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The Lord Chancellor and the Secretary of State for Justice
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By email only

17 April 2020

Dear Sir/Madam

Our clients: Howard League for Penal Reform and Prison Reform Trust
Your client: Lord Chancellor
Letter before claim: pre-action protocol for judicial review

1. We act for the Howard League for Penal Reform and the Prison Reform Trust. These are the two leading penal reform charitable organisations in the UK.
2. We are instructed by our clients in relation to a proposed application for judicial review in relation to the Secretary of State's response to the Covid-19 pandemic as it affects prisoners, and in particular his response to the obvious need (which he acknowledges) to substantially reduce the prison population in order to save lives and avoid a public health catastrophe both within prisons and beyond. The announcements of 31 March 2020 and 4 April 2020, alongside various other public statements, acknowledge the need to reduce the number of people in prison at this time but the rate of releases has been too slow and too limited to make any substantial difference to the prison population and the plans as we understand them are incapable of achieving what the Secretary of State has publicly acknowledged is required. The current prison population is some 81,500¹. Almost 70 per cent of prisons in England and Wales are overcrowded (84 of the 121 prisons), with nearly 18,700 people held in overcrowded accommodation—more than a fifth of the prison population.² The risk the Coronavirus poses both within prisons and for infecting the wider population is obvious. The Secretary of State has recognised the

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¹ [Ministry of Justice \(2020\) Population and Capacity Briefing for Friday 17 April 2020, London: Ministry of Justice](https://www.gov.uk/government/statistics/prison-population-figures-2020) <https://www.gov.uk/government/statistics/prison-population-figures-2020>

² Table 2.2, 2.3 and 2.4, Ministry of Justice (2019) Annual HM Prison and Probation Service digest: 2018 to 2019, London: Ministry of Justice <https://www.gov.uk/government/statistics/hmpps-annual-digest-2018-to-2019>

obvious need to reduce the prison population. Yet, the measures he has taken to date which have been described as multifaceted,³ have had, and will have, a manifestly insufficient impact on the population as a whole or on many of the most overcrowded prisons.

3. We consider that to be unlawful for the following reasons:
 - (i) It is not a rational response to a crisis that requires a substantial reduction in the prison population to avoid significant loss of life to take steps that will have little substantial impact on that population (both in terms of the overall population and the population of overcrowded prisons).
 - (ii) the Secretary of State has stated publicly that he will take steps to reduce the prison population so as to lower the risks to mass infection and loss of life within the prison estate. It is a breach of legitimate expectation to have failed to take steps which have any realistic prospect of doing so.
 - (iii) Prison Rule 9A(1) authorises the Secretary of State to make a direction describing specified prisoners who can be released in response to the Coronavirus. The purpose of the provision is to enable the Secretary of State to make substantial reductions to the prison population across the prison estate and in individual prisons in order to reduce the risk of significant numbers of prisoners being infected. It runs counter to and undermines that purpose to have failed to take measures which will have any substantial effect on the prison population.
 - (iv) The current response is contrary to the common law duty and human rights duties to protect life and health, especially of those most vulnerable to the disease.
 - (v) The failure to publish the operational details of the release schemes is contrary to the legal requirements of fairness and transparency.
4. For the avoidance of doubt, we confirm that this letter should be treated as a formal letter before claim in accordance with the pre-action protocol on judicial review. We also wish to make it clear from the outset that we will be seeking a Cost Capping Order (“CCO”) on

³ See evidence of Lucy Frazer, 14 April 2020, Justice Committee, Q12: “we have a multifaceted approach to reducing the headroom in the estate. We have identified that we will be releasing up to 4,000 prisoners, but that is only one part of our strategy. Another part of our strategy is to increase headroom by bringing temporary accommodation on to existing prison sites, within the prison perimeters. We have already started that process, and some of those additional units are coming

behalf of our clients and so we will set out further details about them.

A. The Claimants

Howard League for Penal Reform

1 Ardleigh Road
London
N1 4HS

5. Founded in 1866, the Howard League is the oldest penal reform charity in the UK. It is a registered charity (charity no: 251926) and is constituted as a company limited by guarantee (company no. 898514). The Howard League has over 13,000 members, including prisoners and their families, lawyers, criminal justice professionals and academics. The Howard League has consultative status with both the United Nations and the Council of Europe. It is an independent charity and accepts no grant funding from the UK Government.
6. The Howard League campaigns for less crime, safer communities and fewer people in prison. It achieves these objectives through conducting and commissioning research and investigations aimed at revealing underlying problems and discovering new solutions to issues of public concern. The Howard League's objectives and principles underlie and inform the charity's parliamentary work, research, legal and participation work as well as its projects.
7. In addition to the policy and campaign work, the Howard League for Penal Reform provides the only legal service dedicated to representing children and young people (aged 21 and under) in custody. It has contracts with the Legal Aid Agency in crime (prison law and criminal appeals) and a civil legal aid contact in public law. The Howard League also runs a free advice line.

The Prison Reform Trust

15 Northburgh St,
London EC1V 0JR

8. The Prison Reform Trust (PRT) is an independent UK charity working to create a just, humane and effective penal system. PRT does this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform.
9. The Prison Reform Trust's main objectives are:

on stream already That will involve significant numbers as well—potentially around 2,000 spaces, in terms of headroom.”

- reducing unnecessary imprisonment and promoting community solutions to crime;
 - improving treatment and conditions for prisoners and their families; and
 - promoting equality and human rights in the justice system.
10. While often working alongside the Prison Service to effect reform and maintaining close links with government departments, to retain its independence PRT does not seek or accept Government funding. The structure and rigour of programmes are agreed with those trusts and foundations that generously fund the work. PRT has a strong track record, developed over nearly 40 years, of effecting change in policy and practice.

