IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE COURT OF APPEAL
(Maurice Kay LJ, Lloyd LJ, Elias LJ)
Neutral citation: [2012] EWCA Civ 376

BETWEEN:

KAMEL BOURGASS AND TANVIR HUSSAIN

Appellants

-and-

THE SECRETARY OF STATE FOR JUSTICE

Respondent

-and-

THE HOWARD LEAGUE FOR PENAL REFORM

Intervener

WRITTEN CASE FOR THE HOWARD LEAGUE FOR PENAL REFORM

Introduction

1. This appeal concerns the requirements of fairness at common law and under Article 6 of the European Convention on Human Rights ("ECHR") when prisoners are segregated. The Howard League seeks to place the issues in this appeal in their wider context. Many segregated prisoners are vulnerable, whether by reason of youth, mental illness, learning disability or other characteristics. Other prisoners who may not appear to be vulnerable, become vulnerable in segregation. It is the Howard League's position that the segregation process must be fair so as to enable meaningful, just and safe decision making.

2. Segregation is used routinely in many prisons. It is not time-limited, reasons are not required to be given to the segregated prisoner either justifying the initial decision to segregate or subsequent decisions to maintain segregation, and there is no mechanism by which segregation can be reviewed by an independent decision maker at any time. Given the seriousness of what is at stake for the prisoner, the

Howard League considers that the law and policy governing segregation do not meet the requisite standards of fairness or the requirements of Article 6 ECHR.

3. The Howard League has filed a witness statement by its chief executive, Frances Crook. That statement sets out the Howard League's experience of segregation by reference to its clients, prisoners who use their helpline and a range of inspectorate and monitoring reports. The documents referred to in the statement are available online via the web links provided and hard copies will be provided if required. The Howard League has also filed a witness statement from Simon Creighton, an experienced prison law solicitor.

The Howard League for Penal Reform

4. Founded in 1866, the Howard League is the oldest penal reform charity in the UK and has around 9,000 members, including prisoners and their families, lawyers, criminal justice professionals and academics. The Howard League has consultative status with both the United Nations and the Council of Europe. It is an independent charity and accepts no grant funding from the UK Government.

5. The Howard League campaigns for less crime, safer communities and fewer people in prison. It aims to achieve these objectives through conducting and commissioning research, carrying out investigations aimed at revealing underlying problems and discovering new solutions to issues of public concern.

6. The Howard League has a legal department which provides front line advice and representation to young people in the criminal justice system aged 21 and under in relation to prison law and public law matters. Where appropriate, the Howard League's legal practice informs its policy work within the organisation.

7. The Howard League has detailed knowledge, experience and understanding of the policies and procedures that apply across the prison estate and prisoners' experience of those policies and procedures. This includes the issues surrounding the segregation of prisoners and the legal team regularly deals with prisoners who are segregated or at risk of segregation and require assistance. Publications and work relevant to segregation undertaken by the Howard League include:

a. Submissions to the Harris Review (2014) highlighting the links between the segregation of young adults and the incidence of self-inflicted deaths;
b. The Carlile Inquiry (2006), commissioned by the Howard League and led by Lord Carlile of Berriew QC, which examined and recommended changes in the use of segregation (amongst other things) on children in the secure estate;
c. Participation by Frances Crook, the Chief Executive of the Howard League, on the first-tier of the Ministerial Council on Deaths in Custody, which brings together decision-makers responsible for policy and issues relating to deaths in custody.
d. *Secretary of State for the Home Department v S.P.* [2004] EWCA Civ 1750, the leading authority on the requirements of procedural fairness when segregating children, in which the Howard League represented the claimant, SP.

