All England Reporter/2004/December/R (on the application of SP) v Secretary of State for the Home Department - [2004] All ER (D) 352 (Dec)

[2004] All ER (D) 352 (Dec)

R (on the application of SP) v Secretary of State for the Home Department

[2004] EWCA Civ 1750

Court of Appeal, Civil Division

Ward, Jacob and Hooper LJJ

21 December 2004

Prisons - Young offender - Detention in prison or remand centre - Segregation - Judge finding claimant having right to make representations before making of order for segregation - Correctness of decision.

On 25 September 2003, the claimant, a detainee at a young offender institution (YOI), was placed on the segregation unit by the governor of the YOI under r 49 of the Young Offender Institution Rules 2000, made pursuant to s 47 of the Prison Act 1953, for the maximum permitted initial period of three days. At that time the claimant was formally at risk of self harm. She remained in the segregation unit until 15 October 2003. She had at the time been 17 years old and on remand awaiting sentence. The claimant subsequently issued proceedings for judicial review, seeking a declaration, inter alia, that the failure of the defendant to give her an opportunity to be heard on the allegation that led to her being detained in the segregation unit was a breach of natural justice and was unlawful. The judge concluded that, given in particular the importance of the initial decision, fairness had required in that context that the claimant should have been given the opportunity to make representations before an order for segregation was made, unless reasons of good order, discipline or urgency (or other relevant circumstances) required that the order should be made without her having that opportunity. He stated that it was the initial decision which was the most important step, and which an inmate would most like to have the opportunity to address, and that it was often the case in any situation involving the decision of an authority that once a decision had been made, it was difficult to change. The judge found that there was no good reason for allowing an inmate a limited right to make representations as to the continuation of an order, but not allowing an inmate a similar right to make representations before an order was made. The judge therefore allowed that part of the claimant's claim. The Secretary of State appealed against that decision.

It was contended that the judge had in effect given a declaration that in all cases whether involving adults or children (under 18), the prisoner had to be given an opportunity to make representations before being detained in a segregation unit, other than at his request and other than in the circumstances outlined by the judge when it would not be necessary to do so. The Secretary of State submitted that the post-decision safeguards were such that fairness did not require that the governor afford an opportunity to a prisoner to be given an opportunity to comment prior to the making of the decision to segregate.

The appeal would be dismissed.

The judge had been right to reach the conclusion he had, which would apply to inmates in a YOI who were under the age of 18 and who were facing removal to the segregation unit for reasons of good order and discipline.

Any decision to remove to a segregation unit would be made on a factual basis. The best time to check on the factual basis by asking for the prisoner's comments was before the decision was made. As the judge had rightly observed, once a decision had been made, it would be difficult to change it. That was particularly so when a decision had been made on a factual basis and when the person subject to the decision sought to persuade the decision-maker, after the decision had been made, that the factual basis on which he acted had been wrong. Inevitably, the decision maker would be reluctant to conclude that his earlier decision was wrong. In those circumstances, the contemporary standards of fairness required the Secretary of State to have given the claimant an opportunity to make representations before the order was made to remove her to the segregation unit for reasons of good order and discipline.

R v Deputy Governor of Parkhurst Prison, ex p Hague [1991] 3 All ER 733 considered.

Decision of Jack J [2004] All ER (D) 251 (Jun) affirmed.

Ian Wise (instructed by the Howard League for Penal Reform) for the claimant.

Jenni Richards (instructed by the Treasury Solicitor) for the Secretary of State.

Melanie Martyn Barrister.

Judgment

[2004] EWCA Civ 1750

COURT OF APPEAL, CIVIL DIVISION

21 DECEMBER 2004

LORD JUSTICE WARD, LORD JUSTICE JACOB and LORD JUSTICE HOOPER

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

LORD JUSTICE HOOPER:

Introduction

1. This is an appeal against part of a decision of Jack J, permission to appeal having been granted by him.

2. On 25 September 2003, the respondent, then a detainee in her Majesty's Prison and Young Offender Institution ("YOI") New Hall, was placed on the segregation unit where she remained until 15 October 2003. The respondent was at the time 17 years old and on remand awaiting sentence.

3. In her claim for judicial review she sought a declaration "that the failure of the defendant to give the claimant the opportunity to be heard on the allegation that led to her being detained in the segregation unit was a breach of natural justice and was unlawful". Other orders were sought which are not now relevant. Permission to apply for judicial review in relation to this complaint was granted to the claimant by the Court of Appeal, permission having been refused by Elias J. Maurice Kay LJ, with whom Brooke LJ agreed, granted

permission "because of the extreme circumstances that can arise in relation to vulnerable prisoners of this type".

4. In his judgment Jack J concluded (paragraph 56):

> "I have come to the conclusion that, given in particular the importance of the initial decision, fairness did require in this context that SP should have been given the opportunity to make representations before an order for segregation was made, unless reasons of good order, discipline or urgency (or other relevant circumstances) required that the order should be made without her having that opportunity. I do not think that there is good reason for allowing an inmate a limited right to make representations as to the continuation of an order, but not allowing the inmate a similar right to make representations before an order is made. I should not conclude that the decision of the Court of Appeal in *Hague* in 1990 is conclusive of the question."

5. The formal order of the Administrative Court dated 23 June 2004 states simply: "It is ordered that this claim be allowed in part."

6. This reflected the judge's conclusion supported by the appellant that no formal declaration was necessary. However Miss Richards submits that the judge was in effect giving a declaration that in all cases whether involving adults or children (under 18), the prisoner must be given an opportunity to make representations before detaining a prisoner in the segregation unit, other than at his request and other than in the circumstances outlined by Jack J when it would not be necessary to do so. In the event of the appeal being dismissed, Miss Richards sought on behalf of the appellant more guidance as to the width of the declaration and the scope of the exceptions.

7. SP being a child and subject therefore to a very particular regime, it does not follow, in my view, that the judge's declaration would necessarily apply to all prisoners. On the other hand there is no reason to distinguish SP from other inmates (the correct description for YOI prisoners) who are under the age of 18 and who are removed to the segregation unit for reasons of good order and discipline. The facts in this case are therefore of less importance, albeit they provide an illustration of the problems which inmates like SP pose.