B. The Defendant

The Lord Chancellor and the Secretary of State for Justice
102 Petty France
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C. The details of the matter being challenged

11. The Howard League and Prison Reform Trust have raised their concerns about the potentially devastating impact of the Covid-19 pandemic on the prison population with you in extensive correspondence, both individually and jointly throughout March and April 2020. The correspondence and the replies to date are appended to this letter for ease of reference.
12. The Secretary of State has publicly accepted that the prison population will need to be reduced and a substantial number of prisoners will need to be released in order to save lives in response to the Covid-19 pandemic. This acceptance is demonstrated by the announcements of 31 March and 4 April 2020. It is also consistent with advice from Public Health England and the views of the Prison Governors' Association.
13. The Howard League and Prison Reform Trust consider, however, that the measures currently in place have not and cannot result in the reduction in the numbers of people detained in prison necessary to prevent a loss of life on a massive scale. As of 14 April 2020, just 18 people had been released under the schemes (that is 0.02% of the

prison population). Meanwhile, 16 people (13 prisoners and 3 members of staff) have already died as a result of Covid-19.

14. Our clients contend that the current response is unlawful for the reasons summarised at paragraph 3 above.

D. The issues: facts, law and grounds of challenge

Facts

15. The Covid-19 pandemic is now known to be in at least half our prisons.⁴ As of 17:00 on Wednesday 15 April 2020, 232 prisoners have tested positive for COVID-19 across 60 prisons; 96 prison staff have tested positive for COVID-19 across 38 prisons; and 7 Prisoner Escort and Custody Services (PECS) staff have tested positive for COVID-19. It was reported to the Justice Committee on 14 April 2020 that 13 prisoners and three prison officers have died.⁵ On the same day it was reported that, 6,268 staff were self-isolating.⁶ This figure represents over one quarter of the usual workforce according to latest data.⁷
16. The Howard League wrote to Secretary of State for Justice on 17 March 2020 setting out need to release prisoners urgently and suggesting a range of ways this could be achieved without the need for legislative change. The Prison Reform Trust wrote to the Prisons Minister on 18 March 2020, also outlining the need for a bold, pre-emptive response to the threat posed by Covid-19. The Prisons Minister responded to the Prison Reform Trust on 25 March 2020 describing a process of planning and monitoring, but not of action.
17. On 25 March 2020 the Prison Governor's Association called for a substantial number of prisoners to be released in response to the pandemic: "Government must look at early release schemes at speed for lower risk offenders" saying that this "will also help delay the spread of the virus through prisons, so from a health perspective there is an imperative".⁸
18. Our clients sent a joint letter to the Secretary of State on 27 March 2020 outlining their concerns about the unprecedented risk to life if

⁴ Ministry of Justice Covid-19 Stakeholder Update 14/04/2020

⁵ The transcript of the session reports that "after the meeting the Ministry of Justice clarified this figure, saying, that 12 prisoners and one member of staff had been confirmed as dying with coronavirus" <https://committees.parliament.uk/work/254/coronavirus-covid19-the-impact-on-prison-probation-and-court-systems/publications/oral-evidence/>

⁶ <https://committees.parliament.uk/work/254/coronavirus-covid19-the-impact-on-prison-probation-and-court-systems/publications/oral-evidence/>

⁷ <https://www.ethnicity-facts-figures.service.gov.uk/workforce-and-business/workforce-diversity/prison-officer-workforce/latest>

⁸ Prison Governors' Association (2020) Covid-19 <https://prison-governors-association.org.uk/prison-governors-association-covid-19/>

decisive action was not taken to release a substantial number of prisoners.

19. On 30 March 2020 the Secretary of State responded stating that a “number of options” were “under consideration to relieve pressure on the prison system”, “including potential releases” and noting that the current crisis is an “unprecedented challenge”.
20. On 30 March 2020, the Howard League and the Prison Reform Trust wrote to the Secretary of State again underlining the need for urgent action and seeking details of firm action.
21. In a letter dated 31 March 2020, the Secretary of State sent both organisations a further response, confirming that: “pregnant women, and those with their baby in custody, will be urgently considered for temporary release. This will be managed through Release on Temporary Licence (ROTL) on compassionate grounds, and will be subject to an individual risk assessment. We are actively, and urgently, considering whether to extend this to other groups most vulnerable to COVID-19 on health grounds as identified by the NHS. We are working closely with DWP, MHCLG and the NHS to make sure necessary support is in place, so that releases can be finalised at the earliest opportunity in all appropriate cases. We are progressing additional measures to mitigate the risks in custody and shield vulnerable individuals, including opportunities to provide additional capacity in the existing estate. We will shortly be providing further guidance to prisons on how they can apply effective shielding strategies in their establishments and manage their populations most effectively to mitigate the risks of large outbreaks. Further releases remain under urgent consideration. I would welcome further engagement with you as we continue to develop our approach to the challenges we face. I hope you will recognise the urgency with which we are responding to the situation, and our focus on protecting those most vulnerable to the risks posed by COVID-19.”
22. On 31 March 2020, the Secretary of State announced that pregnant women and mothers with babies in prison would be considered for temporary release: “Pregnant women in custody who do not pose a high risk of harm to the public will be temporarily released from prison within days to protect them and their unborn children from coronavirus.”⁹ On the same date, “Coronavirus: Interim CPS Charging

⁹ Ministry of Justice (2020) Pregnant prisoners to be temporarily released from custody https://www.gov.uk/government/news/pregnant-prisoners-to-be-temporarily-released-from-custody?utm_source=52002a9d-06fd-46ae-b5ea-cbbf4a513143&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

Protocol between the National Police Chiefs' Council and Crown Prosecution Service” was published.¹⁰

23. On 1 April 2020 the Howard League and the Prison Reform Trust welcomed this move but wrote to the Secretary of State again to urge the immediate further early release of prisoners in order to protect prisoners, staff and the wider public from coronavirus.¹¹ Our clients stressed that “the window of opportunity is closing – delay is now likely to be lethal for prisoners” and reminded you that “in these circumstances, failure to act is not only required on a humanitarian level but is required to comply with your legal obligations”. That letter set out the legal duties that applied in detail. It also enclosed a report by Professor Coker, Emeritus Professor of Public Health, London School of Hygiene & Tropical Medicine, which set out the up to date evidence concerning the nature, spread and transmission of Covid-19 as it applies to prisons.¹² His report states that the risk of exposure to the virus to prisoners and staff is “far, far greater” than the risks to individuals in the wider community.