Submissions

i) The nature, prevalence and impact of segregation

8. A prisoner may be segregated "*where it appears desirable, for the maintenance of good order or discipline or in his own interests…".*[1] This is a broad test which, in the Howard League's experience, is applied in myriad scenarios to deal with challenging behaviour of widely differing degrees. It is not the case that segregation is reserved only for a limited group of prisoners who might be considered particularly dangerous or solely for conduct which is criminal or dangerous. On the contrary, the Independent Monitoring Board ("IMB") and Her Majesty's Inspectorate of Prisons ("HMIP") reports indicate that it is often prisoners with mental health problems, prisoners who are under the age of 21 and prisoners from black and ethnic minority backgrounds who are the most likely to be segregated.[2] The 2014 IMB report into HMP Whitemoor described the segregation unit as the "*warehousing of the mentally vulnerable."*[3] This accords with the Howard League's experience of those in segregation who "*often tend to be the most disturbed and vulnerable prisoners, characterised by being young, institutionalised, with mental health difficulties or histories of self harm or*

[1] Rule 45, Prison Rules 1999.
[2] Witness statement of Frances Crook para.4.17-4.18.
[3] Witness statement of Frances Crook para.4.19.

attempted suicide" and who may be segregated prior to a transfer to hospital under the Mental Health Act 1983.[4]

9. There are no centrally held data on the number of prisoners who are segregated each year and the prevalence of segregation varies between institutions: HMP Altcourse, for example, segregated 518 prisoners in the period December 2013 to May 2014, Doncaster segregated 459 prisoners in October 2013 to March 2014, whereas HMP Dartmoor segregated 85 prisoners in the same period.[5] In spite of the lack of data, it is clear from a survey of IMB and HMIP reports that a significant number of prisoners are segregated for periods of ten to twenty days with a minority being segregated for longer periods, including some prisoners who are segregated for many months or even years.[6] It is certainly the Howard League's experience that some prisons use segregation as a matter of routine for short periods to deal with instances of challenging behaviour, including for behaviour that does not amount to a criminal offence and is not the subject of an adjudication and that may be linked to mental illness or distress.[7]

10. The European Court of Human Rights ("ECtHR") has recognised that "*solitary confinement is one of the most serious measures which can be imposed within a prison"* (Khordorkovskiy v Russia (2014) 59 EHRR 7 §471). The Howard League endorses this observation. It is the Howard League's experience that one of the hallmarks of segregation in the prison estate in England and Wales is that a prisoner will often be locked up alone for upwards of 22 hours per day. This experience is reflected by the IMB, which has observed that the segregation regime routinely involves prisoners being held alone in their cell for 23 hours a day,[8] and HMIP, which has reported that segregated prisoners remain locked in their cells nearly all day.[9] This brings the practice of segregation in England and Wales within the emerging international definition of solitary confinement as being, "*the physical and social isolation of individuals who are confined to their*

[4] Witness statement of Frances Crook para.4.21.
[5] Witness statement of Frances Crook para.4.8-4.12.
[6] Witness statement of Frances Crook paras 4.6 and.4.16.
[7] Witness statement of Frances Crook para.4.6-4.8.
[8] Witness statement of Frances Crook para.1.5. Note that the IMB refers to this practice as solitary confinement.
[9] Witness statement of Frances Crook para.1.4.

cells for 22 to 24 hours a day". This is a practice that the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Mendez, explicitly notes that solitary confinement is also known as 'segregation'.[10]

11. Segregated prisoners are often under an impoverished regime with little or no association with other inmates, limited interaction with staff, a thirty minute exercise period each day (usually alone), no television or radio and little or no access to education or other meaningful activities. Segregated prisoners may also have very limited access to the telephone, including for legal calls, and limited access to healthcare.[11]

12. Furthermore, segregation is indefinite: there are no limits on how long a prisoner may be segregated lawfully nor is there any requirement for the prisoner to be informed of how long he or she will remain in segregation. As Frances Crook describes at paragraphs 5.21-5.25 of her statement, this engenders a profound sense of hopelessness in many prisoners, amplifying the negative psychological impact that being segregated can have.

13. The potential for segregation to have a serious adverse psychological impact on a prisoner is well documented. Sharon Shalev, a leading academic on solitary confinement, notes that, "*[a]ll studies of prisoners who have been detained involuntarily in solitary confinement in regular prison settings for longer than ten days have demonstrated some negative health effects"* and that those in segregation are much more likely to be admitted to hospital for psychiatric care than those on normal location.[12] The ECtHR has recognised that segregation may give rise to inhuman and degrading treatment contrary to Article 3 ECHR (*Enea v Italy* (2010) 51 EHRR 3) and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") has referred to evidence that solitary confinement *"can have an extremely damaging*