8. One more important preliminary point should be made. The appellant has not argued that it would have been difficult to give SP an opportunity to comment on the reasons why the governor was minded to make an order removing her to the segregation unit. Indeed, the Governor's decision was not made until 24 hours after the conversation with the CARATS worker. In the words of Jack J (paragraph 57) :

> "Given that the order was not made until 24 hours after her remark to the CARAT worker about razor blades, it would not seem here that urgency was a problem."

9. The appellant's case is a simple one- whether it would be easy or not to give an inmate the opportunity to comment, an inmate has no right to be asked for her comments before the order is made. Indeed when it was suggested that governors were prohibited from giving an opportunity or not encouraged to do so, she said, on instructions, that governors could do so if they wanted. I return to that later.

10. Miss Richards during the course of argument gave examples of cases in which it would be difficult if not impossible to give an inmate or prisoner an opportunity to comment before the order is made. She, however, rightly did not argue that in all cases it would be difficult if not impossible nor were we given any help as to the ratio of cases falling into the difficult/impossible category.

<u>The respondent</u>

11. The respondent is, in the words of Jack J, a highly disturbed young woman with a "severely disturbed personality characterised by sadistic traits with lack of empathy to the victim, and inability to maintain personal relationships and a general lack of sense of responsibility." That was reflected in the offence of robbery for which she was to be subsequently sentenced to 5 years detention under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000. The robbery was of a girl who was alleged to owe money to the respondent's co-defendant. In the words of Jack J:

> "The girl's hair was cut off and SP slashed the girl's arms with a knife which she found funny. She wanted to cut the girl's ears off but was told not to by her co-defendant."

12. SP has been identified as a risk to vulnerable adults, her peers, the public and to staff. She also had a history of self-harm, overdoses, the use of prohibited drugs and excessive use of alcohol. In the words of the judge:

> "While on remand in secure training centres she had committed acts of self-harm, and committed arson, cut other young people with blades and had been violent towards staff and put a substance in their tea."

13. A chronology of the events leading up to the decision to remove SP to the segregation unit is helpful:

> 30 May '03 Index offences
>
> 1 June '03 C arrested and remanded to Secure Children's Home
>
> 9 Sept. '03 C remanded at HMPYOI New Hall, 'Self-Harm At Risk Form' opened
>
> 18 Sept. '03 Further 'Self Harm at Risk Form' opened, (evidence of self-harm, C/406)
>
> 24 Sept. '03 Prison open 'child protection log'

14. On 25 September the Governor of the YOI ordered the respondent's segregation under rule 49 of the Young Offender Institution Rules 2000 ["YOI Rules"], made pursuant to section 47 of the Prison Act 1952, for the maximum permitted initial period of three days. At that time she was formally at risk of self-harm.

The statutory regime

15. Section 47 of the Prison Act 1952 provides:

> "1) The Secretary of State may make rules for the regulation and management of prisons, ... young offender institutions or secure training centres respectively, and for the classification, treatment, employment, discipline and control of persons required to be detained therein.
>
> (2) Rules made under this section shall make provision for ensuring that a person who is charged with any offence under the rules shall be given a proper opportunity of presenting his case. "

16. Rule 49 of the YOI Rules provides:

> "1) Where it appears desirable, for the maintenance of good order or discipline or in his own interests, that an inmate should not associate with other inmates, either generally or for particular purposes, the governor may arrange for the inmate's removal from association accordingly.

> (2) An inmate shall not be removed under this rule for a period of more than three days without the authority of a member of the board of visitors or of the Secretary of State. An authority given under this paragraph shall in the case of a female inmate aged 21 years or over, be for a period not exceeding one month and, in the case of any other inmate, be for a period not exceeding 14 days, but may be renewed from time to time for a like period.
>
> (3) The governor may arrange at his discretion for such an inmate to resume association with other inmates, and shall do so if in any case the medical officer or a medical practitioner such as is mentioned in rule 27(3) so advises on medical grounds."

17. Rule 49 of the Prison Rules 1999 (the successor to rule 43) is in similar terms.

18. Rule 59 of the YOI Rules, upon which the appellant relies to show the procedures to be followed in the event of a disciplinary charge, provides:

> "(1) Where an inmate is charged with an offence against discipline, he shall be informed of the charge as soon as possible and, in any case, before the time when it is inquired into by the governor.
>
> (2) At an inquiry into charge against an inmate he shall be given a opportunity of hearing what is alleged against him and of presenting his own case."

19. It is submitted by the appellant that, given the provisions of this rule, it would be wrong to require a governor to give a prisoner the right to make representations before an order removing a prisoner to a segregation unit.

20. Rule 60 of the YOI Rules (as amended) is headed Governor's punishments. It provides:

> (1) If he finds an inmate guilty of an offence against discipline the governor may, subject to paragraph (3) and rule 64, impose one or more of the following punishments:
>
> (a)caution;
>
> (b) forfeiture for a period not exceeding 21 days of any of the privileges under rule 6;
>
> (c) removal for a period not exceeding 21 days from any particular activity or activities of the young offender institution, other than education, training courses, work and physical education in accordance with rules 37, 38, 39, 40 and 41;
>
> (d) extra work outside the normal working week for a period not exceeding 21 days and for not more than two hours on any day;
>
> (e) stoppage of or deduction from earnings for a period not exceeding 42 days;
>
> (f) in the case of an offence against discipline committed by an inmate who was aged 18 or over at the time of commission of the offence, other than an inmate who is serving the period of detention and training under a detention and training order pursuant to section 100 of the Powers of Criminal Courts (Sentencing) Act 2000, confinement to a cell or room for a period not exceeding ten days;
>
> (g) removal from his wing or living unit for a period not exceeding 21 days;

> (h) ~~in the case of an inmate who is a short term or long term prisoner, an award of additional days not exceeding 42 days~~ [repealed wef 15/08/2002].

21. Rule 62 provides:

> "Following the imposition of a punishment of removal from his wing or living unit, an inmate shall be accommodated in a separate part of the young offender institution under such restrictions of earnings and activities as the Secretary of State may direct."