24. The report by Professor Coker also outlines how, as large shared spaces, prisons act as “epidemiological pumps”, which can drive the spread of disease among the wider community. It also concludes that that social distancing and personal infection control measures are “almost impossible” in prisons and recommends that authorities “should consider alternative options to incarceration where feasible” (paragraphs 11.1 – 3):

“11.1 My view, based on the literature and my experience, is that prison should be a last resort only and that the risks posed to prisoners and staff are substantial and profound in terms of their health. Preventing entry into prison settings of COVID-19 is going to be extremely challenging, if not impossible. Control of an outbreak may, also, be all but impossible. Preventing transmission through social distancing or isolation in a prison-setting is probably not possible if it is to be implemented in a non-punitive manner. Prisoners who need not be incarcerated and who could conduct social distancing in the community under appropriate supervision would, logically, be following the Government’s recently published broader guidance on social distancing.

11.2 Maintaining such people in prison unnecessarily would be counter to that guidance, in my opinion. It would also be counter to

¹⁰ https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/Interim-CPS-Charging-Protocol-Covid-19-crisis-response.pdf

¹¹ Letter to Rt Hon Robert Buckland QC MP, Lord Chancellor and Secretary of State for Justice, on Covid-19

https://howardleague.org/wp-content/uploads/2020/04/020_04_01_corona_prisons_3.pdf

¹² https://howardleague.org/wp-content/uploads/2020/04/2020_04_01_COKER_Report_HL_PRT.pdf

the profound changes to people's lives that this pandemic necessitates, as articulated by the Prime Minister as he stepped up the Government's strategy to 'suppress' the virus rather than 'mitigate'. This shift in position drew upon the Scientific Advisory Group for Emergencies (SAGE) consensus on behavioural and social interventions published 16th March 2020.

11.3 In my opinion authorities should consider alternative options to incarceration where feasible that avoid congregate settings, where social distancing and isolation/quarantine are measures that are consistent with the most recent, March 20th 2020 guidelines for others in protecting public health."

25. At paragraph 14.1 of his report Professor Coker describes the rate at which the infection spreads and the need for urgent action to prevent the spread in prisons:

"This pandemic is the most serious public health crisis the world has faced in more than a generation. Case numbers are climbing exponentially around the world. Health systems are going to be stretched close to, or beyond, breaking point. Outbreaks in prisons are occurring. Time is of the utmost importance. This pandemic has a doubling time measured in days. Delays of 30 days or 60 days are an eternity when an epidemic is growing at this exponential rate. Prevention of outbreaks in prisons will always be easier than control of outbreaks."

26. Our clients' letter of 1 April 2020 summarised measures taken in a number of countries, including Northern Ireland¹³, France (since then it has been reported that almost 10,000 people have been released from prison in the last month)¹⁴ and the United States¹⁵ to release substantial numbers of prisoners in line with this advice and advice from international expert bodies including the United Nations High Commissioner for Human Rights¹⁶ and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.¹⁷ International advice has continued to strongly advocate for the release of people from prison in response to the virus: see, for

¹³ <https://www.irishnews.com/coronavirus/2020/03/24/news/prisoners-to-be-released-early-in-northern-ireland-1876325/>

¹⁴ <http://www.justice.gouv.fr/la-garde-des-sceaux-10016/covid-19-mesure-daccompagnement-penitentiaire-33010.html>; https://larochesuryon.maville.com/actu/actudet_-coronavirus.-dans-les-prisons-francaises-pres-de-10-000-detenus-de-moins-en-un-mois_54135-4071762_actu.Htm

¹⁵ See for example, California, which has released around 3,500 people from prison <https://www.latimes.com/california/story/2020-03-31/coronavirus-california-release-3500-inmates-prisons>

¹⁶

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E>

¹⁷

<https://rm.coe.int/16809cfa4b>

example, World Health Organisation advice¹⁸ and the Statement from the UN Committee on the Rights of the Child.¹⁹

27. In the same letter, our clients urged the Secretary of State to publish the scientific and medical advice which he had received, as the government has done in relation to many other controversial and difficult matters in recent weeks, noting that they understood that advice on the impact of COVID-19 within the prison system had been presented to the Prime Minister. They asked the Secretary of State to confirm this and publish the advice.
28. On 4 April 2020 the Secretary of State announced that “risk-assessed prisoners who are within two months of their release date will be temporarily released from jail, as part of the national plan to protect the NHS and save lives.”²⁰ The announcement stated that action was being taken “to avoid thousands of prisoners becoming infected”. The announcement noted that “France has announced the release of some 5,000 prisoners, while in the US state of California alone, 3,500 are being granted early release.” Media reports on the same day stated that “as many as 4,000 prisoners in England and Wales are to be temporarily released from jail in an effort to try and control the spread of coronavirus, the government has announced”²¹ and “up to 4,000 prisoners in England and Wales are to be released in an effort to control the spread of coronavirus, the Ministry of Justice has said.”²²
29. On 7 April 2020, the Secretary of State gave evidence to the Justice Committee. The Prison Governors’ Association provided written evidence to the Committee which stated:²³

“The Prison Governors’ Association (PGA) remains concerned about the ability to safeguard and save lives in the prison setting.

