

Early Release

R (On the application of Robinson) v. Secretary of State for Justice (19 May 2010)

R was sentenced to 5 years imprisonment in October 2005 subject to the release provisions of the *CJA 1991*. He was released on licence in July 2008 after serving two-thirds of his term but was recalled to prison in September 2008. He would have served three-quarters of his sentence by January 2009. Just before his original release s.32 of the *Criminal Justice & Immigration Act 2008* came into force. This inserted a new section 50A into the 1991 Act and had the effect of requiring R to serve the whole of the remainder of his sentence subject to Home Office or Parole Board recommendation for any earlier release. R considered that his detention after January 2009 was unlawful and sought judicial review of the Sect of State's refusal to release him. He claimed that his article 6 rights had been infringed because the removal of his automatic right to early release had retrospectively increased his sentence. The judge dismissed his claim and his appeal was also dismissed. A strong Court of Appeal (Lord Neuberger of Abbotsbury MR, Moses and Munby LJ) held that it was the sentencing court's duty to pass the appropriate sentence for the offence regardless of the early release provisions, following *R (on the appn of Smith) v. Parole Board* [2005] 1 W.L.R. 350. In *R (Black) v. S.S.H.D.* [2009] 1 A.C. 949 the House of Lords had recognised the executive's entitlement to take parole decisions without infringing article 5 of the Convention. There was a clear distinction between the court's sentencing powers and the power of the executive concerning early release. In considering the application of article 6 the court held that the legislative changes brought about by the CJ&IA 2008 had not affected the sentence passed which remained one of five years. A change in the early release provisions did not affect the imposition of the sentence. The judge at first instance had been right to find that R's sentence had remained unchanged in spite of the legislative changes and accordingly article 6 was not engaged.

HDC Recall - Appeals Procedure

R (on the application of McAlinden) v. Sect of State for the Home Department (4th May 2010)

M was sentenced to 16 months imprisonment. He was released early on HDC pursuant to s. 246 of the *CJA 2003* and tagged. His licence was revoked under s. 255 and he was recalled on an allegation that his tag had been tampered with. Pursuant to s.255 (2) M made written representations against his recall and requested that the matter be reviewed by the Parole Board. The Secretary of State considered that the tag had been deliberately interfered with and refused M's request and upheld his recall decision. M sought judicial review and claimed that the failure of the Secretary of State to provide for parole board review of the revocation of his licence was incompatible with M's rights under article 5 (4) of the Convention. Judge Milwyn Jarman QC held that at the time M was recalled he did not have a right not to be imprisoned and his release had been a matter of administrative discretion. The decision to recall did not affect the lawfulness of the original sentence. Section 255 provided due process for a prisoner to challenge the revocation of his licence and he had a right to judicially review any decision of the Sect of State under s. 255. Accordingly the Sect of State was not required by art. 5(4) to provide M with a review of his decision by the Parole Board. *R (Benson) v. Secretary of State for Justice* [2007] EWCA 2055 (Admin) applied.

Adjudication Appeals

PSI 32/2010 brings to an end the irregular practice by which Governors responsible for the disputed adjudication decision were expected to submit a report upon the matter to the Briefing and Casework Unit at the MOJ:

http://psi.hmprisonservice.gov.uk/psi_2010_32_discipline_manual_authority_to_conduct_adjudications.doc

The PSI, which came into force on 3rd June 2010, advises [2.1]: "Following a recent judicial review it has been agreed that the requirement in paragraph 9.1 for adjudicators to forward a report to the Briefing and

Casework Unit commenting on a prisoner's request for a review of an adjudication should no longer apply. BCU will review the case only on the basis of the ADJ 1 form submitted by the prisoner, the record of hearing (form F256) and other evidence considered at the hearing."

Sexual Orientation Discrimination

In a recent case brought by Marcus Farrar of Chivers solicitors and a member of GCN chambers the Governor of HMP Wakefield conceded (upon the receipt of legal advice) that it was unlawful for her to attempt to block a civil partnership between two prisoners. The Governor had sought to prevent the couple contacting each other by telephone on the basis that they were not partners; she then refused to provide a supporting statement on behalf of the couple as required under the Civil Partnership Act 2004 on public protection grounds. In **R v Registrar General ex p CPS [2002] EWCA Civ 1661** the Court of Appeal held that the prison could not object to the registration of a marriage on public policy grounds, and that the Governor's role in providing a supporting statement under section 27A (3) (b) of the Marriage Act was limited to matters relating to availability and convenience of the prison for the ceremony itself. The Claimant submitted that this interpretation must apply equally to the Civil Partnership Act 2004, which the Defendant ultimately accepted in conceding the claim. This avoided the need for the court to determine more challenging discrimination issues arising under Article 14.

Categorisation and OBPs

A prison Governor was entitled to refuse to downgrade a prisoner on the basis that his failure to complete offending behaviour work meant that there was a lack of evidence of risk-reduction, so held HHJ Langan Q.C In **R (oao Osborne) v Governor HMP Littlehey**: The Claimant had progressed well throughout his sentence for sex offences but had been excluded from participating on the SOTP due to his denial of the index offences. Permission had been granted on the basis that the initial decision cited only this factor; however later decisions were taken to plug the gaps. The learned judge concluded that good behaviour alone was insufficient to evidence a significant reduction in risk

[39]: "As to the claimant's behaviour, there is, as is made clear in the PSI from which I quoted earlier, nothing to be derived from good behaviour by itself. It is material only in so far as it shows a relevant change of attitude, and that is not something which can be gauged from the (praiseworthy) behaviour of the claimant in this case."

Mark George Q.C. & Matthew Stanbury
June 2010

Garden Court North Chambers are pleased to announce a one-day advanced level prison law training day, which will be held in Manchester on Thursday 17th June 2010.

Please [click here](#) for a link to the course flyer for your information. If anybody within your team would like to attend this course please complete the booking form and return to Chambers with a cheque in payment of your place.

Overview

Sentence Calculation and Licence Recall: The flurry of criminal justice legislation has made this one of the most confusing and complex aspects of prison law even for the most experienced practitioners. The presentation will guide you through the process at every level and serve as a helpful refresher. Topics covered include standard and non-standard recall, HDC and ECL.

Foreign Nationals: The recent changes with regard to the early removal of foreign national prisoners (FNPs) and the consistently confused approach of the authorities to such prisoners will be explored in detail. The topic includes all the latest authorities from the administrative court as well as the latest policy guidance on the segregation of FNPs.

Parole: This aspect of the seminar will focus on the Parole Board (Amendment) Rules and the decline in oral hearings which is the intended result, and consider the best approach to tackling this problem. The topic will also cover areas such as non-disclosure, hearsay and other such areas as are likely to be encountered by the more experienced practitioner.

Fee: £125 + VAT per delegate. Discounts are available for group bookings. Places are limited so book early to avoid disappointment.

Booking: Places are limited so book early to avoid disappointment. To reserve a place please [click here](#) to download a booking form or contact Chris Knowles on 0161 236 1840.