Neutral Citation Number: [2010] EWHC 15 (Admin)

Case No: CO/4096/2009

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/01/2010

Before:

MR JUSTICE HOLMAN

- -

Between:

R on the application of KB (a child, by his litigation friend LW)	**Claimant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**Defendant**

- -
- -

Mr Hugh Southey (instructed by **The Howard League for Penal Reform**) for the **Claimant**
Mr James Strachan (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing date: 10th December 2009

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this judgement and that copies of this version as handed down may be treated as authentic.

Mr Justice Holman:

The issues

1. The claimant, who is now aged 17, was recently detained at Wetherby Young Offender Institution ("Wetherby"). Wetherby publishes and operates a system or scheme known as "Discipline Incident Reports" ("DIR"). The claimant, represented and effectively backed by the Howard League for Penal Reform, contends that the whole DIR system is unlawful in that (i) it is ultra vires, and/or contrary to Prison Service policy; and (ii) it offends Article 8 of the European Convention on Human Rights.

2. Wetherby also publishes and operates an "Incentives and Earned Privileges Policy" ("IEP policy"). The claimant contends that this policy operates in practice to reduce or curtail the opportunity for association between trainees (or, as the relevant rules describe them, inmates) and that insofar as it does so, it is unlawful in that (i) it is ultra vires; and/or (ii) it offends Article 8.

3. Permission was granted to the claimant to apply for judicial review on the above grounds. He raised an additional, but discrete, ground of claim, namely that each of the above policies or systems was introduced without appropriate compliance with duties under section 71 of the Race Relations Act 1976 to have due regard to the need to eliminate unlawful racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups. Permission to apply on this ground was refused. The claimant renewed the application for permission. The time estimated and allowed for the hearing was not sufficient to permit consideration of this discrete matter. Accordingly, and with the agreement of both parties, I order that the oral hearing of the renewed application for permission to apply on the ground in paragraphs 1.4 and 4.6 of the Grounds of Claim is adjourned generally with liberty to the claimant to restore it on notice to the court and the defendant not more than four weeks after the date upon which this judgment is handed down.

The factual background

4. The claimant was born in July 1992. Having been sentenced to three years' detention, he arrived at Wetherby in July 2008, days after attaining the age of 16. He was transferred to a different YOI in May 2009. So throughout his time at Wetherby he was aged 16. Whilst there, he was frequently badly behaved. As a result, he was the subject of sanction under the DIR system on nine occasions which resulted in "loss of association". By the application of the IEP policy he was placed for 46 days on the red or basic incentive level which also resulted in not being permitted to participate in periods of "Association". In addition, he received Governor's awards which, although not in issue in this case, also resulted in periods of loss of association. I understand that out of about 300 days that he spent altogether at Wetherby, he was not able to participate in "Association" on about 107. So if either system or policy is unlawful he was clearly a victim. There is much detail in the documents about the claimant's behaviour at Wetherby, and narrative accounts by him and by the Head of Resettlement, Mr Gary Borthwick, about actual disciplinary processes in relation to the claimant. In my view rightly, neither counsel placed any emphasis on the facts (many of them disputed) in relation to the behaviour and disciplining of the claimant personally. The issues of law which arise and which I need to determine are in a

sense abstract, and are quite independent of the personal behaviour or history of this particular claimant.

Discipline Incident Reports

5. The system is contained and described in a formal document, last revised in May 2008, called "Revised DIR Process", now at bundle tab 10. The narrative description on page 3 includes the following:

> "The DIR system at Wetherby is an effective tool in maintaining G.O.O.D. [Good Order or Discipline]. It is used responsibly by most of the staff …. It exists to deal with minor acts of poor behaviour; issue immediate sanctions with the agreement of the young person and allows them to take responsibility for their own behaviour management. If used correctly, the system will give all areas confidence to use it positively, justly and appropriately. It seeks to rule out abuse and ensure sanctions are consistent. Young people should not feel they have been dealt with unfairly as these guidelines rule out inconsistent punishments …
>
> **Agreement:**
>
> A young person must agree [emphasis in the document] with the issue of the DIR before it can be activated. The young person must sign to say that he accepts the sanction being imposed upon him …. If the young person declines to sign the DIR at the first stage or denies any involvement in the offence then it will automatically go to a minor report. This will allow the incident to be fully investigated as per PSO 2000. This will be the second stage in the process. Stage three for the most serious offenders remains a Governor's adjudication."

6. The document then describes a series of "awards" under the DIR system. The first will be a caution; the second, one hour's extra work; the third, one Loss of Association (LOA); the fourth, one LOA and one loss of dining; the fifth, one LOA, one loss of dining and one loss of television.

7. The document lists fifteen types of "incident" for which an award may be given, of which examples are attending wrong classroom, damaging prison property, incorrect dress, slow timing, verbal abuse, and, as number 15: "miscellaneous".

8. There is a prescribed form of "Discipline Incident Report" at pages 9 and 10 of the document upon which details of the incident must be recorded, and the award given, and which the trainee must sign, with space for his "comments".

9. In his first statement, now at bundle tab 23, Mr Gary Borthwick, the Head of Resettlement (an operational manager of governor grade), describes the system of DIRs as follows:

"5. There are three disciplinary stages at Wetherby. The most serious incidents of unacceptable behaviour are dealt with by a Governor's adjudication. Incidents which do not require a Governor's adjudication are dealt with by a minor report which is submitted by the Reporting Office to the Wing Principal Officer who conducts a minor report hearing into any alleged incidents.

6. Less serious incidents which are not disputed by the trainees are dealt with by Discipline Incident Reports ("DIRs"). When an incident of unacceptable behaviour occurs, the Reporting Officer completes a DIR which the trainee can accept and sign or dispute. If the DIR is disputed the minor report process is followed. If the trainee does not dispute the contents of the DIR and chooses to sign it, the trainee will then be asked for their view of the incident. A sanction will be awarded by the Reporting Officer, or the Unit Manager where the incident occurred during the activity of education. However, the award is only applied if the trainee signs the DIR in agreement. If not, the minor report process is followed to allow the facts to be fully investigated.