Last week, HMPPS published guidance in line with instructions from Government on cohorting prisoners to delay the spread of the virus. These included creating three distinct units for groups of prisoners.

¹⁸ <http://www.euro.who.int/en/health-topics/health-determinants/prisons-and-health/focus-areas/prevention-and-control-of-covid-19-in-prisons-and-other-places-of-detention>

¹⁹ https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/1_Global/INT_CRC_STA_9095_E.pdf

²⁰ Ministry of Justice (2020) Measures announced to protect NHS from coronavirus risk in prisons https://www.gov.uk/government/news/measures-announced-to-protect-nhs-from-coronavirus-risk-in-prisons?utm_source=244b0709-9e03-4ec5-97d9-a629f13045a2&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

²¹ <https://www.theguardian.com/society/2020/apr/04/up-to-4000-inmates-to-be-temporarily-released-in-england-and-wales>

²² <https://www.bbc.co.uk/news/uk-52165919>

²³ <https://prison-governors-association.org.uk/prison-governors-association-pga-evidence-to-justice-committee-on-covid-19/>

7-Day Isolation Unit – This unit will house those prisoners presenting with the symptoms of the virus.

14-Day Isolation Unit – This unit will house those prisoners not displaying symptoms but who may have been exposed and those new into the prison.

Shielding Unit – This unit will house those extremely vulnerable to the virus who could lose their life if infected.

The PGA does not disagree with this position, but we have significant concerns in the ability to achieve this if prisons are full and cells remain doubled. Our members have reported to the PGA National Executive Committee that the challenge is immense. They have also reported to us that Public Health England and HMPPS require a reduction of 15,000 prisoners in order to truly safeguard prisoners and staff.

The announcement on Saturday that early release would be granted for those with fewer than two months to serve while also meeting a strict criteria is not as attractive as it sounds. 4,000 prisoners would be eligible, but following application of the stringent criteria and risk assessment, the number eligible would be far less, possibly as low as 2,000. This is woefully short of the alleged 15,000 required.

The PGA does not understand why there is a need for tagging of early released prisoners. At their normal release date, which would be no more than two months after this early release date, they would not be tagged. The country is in a semi-lockdown scenario and crime is falling. It seems that this is unnecessary bureaucracy which will build in delay at a time when speed and efficiency is of the essence and saving life is the purpose. We also understand from members that capacity in the tagging contract can only cope with around 2,000 extra tags.

There are other possibilities to reduce population. We already have many risk assessed Category D prisoners out in the community released on temporary licence (ROTL). Could a less strict criteria be applied to them and a significant number ROTL'd until the level of risk from the virus allows them to return to their establishment? This would allow those Category D's in Category B & C conditions, following virus testing, to be transferred into the spaces created in Category D prisons. Reducing numbers in Category B & C prisons would support the cohorting initiatives.

This is about saving the lives of staff and prisoners and brave decisions must be made to achieve this.

HMP Pentonville is an example of a prison that has 786 men in overcrowded conditions. A reduction of 393 prisoners is required to reduce its overcrowding.”

30. The figure of up to 4,000 releases in respect of the 4 April 2020 announcement was confirmed in evidence to the Justice Committee by both Jo Farrar and the Secretary of State on 7 April 2020. In evidence, Jo Farrar accepted that on present accommodation levels, between 10,000 and 15,000 would have to be released to achieve single cell occupancy. It was also reported that 6 women out of 70 in the cohort of pregnant women and mothers had been released and that the figure of 4,000 was a “rolling” figure and it was “difficult to be precise or to estimate ahead”. Jo Farrar also noted in her evidence that “fewer” children would be eligible under the temporary release scheme. The Secretary of State also made it clear to the Committee that he was satisfied that he had a range of existing powers that would enable him to release other people beyond the two categories announced. It was noted by Jo Farrar that “the strategy was a mixed plan of release and extra accommodation and more staffing.” Jo Farrar also confirmed that the directions relating the criteria for temporary release “will be published.”²⁴ However, at time of writing, these have not been published.
31. On 8 April 2020, the Howard League and the Prison Reform Trust sent a further letter urging ministers to move further and faster to reduce the prison population and avoid “an intolerable human cost in terms of the lives of both staff and prisoners”.²⁵ Our clients warned that “it has rapidly become apparent as the detail of the scheme has emerged that it represents a small step, likely to produce a reduction in prison numbers far below the figure of 4,000 eligible prisoners which has been made public, and wholly inadequate in the context of the 15,000 reduction which the Prison Governors’ Association has made clear represents the advice you have received from public health experts.” It was also noted that “as presently drawn the temporary release arrangements will only affect a small number of those who would not be eligible for home detention curfew in any event. At present it would appear that only those serving less than four months would be able to gain any real benefit from the temporary release provisions that would not be available under the existing home detention curfew scheme, and then only for very short periods of time.”
32. A week later, in evidence to the Justice Committee, it was reported that just 14 women and four men had been released in accordance with the

²⁴ Summarised note of the meeting with the Lord Chancellor from 7 April 2020
<https://committees.parliament.uk/committee/102/justice-committee/news/145866/summarised-note-of-the-meeting-with-the-lord-chancellor-from-7-april/>

²⁵ Letter to Rt Hon Robert Buckland QC MP, Lord Chancellor and Secretary of State for Justice on Covid-19 and prisons: the need for urgent further action