22. Following the repeal of rule 50(h), removal to a segregation unit as a punishment now seems to be regarded as the most serious punishment available to a governor for an inmate of a YOI. Removal to a segregation unit under rule 49 is not "punishment". However, in the words of Jack J (paragraph 55):

> "Although segregation is not a punishment imposed for a disciplinary offence, in cases where the order is made 'for the maintenance of good order or discipline' the difference may often seem slight, particularly to the subject of the order. "

23. I agree.

Removal of SP to the segregation unit

24. On the form on which the Governor ordered SP's removal to the segregation unit on 25 September, she gave as the reason for segregation:

> "[SP] has been convicted for a particularly violent offence. She has recently been moved to New Hall from a secure unit where her behaviour was also significantly problematic.
>
> Since arriving at New Hall she appears to have had a significantly detrimental effect on her co-accused. She has also disclosed that she feels like putting razor blades in a piece of soap and hurting someone."

25. The Governor made a number of supplementary conditions, for example, "canteen" was to be by "mail order" and there would be no P.E.. As far as education was concerned, she was to have Outreach on Friday 26/9/03 and "to return to Education from the 29/9/03 as part of care plan."

26. The source of the reference to SP feeling "like putting razor blades in a piece of soap and hurting someone" was a CARATS worker (Counselling Assessment, Referral, Advice and Throughcare) made the day before at 4.15pm. According to the judge:

> "SP had said that she would like to harm others using a razor blade in a bar of soap."

27. The source of the other reason for segregation (SP "appears to have had a significantly detrimental effect on her co-accused") were members of staff. In the words of the judge:

> "The staff were ... concerned this time about the effect that SP was having on her co-defendant. In particular, on 16 September a letter from SP to her [on a different wing] had been found suggesting that they should have tortured and murdered their victim."

Furthermore:

> "On 24 September a Security Information Report was opened, the assessment of the Security Officer being that SP was not suitable to be kept on her wing."

28. On her arrival in the segregation unit SP was given the following document:

> "You have been removed from association/~~continue to be removed from association~~ under Prison Rule 45/YOI Rule 46 for good order or discipline/~~in your own interest~~ on the authority of the Governor/BoV.
>
> The reason for this is as follows:
>
> [Handwritten] For the safety of others on the wing following your disclosure that you feel like putting razor blades in a piece of soap and harming someone. You will remain segregated to allow an assessment on your behaviour and your risk to others to be made.
>
> You will remain segregated until 28/09/03 (16.20 hrs). On that date, or sooner if circumstances change, a decision will be made on whether your segregation is continued or terminated.
>
> A governor's/director's representative and a chaplain will visit you every day. A medical officer will visit you regularly. You should talk to them or any member of the board of visitors if you have any concerns, complaints or problems arising from your segregation with which staff are unable to help.
>
> The segregation unit staff will explain the regime of the unit to you soon, if they have not done so already. If you are not sure what you should do, you must ask a member of staff."

29. SP was, it appears, also informed of this reason at the time of removal from her wing to the segregation unit.

30. It will be noted that SP was only given one of the two reasons, a procedure permitted by paragraph 2.2.1 of the relevant Prison Service Order. That provides that the reasons given to the prisoner must be identical to those on the appropriate form ordering segregation unless by giving the reasons "it is considered likely to endanger the safety of others or the security of the establishment". "In such cases, the prisoner must still be given the reason for their segregation, removing any detailed references that might endanger the safety of others or the security of the establishment." Neither party addressed us about this provision in so far as SP was concerned.

31. Turning briefly to the subsequent history, in the words of the judge:

> "On 28 September a further order was made for segregation until 10 October. It was in addition signed by a member of the Board of Visitors [now the Independent Monitoring Board], who had earlier seen SP. On 10 October a further order was made running to 15 October. The reasons referred to fresh threats made by SP to other inmates and staff. It was again countersigned by a member of the Board of Visitors who had seen SP. On the occasion of each order forms were completed in the form prescribed by Prison Service Order 1700. These covered the activities to be permitted to SP and conditions attaching to them."

32. Paragraphs 84 of the witness statement of Mahala Hodgson, a governor at New Hall reads:

> "The claimant had numerous opportunities to make representations against her detention in the segregation unit. She has the right to see the Governor and a member of the Independent Monitoring Board... at any time. The latter is required to hear any complaint or request the pris-

> oner wishes to make....A member of the Independent Monitoring Board visits the segregation unit two or three times a week. "

33. Paragraph 86 of her statement reads:

> "In addition she could have submitted a request/complaint form asking for the reasons for her removal to be amplified and/or the decision to be reviewed. This procedure is available to all prisoners and is easy to use. Complaint forms are openly available on each unit."

34. Mahala Hodgson goes on to state that the complaints are dealt with in a timely manner. Reference is also made to an appeal to the area manager and then to the Prisons Ombudsman. We were told that no complaints had been made.

35. The records in the papers prepared for the Court of Appeal do not record any representations made by SP. There is no document (in the papers) recording that she was asked to comment about the reasons for her removal to the segregation unit. I see no document in the relevant Prison Service Order (to which I return below) which includes a space for a record of the prisoner's comments.

36. If SP had been given the opportunity to respond to the allegation that she felt like putting razor blades in a piece of soap and harming someone about, she says that would have responded to the effect:

> "I can recall saying that a prisoner was annoying me or bullying me on the wing. I think that in the conversation with the CARAT worker I would have been putting on a brave face. I know when I am angry I can say evil stuff and say things I don't mean."

37. That reference to bullying, so Mr Wise submits, is very significant. Bullying of youngsters in prison is a matter of considerable concern.

38. During the period January to April in the next year SP was subsequently returned to the segregation unit on some three occasions.

<u>The regime on the segregation unit</u>

39. The normal daily regime for detainees, not subject to segregation, is summarised by Mahala Hodgson. They are generally unlocked at approximately 08.00 hours in the morning. For 30 minutes they perform various domestic tasks and at 08.30 on weekdays they go to education returning to the wings at 11.45 for lunch. Lunch is eaten on the wing at large dining tables. After lunch they are locked up from approximately 12.20 until 13.30. The detainees are unlocked at 13.30 hours and returned to education at 13.45 hours. Education finishes at 1630 hours and the inmates return to the wing for tea. This meal is also eaten on the wing at large dining tables. After tea the inmates are locked up until 18.00 hours and association lasts from then until 19.55 hours. At the weekends the time spent on education during the weekdays is spent on association.