7. ……

8. An award for the first DIR of a particular type would ordinarily be a caution. The second award would ordinarily be an extra hour's work (where supervision is available). The third award would generally be a loss of association ("LOA"). The fourth award would normally be LOA and dining in cell ("DIC"). The fifth award would normally be LOA, DIC and loss of television. However, the award for any particular incident will depend on the seriousness of the incident.

9. LOA is normally only awarded for a third incident of the same type and then only with the trainee's agreement. Each award of LOA only applies to one association session. An association session is a period of free time for trainees between 6pm and 8.15pm on every other night during which time the trainees may spend their free time associating with each other. Trainees subject to an LOA award are therefore not segregated from other prisoners, nor removed from association in that sense. They will still participate in the day to day regime at Wetherby which includes education, vocational workshops, intervention groups and gymnasium periods, all with other trainees. The award of LOA only curtails their participation in a privilege, namely one association session.

…….

45. At paragraph 4.3 of the claimant's grounds, the claimant alleges that the DIR system is *ultra vires* the YOI rules on the

> basis that he says it is not a system authorised by the YOI rules which are otherwise comprehensive. The claimant alleges that DIRs can be imposed for minor incidents of bad behaviour that do not necessarily amount to disciplinary offences. This is incorrect. DIRs are not imposed. They are always agreed with a trainee as a consequence for a disciplinary offence. If a trainee does not agree, a minor report and consequential investigation will follow automatically. There cannot be a minor report without a disciplinary offence.
>
> 46. The claimant also states that the list of penalties for a disciplinary offence does not include denial of association. However, 1 x LOA as a sanction under a DIR is not a denial of association. As I have already explained, it relates only to one period of evening free time and the trainee will continue to associate during the day. It is merely the loss of the privilege to participate in the specific period of Association allocated between 6pm and 8.15pm."

10. As to the operation and effect of DIRs, the claimant himself says at paragraphs 10 and 12 of his first statement, now at bundle tab 6:

> "10. I have had a lot of DIRs, especially in education. I don't like DIRs because it feels like officers can give them out whenever they want, even for petty things, and you don't get a hearing to explain your side of the story. Sometimes it feels like I have been getting DIRs non-stop. You have to agree to a DIR, but if you don't, it goes to a senior officer who gives a longer one lasting for 3 days. I have had more than 22 DIRs since I have been at Wetherby.
>
> …..
>
> 12. DIRs often upset me because of the way they are given out. For instance, on 14 February 2009, I had a really bad day which started off when I was given a DIR for playing cards in the exercise yard. The officer just said "K – no cards – loss of association, you're not coming out." This upset me and it felt unfair because a lot of trainees were playing cards in the yard and none of them were being punished. I said to the officer that if she was punishing me she should punish everybody. She just said "If you want to take it further, I'll make you eat in your cell as well." "

Incentives and Earned Privileges Policy

11. The policy and system is described in a document for the "Guidance for Staff and Trainees" dated March 2007 and now at bundle tab 9. It states at the outset that "A well balanced IEP scheme enables staff to exercise control over trainees' behaviour

and acts as an appropriate reward for those who embrace the positive regime activities that are on offer [at Wetherby]." The incentive levels are named Red (basic), Silver (standard), Gold (enhanced). The "Key earnable privileges" include access to private cash (on an increasing scale of amount from Red to Gold), in cell television, permission to wear own trainers, and "Association." A grid under the heading "Association" provides as follows:

> "RED First 3 days work/activities times only. Following 3 day review allowed to associate at mealtimes if behaviour is improving
>
> SILVER Association on an every other session basis
>
> GOLD As silver with enhanced access and facilities. Top up of association on a rota basis"

12. There is a detailed "Review Process", with provision for a Review Board and an Appeals Process. This is fully set out and described in the IEP document at pages 5 – 7. On behalf of the defendant, Mr James Strachan placed emphasis on the existence and content of that review process, which I do not overlook. However I will not reproduce it here.

13. At paragraphs 15, 17 and 23 of his first statement Mr Borthwick describes the IEP policy as follows:

> "15. All trainees start off on silver (standard) level under the IEP Scheme. On this level, their privileges include attendance at every other session of Association.
>
> 16 ……..
>
> 17. In line with the policy of the IEP scheme, a trainee whose IEP level is reduced to Red (basic) level for poor behaviour will lose the Association privileges for three days. After that period, their IEP level will be reviewed to see if the trainee's behaviour has improved. Because the session of Association is only available every other night, LOA for three days under the red level in effect means that a maximum of two sessions of Association (ie. between 6pm and 8.15pm) will be missed. If a trainee has made very good progress he could be removed at the three day stage, if not he will remain on Red until the seven day review. Again, however, a trainee who loses the privilege of evening Association while on Red level will still be able to associate and interact with other trainees during education, workshops, interventions groups and gymnasium periods. At weekends and holiday periods the trainee will get a minimum of one hour's exercise each day and access to a shower and telephone call whenever his free time Association period would have been.
>
> ……

> 23. A trainee can only be reduced to Red level with the approval of an officer of Principal Officer grade or above. A trainee has the right to appeal any decision to change his IEP level downward. The process to appeal, which is set out in the policy document, is that a trainee can fill in the IEP Feedback/Appeal form and have their IEP review considered by an appeal adjudicator, or else the trainee can make a complaint to the Head of Residence through the Request Complaint system."