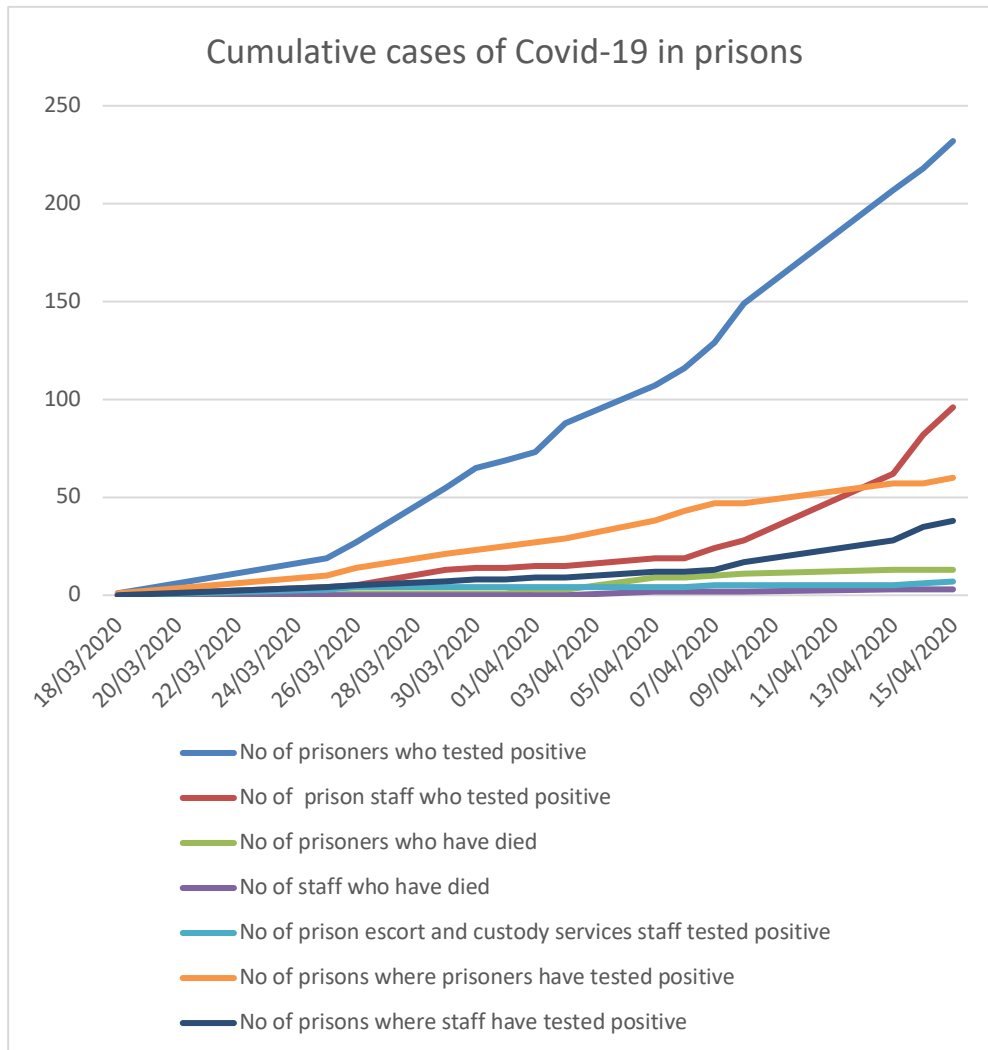
announcements from 31 March 2020 and 4 April 2020.²⁶ The Prisons Minister also provided the following update as to the “multifaceted approach to reducing the headroom in the estate”:

“We have identified that we will be releasing up to 4,000 prisoners, but that is only one part of our strategy. Another part of our strategy is to increase headroom by bringing temporary accommodation on to existing prison sites, within the prison perimeters. We have already started that process, and some of those additional units are coming on stream already. That will involve significant numbers as well—potentially around 2,000 spaces, in terms of headroom.”

33. However, the same evidence session, it was made clear that the strategies of shielding and co-horting could not be guaranteed: Jo Farrar stated “As the Minister said, our policy is to work prison by prison to make sure that we isolate and shield, and if they have symptoms maybe put people together in a unit. We try not to place people who are symptom-free with people who have symptoms. Obviously, with a fast-spreading virus, it is hard to guarantee that that will always be the case.”
34. No response has been received to the letter of 8 April 2020. At time of writing, neither the advice from Public Health England as to how to manage and prevent the spread of the virus in prisons nor the directions as to how the temporary release arrangements will work have been published.
35. Current data from the Ministry of Justice shows that the infection is increasing rapidly. However, the data only shows the numbers of people who have tested positive and it is not known how many prisoners or staff members are tested or what circumstances trigger a test. It is noted that, as Professor Coker states in his report, fatality rates can be as high as 12 per cent and that men, who make up 96 per cent of the prison population, are twice as likely to die as women.

<https://howardleague.org/wp-content/uploads/2020/04/Letter-to-Robert-Buckland-08.04.20.pdf>

²⁶ <https://committees.parliament.uk/work/254/coronavirus-covid19-the-impact-on-prison-probation-and-court-systems/publications/>



Law

36. The following are well-established public law principles.

37. First, a decision which does “not add up – in which, in other words, there is an error of reasoning which robs the decision of logic” will be “irrational” and hence unlawful (per Sedley LJ, *R v Parliamentary Commissioner for Administration ex parte Balchin and others* [1998] 1 PLR 1).

38. Second, decision-makers can create a “legitimate expectation” by statements they give as to the action they intend to take. Unless there is a good reason to frustrate that expectation, it must be complied with as a matter of “good public administration” pursuant to which public bodies should not be able to resile “at whim” from undertakings they give. The law on “legitimate expectation” was considered by the Supreme Court in *re Geraldine Finucane* [2019] 3 All ER 191. Lord Kerr, with whom the majority agreed, cited with approval, at §59, the

statement of principle of Laws LJ in *Nadarajah v SSHD* [2005] EWCA Civ 1363, at §58:

"[Legitimate expectation] is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. In my judgment this is a legal standard which, although not found in terms in the European Convention on Human Rights, takes its place alongside such rights as fair trial, and no punishment without law. That being so there is every reason to articulate the limits of this requirement - to describe what may count as good reason to depart from it - as we have come to articulate the limits of other constitutional principles overtly found in the European Convention. Accordingly a public body's promise or practice as to future conduct may only be denied, and thus the standard I have expressed may only be departed from, in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances."

