NATIONAL REPORT

ENGLAND AND WALES

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PART I - ECtHR case law

1. The framework of the ECHR Article 3

Article 3 ECHR states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment"[1].

Detention involves the negative obligation on states to refrain from inflicting serious harm on persons within their jurisdiction but in *Keenan v UK* the European Court of Human Rights held that detention also engages the positive obligation on state to take measures designed to ensure that individual within their jurisdiction are not subjected to treatment contrary to the ECHR Article 3[2]. In this judgement the suicide in custody of a mentally ill prisoner was found to result, not in a breach of the Article 2, but of breach of the Article 3 by reason of neglect. The Court stated there had been a lack of monitoring of the prisoner's condition and of sufficient psychiatric assessment, and he had been inappropriately detained in segregation in a punishment block. Therefore, the Article 3 has also deemed to be relevant to the conditions which may form the background to some self-inflicted deaths in custody. The general consequence of the judicial reasoning was that unsatisfactory prison conditions may give rise to breaches of Article 3.

As the ECtHR established in *Z v UK*, the positive obligation of states under ECHR article 3 includes a duty to take reasonable steps to prevent the continuance of an inhuman and degrading treatment[3]. The Court reiterated that Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to guarantee that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals.

The preventative obligations on the state are particularly high insofar as they concern those in state custody. ECHR Article 3 will be engaged only where the treatment complained of reaches a minimum level of severity. In *Keenan*, the ECtHR went on to find that it is relevant to the assessment of whether treatment has attained the minimum level of severity whether 'its object is to humiliate and debase the person concerned'[4]. In the same judgement, the Court stated that is also relevant to the severity assessment whether the treatment complained of adversely affected the victim's personality[5]. As result of the special obligations of states to persons in custody, ECHR Article 3 will be breached by lesser ill-treatment towards detainee than might be required to cross the threshold for those at liberty. The Court of Appeal has observed that:

[1] Convention for the Protection of Human Rights and Fundamental Freedom, Article 3, 4 November 1950.
[2] ECtHR, *Keenan v UK*, *Application no. 27229/95*, 3 April 2001, paras 109-116.
[3] ECtHR, *Z and Others v UK*, *Application no. 29392/95*, 10 May 2001.
[4] ECtHR, *Keenan v UK*, cit., paras 109-110.
[5] *Ibidem*, para 110.

"We tend to think of obligations under Article 3 in terms of extreme violence, deprivation or humiliation. Convention jurisprudence however makes clear that depending on the circumstances article 3 may be engaged by conduct that falls below that high level. Two circumstances that have been identified as imposing special obligations on the state are that the subject is dependent on the state because he has been deprived of his liberty; and that he is young and vulnerable. That is the uniform jurisprudence of the ECtHR"[6].

ECHR article 3 complaints in the UK detention context will usually concern inhuman or degrading treatment. In *Ireland v UK* the ECtHR held that there is no requirement that the inhuman treatment or the suffering entailed in such treatment be intentionally inflicted[7]. As stated in *V v UK* and in *Pretty v UK*, there is no requirement for degrading treatment that the humiliation or debasement be intentionally inflicted[8].

1. 1. Life imprisonment as a violation of the ECHR article 3. The ECtHR decision *Vinter and others v. The United Kingdom.*

The case concerned three applicants' complaint that their imprisonment for life amount to inhuman and degrading treatment as they had no hope of release. The applicants, Douglas Gary Vinter, Jeremy Neville Bamber and Peter Howard Moore, are British nationals who were serving sentences of life imprisonment for murder. Mr Vinter was convicted of the murder of his wife in February 2008, having already been convicted of murdering a work colleague in 1996. Mr Bamber was convicted of the murders of his adoptive parents, sister and her two young children in August 1985. Mr Moore was convicted of the murders or four men between September and December 1995.

The English and Welsh Government did not interpret the section 30 of the *Crime (Sentences) Act 1997* in a Convention compliant manner, consequently a possible exceptional release of whole life prisoners has been excluded.