14. Mr Borthwick especially stresses that any loss of association under the IEP policy is not segregation but withdrawal of what would otherwise be the privilege of "Association" between 6 and 8.15pm every other night. He says at paragraph 38:

> "38. The Claimant alleges that red level IEP is unlawful because it does not permit a minimum level of association within the meaning of rule 6(2) of the YOI rules and because it denies him association for the purposes of rule 49. This is incorrect. A trainee on Red level will associate with other trainees daily in the same way as a trainee on Silver or Gold level. The only difference is that a trainee on Red level will miss out on the specific period of free time termed Association between 6 and 8.15pm on every other night, until this loss of privilege is reviewed or the trainee returns to silver level, and that for the first three days on Red level, a trainee will also take meals in their cell. This is in contrast to a trainee who is subject to segregation. Such a trainee is removed from the day to day regime. A trainee in segregation can continue to attend Education and Workshops (dependent on behaviour and risk to others). He would be housed in the SCU and not allowed to associate generally on his parent unit or anywhere else. Rule 49 applies to segregation but not to the loss of privilege of free time every other evening."

15. Mr Borthwick also very strongly stresses that the loss of the privilege of association amounts to two and a quarter hours on alternate days. On behalf of the claimant, his solicitor, Ms Anne-Marie Jolly, does not accept that. At paragraph 22 of her second statement, now at bundle tab 26, she says:

> "22. It is clear that association affords an opportunity to socialise freely in a way that other activities do not. During regime activities, attention will be focused on a particular task and free social interaction will be limited and sometimes even discouraged. By contrast, association is unrestricted time during which prisoners can interact in the way they choose and talk about what they want. It is therefore important in establishing and developing relationships with others and in the development and fulfilment of personality."

16. Describing association in that way, Ms Jolly contends that the loss of association is not merely for a privilege period of two and a quarter hours, but for a continuous period of a minimum of 72 hours and, possibly, much longer.

17. The claimant himself says in paragraphs 2 and 5 of his second statement, now at bundle tab 27, that:

> "2. In my experience association is very different to other kinds of activities like education and work. Association is when you get time to talk freely and chill out with your friends. It is hard to do this in education and work because you are busy doing other things. If you chat in class instead of doing the work you get told off for messing around. Association helps me because it helps me let off steam. It makes me feel less frustrated and cooped up.
>
> ……..
>
> 5. It is not true that loss of association as a punishment for a DIR is not 24 hours' loss of association. It actually works out more than 24 hours. This is because association is every other day at Wetherby. This means that you have to go for three days without association if you get a DIR loss of association."

18. In reply to these passages Mr Borthwick says in his second, unbundled, statement at paragraphs 7, 11, 12 and 13:

> "7. I do not accept the tortuous distinction which Ms Jolly is making regarding association as being <u>only</u> that specific time set aside between 6.00 – 8.15pm, and that by implication once this privilege is withdrawn, then the trainee has no other recourse to any association at all. I believe that a more common sense view has to be taken of the association that occurs.
>
> …….
>
> 11. The other opportunities for association at Wetherby include the periods at mealtimes, which are three half hour periods throughout the day where trainees can have free conversations in groups of their choosing. There are the same numbers of staff around as for the Association period at 6pm, so they are no more supervised at mealtimes than then. ….
>
> 12. While trainees are in classrooms, there is a more formal structure typical of a school classroom and they spend nearly half their day there. But the other half of the day is spent doing vocational training (e.g. farms and gardens) in which they are in groups. Here again there is free social interaction between trainees.

> 13. Trainees also have the opportunity to go to the gym which is another key time for association, and they can do this every other day ….."

19. To this the claimant replies in his third, unbundled, statement at paragraphs 3, 4, 6 and 10:

> "3. I agree that normally half my day was spent doing education and half doing vocational training. We used to call vocational training 'work'.
>
> 4. I do not agree that trainees could talk freely during work. During most of my time at Wetherby, my work was PC maintenance. This involved building computers and designing websites, although we did not actually have access to the internet.
>
> …….
>
> 6. It was not really possible to talk freely because we were working. We were too busy doing work to be able to talk freely. …
>
> …..
>
> 10. During association, I could also do things like play pool and watch TV, but it was different because it was up to me what I did and who with. This meant I could choose to do things with people that I got on with and end up making friends. It also made it more relaxing. If I wanted to chat and joke around during an activity or stop and do something different with other people, this was ok during association."

The legal framework

20. The essential legal framework is common to both issues.

(i) Statute

21. Section 47 of the Prison Act 1952, as amended, ("the Act") provides as follows:

> "47. **Rules for the management of prisons, remand centres and young offender institutions.**
>
> (1) The Secretary of State may make rules for the regulation of prisons, remand centres, 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.
>
> ……"

22. Section 52 provides for such rules to be made by statutory instrument.

(ii) The YOI Rules

23. The relevant rules are the Young Offender Institution Rules 2000, SI 2000 No. 3371 ("the rules"), which came into force on 1 April 2001. The rules most relevant to this case are the following:

> "**3.- Aims and general principles of young offender institutions**
>
> (1) The aim of a young offender institution shall be to help offenders to prepare for their return to the outside community.
>
> (2) The aim mentioned in paragraph (1) shall be achieved, in particular, by -
>
> (a) providing a programme of activities, including education, training and work designed to assist offenders to acquire or develop personal responsibility, self-discipline, physical fitness, interests and skills and to obtain suitable employment after release;
>
> …….
>
> *Conditions*
>
> **6.- Privileges**
>
> (1) There shall be established at every young offender institution systems of privileges approved by the Secretary of State and appropriate to the classes of inmates thereof and their ages, characters and circumstances, which shall include arrangements under which money earned by inmates may be spent by them within the young offender institution.
>
> (2) Systems of privileges approved under paragraph (1) may include arrangements under which inmates may be allowed time outside the cells and in association with one another, in excess of the minimum time which, subject to the other provisions of these Rules apart from this rule, is otherwise allowed to inmates at the young offender institution for this purpose.
>
> …….

Occupation and Links with the Community

37. - Regime activities

(1) An inmate shall be occupied in a programme of activities provided in accordance with rule 3 which shall include education, training courses, work and physical education.