39. Having summarised the relevant authorities in *Finucane*, Lord Kerr went on to state that, "[f]rom these authorities it can be deduced that where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so. The court is the arbiter of fairness in this context" [at §62]. He continued, "a matter sounding on the question of fairness is whether the alteration in policy frustrates any reliance which the person or group has placed on it." [§63].
40. Third, it is well established that where a statutory power is conferred on a decision maker it must be used "to promote the policy and objects" of the statute that conferred the power and not "to thwart or run counter to the policy and objects" (see *Padfield v Minister of Agriculture, Fisheries & Food* [1968] AC 997 at 1030_).
41. Prison Rule 9A(1) was created by Statutory Instrument 400/2020, The Prison and Young Offender Institution (Coronavirus) (Amendment) Rules 2020. It empowers the Secretary of State to make a direction describing specified prisoners who can be released in response to the Coronavirus. It provides:

“Coronavirus Restricted Temporary Release

9A.

(1) During a transmission control period, the Secretary of State may, in accordance with the other provisions of this rule, temporarily release a prisoner falling within a description specified in a direction made under this rule.

(2) A prisoner may only be released under this rule (subject to paragraph (3)) if—

(a) a transmission control period is in effect; and

(b) the prisoner is—

(i) a fixed term prisoner subject to release pursuant to section 244(a) of the 2003 Act; or

(ii) a fine defaulter or contemnor subject to release pursuant to section 258(b) of the 2003 Act; and

(c) the Secretary of State is satisfied that the temporary release is—

(i) for the purpose of preventing, protecting against, delaying or otherwise controlling the incidence or transmission of coronavirus; or

(ii) for the facilitation of the most appropriate deployment of personnel and resources in, or in connection with, prisons in England and Wales.

(3) A prisoner must not be released under this rule if—

(a) the prisoner would not be eligible for release on temporary licence under the following restrictions on rule 9 of these Rules (temporary release)—

(i) rule 9(1A) (prisoners with a relevant deportation status);

(ii) rule 9(6) (prisoners who have committed offences whilst at large following temporary release);

(iii) rule 9(9) (prisoners committed or remanded).

(b) the prisoner is subject to the notification requirements of Part 2 of the Sexual Offences Act 2003(c);

(c) the Secretary of State has classified the prisoner as Category A or restricted status in accordance with a direction under rule 7 (classification of prisoners).

(4) A description specified in a direction under this rule may be framed by reference to whatever matters the Secretary of State considers appropriate.

(5) A prisoner may be released under this rule for any period or periods and subject to any conditions.

(6) In particular, the Secretary of State may impose a condition which requires the prisoner to—

(a) report to a specified person at a specified place at a specified time;

(b) return to a prison at a specified time;

(c) comply with directions issued by the Secretary of State or another person.

(7) A prisoner released under this rule may be recalled at any time whether the conditions of his release have been broken or not.

(8) In this rule –

“coronavirus” has the meaning given by section 1 of the 2020 Act (meaning of

“coronavirus” and related terminology);

“the 2020 Act” means the Coronavirus Act 2020(d);
“transmission control period” has the meaning given by paragraph 5 of Schedule 21 to the 2020 Act.”.

(3) In rule 51(8) (offences against discipline), after “under rule 9”, insert “or rule 9A”.

(4) In rule 51(9) (offences against discipline), after “under rule 9”, insert “or rule 9A”.

42. A parallel provision appears for those detained in Young Offender Institutes (YOIs), at YOI Rule 5A(1).

43. The “policy and object” of the above provision is clear. It was to enable the Secretary of State to make reductions to the prison population across the prison estate and in individual prisons in response to the Covid pandemic. Paragraph 2.1 of the explanatory memorandum states:

“The purpose of the Prison and Young Offender Institution (Coronavirus) (Amendment) Rules 2020 (“the first instrument”) and the Offender Management Act 2007 (Coronavirus) (Approved Premises) (Amendment) Regulations 2020 (“the second instrument”) (collectively “the instruments”) is to allow prison governors, on behalf of the Secretary of State, to release certain prisoners temporarily to help manage the incidence or transmission of coronavirus and to facilitate the effective running of prisons and young offender institutions for this purpose.”

44. Fourth, there is a positive obligation on the State, at common law and under Articles 2 and 3 of the European Convention on Human rights, to protect persons who are detained by the state from death or serious harm.

45. The duty of protection applies to all persons who are detained (see, for example, *Keenan v United Kingdom* (2001) 33 EHRR 38 at [111]; *Kudla v Poland* (2002) 35 EHRR 11 at [94]). Keenan establishes the uncontroversial proposition that one of the reasons the state owes this duty is because of the inherent vulnerability of those who are detained by the state: see [110]. Put simply, the detained are unable to take matters into their own hands, and go elsewhere for help and assistance. The duty is “particularly stringent in relation to those who are especially vulnerable by reason of their physical or mental condition” (*Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, §22 per Lord Dyson).

46. Articles 2 and 3 of the Convention comprise both a general duty to devise, apply and staff appropriate systems for the identification of those needing protection, together with an operational duty to act when someone is or should be known to be at real risk of harm.