[10] Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, 5 August 2011, p.8-9; witness statement of Frances Crook para.3.1.
[11] Witness statement of Frances Crook para.5.15-5.18.
[12] Witness statement of Frances Crook para.5.7.

effect on the mental, somatic and social health of those concerned".[13] This serious adverse impact on a prisoner's mental health may materialise at any time, particularly for the many prisoners with pre-existing mental health problems, and is not confined solely to those who endure long term segregation. Mr Creighton, for example, explains that one of his clients attempted suicide within hours of being segregated.[14]

14. Long term segregation poses particularly serious risks to a prisoner. The Special Rapporteur has recorded that according to the literature, solitary confinement in excess of fifteen days may lead to the harmful psychological effects becoming irreversible.[15] Frances Crook gives the example of the long term segregation, lasting for many months, of a young person, 'C', with severe learning disabilities, mental health problems and hearing loss, none of which was identified until he was eventually transferred to hospital under the Mental Health Act 1983. That young person described that he felt like he was being treated like an animal in segregation, with no light at the end of the tunnel.[16]

15. Unsurprisingly in light of this, a significant number of prisoners who take their own lives in prison will have had some experience of segregation prior to their death[17] or will have died in segregation: see, for example, *Keenan v United Kingdom* (2001) 33 EHRR 38 and Prison Service Order ("PSO") 1700 itself, which recognises the disproportionately high number of self-inflicted deaths in segregation units.[18]

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[13] CPT annual report of 10 November 2011 covering the year from 1 August 2010 at p.53.
[14] Para.8.
[15] Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, 5 August 2011, p.9.
[16] Witness statement of Frances Crook para.5.8.
[17] Witness statement of Mr Creighton para.3.
[18] PSO 1700, p 4 and see further at p.29: "*Research into the mental health of prisoners held in solitary confinement indicates that for most prisoners there is a negative effect on their mental well being and that in some cases the effects can be serious. A study by Grassian & Friedman (1986) stated that, 'Whilst a term in solitary confinement would be difficult for a well adjusted person, it can be almost unbearable for the poorly adjusted personality types often found in a prison.' The study reported that the prisoners became hypersensitive to noises and smells and that many suffered from several types of perceptual distortions (eg. hearing voices, hallucinations and paranoia).*" See also witness statement of Frances Crook at para.5.2-5.6.

16. Segregation also impacts on a prisoner's ability to progress in his or her sentence. As explained by Mr Creighton, prisoners who have been segregated will often experience difficulty being recategorised or in securing a progressive transfer, and periods of segregation are frequently raised as matters of concern by the Parole Board when considering whether to release a prisoner on licence or to an open prison.[19] On the same theme, Frances Crook refers to one of the Howard League's clients who lost his enhanced privileges status because he was in segregation.[20]

17. The effect of all of these features is that segregated prisoners, particularly children, young adults and prisoners with mental health problems or learning disabilities, often feel hopeless, helpless and distressed in segregation, where they may find themselves for undefined periods on a regular basis.

ii) The requirements of fairness in the context of segregation

18. The Howard League submits that the seriousness of what is at stake for the segregated prisoner - both in terms of the potential adverse psychological impact and the impact the prisoner's progression through his or her sentence - means that high standards of fairness must apply to the initial decision to segregate, subsequent decisions to maintain segregation and the process by which a prisoner may have his or her segregation reviewed. The Howard League's view is that the current segregation regime falls far below these standards.

19. Further, the Howard League endorses the Appellants' submission that segregation is striking for its inconsistency with other areas of prison decision making where the requirements of procedural fairness are held to apply.[21] The Howard League considers that there is no good reason of principle or practice why the same standards of fairness should not apply to the process of segregation as to the process of adjudications, categorisation, Parole Board hearings, referral to Close Supervision Centres or escape risk classification.

[19] Witness statement of Mr Creighton para.10.
[20] Witness statement of Frances Crook para.3.7.
[21] See witness statements of Frances Crook at para.6.2 and Mr Creighton at paras 11-12.

20. In summary, the Howard League considers that procedural fairness in the context of segregation requires:
    a. The prisoner to be given sufficient information about the reasons and evidence relied on to justify the decision to segregate them, and their continuing segregation, so as to enable them to make meaningful and effective representations in their defence.
    b. The prisoner's segregation to be subject to an independent review no later than fourteen days after segregation has commenced and, if segregation is maintained, at regular intervals thereafter.
    c. The prisoner to be enabled to participate effectively in all aspects of the segregation process.