……

Discipline and Control

44. - Maintenance of order and discipline

(1) Order and discipline shall be maintained, but with no more restriction than is required in the interests of security and well-ordered community life.

……

(4) In the control of inmates, officers shall seek to influence them through their own example and leadership, and to enlist their willing co-operation.

49. - Removal from association

(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 72 hours without the authority of the Secretary of State….

(3) The governor may arrange at his discretion for an inmate removed under this rule to resume association with other inmates at any time, and in exercising that discretion the governor must fully consider any recommendation that the inmate resumes association on medical grounds made by a registered medical practitioner or registered nurse such as is mentioned in rule 27(3).

55. - Offences against discipline

An inmate is guilty of an offence against discipline if he -

(1) commits any assault; ……

[There then follows a numbered list of 29 offences, to which I will make some reference below]

58. - Disciplinary charges

(1) Where an inmate is to be charged with an offence against discipline, the charge shall be laid as soon as possible and, save in exceptional circumstances, within 48 hours of the discovery of the offence.

(2) Every charge shall be inquired into by the governor or, as the case may be, the adjudicator.

…….

59. - Rights of inmates charged

(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 or, as the case may be, the adjudicator.

(2) At an inquiry into charge against an inmate he shall be given a[n] opportunity of hearing what is alleged against him and of presenting his own case.

(3) At an inquiry into a charge which has been referred to the adjudicator, the inmate who has been charged shall be given the opportunity to be legally represented.

60. - Governor's punishments

(1) If he finds an inmate guilty of an offence against discipline the governor may, subject to paragraph (3) and rule 65, 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;

……"

Extra-statutory material

24. As well as the Act and the rules, both counsel drew my attention to certain extra-statutory material which does not have the status or force of law but which nevertheless requires respect and close consideration.

25. There are two relevant Prison Service Orders published by HM Prison Service. Relevant to the importance of association generally is order number 4950, "Care and Management of Young People", updated and issued in February 2008. Chapter 6, under a heading "Preventing reoffending" and a sub-heading "Provision of a full, purposeful and active day", states:

> "6.3 The establishment must offer opportunities for each young person to develop social skills and interests through the core day learning and skills programme and by providing a range of recreational opportunities, including association, suitable for the age group which are appropriately led, supervised and structured."

26. Relevant specifically to a policy of IEP is Prison Service Order number 4000, "Incentives and Earned Privileges", updated and issued in October 2006. That requires that each establishment's IEP scheme must operate (as Wetherby's does) on at least three tiers, basic, standard and enhanced, with new inmates being placed initially on the standard privilege level. Paragraph 2.4 expressly requires that certain "Key earnable privileges" must, when available, be included in local IEP schemes. These include "time out of cell for association".

27. Paragraph 3 refers to the three privilege levels. Under "Basic level" it makes plain at paragraph 3.4 that the position of a prisoner (or trainee) on basic level "will be very different from those prisoners in the segregation unit …. They will continue to participate in normal regime activities, including work, education, treatment programmes …. exercise *and association* ….." (my emphasis). Under "Standard level" it states that "Prisoners on standard level will be provided with a greater volume of allowances and facilities …. [including] *more time for association* ……" Under "Enhanced level" it refers at paragraph 3.5 to "….. *additional time for association* ….." viz additional to that on standard level.

28. Under the heading "Time out of cell" paragraph 3.11 states:

> "3.11 The amount of time prisoners are allowed to spend outside their cells to engage in activities (other than work, education, treatment programmes or religious services) or to associate together will vary from one establishment to another, depending on the availability of constructive activities and

> supervisory staff. But where there is scope to increase the allowance, standard level prisoners may earn extra time out of cell in addition to the establishment's basic minimum, and then further time if they are on enhanced level. ……."

29. Both counsel also placed reliance upon Guidance Notes No. 5, "Rewards and Sanctions Systems", published by the Youth Justice Board in January 2002. The Foreword states that "This is a Youth Justice Board guidance document to assist staff ….. in ensuring that their rewards and sanction systems are consistent with key aims, principles and objectives which are specifically focussed on positively influencing the behaviour of young people." Some requirements (not directly in point in this case) are mandatory, but "in the main the document offers best practice guidance." Part 7, under the heading "Promoting good order", describes the aim of a rewards and sanctions system; and at paragraph 7.2, under the heading "Sanctions and disciplinary processes", states that "The rewards and sanctions system runs in parallel to the formal disciplinary processes …… A simple illustration of the inter-connection of these systems is provided below." There then follows a grid, with four boxes as follows:

> "**Rewards** Earned incentives for positive behaviour
>
> **Sanctions** Loss of rewards, and imposition or formal warnings or sanctions
>
> **Disciplinary processes** In line with current legislative requirements and agency policy
>
> **Criminal prosecution** …. "

30. Paragraph 7.2 continues: " …. Breaches of the rewards and sanctions system will often not be serious enough to justify use of the formal disciplinary system."

31. Paragraph 7.3 states:

> "7.3 To maintain a safe, controlled environment, staff must be able to respond immediately to unacceptable behaviour. Staff must be able to exercise discretion (for which they are accountable) in responding to unacceptable behaviour, as follows:
>
> - they can administer an informal or formal warning prior to action;
> - apply immediate and limited sanction to the young person; and
> - in doing so, take account of an individual's known problems, ability and any vulnerability."

32. In Appendix 5, the document contains columns of "suggested rewards and sanctions." The rewards include "Extra association". The sanctions are on a scale or spectrum of increasing severity from "verbal reprimand", through "…. selected and incremental withdrawal of rewards …..", "…. additional chores", "formal disciplinary procedures", "denial of early release", to, ultimately, "criminal prosecution". It is to be noted that in this graded list of sanctions of increasing severity, "formal disciplinary procedures" appears about half way down, and after a range of sanctions (e.g. "sending the young person to bed early", and "additional chores") which are nevertheless clearly in the nature of punishment.