47. The courts are willing and able to provide detailed scrutiny of systems in order to determine whether the duties have been discharged (*McGlinchey v UK* (2003) 37 EHRR 821). In *McGlinchey* matters such as inadequate equipment, and gaps in staff cover, meant that the systems were insufficient. A proper system, to be lawful, will also need to discharge equality duties. Proper regard must be had to those with protected characteristics, who may be vulnerable for that reason, but who may also not be able to (for example) communicate their vulnerability.
48. Fifth, a public body must operate pursuant to fair and transparent and published policy (as required by the Supreme Court in *Lumba v SSHD* [2011] UKSC 12). That is partly to avoid the risk of arbitrary and/or discriminatory decisions, but also (in the present case) to avoid the obvious tensions on the grounds if prisoners and prison staff do not understand what is going on or if decisions seems capricious or random to them.
49. Sixth, the state also has a legal duty to avoid indirect discrimination against prisoners with protected characteristics (which include age and disability), both in accordance with the Equality Act 2010 and Articles 2, 3, 8 and 14 of the European Convention on Human Rights.

Grounds of Challenge

(i) Rationality

50. In his letter of 30 March 2020 the Secretary of State described the current state of affairs as an “unprecedented challenge”. In the same letter he confirmed that “number of options” were “under consideration to relieve pressure on the prison system”, “including potential releases”. The following day, the possible release of pregnant women and mothers was announced, followed by an announcement on 4 April 2020 that “risk-assessed prisoners who are within two months of their release date will be temporarily released from jail, as part of the national plan to protect the NHS and save lives.”²⁷ On 14 April, the strategy in response to Covid-19 was described by the Prison’s Minister as “the “multifaceted approach to reducing the headroom in the estate” including: “releasing up to 4,000 prisoners” and “to increase headroom by bringing temporary accommodation on to existing prison sites, potentially around 2,000 spaces, in terms of headroom.”

²⁷ Ministry of Justice (2020) Measures announced to protect NHS from coronavirus risk in prisons https://www.gov.uk/government/news/measures-announced-to-protect-nhs-from-coronavirus-risk-in-prisons?utm_source=244b0709-9e03-4ec5-97d9-a629f13045a2&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

51. The measures that the Secretary of State has put in place, however, clearly do not add up to a package that will meet what is required to “protect the NHS and save lives” and in particular will not lead to any substantial reduction of the prison population (whether overall or in the most overcrowded prisons).
52. While the prison population has decreased in the last two weeks from 83,709 on 21 March to 81,454 as of 17 April 2020,²⁸ it is anticipated that this reflects fewer admissions, possibly due to the reduction in Court work and the CPS and police charging protocol. As of 14 April 2020, just 18 people had been released under the temporary release schemes announced by the Secretary of State and the recorded rate of infection has soared.
53. As noted in our clients’ letter of 8 April 2020, the while the Statutory Instrument authorizing the temporary release of prisoners in response to Covid is not restrictive, the announcement and slow rate of releases so far would indicate that the policy for implementation is too narrow to be effective. Although the detailed operational policy has not been published, it would appear from what is in the public domain that only those serving sentences of under four months would have an additional opportunity for release that does not already exist under the Home Detention Curfew (HDC) scheme. The other restrictions that appear in the announcement, but not in the Statutory Instrument, include a requirement to use electronic tagging, an exclusion of those convicted of violent offences, even where they may now be deemed low risk and a restriction of two months’ prior to the automatic release date. The result has been, and will be, that the prison population will not substantially be reduced.
54. The evidence from the Prison Governors’ Association that 15,000 releases are required to reduce pressure on the estate. A need to reduce the population between 10,000 to 15,000, to reduce overcrowding which was accepted by the head of Her Majesty’s Prison and Probation Service (HMPPS) in evidence to the Justice Committee on 7 April 2020. In evidence to the Committee there was no clear strategy to meet that aim. The admission by the Secretary of State in evidence to the Committee that releases of up to 4000 prisoners would be part of a rolling programme over time do not take into account the need for urgent preventative action as set out in Professor Coker’s report.
55. It is impossible to see how the additional strategies of increased headroom of up to potentially 2000 spaces through temporary accommodation could achieve the stated aim of saving lives by

²⁸ <https://www.gov.uk/government/statistics/prison-population-figures-2020>

relieving pressure. The sites where the first of 500 temporary cells will be installed – North Sea Camp, Littlehey, Hollesley Bay, Highpoint, Moorland, Lindholme and Humber – are all either at or over capacity, but they are not the most overcrowded prisons in the estate. The ten most overcrowded prisons in England and Wales, all of which are 150 per cent over capacity or more, are Doncaster, Pentonville, Exeter, Preston, Wandsworth, Leeds, Lincoln, Leicester, Durham and Swansea. The places where the accommodation is set to be built will not assist with reducing overcrowding in prisons such as a Pentonville where there is simple no capacity for prefab accommodation and the prison is, as noted by the Prison Governors' Association, already overcrowded to the tune of 393 men.

56. It appears now to be widely accepted (including by the Secretary of State) that a response to the current pandemic requires a substantial reduction in the prison population to avoid significant loss of life (both in terms of the overall population and the population of overcrowded prisons). Measures which purport to meet that requirement but which will have little or no impact on the overall prison population in general, and the most overcrowded prisons in particular, is not a rational response. In the words of Sedley J (as he then was) it is a measure which does not “add up”.

(ii) **Legitimate expectation**

57. As noted above (§50), the Secretary of State has stated publicly that he will take steps to reduce the prison population so as to lower the risks to mass infection and loss of life within the prison estate.

58. In respect of the 31 March 2020 announcement for mothers, the figure given to the media was that around 70 women would be eligible. As of 14 April 2020, just 14 women had been released.

59. The figure given to the media on 4 April 2020 and confirmed before the Justice Committee on 7 April 2020 was the release of up to 4000 prisoners. As of 14 April 2020, just four of that number had been released and on that date the Prisons' Minister anticipated hundreds would be released later this week. Taken at its highest, the anticipated releases in the short term fall woefully short of constituting the release of sufficient prisoners to have any real likelihood of reducing the risk of the virus spreading through the prison estate.

