

Chapter 15: The European Convention on Human Rights and the Human Rights Act 1998

Problem scenario

Martha Pugwood, a (fictitious) Member of Parliament and Secretary of State for Justice seeks to introduce into the House of Commons a Bill to enact more stringent restrictions on the lives enjoyed by prisoners in the UK—entitled the Prisoners Reform Bill 2023. It comes following criticism from the public, various interest groups, and MPs in Parliament, who all argue that the quality of life in prisons is so good that the experience is less and less about the punishment of offenders. To this end, the Bill includes the following features:

- Section 1: prison wardens have the power to open and inspect ALL incoming and outgoing prisoner correspondence.
- Section 2: where a prisoner is serving a sentence of five years or more, the Secretary of State for Justice has the power to restrict the right to vote in any election. In exercising this power, the Secretary of State must take into consideration the nature of the offence of which the prisoner has been convicted, and this restriction must be reviewed every two years.
- Section 3: the Home Secretary has the power to limit the amount of time prisoners are permitted to leave their cells each day.
- Section 4: Prison Boards have the power to refuse prisoners visits from family and friends 'as they see fit'. The prisoners find themselves in the following situations:
 - The Home Secretary decides that Prisoner W should be kept locked in his cell for twentythree hours a day.
 - The Prison Board, at Prisoner X's jail, decide that Prisoner X should not be allowed to have visits from her friends or family for six months.
 - The Secretary of State for Justice decides to restrict Prisoner Y's right to vote. He is just starting a fifteen-year sentence.
 - Prison Wardens open Prisoner Z's correspondence, reading through letters to her lawyer and to her partner.

Imagine that you have been presented with this scenario and asked to advise each of the prisoners.

The scenario potentially engages a number of ECHR rights with regard to the ways in which the prisoners will be affected by the new legislation. We will look at each prisoner in turn.

(1) Prisoner W

One of the primary objectives of imprisonment is to limit an individual's freedom and liberty, as a means of punishment and to provide opportunity for rehabilitation. Indeed, Article 5(1)(a) makes clear that, whilst '[e]veryone has the right to liberty', of which they 'shall [not] be deprived', a lawful exception to this is in the event of detention, following conviction for an offence. This said, it could be argued that a further limitation of an individual's liberty, such as to require Prisoner W to remain in his cell for twenty-three hours a day, engages the Article 5 right to liberty. Indeed, depending on the conditions and size of Prisoner W's cell, as well as the number of prisoners therein detained, it is likely that Article 3 would also be engaged, as a string of cases serves to exemplify.¹

If Prisoner W were to bring a challenge in respect of this limitation, the Home Secretary's decision would undoubtedly be found to infringe upon Prisoner W's rights. However, it is also argued that the interpretative duty could work to find that section 3 of the 2023 Act is still compatible with the ECHR. That the Home Secretary has infringed Prisoner W's ECHR rights, therefore, is fairly clear to see. But, it might be argued that he was merely acting within the power set out in the 2023 Act. In protecting Prisoner W's (and others) rights, therefore, it would be incumbent upon the courts to determine whether or not section 3 could be read compatibly or whether a declaration of incompatibility should be issued under section 4. The case of *R v A (No 2)*² provides authority that supports the use of the section 3 interpretative duty in this instance. In that case, a measure (section 41 of the Youth Justice and Criminal Evidence Act 1999) was read in such a way that permitted evidence of a complainant's past sexual behaviour to be adduced where to exclude such evidence would be in breach of the right to a fair trial. Similarly, here, therefore, section 3 of the 2023 Act

¹ See European Court of Human Rights, 'Detention Conditions and Treatment of Prisoners' (2017), http://www.echr.coe.int/Documents/FS_Detention_conditions_ENG.pdf.

² [2001] UKHL 25.

could be read in such a way that permits the Home Secretary to limit the amount of time prisoners are permitted to leave their cells each day, up until the point when the infringement on Article 5—and possibly Article 3—would be so great as to render the limitation disproportionate. At that point, such action could be held unlawful.

On the basis of this reading, the Home Secretary's actions could be held to amount to an infringement of Prisoner W's ECHR rights, whilst the interpretative duty could ensure that section 3 of the 2023 Act be read compatibly with the Convention.

(2) Prisoner X

Preventing Prisoner X from having visits from friends or family for a period of six months potentially engages Article 8. Whilst, as noted in respect of section 3, prisoners should expect limitations of their rights whilst serving time in prison, keeping in mind that any infringements of ECHR rights must be proportionate, depriving Prisoner X from seeing her friends or family for such a long period of time would engage the right to a private and family life.

(3) Prisoner Y

This aspect of the scenario concerns the right to vote. The right to vote is protected through Article 3 of the First Protocol to the ECHR. This states that '[t]he High Contracting Parties undertaking to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'. This is the provision that is relevant to section 2 of the 2023 Act.

The case of *R (Chester) v Secretary of State for Justice*³ is considered at 15.5.3, in which the UK Supreme Court held that the UK's blanket ban on prisoner voting was found to be incompatible with Article 3 of the First Protocol to the ECHR, a decision that followed the ECtHR judgment in *Hirst v UK (No 2)*.⁴ The circumstances in the problem scenario, however, are different. Under the 2023 Act, where a prisoner is serving a sentence of five years or more, the Secretary of State for Justice has the power to restrict the right to vote in any election. In exercising this power, the Secretary of State must take into consideration the

³ [2013] UKSC 63.

⁴ (2006) 42 EHRR 41.

nature of the offence of which the prisoner has been convicted and this restriction must be reviewed every two years. It is on the basis of this power that Prisoner Y has had his right to vote restricted. The Secretary of State has acted within the power set out in the 2023 Act.

In *Hirst*, the ECtHR noted that Article 3 of Protocol 1 was not absolute and that there could be instances where the right to vote was limited, provided this ‘did not impair the very essence of the right . . . [and provided it was] imposed in pursuit of a legitimate aim, and . . . proportionate’.⁵ The Strasbourg Court also pointed out that ‘[w]hether or not an offence was . . . deprived of the right to vote depended entirely on whether the judge imposed a custodial sentence . . . there was no direct link between the facts of any individual case and the removal of the right to vote’.⁶ By empowering the Secretary of State to restrict the right to vote, mindful of the offence of which the prisoner has been convicted, and ensuring that any restriction be reviewed every two years, the 2023 Act would ensure that there was a greater link between the facts of an individual case and the removal of the right to vote. The exercise of discretion would ensure that the proportionality of the restriction might be considered in each case. Section 2 of the 2023 Act, therefore, could arguably be seen as compatible with ECHR rights and the Secretary of State’s restriction of Prisoner Y’s right to vote legitimate.

(4) Prisoner Z

The Prison Warden’s opening of Prisoner Z’s correspondence is reminiscent of the case of *R (Daly) v Secretary of State for the Home Department*,⁷ discussed in 12.4 and where judicial review proceedings were brought in respect of a prison’s searching of prison cells, including confidential legal correspondence. The House of Lords held in that case that the Article 8 right to a private family life, which includes respect for correspondence, was unreasonably infringed. Similarly, in this instance, therefore, the 2023 Act potentially engages the same right insofar as it potentially denies Prisoner Z any respect for her correspondence.

⁵ *Ibid* [H6], also see [62].

⁶ *Ibid* [H8], also see [77].

⁷ [2001] UKHL 26.