33. Finally, both counsel made some reference to the Council of Europe Recommendation CM/Rec (2008) 11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures. This is a non-binding recommendation "that governments of the member states be guided in their legislation, policies and practice by the rules contained in …. this recommendation." Governments are also recommended to ensure that the rules are disseminated to, amongst others, judicial authorities and institutions holding juvenile offenders and their staff. The European rules are relevant when determining obligations under Article 8 of the European Convention on Human Rights.

34. Of particular relevance to this case are the following:

> "80.1 The regime shall allow all juveniles to spend as many hours a day outside their sleeping accommodation as are necessary for an adequate level of social interaction. Such period shall be preferably at least eight hours a day.
>
> …….
>
> E.13.5 Discipline and punishment
>
> 94.1 Disciplinary procedures shall be mechanisms of last resort. Restorative conflict resolution and educational interaction with the aim of norm validation shall be given priority over formal disciplinary hearings and punishments.
>
> …….
>
> 94.3 National law shall determine the acts or omissions that constitute disciplinary offences, the procedures to be followed at disciplinary hearings, the types and duration of punishment that may be imposed, the authority competent to impose such punishment and the appellate process."

The Discipline Incident Report system

35. The challenge to the DIR system is the more profound of the two challenges. The challenge is not limited to, or even particularly focussed upon, the possible impact of DIR on association but, rather, on the lawfulness of the entire system.

36. Plainly the IEP policy is grounded in rule 6, but the DIR system has no basis in the rules at all. Stripped of a lot of elaboration and detail, the essential submission of Mr Hugh Southey, on behalf of the claimant, is that rules 44 – 66, under the heading "Discipline and Control", are exhaustive of the categories of offences against discipline and of the lawful methods and procedure for imposing punishment; and that the DIR system at Wetherby is an unauthorised, unlawful system which lacks the safeguards which the rules and section 47(2) of the Act itself require; is arbitrary; and is procedurally objectionable.

37. On behalf of the Secretary of State, Mr Strachan submits that the DIR system is in accordance with rule 6. He submits that the rules are not exhaustive as to procedure and that the DIR system provides an adequately safeguarded, swift, summary procedure whereby officers of junior rank can deal with relatively minor matters (which may include, but are not limited to, an offence against discipline under rule 55) without resort to the formal charging procedure under rule 58, provided always that the trainee consents.

38. Mr Strachan stresses in particular the requirement always of consent and submits, in the words of paragraph 69 of his written skeleton argument, that "Contrary to the claimant's assertion, the DIR process does not involve the imposition of penalties, as the process is consensual." He submits that the DIR system falls squarely within the second box in the grid in paragraph 7.2 of the Youth Justice Board Rewards and Sanctions Systems Guidance (see paragraph 29 above) and fulfils the aims of paragraph 7.3 of that guidance, namely enabling staff to respond immediately to unacceptable behaviour by applying an immediate and limited sanction (see paragraph 31 above).

39. The starting point of any consideration has to be section 47 of the Prison Act 1952. Section 47(1) employs the word "may", not "shall". Subsection (1), when read alone, thus empowers or enables the Secretary of State to make rules, but does not require that he does do so. In my view, however, the section as a whole clearly contemplates that the Secretary of State will in fact make, as he has done, rules under that section. There is considerable detailed provision in subsections (2) – (5) as to what rules made under section 47 shall, or may provide; and Parliament cannot have enacted so important a rule-making power, and with such detail, without expecting and intending that it would be exercised. Further, in relation to those subsections (which include subsection (2)) which employ the word "shall" ("shall make provision", "shall provide") the clear intention and effect is, in my view, that the Secretary of State must make rules so as to make provision, or provide, for the matters referred to in those subsections.

40. Section 47(1) itself clearly contains two limbs. The first limb is rules "for the regulation and management of prisons [etc.]". The second limb is rules "for the classification ….. discipline and control of persons detained therein". The first limb of section 47(1) could scarcely intend that rules made by the Secretary of State are exhaustive of all matters of "regulation and management." The word "management", in particular, is very wide and there must be matters of management which may lawfully be prescribed at a local level outside the provisions of the rules, provided they do not conflict with any express provision of the rules.

41. It does not necessarily follow, however, that rules made in relation to the matters more precisely specified in the second limb of section 47(1) are not exhaustive.

42. The precise construction of the superficially straightforward subsection (2) is not easy. In my view the words "under the rules" where they appear in subsection (2) qualify both the word "charged" and the word "offence". The importance of "a proper opportunity of presenting his case" is such that there must be a prescribed and identifiable "charge …. under the rules" as well as an identifiable "offence under the rules" so that it is clear whether or not the subsection, and rules made under it, have been triggered. In my view, section 47(2) accordingly requires that rules make provision, cumulatively, for (i) a prescribed and identifiable process of charge, for (ii) a prescribed and identified offence, with (iii) a prescribed proper opportunity for a person charged to present his case.

43. Turning from the Act to the rules, rule 6 requires the establishment of systems of privileges (which clearly include loss of privileges). It is quite clear, however, that the DIR system is not itself a system of privileges, which is provided at Wetherby by the IEP policy.

44. The DIR system is described by the relatively anodyne title "incident reports", which suggests that it is no more than a matter of "reporting" and the keeping of a log or record of reports. The system and document uses the language of "award" or "awards". In my view, however, it is clearly a system of punishment for offending. The first or lowest level of "award" may be no more than a "caution". But subsequent or higher awards comprise extra work, loss of association, loss of dining and loss of television. "Extra work" is one of the "punishments" prescribed by rule 60 which the governor may impose under rule 60(1)(d). Loss of Association and (in cell) television are both losses of defined "privileges" under the IEP policy and, accordingly, amount to a punishment which the governor may impose under rule 60(1)(b) ("forfeiture for a period … of any of the privileges under rule 6"). In my view the system clearly results, or may result, in the reality of punishment which cannot be masked by the language or fig leaf of "award".