40. Her witness statement shows that New Hall significantly exceeds the prescribed target for "out-of-cell activity" of 10 hours per weekday.

41. The situation in which SP found herself on the segregation unit was very different. Having been removed from her unit for reasons of good order and discipline, she was not entitled to receive the 10 hours out-of-cell activity. The various plans and timetables formulated for her "would have provided close to six hours for activity during the week" (see paragraph 79).

42. An examination of the records showed that SP was out of her cell for an average of 2.41 hours a day.

43. The precise amount of out of cell activity compared with what SP was receiving on the wing (which appears to have been less than the norm) is not easy to calculate. It is clear that it was significantly less than before and significantly less than the target. She would also have had to eat her meals in her cell.

The Prison Service Orders

44. As Jack J pointed out, the YOI Rules do little more than provide a basic framework:

> "The detailed provisions under which prisons and young offender institutions are managed are contained in a number of Prison Service Orders ["PSO"]. These set out policy, guidance or instructions as to how particular aspects of the prison regime are to be managed."

45. PSO 4950 was issued on 11 February 2000 and is entitled "Regimes for young women under 18 years old". Paragraphs 1.5 and 1.6 provide:

> "1.5 Regimes for adolescent women need to be appropriate to their particular needs, abilities and aptitudes.
>
> To do this they must take into account the characteristics of adolescent behaviour:
>
> I) the importance of peers and peer-pressure on behaviour;
>
> II) their impulsiveness and inclination not to think ahead but to act to gratify immediate needs;
>
> III) emotional immaturity even when cloaked in physical maturity;
>
> IV) their capacity for being cruel to one another - hence the importance both of staff and peers providing role models, promoting good behaviour and of clearly defining and maintaining the boundaries of bad behaviour;
>
> V) the prevalence of impoverished upbringing in their backgrounds and a history of low achievement;
>
> VI) their potential to mature and grow out of crime.
>
> 1.6 Adolescent behaviour can also be influenced by the following:
>
> 1) the prevalence of abuse and implications this has for self-harm;
>
> 11) impoverished backgrounds;
>
> Ill) educational under-achievement and lack of work experience,
>
> IV) generational unemployment."

46. Paragraph 2.2 provides under the heading "Culture and Ethos":

> "2.2.1 As important as the structure and features of the regimes, are the ethos and culture of the establishment in which the young woman is detained. If the new regimes are to give life to the principle of dealing with people as individuals, a positive ethos and culture must exist which recognises the rights and responsibilities of the individual. Central to this is the role of staff in

promoting and protecting each young woman's welfare. To discharge this duty effectively it is necessary to do more than merely protect the individual from harm. It requires governors to identify and meet the legitimate needs of each young woman by limiting the negative impact custody can have on the individual. The ethos of the institution must nurture that development. Critically it will depend upon the attitudes and behaviors of staff, which must be anti-discriminatory and age-appropriate. Governors must ensure that all staff are clear about their responsibility in all circumstances to deal with the young women in their care openly and fairly, and to be mindful of their vulnerability. This must be underpinned with appropriate training.

2.2.2 Governors must write and publish a statement of purpose for their establishment which succinctly and clearly encapsulates the principles and aims of the regimes and the ethos and values which underpin them. The statement must be consistent with the Prison Service's statement of Purpose, the principal aim of the youth justice system and reflect the principles and spirit of the Children Act 1989 and the basis upon which the custody and care of young women are achieved. A signed copy of it must be prominently displayed in the pedestrian entrances to the establishment together with the establishment's formal designation in law of its status as a YOI. Its purpose is to signal and to reflect the qualitatively different types of regimes which they operate for young women aged under 18." (Emphasis added)

47. Chapter 3 deals with the role of the staff and under the heading "Objective" the following is stated:

"Young women can be easily influenced by the immature and irresponsible behavior of their peers; as significant adults, staff have the opportunity and responsibility to provide models of behavior which assist young women's personal development, help maintain a safe and secure environment and which ultimately will help prevent them offending. Whatever their designated duties and whatever their work activity, the way in which staff speak and act towards one another, as well as towards young women will profoundly influence the way in which young women behave. This method of working with young people is termed 'pro-social modelling' and is defined as the quality of a person's relationship with staff and the way that relationship is used to reinforce pro-social behavior". (Emphasis added)

48. Paragraph 5.5.4 under the heading "Managing bad behaviour", reads:

"Governors must strictly control the use of segregation or removal from unit so that it is only used when necessary and that it is always accompanied by a strategy of intervention through advice and counselling, the objective of which is to return the young woman to ordinary accommodation as soon as possible."

49. Annex A states, in part:

"The Children Act 1989

The Children Act 1989, does not apply to the regimes for the treatment of under 18 year olds in prison establishments. [See now *R. on the application of Howard League for Penal Reform v Secretary of State for the Home Department* [2002] EWHC 2497 *Admin*, [2003] 1 FLR 484.] However, we are required to reflect the standards imposed by the Act through delegated legislation and Codes of Practice. The central tenet of the Act is the principle that safeguarding a child's welfare is of paramount importance so that when decisions are made about a child, the primary consideration must be what is best to safeguard their welfare. The Prison Service has a responsibility to ensure that the welfare of each young woman in our custody is safeguarded. But it also has a responsibility to safeguard the welfare of all prisoners including the other young women in the establishment and to maintain a safe environment for staff and for visitors. These considerations, and that of safeguarding the public by executing the warrant of the court,

> must be born 'in mind when determining how the welfare of the individual is best safeguarded. ..." (Emphasis added)

50. I turn to PSO 1700 entitled "Management of segregation units and management of prisoners under Rule 45 (YOI Rule 49)". The order in force in September 2003 was replaced in November 2003.

51. According to paragraph 1.1 of Chapter 1, the purpose of Rules 45 and 49 is to provide a power to withdraw the opportunity for prisoners to have contact with other prisoners. This power is stated to be given for two purposes - the maintenance of good order or discipline [the relevant purpose in this case] and, secondly, the prisoner's own interests.

