislature in the UK and the European Court. Also, the current challenge to the use of whole life tariffs in England was extraordinary as the Court of Appeal with the Lord Chief Justice presiding issued a fresh judgment on the issue just days before the ECtHR heard the case, despite the fact that the domestic law was already settled. This was an extraordinarily provocative act and this and the voting case, more than any other, illustrate the difference between the concept of a margin of

appreciation for domestic states and allowing public concern and media outrage to dictate prison policy and to curtail the existence of prisoners' rights.

Other sources of rights

The final point I wish to make is that it is very often the actions of reform organisations and even prisoners themselves that lead to real changes in prisoners' rights. In England there have been periods where significant prison disturbances have affected the prison system. The most well known and prolonged was in 1989 at Strangeways in Manchester. In response, the Government commissioned a judge led inquiry that in turn produced the *Woolf Report*. This is one of the most significant documents in terms of promoting and protecting prisoners' rights in the UK. It recognised that justice in closed institutions requires transparency and fairness. The report concentrated equally on creating procedural fairness and improving prison conditions. It resulted in a formalised complaints system being instituted and the creation of an Ombudsman to oversee those complaints. Importantly, it also made significant recommendations about improving living conditions and rehabilitative measures. These were probably the most important reforms of the English prison system of the late 20th century and the most long lasting. It is important to recognise that they came about as a result of the failure of the legal system to properly ensure justice and fairness within prisons.