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Lord Trefgarne
Chairman
Secondary Legislation Scrutiny Committee
House of Lords
London
SW1A 0PW

Sent by email to: seclegscrutiny@parliament.uk

9 October 2015

Dear Lord Trefgarne,

Re: UK Statutory Instrument, 2015 No. 1638 - The Prison and Young Offender Institution (Amendment) Rules 2015

Statutory Instrument, 2015 No. 1638; The Prison and Young Offender Institution (Amendment) Rules 2015 was laid on 3 September 2015 in response to a recent Supreme Court judgment on solitary confinement in prison, *R (on the application of Bourgass and another) v Secretary of State for Justice* [2015] UKSC 54. The Howard League intervened in this case.

The Howard League for Penal Reform believes that the statutory instrument is politically and legally important. We believe that it raises issues of public policy likely to be of interest to the House.

Summary of concerns

Between January 2007 and March 2014, 28 prisoners took their own lives while being held in segregation units (solitary confinement) in England and Wales (*Bourgass*, paragraph 36). Under the Rules amended by this SI, children and mentally ill adults can be held in solitary confinement for extended periods for their 'own protection' or 'good order and discipline'.

The Supreme Court found that the Rules, which required the Secretary of State's authorisation for segregation beyond 72 hours, had been wrongly understood: authorisation had been contained within the prison whereas a correct reading of the Rules meant that authorisation was required by an official independent of the prison. The SI retains the need for authorisation following a decision to segregate a prisoner but extends the period before which external authorisation is required from 72 hours to 42 days.

The SI is contrary to the spirit of the Supreme Court judgment and puts prisoners at grave risk. It goes beyond the intention of Parliament in the enabling legislation (the Prisons Act 1952) and is therefore ultra vires. It is impossible to see how this provision, intended as a safeguard, can adequately protect prisoners. This is because it does not bite until **a month after** the UN special rapporteur on torture has said irreversible damage can be caused by segregation.

We urge the committee to criticise the government's policy and invite the House to pursue a line of questioning that scrutinises the rationale behind the policy.

We would be happy to provide further detail regarding our concerns, in either person or writing.

Submissions

The position prior to the amendment to the Rules

Rule 45 of the Prison Rules applies where a prisoner is placed in segregation or solitary confinement for his or her own protection or for the good order and discipline of the establishment.

Prior to 4 September 2015, Rule 45 (2) required authorisation by the Secretary of State of any period of segregation under that Rule beyond 72 hours.

The Supreme Court in *Bourgass* held that a proper reading of the Rules required the authorisation on behalf of the Secretary of State to be made by an official independent of the prison. Authorisation could not lawfully be made by the governor on behalf of the Secretary of State, despite the fact that this is how the process had been operating for years.

The Supreme Court considered extensive evidence from both international and domestic experts about the irreversible risks to the health, mental health and even life of a prisoner subject to a prolonged period of solitary confinement [§35ff]:

“The effects of segregation

35. In about 2003 the Secretary of State issued Prison Service Order 1700 (“the PSO”), a non-statutory document concerned with segregation. It acknowledges that the number of self-inflicted deaths in segregated settings is disproportionate. It continues 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 wellbeing 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).”

36. According to a report published in June 2015 by the Prisons and Probation Ombudsman for England and Wales, 28 prisoners took their own lives while being held in segregation units in England and Wales between January 2007 and March 2014.

37. An interim report submitted to the UN General Assembly in August 2011 by Juan E Méndez, the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment expressed particular concern about prolonged solitary confinement (or segregation, as it was also termed), which he defined as solitary confinement in excess of 15 days. He noted that after that length of time, “according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible” (para 26). He also noted that lasting personality changes often prevent individuals from successfully readjusting to life within the broader prison population and severely impair their capacity to reintegrate into society when released from prison (para 65).

38. The previous Special Rapporteur, Manfred Nowak, annexed to an earlier report, submitted in July 2008, the Istanbul Statement on the Use and Effects of Solitary Confinement, adopted on 9 December 2007. It stated, in a passage cited by the Special Rapporteur:

“It has been convincingly documented on numerous occasions that solitary confinement may cause serious psychological and sometimes physiological ill effects. Research suggests that between one third and as many as 90% of prisoners experience adverse symptoms in solitary confinement. A long list of symptoms ranging from insomnia and confusion to hallucinations and psychosis has been documented. Negative health effects can occur after only a few days in solitary confinement, and the health risks rise with each additional day spent in such conditions.”