21. The Howard League emphasises that these should be considered the minimum requirements of procedural fairness in this context. They must also be applied flexibly to take account of the particular needs of individual prisoner and the impact of segregation on each individual. Thus, for example, a prisoner with learning disabilities may require more time, support and advice to enable him or her to participate effectively in the review process and a prisoner with mental health problems may need to have his or her segregation reviewed sooner than the fourteen day longstop if there is evidence of a deterioration in mental health.

(a) Reasons and evidence

22. The common law has long recognised that an essential ingredient of fair decision making is the duty to provide sufficient reasons so that a person can meet the case against him (*Kanda v Government of Malaya* [1962] AC 322; *O'Reilly v Mackman* [1983] 2 AC 237, at §279F-G). In *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531 at §560, Lord Mustill set out the following two principles of fairness, among others:

> *"(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors*

may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

23. In *R v Secretary of State for the Home Department ex p McAvoy* [1998] 1 WLR 790, at §798D the Court of Appeal held, *"A prisoner's right to make representations is largely valueless unless he knows the case against him and secret, unchallengeable reports which may contain damaging inaccuracies and which result in continuing loss of liberty are, or should be, anathema in a civilised, democratic society."*

24. In addition to the provision of information detailing the case against a prisoner, procedural fairness also requires that any decision reached must itself be properly reasoned. In *South Bucks District Council v Porter (No.2)* [2004] 1 WLR 1953, Lord Brown articulated the correct standard for administrative decisions at §36:

> *"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved... The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds."*

25. The Howard League is conscious of the need not to duplicate submissions already made by the parties to this appeal. With that in mind it does not make submissions on the Court of Appeal's decision in *R v Deputy Governor of Parkhurst Prison ex p Hague* [1992] 1 AC 58 save as to endorse the Appellants' submission that this decision is no longer sustainable and should not be followed.

26. The current approach taken in the domestic law is reflected and developed in the international standards governing segregation. The Special Rapporteur stated in his 2011 report:

> *"93. All assessments and decisions taken with respect to the imposition of solitary confinement must be clearly documented and readily available to the detained persons and their legal counsel. This includes the identity and title of the authority imposing solitary confinement, the source of his or her legal attributes to impose it, a statement of underlying justification*

for its imposition, its duration, the reasons for which solitary confinement is determined to be appropriate in accordance with the detained person's mental and physical health, the reasons for which solitary confinement is determined to be proportional to the infraction, reports from regular review of the justification for solitary confinement, and medical assessments of the detained person's mental and physical health.

94. From the moment that solitary confinement is imposed, through all stages of its review and decisions of extension or termination, the justification and duration of the solitary confinement should be recorded and made known to the detained person…"

27. It is also of note that in Canada a segregated prisoner is entitled to the written reasons justifying their segregation within one working day.[22]

28. The Howard League submits that the domestic case law, taken together with the international standards and the factual reality of segregation for prisoners, indicates that fairness requires that the decision to segregate must be properly reasoned and that the reasons and evidence supporting the decision must be provided to the prisoner.

29. It is the Howard League's experience that reasons are rarely given in support of segregation decisions, and that when they are they lack specificity and accuracy.[23] This is supported by HMIP's findings about the quality of segregation records generally: HMIP's annual report of 2012-2013 stated that, "*the analysis and documentation of segregation was inadequate in many prisons*"; the previous annual report found that "*[i]n the majority of prisons, authorisation records completed by operational managers often did not support decisions to segregate prisoners"*; and the report into HMP Sudbury in 2013 found that, "*[t]he*

[22] Regulation 19 of the Corrections and Conditional Release Regulations: http://laws-lois.justice.gc.ca/eng/regulations/SOR-92-620/section-19.html

[23] Witness statement of Frances Crook para.6.5-6.7. While the Court of Appeal's decision in *S.P.* requiring reasons to be given prior to children before they are segregated was welcomed, it is unfortunately the Howard League's experience that Young Offender Institutions routinely fail to provide such reasons, seemingly in part because the requirements of procedural fairness have not been embedded into the segregation process across the whole of the prison estate (see Crook para. 6.4). In any event, the Howard League considers that the same rationale for providing children with reasons for their segregation will apply to many prisoners.

completion of segregation paperwork was extremely poor and some prisoners had been segregated without proper authorisation." [24]

30. This lack of reasons and poor quality decision making, combined with the absence of any independent review mechanism for segregation, creates a "*stinging sense of injustice"* in many prisoners,[25] exactly as articulated by Lord Reed in *R (Osborn) v Parole Board* [2014] AC 1115 at §68-70.

