

## Chapter 12: Judicial review: irrationality and proportionality

### Problem scenario

Pursuant to section 3(2) of the (fictitious) Criminal Evidence (Prison Life) Act 2024, Prison Boards are given significant power to punish misbehaving prisoners 'as they see fit'. At Her Majesty's Prison on the Isle of Grass (also fictitious), a disturbance is caused by three particularly troublesome prisoners. One breaks into the Warden's office and steals a prison officer's uniform. He wears it and proceeds to patrol the prison yard, shouting at his fellow prisoners. A second prisoner causes a fracas in the dining area, throwing chairs around and overturning tables. Finally, a third prisoner climbs the fence and tries to escape. Dealing with the three cases simultaneously, the Prison Board imposes the following punishment on the prisoners:

- they are forbidden from having visits from friends or family for two months;
- they are to be placed in solitary confinement for three weeks; and
- once out of solitary confinement, their cells are to be searched daily (for a period of six months), including diaries and private correspondence, during which time prisoners are to be excluded from their cells.

Imagine that you have been presented with this scenario and asked to advise the prisoners, who wish to seek an application for judicial review in respect of the Prison Board's punishment, focusing on the extent to which they might be deemed reasonable or proportionate under UK law.

The power set out in the 2024 Act is particularly broad. It ostensibly gives Prison Boards the authority to do whatever they think fit or appropriate in punishing misbehaving prisoners. With this in mind, and in setting the foundation for our discussion of this problem scenario, the need to ensure that this power is exercised reasonably, despite its apparently limitless scope, is helpfully provided by these words of Lord Wrenbury in *Roberts v Hopwood*:

A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so—he must in the exercise of his discretion do not what he likes but what he ought. In other

words, he must, by use of his reason, ascertain and follow the course which reason directs. He must act reasonably.<sup>1</sup>

The first major question to consider, however, concerns satisfaction of the *Wednesbury* test from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*<sup>2</sup> of unreasonableness. Whether the punishment handed down by the Prison Board can be seen as reasonable is, of course, a question of judgment. Though there are potential arguments to make regarding human rights, we consider these below and leave them aside for the moment. For now, we need to consider whether the punishments could be seen as ‘so absurd that no sensible person could ever dream that it lay within the powers of the authority’,<sup>3</sup> or ‘so outrageous in [their] defiance of logic or of accepted moral standards’.<sup>4</sup>

In dealing with misbehaving prisoners, under the power set out in the 2024 Act, it is perhaps understandable that the Prison Board would withhold certain privileges or impose stricter conditions of imprisonment. Furthermore, whilst some features of this punishment might seem somewhat harsh—three weeks in solitary confinement, for instance—this is not the same thing as ‘unreasonable’. It could be argued, therefore, that the actions of the Prison Board fall short of the high standard of the *Wednesbury* test. Indeed, recalling the House of Lords’ judgment in *Nottinghamshire County Council v Secretary of State for the Environment*,<sup>5</sup> we can use Lord Scarman’s reasoning to consider whether the Board ‘has acted in bad faith, or for an improper motive, or . . . [in] so absurd [a way] that [they] must have taken leave of [their] senses’.<sup>6</sup> On the basis of these questions, the answer would most probably be no.

Another matter to consider in respect of this question is, with the development of proportionality in mind, particularly within the sphere of human rights, whether a court would now take a different view in light of that test.

Probably, yes. For two connected reasons. First, the more structured proportionality test would likely permit a more intense level of review and scrutiny of the Board’s actions. Secondly, the actions of the Prison Board engage certain Convention rights. We consider these reasons in reverse.

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<sup>1</sup> [1925] AC 578, 613.

<sup>2</sup> [1948] 1 KB 223.

<sup>3</sup> *Ibid* 229.

<sup>4</sup> [1985] AC 374, 410–11.

<sup>5</sup> [1986] AC 240.

<sup>6</sup> *Ibid* 247.

Though the ECHR is discussed in Chapters 15 and 16, we can here identify certain rights that are engaged by this problem scenario. Being forbidden from seeing friends or family for two months touches on the right protected in Article 8 ECHR, which sets out a right to a private and family life, whilst being placed in solitary confinement for three weeks amounts to a greater limitation of the Article 5 right to liberty (than that ordinarily imposed on prisoners), even arguably touching upon the Article 3 right to freedom from inhuman or degrading treatment. Finally, and as in *R (Daly) v Secretary of State for the Home Department*,<sup>7</sup> the cell-searching and examination of private correspondence potentially amounts to a breach of confidentiality (depending on the nature of any such correspondence). With these rights identified and explained, we can now consider the proportionality test and determine whether the Prison Board's actions would be held lawful on that basis. For this, we can draw from the test made clear in *Bank Mellat v HM Treasury*.<sup>8</sup> This is made clear again here for ease of reference. The questions to consider are:

(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.<sup>9</sup>

In answering these questions in light of the problem scenario, it could be argued that the punishment imposed by the Prison Board is disproportionate to the objective to be achieved (this being the punishment of prisoners for their misdemeanours). Whilst the need to impose some form of punishment in the circumstances can be accepted as necessary, the argument is that these actions go too far and that there are 'less intrusive measures' that could have been used for the same purpose. The refusal of friends and family visits for a couple of weeks for instance, or the imposition of solitary confinement for a couple of days,<sup>10</sup> or, indeed, searching cells, excluding

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<sup>7</sup> [2001] UKHL 26.

<sup>8</sup> [2013] UKSC 39.

<sup>9</sup> [2007] UKHL 11 [74].

<sup>10</sup> The 'Council of Europe's Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has advised that for punitive purposes any stint [of solitary confinement] should be limited to 14 days' (Fraser Simpson, 'Unauthorised solitary confinement incompatible with prisoner's rights' (UK Human Rights Blog, 15 October 2015), <https://ukhumanrightsblog.com/2015/10/15/unauthorised-solitary-confinement-incompatible-with-prisoners-rights/>), citing: CPT, '21st General Report' (Strasbourg, November 2011) 40, <https://rm.coe.int/1680696a88> ).

private and confidential correspondence, might all be deemed acceptable forms of punishment. Remission of sentence has even been used before.<sup>11</sup> The degrees of punishment here imposed are arguably a disproportionate infringement of the rights of prisoners.

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<sup>11</sup> See *O'Reilly v Mackman* [1983] 2 AC 237, discussed in 10.5.