39. Similar conclusions were reached by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in its 21st General Report of 10 November 2011. It referred to evidence that solitary confinement “can have an extremely damaging effect on the mental, somatic and social health of those concerned”, which “increases the longer the measure lasts and the more indeterminate it is” (para 53). It considered the maximum period for which solitary confinement should be imposed as a punishment to be 14 days (para 56(b)).

40. The risks of segregation are recognised by the Secretary of State.”

The Supreme Court's ruling held that the rationale for rule 45(2) (the equivalent of YOI Rule 49(2) in the Prison Rules) was to safeguard a prisoner in view of the established risks of segregation:

"If, as counsel submitted, rule 45(2) was not intended to provide a safeguard, then the requirement to obtain the authority of the Secretary of State, before segregation can lawfully continue for more than 72 hours, would lack any rationale." [paragraph 88]

The new rules

The new rules do not take away the need for external review. The provision remains in place, presumably to ensure the existence of the safeguard of review in view of the risks associated with segregation. Yet the period before a review independent of the prison is required has been increased by a factor of 14, from 72 hours to 42 days. After the first authorisation, the amended Rules only require authorisation from the Secretary of State every 42 days.

Why the new rules present a grave risk to prisoners and are ultra vires

Secondary legislation cannot properly go beyond what was clearly contemplated by Parliament in the enabling legislation, in this case the Prison Act 1952 (*R v Secretary of State for the Home ex parte Leech (no.2)* [1994] QB 198).

The rationale for Rule 45(2) and the very existence of a mechanism for review, was to safeguard prisoners in view of the recognised risks to the health, mental health and even life of a prisoner resulting from prolonged segregation. The decision to extend the period before external authorisation is required to 42 days subverts the whole purpose of the safeguarding provision. It is such a long period that it cannot act as a safeguard at all.

This is because it is well established that *irreversible damage* can be caused after 15 days (*Bourgass*, paragraph 37). It is also inconsistent with the rest of the Prison Rules which prescribe a maximum of 21 days for solitary confinement as a punishment for people over the age of 18 (it is prohibited altogether for children):

"The regime which was applied to Bourgass and Hussain is similar to that which applies to prisoners undergoing cellular confinement as a punishment for an offence against discipline. Such a punishment can however only be imposed following disciplinary proceedings conducted in accordance with the Rules. It can, in addition, only be imposed for a maximum of 21 days. That maximum reflects the well-known risks which solitary confinement poses to the mental health of those subjected to it for prolonged periods..." [*Bourgass* §34].

Parliament cannot have contemplated a negative statutory instrument that would allow a person to be isolated for double that period for *their own protection* before the safeguard of external authorisation kicks in.

It is impossible to see how an extended period of 42 days, which surpasses even the 28 day period of review in Scotland, can be justified before external authorisation is required in light of the purpose of the mechanism and the risks associated with segregation. There is a real risk that the 42 day period will just be too late for the most vulnerable prisoners: the case studies in the PPO report on deaths in segregation units suggest that most of prisoners that die in solitary confinement do not make it to 42 days. As a consequence, this SI runs the risk of being so 'uncompromisingly draconian in effect that they must indeed be held ultra vires' (*R v. Secretary of State for Social Security, Ex parte B and Joint Council for the Welfare of Immigrants* [1996] 4 All England Law Reports 385).

The Howard League believes that fairness requires an external review no later than fourteen days after segregation commences and every 14 day period following that. This is based on our own experience of working with segregated prisoners, including children. Our enclosed witness statement submitted to the Supreme Court refers to the case of a woman at HMP Bronzefield who spent six years in segregation. External reviews at 14 day intervals are viable. For example, a person sectioned under section 2 of the Mental Health Act 1983 is entitled to apply for an independent review by way of an oral hearing within fourteen days. Hearings are routinely listed within seven days. By contrast, the reviews for segregated prisoners are not conducted by way of oral hearings and it is therefore feasible for a paper review to take place within 14 days.

Please get in touch if you require any further information.

Yours sincerely



Frances Crook