31. It is important to emphasise here that the majority of segregation decisions will not involve matters of national security or intelligence and the giving of reasons and evidence will be neither administratively burdensome nor sensitive.[26] While the Howard League endorses the Appellants' explanation of how information may be redacted or sanitised so as to protect the interests of the prison and the state, such an approach will only be necessary in a minority of cases. In the majority of segregation cases matters of non-disclosure or intelligence will simply not arise and the reasons behind the decision to segregate will readily be discoverable from prison staff or will relate to self-evident or admitted conduct. In those circumstances the requirement to provide reasons and evidence cannot properly be said to be burdensome or compromising at all, or certainly not to the degree that it can outweigh the importance to the prisoner of understanding the case against him or her and being able to meet it. The Howard League accepts that there will be a minority of cases where the prison will be required to have recourse to redaction, sanitisation and gisting, but the existence of those rare cases cannot begin to justify the denial of procedural fairness in the majority of cases.

(b) Independent and timely review

32. The common law recognises that an important ingredient of fairness is that a decision maker must be independent. In *re Medicaments* [2001] 1 WLR 700, Lord Phillips observed at §35, "*The requirement that [a] tribunal should be independent and impartial is one that has long been recognised by English common law*." This requirement applies to all administrative decision making, not

[24] Witness statement of Frances Crook para.6.5-6.9.
[25] Witness statement of Frances Crook para.5.1.
[26] Witness statement of Frances Crook para.4.10.

least because of the importance of what may be at stake for individuals involved in administrative processes.

33. Given the importance of what is at stake for segregated prisoners, the Howard League submits that the common law requires there to be an independent review of their segregation. This approach finds unequivocal support in the international standards. The Special Rapporteur's 2011 report at §95 states that reviews of segregation *"should be conducted in good faith and carried out by an independent body"* and the CPT annual report of 10 November 2011 states at §57(c) that once solitary confinement continues for more than 24 hours it should be subject to a "*full review ... with a view to withdrawing the measure at the earliest possible time."* It goes on to state: "*If it becomes clear that solitary confinement is likely to be required for a longer period of time, a body external to the prison holding the prisoner, for example, a senior member of headquarters staff, should become involved*".

34. The Appellants give the example of the Scottish segregation process which enables a review by an external, albeit not independent, body. An independent process is used in New South Wales in Australia, where any prisoner segregated for more than fourteen days can have his segregation reviewed by the Serious Offenders Review Council which, *inter alia,* includes two independent judicial members and before which the prisoner is entitled to be legally represented.[27]

35. By contrast, in England and Wales there is no external, independent or judicial involvement in any segregation review. This exacerbates the "*stinging sense of injustice"* described by segregated prisoners. The only way in which a prisoner can seek to challenge and probe the decision to segregate them (other than judicial review or via the complaints process: see further below) is by attending the Segregation Review Board ("SRB") meetings. However, the Board is not independent of or external to the prison and its decision making is inevitably tainted by an over reliance, or an apparent over reliance, on the purported

[27] "Administrative segregation of prisoners: Powers, principles of review and remedies", *Melbourne University Law Review*, Vol.20 1996, p.650. Witness statement of Frances Crook at para. 6.18.

operational and disciplinary reasons to maintain segregation. While the SRBs may appear to be multi-disciplinary and specialist, the reality is that their lack of independence undermines their ability to provide a check on the overuse of segregation and engenders a strong sense of injustice and hopelessness in the prisoner. It also creates an imbalance of power with no external adjudicator to ensure equality of arms between the prisoner and the many members of the institution. The only external member of the SRB is the representative from the IMB. However, as one young person told the Howard League, it is difficult to see the IMB members as on your side when they are having cups of tea with officers.[28] Mr Creighton also indicates that the perception among prisoners is that IMB members do little more than rubber stamp segregation decisions.[29]

36. The problem of the lack of independence is particularly acute in circumstances where prisoners are not entitled to the reasons and evidence underlying the decision to segregate them, meaning that the SRB will rarely have the benefit of the prisoner's response to the case against him or her when undertaking their review.