52. Paragraph 1.4.1 reads:

> "Rule 45 Good Order of Discipline
>
> 1.4.1 Segregation under Rule 45 for reasons of Good Order or Discipline (GOoD) must only take place when there are reasonable grounds for believing that the prisoner's behaviour is likely to be so disruptive or cause disruption that maintaining the prisoner in ordinary location is impossible. It is not possible to set down a list of every eventuality that might require a prisoner to be removed but it will need to be shown that the reasons for doing so are reasonable and appropriate.
>
> 1.4.2 Occasions where segregation may be appropriate include:-
>
> .....
>
> - there is a risk to the safety of staff or other prisoners or the risk of damage to prison property;
>
> - ..."

53. Paragraph 1.6.1 provides in part:

> "In young offender institutions removal from association under YOI rule 49 (especially for own protection) is, and should continue to be, an exceptional step particularly for those prisoners under the age of 18."

54. The procedures do not envisage the governor asking for comments from the prisoner before the decision is made. The governor is not told in the substantial documentation that he can do that and no form envisages that it will be done. Whilst such a course could not be said to be prohibited, silence about the possibility of adopting the course has the same effect as prohibiting it. Given that governors will go step by step through the complex procedures, there is little chance of taking a step (however desirable) which is not an authorised or required step.

55. The appellant stresses the existence of many safeguards after removal both in the PSO then in force and in its replacement. Miss Richards listed them in her skeleton argument and took us to them in the course of oral argument.

> "31. ... Safeguards in relation to removal from association under Rule 45/Rule 49 can be found both in the Rules and in the procedures outlined in PSO 1700. Insofar as the Rules are concerned:

a Removal from association cannot exceed 3 days without the authority of the Secretary of State or the Board of Visitors (now re-named the Independent Monitoring Board): Prison Rule 45 (2), YOI Rule 49 (2).

b The governor may in his discretion terminate the segregation at any time and shall do so if so advised on medical grounds: Prison Rule 45 (3) and YOI Rule 49 (3).

c The prisoner has the right to make an oral or written request or complaint to the governor and/or a member of the Independent Monitoring Board ('IMB') at any time: Prison Rule 11 (1), YOI Rule 8 (1).

d The governor is required on every day to hear any requests and complaints made to him: Prison Rule 11 (2), YOI Rule 8 (2).

e The IMB is required to hear any complaint or request made to it: Prison Rule 78 (1) and YOI Rule 82 (1).

32. Moreover, PSO 1700 (in the form which existed at the time of SP's segregation) provided that:

a The initial decision to remove from association must be authorised by the governor or operational manager not below grade 3: paragraph 1.7.1.

b If the governor considers that segregation needs to continue beyond 72 hours the authority of a member of the IMB must be sought: paragraph 1.7.2.

c When authorising segregation for a prisoner under 18 or serving a DTO the supervising officer of the relevant YOI must be informed within 24 hours: paragraph 1.7.5.

d The healthcare unit must be informed that the prisoner has been transferred to the segregation unit: paragraph 2.1.3.

e The IMB must be informed within 24 hours that the prisoner has been segregated: paragraph 2.1.3.

f The prisoner should be given the reasons for their segregation orally: paragraph 2.2.1.

g Within 24 hours the prisoner should be given written reasons: paragraph 2.2.1.

h No later than 48 hours after segregation the operational manager must consider whether continued segregation beyond 72 hours is desirable: paragraph 2.3.1.

i Whenever considerations of good order and security allow the prisoner should be allowed to be present and to contribute to the review of their case: paragraph 2.3.1.

j Before authorising continued segregation the member of the IMB must interview the segregated prisoner, examine the documentation and discuss the case with staff responsible for supervising the prisoner and then decide if continued segregation is necessary and if so for how long: paragraph 2.3.2.

33. The new PSO 1700 contains similar although not identical provisions. The principal distinction is that the Segregation Review Board has taken over the role of authorisation of continued segregation beyond 72 hours from the IMB:

a The initial Segregation Review Board will be held within 72 hours.

> b The prisoner is to be kept informed about his/her segregation and told when Review Boards will take place.
>
> c The prisoner will be informed of the outcome of the Segregation Review Board and given reasons if segregation is to continue.
>
> d The prisoner will normally have the opportunity to attend the Segregation Review Board at least for some of the time.
>
> 34. The IMB continues to have an important role to play:
>
> a The IMB is notified within 24 hours of the segregation of any prisoner.
>
> b The IMB should speak to the prisoner and scrutinise the paperwork authorising initial segregation.
>
> c The IMB member should speak to the operational manager if they have any concerns about the decision.
>
> d Prisoners in segregation should be seen by the IMB on each rota visit.
>
> e If at any time the IMB member has a serious objection to the continued segregation of the prisoner, they should raise the objection with the duty governor.
>
> f A member of the IMB should attend the Segregation Review Board and should monitor and oversee the decision-making process and satisfy themselves that the laid down procedures are being followed and that a reasonable decision has been reached.
>
> g The IMB representative should indicate whether or not they agree with the Board's decision; if not (or if at any time their expression of concern to continued segregation has not been satisfactorily resolved) they should follow the procedures for IMB objection to continued segregation."

56. Miss Richards submits that the post-decision safeguards are such that fairness does not require that the governor afford an opportunity to the prisoner to be given an opportunity to comment prior to the making of the decision.

Is giving an opportunity for comments after the decision a sufficient safeguard to ensure fairness?

57. As to these various methods used to review an order placing an inmate in a segregation unit and the facilities for making a complaint, Jack J said:

> "All of this, however, comes after the order has been made and she had been transferred. It is the initial decision which is the most important step, and which an inmate would most like to have the opportunity to address. It is often the case in any situation involving a decision of an authority that once a decision has been made, it is difficult to change it". (Paragraph 50)

58. I agree. Miss Richards showed that decisions to place a person in the segregation unit can be revoked quickly and before the expiry of the first 3 days - for example, she said, if the prisoner has calmed down. That does not, in my view, meet the point being made by Jack J. Any decision to remove to a segregation unit will be made based on a factual basis. The best time to check on the factual basis by asking for the prisoner's comments is before the decision is made. As Jack J rightly observed once a decision is made, it is

difficult to change it. This is particularly so when a decision has been made on a factual basis and when the person subject to the decision seeks to persuade the decision maker, after the decision has been made, that the factual basis on which he acted is wrong. Inevitably the decision maker will be reluctant to conclude that his original decision was wrong. Simon Brown LJ in *R. v. SSHD ex parte Hickey (No 2*) [1995] 1 WLR 734, at 744 made the point that "it is difficult to suppose that [a decision maker] can remain as open-minded as if no clear decision has been taken".