45. Further, a number of the listed types of "incident" numbered as 1 – 14 on pages 4, 5 and 9 of the DIR document clearly constitute "offences against discipline" as listed in rule 55 (namely attending wrong classroom/workroom; damaging prison property; racist comments; refusal to work; threatening behaviour; and verbal abuse, which respectively fall within paragraphs (20), (18), (23), (24), (23) and (22) of rule 55). Other listed "incidents", such as bed-pack not made; giving false information during registration process; incorrect dress; misuse of cell bell; shout out of window or cell, are not expressly listed or described in rule 55, but may fall within the offences of "disobeys any lawful order" (paragraph (25)) or "disobeys or fails to comply with any rule or regulation applying to him" (paragraph (26)).

46. (Listed incident number 15 is "miscellaneous" which, in my view, is so vague and arbitrary as to be patently unlawful. It has the effect that <u>any</u> "incident" may be the subject of a DIR, and punishment (an "award") if the officer characterises it as an incident within the system and the trainee consents. This, in my view, gives rise to lawless and arbitrary punishment which is not saved by the element of consent. The remedy for that, however, could simply be to delete the category of "miscellaneous"

from the lists on pages 4, 5 and 9 of the document. It does not go to the fundamental lawfulness of the whole system.)

47. In short, the system provides for the punishment of conduct which is, or includes, "offences against discipline" as prescribed in rule 55 and is, as I have said, a system of punishment for offending.

48. The system appears superficially to avoid discretion, rather as does an automatic prescribed points system. One of the expressed aims of the system is to "ensure [that] sanctions are consistent", and the nature and severity of the award appears to follow automatically according to whether it is first, second, third, fourth or fifth. In practice, however, there is a discretion in the application of the system: see the paragraph under "Exceptions" on page 6 of the DIR document: "There is an exception to the rule of a Caution. If the young person is very abusive to staff and threatening and it is his first offence, they [sic] can be placed onto the next stage of the DIR process and given an appropriate award …. Staff must exercise their common sense in these circumstances." Further, Mr Borthwick says at paragraph 8 of his first witness statement (quoted in paragraph 9 above): "However, the award for any particular incident will depend on the seriousness of the incident."

49. I have already explained in paragraph 42 above that section 47(2) requires a prescribed and identifiable process of charge for a prescribed and identified offence with a proper opportunity for the person charged to present his case. Rule 55 prescribes and identifies the offences. Rule 58 prescribes and identifies the process of charge. Rule 59 prescribes the rights of inmates charged and the process and opportunity of presenting the inmate's own case.

50. The language of section 47(2) and rules 58 and 59 all raise or beg the question what is meant by "charged" or "to be charged". The word "charged" is not defined in either the Act or the rules. Rule 58(1) refers to the charge being "laid" ("…the charge shall be laid...") which clearly connotes some form of document. On behalf of the Secretary of State, Mr Strachan submits that the DIR system does not involve any document in the nature of a "charge" which is "laid" and, accordingly, that it is simply outside the scope of rules 58 and 59; or that those rules are satisfied through consent. On behalf of the claimant, Mr Southey submits that once the point is reached when a prison officer is asserting, alleging or accusing that a trainee has committed an "incident", at any rate if it amounts to an offence against discipline under rule 55 of the rules, then he is charging such an offence and must do so with the formality that rule 58 requires and with the disciplinary inquiry which then ensues, including the rights of, and protection for, the inmate under rule 59.

51. The overarching submission of Mr Strachan is that the required and fundamental element of consent takes the DIR system outside those rules, or alternatively those rules are satisfied through consent. He bolstered that submission by reference to the words "shall seek …. to enlist their [inmates'] willing co-operation" where they appear in rule 44(4). In my view those words in that rule mean no more than that officers shall seek by their own example and leadership to get inmates to co-operate willingly and voluntarily, and not unwillingly, reluctantly or by coercion. Although the use of example and leadership is a very important target and principle indeed, the words where used in the context of rule 44(4) can scarcely underpin an entire disciplinary and sanctions system.

52. I simply reject that the system can be saved by the supposed element of consent; and I reject the proposition in paragraph 69 of Mr Strachan's skeleton argument (see paragraph 38 above) that because "the process is consensual" the system "does not involve the imposition of penalties". Except where the rights of prisoners, or trainees, are expressly restricted or curtailed by statute, rules or by necessary implication from the fact of lawful detention, prisoners or trainees retain all their civil rights; see *Raymond v Honey* [1983] AC1 at 10G and 14F. In civilian life, offences cannot be created simply by consent between the accuser and the accused. There may of course be a plea of guilty which admits both the facts and that they amount to an offence; but that is after, not before or in substitution for, charge. In civilian life, sentence or punishments cannot be imposed or accepted simply by consent save within clearly prescribed statutory frameworks (such as fixed penalties for motoring offences).

53. The DIR system permits the most junior rank of uniformed officer to be both the witness and accuser, in some situations also the "victim" (e.g. if the inmate is abusive or threatening to the officer), and in some situations the arbitrator of the punishment. The rules clearly require inquiry by the governor or, in the most serious cases, the adjudicator (an approved District Judge (Magistrates' Courts) or deputy such judge). I understand that for disciplinary inquiries at Wetherby "governor" extends to all officers there of "governor grade". (This may be as a result of the terms of their appointment, or of delegation under rule 85, although this was not considered at the hearing.) Mr Borthwick told me that at Wetherby there are one governing governor, one deputy governor and eight operational managers (including himself) of governor grade, making a total of ten who may exercise disciplinary powers, conduct inquiries, and impose punishment under rules 58 – 60. Beneath those ten are ten principal officers (the highest uniformed grade), thirty four senior officers, and about 180 officers.