37. Furthermore, it is widely recognised that the quality of the decision making and reasoning provided by SRBs is poor: HMIP has repeatedly criticised segregation reviews for being "*perfunctory", "too generic",* lacking "*sufficient depth"* and "*with little emphasis on reintegration to a normal residential unit or meaningful target-setting to challenge and address poor behaviour".*[30]

38. The Howard League recognises that there may be circumstances where a prisoner may be need to be segregated for a short time in order to avoid an immediate threat to good order or discipline in the prison. The Howard League also understands the need for the requirements of fairness to be compatible with the operational requirements of a prison. With these considerations in mind, the Howard League submits that fairness requires that a prisoner's segregation be reviewed by an independent body after a prisoner has spent any longer than a *de*

[28] Witness statement of Frances Crook para.6.11.
[29] Witness statement of Mr Creighton paras 6-7.
[30] Witness statement of Frances Crook paras 5.23-5.24.

minimis period in segregation, and no later than fourteen days after the segregation has commenced[31]. If segregation is maintained by the independent reviewer, it must be independently reviewed at regular intervals thereafter and increasingly compelling reasons will be required to justify segregation as it becomes more prolonged.

39. The Howard League's view that fairness requires an independent review no later than fourteen days after segregation commences is drawn from its own experience of working with segregated prisoners and from the Special Rapporteur's recognition that the evidence suggests that the harmful effects of solitary confinement may become irreversible after fifteen days. The Howard League considers that an independent review must take place before this time is reached. It is instructive to note that a person placed under section 2 of the Mental Health Act 1983 is entitled to an independent review within fourteen days, with the right to free non-means tested legal representation.

40. However, the Howard League emphasises that in some cases fairness will require that the independent review must take place sooner. For example, where the segregated prisoner is particularly vulnerable or where there are signs that segregation is causing a deterioration in mental health it will be incumbent upon the prison to expedite the review process. This is in part a reflection of the requirements of common law fairness, but also a recognition of the prison authorities' obligation to protect segregated prisoners from treatment contrary to their rights under Articles 3 and 8 ECHR. The Howard League also emphasises that the independent review cannot supplant the existing review requirements under Rule 45 of the Prison Rules 1999 and PSO 1700.

41. The Howard League does not consider that it can credibly be suggested that the requirement for an independent review no later than fourteen days after segregation commences imposes a significant or disproportionate burden on the authorities. In particular, it does not appear from the available information that there are high numbers of prisoners who are in fact segregated for periods in

[31] Witness statement of Frances Crook para. 6.16

excess of fourteen days. For example, at HMP Swinfen Hall the average length of stay in the segregation unit in 2013 was ten days and at HMP Risley the average time spent in segregation in 2010 was 10.7 days. At HMP Altcourse, HMIP deemed the 16 day average length of segregation as "*high"* and at HMP Dartmoor of the 85 prisoners segregated over a six month period, only six remained on the unit for more than 20 days.[32]

(c) Effective participation

42. Underlying all of the requirements of fairness is the need to ensure that the prisoner can effectively participate in the processes that are in place. It is the Howard League's experience that many prisoners, whether for reason of mental illness, learning disability, lack of spoken English, youth, illiteracy or other disadvantages, are unable to participate, effectively or at all, in many of the administrative processes governing their life in prison.

43. In order for fairness to be a reality for these vulnerable prisoners, considered and individualised steps must be taken in each case to ensure that they can participate effectively. This is a reflection of the well recognised need for fairness to be applied flexibly: as Lord Mustill held in Doody at §560E, "*The principles of fairness are not to be applied by rote identically in every situation"* and as Lord Woolf held in *R (Hirst) v Secretary of State for the Home Department* [2001] EWCA Civ 378 at §25, "*the rules of fairness and natural justice are flexible and not static; they are capable of developing not only in relation to the expectations of contemporary society, but also to meet proper operational requirements. The ability of the prison service to meet both their operational needs and the needs for prisoners to be treated fairly can usually be achieved within the panoply of the requirements of fairness*."