59. Unless constrained by authority to find otherwise, I have no doubt that contemporary standards of fairness and the principles in PSO 4950 required the appellant to have given SP an opportunity to make representations before the order was made to remove her to the segregation unit for reasons of good order and discipline.

60. As I have shown, there is a substantial difference between the regime for a 17 year old on her unit and in the segregation regime. Although not formally a punishment measure, removal to the segregation unit is in fact the most severe punishment that can be awarded following disciplinary charges for an inmate of a YOI. Although the purpose of sending the respondent into segregation was to protect others from the risk of harm, nonetheless there must be in the eyes of the detainees and others a substantial punitive element.

61. The appellant's own PSO requires all staff must deal with the young women in their care openly and fairly, and to be mindful of their vulnerability (paragraph 46 above). A requirement to give an opportunity to an inmate such as SP to comment on the proposed reasons for removing her to the segregation unit would fulfil the objective of dealing with the inmate "fairly and openly." If (and I stress the word "if') SP had then given the response which she says now that she would have given (paragraph 36 above), that might well have led the Governor to consider whether SP was vulnerable to bullying and to consider whether her account of the conversation to the CARATS worker should influence her tentative decision and to take steps to prevent any bullying.

62. The new PSO 1700 emphasises the importance of keeping an inmate informed:

> "For Prisoners Segregated Under Prison Rule 45 (YOI 49)
>
> Outcome,: The Prisoner is kept informed about his/her segregation and told when reviews will take place so that they do not feel isolated from the process/system of segregation, nor from staff." (Emphasis added)

If the inmate should be kept informed for this reason after the decision has been made, then so should she be informed before the decision is made.

63. Fair treatment is, in my view, an important part of the rehabilitative process. As the PSO makes clear:

> "the way in which staff speak and act ... towards young women will profoundly influence the way in which young women behave". (Paragraph 47 above)

64. Fairness also plays a part in helping to prevent unnecessary grievances within the closed prison system. *R (Daly) v. The Secretary of State for the Home Department* [2001] UKHL 26 [2001] 2 AC 532 was a case concerned with a prisoner's rights in relation to documents covered by legal professional privilege. Nonetheless a passage in the speech of Lord Bingham of Cornhill is instructive:

> "5 Any custodial order inevitably curtails the enjoyment, by the person confined, of rights enjoyed by other citizens. He cannot move freely and choose his associates as they are entitled to do. It is indeed an important objective of such an order to curtail such rights, whether to punish him or to protect other members of the public or both. But the order does not wholly deprive

> the person confined of all rights enjoyed by other citizens. Some rights, perhaps in an attenuated or qualified form, survive the making of the order. And it may well be that the importance of such surviving rights is enhanced by the loss or partial loss of other rights."

65. It is not necessary to consider the ramifications of the decision of Munby J in the *Howard League* case (see paragraph 49 above) because it is accepted in the PSO that "the principles and aims of the regimes and the ethos and values which underpin them" must reflect, amongst other things, "the principles and spirit of the Children Act 1989" and:

> "The central tenet of the Act is the principle that safeguarding a child's welfare is of paramount importance so that when decisions are made about a child, the primary consideration must be what is best to safeguard their welfare." (Paragraph 46 above)

66. Obtaining the child inmate's views about the tentative reasons for removing her from her unit and her friends to a segregation unit seems to me consistent with, if not required by, "the principle that safeguarding a child's welfare is of paramount importance".

67. Miss Richards submits that the authorities constrain this court to reach a different conclusion and she cites *Young v Bristol Aeroplane Company* [1944] 1KB 718. To these authorities, I now turn.

The authorities

68. Miss Richards took us to *Wiseman v. Borneman* [1971] AC 297. She cited passage from Lord Reid (page 308) to the effect that the requirement of fairness should not degenerate into hard-and-fast rules and any additional steps to the statutory procedure must not frustrate the apparent purpose of the legislation. I do not see how giving the opportunity to make representations before an order for segregation is made, subject to exceptions, frustrates the purpose of the Rules. Miss Richards also referred to a passage from the speech of Lord Guest (310) that the principles "should be reasonably clear and definite" and cases should not be "decided ex post facto on some uncertain basis." I hope that I have avoided that error.

69. Miss Richards cited a passage from *Lloyd v McMahon* [1987] AC 625 in which Lord Bridge observed at p. 702 that:

> "... what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure attainment of fairness." (Emphasis added)

70. I do not believe that giving the opportunity to make representations before an order for segregation is made is requiring more additional procedural safeguards than are necessary to ensure the attainment of fairness.

71. Miss Richards cited *R v Life Assurance Unit Trust Regulatory Authority Organisation Ltd, ex parte Ross* [1993] QB 17 for the proposition that there are circumstances where it is not possible to allow representations before the decision, in which case they should be allowed afterwards. If there are circumstances where it is not possible to give the inmate an opportunity to comment, the decision of Jack J allows for that.

72. The principal authority on which Miss Richards relies and which she submits is binding, is the decision of the Court of Appeal in *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58 (the case eventually went to the House of Lords, but not on this issue). The prisoner in that case challenged the decision to place him in segregation under what was then Prison Rule 43 (which was in similar terms to YOI Rule 49/Prison Rule 45). It was submitted on his behalf that: "a decision to segregate a prisoner against his will involves consequences which ... require him to be given an opportunity to know and respond to the reasons for his proposed segregation" (p.80h).

73. The Divisional Court rejected this submission. In the words of Ralph Gibson LJ:

> "In this case Mr Sedley [QC] acknowledged that there could not be an unqualified obligation in all cases upon the governor to allow the right to be heard. There may be cases of urgency. We would add that there may be difficulty in disclosing the reasons, or part of them, if, for example, the intention to segregate is based upon information obtained as to threatened misconduct, such as violence against another prisoner. Giving detailed notice of the grounds might well indicate to the prisoner the source of the information and thereby create the risk of an immediate retaliation against the giver of the information. In this case the giving of notice to the applicant might have been regarded as giving rise to the risk of an immediate protest in breach of the rules by the applicant intended to cause others to join his protest. In another case a governor might reasonably claim that he could not sensibly disclose the reasons for his intended decision, or some part of those reasons, because of the need not to reveal either the source of the information or that certain facts are known to the prison department. Mr Sedley maintained that this was not such a case and, if the right to be heard could be allowed, the law should require that it be allowed.
>
> We do not accept this submission. In our view, having due regard to the interests of the prisoner and of society at large, including the due administration of the prisoners, fairness does not require that a prisoner be given the right to be heard before a decision affecting him is made under rule 43."