60. As such the reality is drastically different from the announcement: the Secretary of State has not dealt “straightforwardly and consistently with the public” and his current and proposed actions to date mean that releases from custody will not have any prospect of significantly reducing the prison population. That is a breach of the legitimate expectation that the Secretary of State would take such measures. No good reason has been given to frustrate that expectation: if anything

the crisis has significantly worsened since the announcement was made.

(iii) Frustration of legislative intention

61. Prison Rule 9A(1) authorises the Secretary of State to make a direction describing specified prisoners who can be released in response to the Coronavirus. The policy and object of the provision was clearly to enable the Secretary of State to make substantial reductions to the prison population across the prison estate and in individual prisons in response to the Corona virus. There is nothing in the Statutory Instrument to prevent the release of prisoners prior to two months before they would be released anyway, without electronic tagging or who have been convicted of violent offences but are deemed safe for release. Yet the Secretary of State's announcement appears to have restricted his consideration to a much narrower pool of prisoners than the legislation would otherwise permit, such that the operation of the policy in truth only affects a small category of prisoners who are not already eligible for release under the HDC scheme. That will not achieve the policy and object of the provision.

62. Indeed, the narrow approach taken by the Secretary of State to his release programme runs counter to and undermines the purpose of the legislation, which is expressly described in the explanatory memorandum as "to allow prison governors, on behalf of the Secretary of State, to release certain prisoners temporarily to help manage the incidence or transmission of coronavirus and to facilitate the effective running of prisons and young offender institutions".

(iv) Duty to protect life and health without discrimination

63. The rate of infection following tests is increasing rapidly. Since our clients first wrote to you jointly on 27 March 2020 the number of prisoners infected has increased from 27 on 26 March 2020 to 232 as of 15 April 2020, an increase of almost ten-fold. During the same period the infection has spread from 14 to 60 prisons, over half the prisons in England and Wales.

64. The prison population is at particular risk: Professor Coker has highlighted research that fatality rates can be as high as 12 per cent. The prison population is 96 per cent male, and men are twice as likely to die. The prison population is aging and has a disproportionately high number of people within it with underlying health conditions. Access to healthcare is restricted. There are, furthermore, a disproportionate number of Black, Asian and minority ethnic (BAME) individuals in the prison system.

65. England and Wales continues to detain a high number of children, for whom special legal considerations apply. The admission before the

Justice Committee on 7 April 2020 that that “fewer” children would be eligible under the temporary release scheme is clearly contrary to the enhanced duty to protect the human right of children without discrimination.

66. The current response is contrary to the common law duty and human rights duties to protect life and health, especially of those most vulnerable to the disease.

(v) Fairness and transparency

67. Our clients have asked you to publish the advice you have received and the detail of the policies you are working to. On 7 April 2020, the Justice Committee was told the policies would be published. Neither the advice nor the policies have been published.

68. The failure to publish the operational details of the release schemes is contrary to the legal requirements of fairness and transparency.

E. The details of the action that the Defendant is expected to take

69. The Defendant is asked to take immediate action to ease the pressure on the prison population to save lives, by devising a fair, transparent scheme or means of release using the powers available to him.

70. Numerous remedies have been suggested and are available, as outlined in our clients’ previous correspondence. These include:

- a. Increasing the scope of the Covid temporary release scheme as permitted by the Statutory Instrument, to allow a meaningful increase to the number of prisoners who would otherwise not be eligible for release, by increasing the period of release from two months, relaxing the necessity for tagging in every case, considering those who have been convicted of violent offences but can now be safely released.
- b. Expediting the consideration of release of pregnant women and mothers.
- c. Expanding the scope of the temporary release scheme to all prisoners at particular risk from Covid-19.
- d. Urgently considering the release of all children in custody in line international guidance and law.
- e. Accepting that the pandemic constitutes exceptional circumstances in respect of existing early release procedures and applications for compassionate release.

- f. Allowing category D prisoners who have already been risk assessed and have a home to live in to have extended releases on temporary licence due to the virus.
- g. Ensuring that all current applications for early release are expedited and subject to enhanced resources to facilitate them where possible.
- h. Remitting additional days imposed for disciplinary matters.
- i. Reducing recalls, remands and facilitating bail applications.

F. Costs and timing

71. Due to our clients' limited financial resources and in view of the importance of the issues, the legal team including counsel have agreed to act under the terms of a "Conditional Fee Agreement".

72. We sincerely hope for a positive response to this letter and we would ask for your response in any event by close of business on **4pm Tuesday 21 April 2020**. We reserve the right to issue proceedings after that date further notice including, if appropriate, an application for injunctive relief.

73. In any such proceedings, because of our client's financial circumstances and given the public interest in bringing this challenge, we will be making an application for a CCO. We would ask, with a view to saving court time and public money that you undertake not to pursue our clients for costs if the claim is unsuccessful and to agree to our application for a CCO.

G. The details of the legal advisors, if any, dealing with this claim

74. Bhatt Murphy, 10 Tyssen Street, Dalston, London, E8 2FE
DX 46806 Dalston
Tel: 020 7729 1115
DD: 020 7033 2008
Fax: 020 7729 1117

H. The details of any information sought

75. We seek copies of all relevant policies relating the Covid-19 pandemic in custody and all advice provided to officials concerning the risks associated with the pandemic in prisons.

I. The details of any documents considered relevant and necessary

76. Any document relevant to the issues above.

J. Details of any interested parties

77. We consider that the Prison Governors' Association is an interested party in this matter.

K. The address for reply and service of court documents

Bhatt Murphy: 10 Tyssen Street, Dalston, London, E8 2FE

Yours faithfully

Bhatt Murphy