44. The Howard League does not set out an exhaustive list of the steps that may need to be taken to ensure that a prisoner can participate effectively in the segregation process; to so would undermine the requirement to respond to each prisoner according to their particular needs. But the Howard League does consider that the

[32] Witness statement of Frances Crook para.4.11-4.13.

following steps may need to be taken in order to enable prisoners to participate effectively, particularly those prisoners with the vulnerabilities identified above. These steps should therefore be available to the prison authorities as part of the panoply of mechanisms that they may put in place to comply with the requirements of fairness. A failure to take these steps may render the segregation process unfair, regardless of whether there has been adequate disclosure, sufficient reasons and an independent review:

a. Independent legal advice and representation: There will be circumstances where fairness will require that a prisoner has access to free legal advice and representation during the segregation process.[33] The possibility that fairness will require legal representation was accepted in the context of adjudications in *R v Home Secretary, ex parte Tarrant* [1985] QB 251 at §285 and the Howard League considers that there is no good reason why the same criteria should not apply to the provision of legal advice and assistance in segregation cases. The circumstances where legal advice and representation will be required include where the prisoner has characteristics that make it impossible for him or her to understand the reasons for the segregation or participate in the review process effectively, including because of mental illness, learning disability or age; where the significance of what is at stake for the prisoner is particularly high; and where the factual complexity is such that it cannot be navigated by the prisoner alone.

b. Support and assistance: Many prisoners will require some adjustment to be made to the segregation process so that they can understand what is happening to them and why, how they may challenge it and how they may participate effectively in the process. This is most likely to arise for prisoners who are young, who have learning disabilities or who struggle with written English. In these circumstances the prison must take steps to explain the process to the prisoner in a way that he or she can understand and to provide

[33] The Howard League notes that in Canada segregated prisoners must be "given a reasonable opportunity to retain and instruct legal counsel without delay and that every inmate is informed of the inmate's right to legal counsel" (Regulation 97(2) of the Corrections and Conditional Release Regulations: http://laws-lois.justice.gc.ca/eng/regulations/SOR-92-620/section-19.html).

them with any support or assistance that is required as the process unfolds. This may include a requirement to provide the prisoner with a Mackenzie friend where legal advice and representation is not available. This is analogous with the requirement that children be provided with adult assistance at internal adjudications before the governor[34].

c. Independent expert reports: As in other, comparable areas of administrative decision making in prisons, the ability of the prisoner to commission and rely on independent expert evidence may be required in some segregation cases. For example, where there is a dispute over the impact of segregation on a prisoner's mental health, the Howard League considers that fairness will require that the prisoner has access to independent medical evidence so as to be able effectively to challenge the medical evidence provided by the prison or demonstrate the adverse impact that segregation is having on his or her mental wellbeing[35].

d. Interpreters: A significant proportion of the prison population in England and Wales do not speak English as their first language. Segregated prisoners must be provided with interpreters and written information in their native language in order that they understand and can participate in the segregation process.

45. It may also be observed that these adjustments, among others, may in certain circumstances form part of a prison's obligation to make reasonable adjustments under the Equality Act 2010 and to discharge the positive obligation to ensure effective participation in decisions engaging Article 8 ECHR.

Human rights and segregation

46. The Howard League supports the Appellants' submission (and the conclusion of the Divisional Court and Elias LJ in the Court of Appeal) that, on a proper analysis, a prisoner's association with other prisoners is a right and not a privilege and that this right is civil in nature, particularly in light of the ECtHR's decision in *Kostov v Bulgaria* (App. No.13801/07) (24 July 2012). The Howard League also

[34] Witness statement of Frances Crook para. 6.2
[35] Witness statement of Frances Crook para. 6.3

contends that a "*dispute"* over a prisoner's civil right to associate arises as soon as that prisoner's segregation is reviewed. That is the moment, in the majority of cases, where a prisoner challenges the prison's decision to segregate, or would do so if the standards of procedural fairness had been properly applied.