74. As this passage shows, Ralph Gibson LJ was much influenced by the operational difficulties to which the proposed right to be heard might give rise.

75. Ralph Gibson LJ continued (page 92):

> "Good administration will often allow and cause a governor to provide such an opportunity to a prisoner but that, in our view, is for decision by the governor having regard to any policy instructions by the Secretary of State."

As I have shown (paragraph 54 above), there are no such policy instructions and the very detailed procedures do not envisage the governor asking for comments from the prisoner before the decision is made. In my view this gap should be remedied in the case of all prisoners to ensure "good administration".

76. Ralph Gibson LJ continued:

> "There could be no unqualified obligation applicable in all cases for the reasons stated above. The rule, if it existed, would have to be stated in terms providing for the necessary qualifications. The requirements of the law, in prison administration, based upon natural justice, should, in our view, be both clear and simple. Any such rule would open many rule 43 decisions to question on the ground that the reasons given were deficient."

77. I for my part doubt whether the necessary qualifications could not be drafted in a clear and simple way and in a way to avoid subsequent questioning of the decision. The Court of Appeal, to whose judgment I now turn, did not rely on the proposition that a qualified rule would be impractical. As Jack J said (paragraph 54):

> "The impracticality of a qualified rule was a major reason why the Divisional Court held as it did in *Hague*, but that did not find a place in the reasoning of the Court of Appeal."

78. The Court of Appeal agreed with the Divisional Court (pp. 109-112). Taylor LJ stressed (p. 109h-110a):

> "Apart from the urgency of decisions under r 43, there may well be other public policy grounds for not giving reasons in advance to the prisoner so as to enable him to make representations. Giving reasons would often require unwise disclosure of information. Such disclosure could reveal to prisoners the extent of the governor's knowledge about their activities. It would reveal the source of such information, thereby putting informants at risk. It could cause an immediate escalation of trouble."

79. As to this passage I would comment that not all decisions under what was then rule 43 have to be taken urgently (as this case shows). Furthermore the problem of "unwise disclosure of information" was dealt with in rule 2.2.1 (paragraph 30 above) and there is no evidence before us that it has caused difficulties.

80. The Court of Appeal considered that a clear distinction could be drawn between the procedural requirements in disciplinary proceedings and the use of rule 43 (110f-g):

> "In disciplinary proceedings which may result in punitive action, the full panoply of natural justice principles is appropriate and Parliament has provided that it should apply. Although the consequences of rule 43 are in some respects akin to those imposed as punishment, the object of the rule is not punitive. Indeed, where it is invoked at the prisoner's request it is specifically aimed at protecting him from illegal punishment at the hands of fellow prisoners. So, in the context of rule 43, although the governor and the regional director must act fairly and make reasoned decisions, the principles of natural justice are not invoked in the rules. Instead, alternative safeguards are provided to protect the prisoner's rights."

81. I make it clear later in my judgment that I would not require "the full panoply of natural justice principles". Whilst accepting that the object of the rule is not punitive, I have already expressed my agreement with Jack J about how the use of segregation for reasons of good order and discipline operates in practice, how it relates to disciplinary offences for children under the age of 18 and how it is likely to be perceived.

82. The Court concluded that, having regard to the interests of the prisoner and of society at large, including the due administration of prisons, fairness did not require that a prisoner be given the right to be heard before a decision affecting him was made under rule 43.

83. Jack J rightly in my view pointed out (paragraph 46) when considering whether *ex parte Hague* was binding on him, that that the claimant in this case is a child. Later he said (paragraph 56):

> "The PSOs which I have had to study in this case show a considerable change [since Hague] in the management of young offenders institutions, and, in regard to PSO 1700, to prisons also."

84. I agree. Indeed there were, according to Mr Wise, nothing equivalent to the modern PSOs until the late nineties, PSOs taking the place of instructions to governors.

85. Miss Richards reminded us of the following passage in the speech of Lord Mustill in *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 A.C. 53, at 561:

> "The court must constantly bear in mind that it is to the decision maker, not the court, that Parliament has entrusted not only the making of the decision but also the choice as to how the decision is made."

86. She also referred to the well-known passage in the same speech, in which Lord Mustill listed the principles which he derived from the authorities:

> "... (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (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."

87. As to the second principle (the standards of fairness may change with the passage of time) she submitted that they had not changed since *ex parte Hague*. Mr Wise submitted that they had. In this context, Jack J said:

> "I have to consider the question at issue in that changed context, in the context of the European Convention on Human Rights ["ECHR"] and, in this case, in the context of the rights recognised by Munby J. in the *Howard League* case."

88. It is not necessary, in my view, to decide in this case whether the effect of the ECHR is to overtake the decision in *ex parte Hague*. For my part, I would decide this case on the narrower basis which I have outlined earlier. In my view we do not need to resolve in this case whether *ex parte Hague* is still binding authority in the case of someone over the age of 18. The resolution of that may well require the kind of detailed analysis of the relevant PSOs which I have tried to undertake in this case as well as consideration of the ECHR.

89. Miss Richards relies also on the fifth principle ("Fairness will very often require that a person ... will have an opportunity to make representations ... either before the decision is taken ... ; or after it is taken ... or both"). As a statement of principle this must be right - it does not however give much help in any particular case to make what Lord Mustill described as "essentially an intuitive judgment".