54. The danger of the system is, in my view, obvious. I hesitate to give any weight to the description given by an undoubtedly awkward and rebellious trouble maker, as the claimant clearly was at Wetherby; but the perception which he describes in paragraphs 10 and 12 of his first statement, quoted at paragraph 10 above, rings true. Whatever the reality, it is very understandable that a trainee may feel that if he does not agree to a DIR the matter will be reported to, and dealt with at, a higher level and a longer or more severe penalty result. In an environment of such power imbalance as exists between a trainee and an officer, the safeguard of consent is, in my view, illusory. I agree with the following passage at paragraph 3.49.4 of Mr Southey's written skeleton argument: "… detainees who are the subject of disciplinary procedures must enjoy a minimum level of procedural fairness. There is an obvious concern that the system of DIRs will deny detainees procedural fairness. For example, DIRs do not require any level of impartiality and can be given out by junior staff who participated in or witnessed the incident. There is a danger that junior staff will put pressure on detainees to accept a DIR by threatening more severe penalties if the matter is dealt with as a disciplinary offence. That is presumably why the YOI rules limit the persons who can impose penalties to governors or independent adjudicators."

55. For these reasons I am satisfied, in summary, that the DIR system as prescribed in the document and operated at Wetherby is unlawful because (i) it is ultra vires the Act

and the rules; (ii) it is actually or potentially arbitrary in the characterisation of offences; and (iii) it lacks minimum essential safeguards for the imposition of punishment.

56. I wish to make clear at once that these conclusions relate and refer specifically to the system at Wetherby as to which I have evidence. If and insofar as there may be similar systems in place in other establishments, I have no information as to the detail of them and say nothing directly about them although they may require to be reappraised in the light of this judgment.

57. Further, it is fundamental to this judgment that the DIR system is unlawful being outside the scope of the rules. I do not in any way preclude that the Secretary of State may make rules, with due compliance with section 47(2), which provide a relatively summary but properly safeguarded means of punishing relatively minor but properly described offences.

58. The above conclusions in no way depend upon the fact that one form or element of award or punishment under the DIR system may be loss of association. Insofar as Mr Southey relies upon Article 8 of the European Convention of Human Rights, he does so firmly and specifically on the basis of loss of association, and I accordingly defer brief consideration of Article 8 to paragraphs 77 – 79 below under the topic of the IEP policy where it is more centrally engaged.

59. In reaching these conclusions I have not at all overlooked the Youth Justice Board "Rewards and Sanctions Systems Guidance" document already referred to in paragraphs 29 to 32 above. It is not entirely clear how far that document is addressing a Privileges system as required by rule 6 and provided at Wetherby by the IEP policy; and how far the document is recommending a disciplinary system including punishments going beyond the withdrawal of privileges. I accept that the document refers throughout to "sanctions" and that the second box in the grid in paragraph 7.2 speaks of "loss of rewards" and "imposition of…sanctions". Paragraph 7.2 seems to contemplate a "sanctions system" outside "the formal disciplinary system", and paragraph 7.3 refers to the need to be able to "apply immediate and limited sanction." As already noted, the list of ascending "sanctions" in Appendix 5 includes "additional chores" (effectively, extra work) above and before "formal disciplinary procedures".

60. However, no matter how eminent its source, a guidance document cannot make lawful that which is unlawful. If the aims of that guidance document are unlawful but desirable, then they may be achieved by suitable rules as already noted.

61. Nor do I overlook the Recommendation of the Committee of Ministers to member states on the European Rules for juvenile offenders. Mr Strachan particularly emphasised rule 94.1, quoted in paragraph 34 above, which recommends that "disciplinary procedures shall be mechanisms of last resort. Restorative conflict resolution …. shall be given priority …." In my view, however, the DIR system cannot be characterised simply as "restorative conflict resolution", although it makes reference to restorative justice on page 7 and contains elements of restorative justice within it. Further, rule 94.3 makes plain that "national law", not local institution systems, "shall determine the acts or omissions that constitute disciplinary offences,

the procedures to be followed at disciplinary hearings …. the authority competent to impose …. punishment ….” The DIR system is not made by national law at all.

62. I do not in any sense apply the European Rules, which are not part of the domestic law, but they cannot, and do not, diminish my opinion that the DIR system is unlawful under domestic law.

The Incentives and Earned Privileges Policy

63. Clearly, rule 6 not merely permits but requires (“shall”) systems of privileges to be established in every YOI. They must be approved by the Secretary of State and, although the point was not touched on in argument, I assume the one at Wetherby has been. The scheme of rule 6, when read as a whole, is clearly that privileges may be both granted and forfeited, lost, or not “continue to be granted” (rules 6(4) and (5)).

64. It is crystal clear, too, that one form of privilege in a system of privileges may be “arrangements under which inmates may be allowed time outside the cells and in association with one another, in excess of the minimum time which …. is otherwise allowed to inmates at the young offender institution for this purpose.” (rule 6(2)). In short, “extra association”. In considering rule 6(2) it should be noted that it clearly refers to “time outside the cells” *and* “in association with one another”, with the focus clearly on the element of association. Under the rule, the “excess” or extra association is measured against that which is otherwise allowed at *the* YOI in question.

65. Rule 6(2) expressly refers to “in excess of the *minimum* time which…is otherwise allowed ….” Mr Southey strongly fastens on the word “minimum” and submits that there must always be a “minimum”, which is more than zero, and below which association cannot be reduced under the system of privileges, including withdrawal of privileges.

66. It is clear that a system of privileges, including their loss, is an important mechanism in any prison or YOI for encouraging positive behaviour and discouraging negative behaviour, and the importance is not in any way put in issue by or on behalf of the claimant. The issue relates solely to the element of loss of association.

67. There is frequent reference to “association” in the rules but the term is nowhere defined in them. It is clear from rule 49 that association is important. Even if the governor removes an inmate from association under that rule, the period cannot exceed 72 hours without the authority of the Secretary of State. It is clear from rule 49(3) that removal from association may impact on health.