47. It is settled law that Article 6 ECHR requires that decisions which determine civil rights are taken fairly and by an independent and impartial tribunal. The Howard League considers that while Article 6 ECHR may not be engaged by the initial decision to segregate, it is certainly engaged once segregation becomes prolonged and at the very latest after fourteen days. At this time Article 6 ECHR requires that an independent review must take place. Furthermore, this independent review must be judicial in nature and must therefore be conducted by a legal person endowed with a judicial role and wholly independent from the executive.

48. For the avoidance of doubt the Howard League emphasises that Article 3 ECHR and Article 6 ECHR are autonomous: the fact that segregation does not engage Article 6 until some period of time has elapsed does not mean that the segregation of a particular prisoner may not be inhuman and degrading treatment from the outset. That is a factual question quite separate from the Article 6 analysis.

<u>The absence of independent, adequate or effective review mechanisms</u>

49. The Howard League respectfully submits that the Court of Appeal erred in its conclusion that the availability of judicial review was capable of curing the lack of independence inherent in the segregation review process, either for the purposes of the common law or Article 6 ECHR. It is the Howard League's position that judicial review does not provide an adequate or effective safeguard or remedy for segregated prisoners for the following reasons:[36]
    a. The bringing of a judicial review requires a proactive step to be taken by a segregated prisoner to contact and instruct a solicitor. Many prisoners will simply be unaware that this remedy is available to them. More significantly, the adverse impact of segregation on prisoners' mental health and the likelihood that segregated prisoners will be those that are particularly

[36] Witness statement of Frances Crook para.6.13.

vulnerable means that they are less likely to initiate legal proceedings. Given the risks inherent in the segregation process, the review process must be one that is automatically conferred upon the prisoner so as to safeguard them against these risks;

b. The serious adverse psychological effects of segregation may materialise within days or even hours of segregation. Even if a prisoner did initiate judicial review proceedings to challenge his or her segregation, those proceedings would not be sufficiently expeditious to safeguard against further deterioration. It is extremely rare for a judicial review claim to be heard within fourteen days of it being issued, even in urgent cases. In those circumstances irreversible damage may be done to the prisoner before the case is even heard;

c. Judicial review proceedings are not, in any event, the appropriate forum to undertake the requisite merits review of the decision to segregate so as to decide whether the case against the prisoner is made out and whether segregation can therefore be justified.

50. In addition, and as Frances Crook explains in her statement at paragraph 6.12, neither the prison complaints system nor the Prison and Probation Ombudsman are capable of providing an effective or speedy safeguard, review or remedy for segregated prisoners. Those systems have no mechanism for dealing with urgent cases; they cannot issue binding decisions; their processes are lengthy and under resourced; and there is no legal aid available for prisoners to be assisted with navigating them, no matter how vulnerable they are.

Conclusion

51. The evidence and submissions made by the Howard League support the following conclusions:

i) Segregation is a procedure used in many prisons to deal with challenging behaviour. That behaviour may not be criminal and it may not be sufficiently serious to merit an adjudication. A significant proportion of prisoners who are segregated are those with pre-existing vulnerabilities, including children and young people, people with mental health problems and people with learning difficulties.

ii) The segregation regime in England and Wales routinely entails a prisoner being alone in a cell for 22-24 hours per day with little access to the outside world or activities. Segregation can have a serious adverse impact on prisoners' mental health and these effects may be irreversible. In addition, segregation can have a serious impact on a prisoner's ability to progress through his or her sentence.

iii) In light of the significance of what is at stake for the segregated prisoner, high standards of fairness must apply to the segregation process.

iv) Fairness requires that prisoners be provided with sufficient information about the reasons and evidence relied on to justify their segregation, both initially and as segregation is maintained, so as to enable them to make effective representations in their defence.

v) Fairness requires that once a prisoner has been segregated for any significantly prolonged period, that prisoner's segregation must be reviewed by an independent body. This review must take place no later than fourteen days after segregation has commenced.

vi) Fairness requires that a segregated prisoner be enabled to participate effectively in the segregation process. For vulnerable prisoners this will routinely require additional steps to be taken to ensure their effective participation.

vii) Article 6 ECHR is engaged by the decision to segregate a prisoner. As well as imposing the same requirements of fairness as the common law, Article 6 ECHR requires that the segregation decision be reviewed no later than fourteen days by an independent and impartial judicial decision maker.

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