90. Miss Richards also relies on other cases which were considered by Jack J and I adopt his summary of them:

> "47. In *Mehmet v O'Connor* Turner J., unreported, 9 February 1999, the prisoner applicants challenged their detention within Close Supervision Centres, saying that fairness required they be told the reasons and be given the opportunity to make representations against the decision. It was held that fairness did not require that an opportunity to make representations be given. The decision was strongly relied on before me on behalf of the Secretary of State. In the course of his judgment Turner J. stated:

'In my judgment, the three cases of *Wilson*, *Doody* and *Duggan* (supra) make clear that the common law power to imply standards of procedural fairness into decision making processes, is a flexible one and will ordinarily only be exercised in cases in which the rights of an individual are under threat. In the further case of *Lloyd* (supra) it was not the liberty of the individual which was immediately at risk but the risk that a financial penalty might be imposed. In the prison cases referred to above, the problem which confronted the courts was how to identify and categorise the circumstances which had to exist before the common law was prepared to intervene. All three cases concerned the possible delay to release dates. Standards of procedural fairness were held to require that where the consequence of the decision would adversely affect release dates, so that the liberty of the individual was at risk, as by delay in release, an opportunity to be heard must be accorded to the individual who should also know what was the nature of the case against him so that he could make informed representation against it. It is not hard, now, to understand how the courts arrived at the conclusion that where either the liberty of the individual was at stake, or his financial position was involved, concepts of procedural fairness demanded that he was able to make informed representations why a course of action, which might impact on either aspect of a person's rights, should not be adopted. As a result it is not difficult to recognise that in cases, where the liberty or the financial interests of an individual is likely to be adversely affected, the common law, in the field of public law at least, will ensure that the individual concerned will have the opportunity of being heard. The problem in this case comes down to the question whether or not the applicants can show that allocation to a CSC does indeed impinge on their right to freedom in the sense already indicated.

.....

It was, in my judgment, correctly submitted that the mere fact of allocation does not adversely impact on the prospects of parole. In truth, as the respondent submitted, it was the prisoner's conduct before and not as the result of allocation which was likely to be a factor which would affect the prospect of release on parole. It was pointed out that if the effect of allocation to a CSC was beneficial, in accordance with one of its stated purposes, then prospects of release were enhanced rather than damaged as the result of allocation. This observation is consistent with that part of the decision in Bowen which will be found at p22G-23C of the transcript. That this can be expected to be the position is confirmed in the affidavit of Mr Wheatley, paragraph 23.

In conclusion, I hold that allocation of a prisoner to a CSC does not so affect his personal rights that the common law will intervene by requiring that he should have been given by standards of procedural fairness the opportunity to make representations against his allocation.'

48. *R v Secretary of State for the Home Department ex parte Allen*, Court of Appeal, unreported, 10 March 2000, was concerned with early release on home detention curfew. A decision to withhold release on home detention and curfew was subject to an appeal to a more senior governor, on which the prisoner could make representations. It was held that this was all that fairness required.

49. I was lastly referred to *Hirst v Secretary of State for the Home Department* [2001] EWCA CIV 378, Court of Appeal, 8 March 2001. This concerned the recategorisation of a discretionary life sentence prisoner from Category C to Category B. The issue was whether fairness required the claimant to be informed of the reasons for his proposed recategorisation and to have an opportunity to make representations before it took place. There was evidence to the effect that the recategorisation was likely to effect the claimant's eventual release date. In giving the leading judgment of the Court of Appeal Lord Woolf C.J. stated:

"25. I have found the question of what should be the outcome of this appeal by no means easy to determine. I accept the importance of the prison service being able to make decisions which

> are operationally important without having to go through the technical requirements of providing opportunities for making representations. However, 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. On the whole, the courts will require considerable persuasion that administrative convenience justifies a departure from the principles of fairness which would otherwise be appropriate in a particular situation. However, the arguments which are advanced by the Home Office in this case, as I understand them, are not only ones of administrative convenience. They refer to operational difficulties and operational problems which could undermine the security and discipline within the prison system.
>
> 26. It seems to me basic that a decision which is as important as the present decision to Mr Hirst should not be taken without giving him the opportunity to make representations and to have the matter properly considered as a consequence of his so doing. I think that there is some substance, but would not overvalue it, in the problem referred to by Lord Justice Simon Brown which arise in reconsidering a decision [paragraph 58 above]. However, regardless of that difficulty, it seems to me that a decision of this nature as a matter of fairness should not be taken until Mr Hirst had been fully involved. He should have been given a reasonable period to make representations before the decision was taken. He should have been given that opportunity after he had been told the grounds upon which it was appropriate to recategorise him."

91. In my view *Hirst* is of help in deciding how the issue of fairness and decisions affecting prisoners should be approached to-day. Miss Richards relies on a subsequent passage in the judgment of Lord Woolf and a passage to a similar effect in the judgment of May LJ, the effect of which were that if prior to recategorisation it was necessary for operational reasons to remove the prisoner to more secure conditions that could be done. Dyson LJ, however, said (paragraph 30) that there may be cases where operational reasons will not require a transfer before the decision to recategorise is made. In the present case Jack J makes allowance for those operational reasons when he said that the opportunity to make representations must be given unless reasons of good order, discipline or urgency (or other relevant circumstances) required that the order should be made without her having that opportunity

92. Miss Richards stressed the operational difficulties of permitting the inmate to make observations on the tentative reasons for segregating her. Those reasons weighed heavily with the Court of Appeal in *ex parte Hague*. Putting aside my doubt whether the operational reasons are soundly based, I have no doubt that in the case of a child inmate, the alleged difficulties are outweighed by the various considerations which I have identified in paragraphs 57-66.

Conclusion

93. I therefore do not accept the submission made on behalf of the appellant. The judge was right in my view to reach the conclusion which he did in paragraph 56:

> "... fairness did require in this context that SP should have been given the opportunity to make representations before an order for segregation was made, unless reasons of good order, discipline or urgency (or other relevant circumstances) required that the order should be made without her having that opportunity."

94. I would add that, in my view, this conclusion applies to inmates in a YOI who are under the age of 18 and who are facing removal to the segregation unit for reasons of good order and discipline. Although Miss Richards seeks further guidance about the exceptions, that must be a matter for the appellant to consider and draft the appropriate rules or guidance.

95. I would also make it clear that giving the inmate an opportunity to make representations does not require more than giving the inmate an opportunity to comment on the tentative reasons (as I have called them). I am not suggesting that the inmate be given the kind of rights available to her when disciplinary charges are being brought. I also would accept that there may be circumstances should not be given the detailed reasons as permitted in pare (paragraph 30 above).

96. For these reasons I would dismiss the appeal.

LORD JUSTICE JACOB

97. I agree

LORD JUSTICE WARD:

98. I also agree