68. Mr Southey submits that association must be distinguished from, and is separate and distinct from, “regime activities”. Reference to rule 37(1) indicates that education, training courses, work and physical education are all regime activities, and they are ones which, because of their importance, are ring-fenced from removal as punishment (see rule 60(1)(c): “…. other than education, training courses, work and physical education …”). Since education, training courses, work and physical education cannot be removed, they are not a privilege within the scope of rule 6; and so, submits Mr Southey, the association contemplated by rule 6(2) must be association separate

and distinct from any social interaction which may occur during education, training courses, work and physical education.

69. Mr Southey relies also on paragraph 6.3 of Prison Service Order number 4950, quoted in paragraph 25 above. This refers to opportunities to develop social skills and interests "through the core day learning and skills programme" (viz the protected regime activities) "*and* by providing a range of recreational opportunities including association …." (my emphasis). Mr Southey submits that that indicates that association is an aspect of recreational opportunities rather than the core, regime programme. I, for my part, do not read paragraph 6.3 that way. Whilst the recreational opportunities should include association, that does not preclude that there is association during the core or regime activities.

70. Mr Southey refers, too, to paragraph 80.1 of the European Rules which refers to "…. as many hours a day...as are necessary for an adequate level of social interaction. Such a period shall be preferably at least eight hours a day." If and insofar as "an adequate level of social interaction" is considered to be a reference to association, then the European rule, in the context of the section headed "E.10 Regime activities" read as a whole, seems to me to contemplate that social interaction can indeed occur during the regime activities themselves. Rule 80.1 appears under the heading "Regime activities", and the rules could scarcely contemplate that there be at least eight hours a day of social interaction outside the sleeping accommodation in addition to the time required for regime activities.

71. On behalf of the Secretary of State, Mr Strachan submits that the whole argument is semantic. The only form of association which is touched or affected by the IEP policy is the period of "free time" which takes place at Wetherby between 6 and 8.15pm on alternate days and is labelled "Association" but could be labelled "free time", or "leisure time" or some similar word or phrase. He submits at paragraph 42 of his written skeleton argument that "The claimant's claim depends upon an arbitrary and unjustified definition of the term "association" as one which does not involve any other activity (such as eating, playing games together, working or vocational training ….). There is no basis for this in rule 6.2 itself, nor in policy." That submission echoes and reflects the comment of Mr Borthwick in paragraph 7 of his second statement, quoted at paragraph 18 above: "…a more common sense view has to be taken of the association that occurs."

72. I bear in mind the evidence and perception of the claimant himself, who has direct experience of the system, and in particular the paragraphs from his third witness statement quoted at paragraph 19 above. There is an obvious difference between the purely "free time" in the privilege period known as "Association", and time spent on regime and other activities. It does not follow, however, that there is no element of association or social interaction during those activities.

73. I firmly eschew any attempt to define "association" which is not defined in the rules or any other document to which I have been referred. Plainly, however, it conveys the idea of being in the company of, and interacting with, fellow human beings. As such, it is of very great importance, not least, but especially, to those who are detained and deprived of other freedoms. A human being is a social animal, and association is of especial importance to the normal and healthy development of young people.

74. In my view, however, the Secretary of State, and Wetherby, are on this issue clearly right. The very fact that rule 49 treats "removal from association" as a serious matter indicates that it is different from merely a session of free time between 6 and 8.15pm. The rules cannot intend that the authority of the Secretary of State is required every time such periods of free time are removed for more than 72 hours. Rule 49 is indicative that removal of association (whether generally or for particular purposes) involves that the inmate does not come into contact with, or interact with, other inmates at all. In my view rule 6(2) must be read in a similar way. The reference to "…the minimum time … which … is otherwise allowed … for this purpose …." is a reference to the minimum time allowed outside the cells and in contact with, and interacting with, other inmates.

75. In ordinary language people are in association with each other if they are eating together, standing in a food queue together, playing games or exercising together, or working together and not in isolation: viz during most, if not all, regime activities.

76. In my view rule 6(2) precisely contemplates that there may be an extra period of free time, which Wetherby call "Association", which may be earned or lost as a privilege and the IEP policy is, in the respect under challenge in this case, entirely lawful.

Article 8

77. If association means any contact or social interaction at all with other inmates, then I readily accept, for the purpose of this judgment, that Article 8 is engaged if association is removed. (I would thus accept that removal of association of the kind contemplated by rule 49 clearly engages Article 8.) In *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148 Lord Bingham of Cornhill said at paragraph 32: "It is obvious that seclusion, improperly used, may violate a patient's Article 8 rights …." and the same is no less true of an inmate. In *R (BP) v The Secretary of State for the Home Department* [2003] EWHC Admin 1963, Moses J. clearly considered that segregation of a trainee at a YOI engaged Article 8, although he rejected that there had been a breach on the facts of that case (see paragraphs 28 – 34, and the references to the fact of breach or violation in paragraphs 30 and 34).

78. However I am quite clear that neither the IEP policy, nor indeed the DIR system, involves loss of association in that sense. It involves no more than loss of the privilege of participating in the sessions of free time called "Association". That privilege does not engage Article 8. If, alternatively, it does, then interference with the right to respect under Article 8(1) is amply justified by, and proportionate to, the purpose of the system of privileges and the IEP policy.

79. I accordingly reject that the impact of the IEP policy upon the claimant involved any breach or violation of his rights under Article 8.

Outcome

80. In the result, I reject and dismiss the claim for judicial review insofar as it challenges the IEP policy at Wetherby. I allow the claim insofar as it challenges the DIR system contained and described in the document "Revised DIR Process May 2008" now at bundle tab 10, and I declare that that system is unlawful.

81. The Secretary of State and HM YOI Wetherby (and HM Prison Service if there are similar systems in operation elsewhere) will need to consider and take stock of this judgment and, of course, to act upon it. In my view it is unnecessary, and a recipe for chaos, here and now to quash the DIR system, and I decline to do so.