[6] *R (C) v Secretary of State for Justice*, 2008, EWCA, para 58.
[7] ECtHR, *Ireland v UK*, Application no. 5310/71, 18 January 1978, para 167.
[8] ECtHR, *V v the United Kingdom, (Application no. 24888/94)*, 6 December 1999, para 71; ECtHR, *Pretty v the United Kingdom, (Application no. 2346/02)*, 29 April 2002, para 52.

The Court considered that, in the context of a life sentence [9], "Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds"[10]. Although the margin of appreciation must be accorded to Contracting States in the matters of criminal justice and sentencing, the Court observed that the comparative and international law materials before it show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter.

It follows from this conclusion that where domestic law does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Article 3 of the Convention. As the Strasbourg judge stated, a whole life prisoner should not be obliged to wait and serve an indeterminate number of years of his sentence before he can raise the complaint that the legal conditions attaching to his sentence fail to comply with the requirements of Article 3 in this regard. This would be contrary both to legal certainty and to the general principles on victim *status* within the meaning of that term in Article 34 of the Convention. Furthermore, in cases where the sentence, on imposition, is irreducible under domestic law, it would be capricious to expect the prisoner to work towards his own rehabilitation without knowing whether, at an unspecified, future date, a mechanism might be introduced which would allow him, on the basis of that rehabilitation, to be considered for release. In the Grand Chamber's perspective domestic mechanisms for reviewing sentences must ensure a realistic prospect of release based on a well-pondered balance between on the one hand legitimate penological purposes such as retribution, deterrence, public protection and on the other hand rehabilitation over the course of a prisoner's sentence. Although the ECtHR will not prescribe the form of such a review mechanism, the general principle is that a whole life prisoner is entitled to know, at

[9] In the wider category of the life sentences it is possible to distinguish mandatory sentences from discretionary sentences. Although it was prior to the *Criminal Justice Act 2003*, it is useful to recall the historical *Doody* decision: "Mandatory life sentence cases, however, raise quite different issues and the Government do not agree that it is appropriate to extend a similar procedure to these cases. In a discretionary case, the decision on release is based purely on whether the offender continues to be a risk to the public. The presumption is that once the period that is appropriate to punishment has passed, the prisoner should be released if it is safe to do so. The nature of the mandatory sentence is different. The element of risk is not the decisive factor in handing down a life sentence. According to the judicial process, the offender has committed a crime of such gravity that he forfeits his liberty to the state for the rest of his days - if necessary, he can be detained for life without the necessity for subsequent judicial intervention. The presumption is, therefore, that the offender should remain in custody until and unless the Home Secretary concludes that the public interest would be better served by the prisoner's release than by his continued detention. In exercising his continued discretion in that respect, the Home Secretary must take account, not just of the question of risk, but of how society as a whole would view the prisoner's release at that juncture. The Home Secretary takes into account of the judicial recommendation, but the final decision is his", *R v Secretary of State for the Home Department, ex p Doody*, 24 June 1993, UKHL 8, para. 9. On this issue, in addition: "the discretionary and mandatory life sentences, having in the past grown apart, may now be converging. Nevertheless, on the statutory framework, the underlying theory and the current practice there remains a substantial gap between them. It may be - I express no opinion - that the time is approaching when the effect of the two types of life sentence should be further assimilated. But this is a task for Parliament, and I think it quite impossible for the courts to introduce a fundamental change in the relationship between the convicted murderer and the state, through the medium of judicial review", *ibidem*, para 13.

[10] ECtHR, Grand Chamber, *Vinter and others v the United Kingdom*, Applications nos. 66069/09, 130/10 and 3896/10, 9 July 2013, para 119.

the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Consequently, where national law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration.

In the current statutory framework on whole life orders of England and Wales, the *Criminal Justice Act 2003*, the twenty-five years review was not included because, for the reasons given by the Government, the *intentio legis* was to judicialise decisions concerning the appropriate terms of imprisonment for the purposes of punishment and deterrence. Although section 30 of the *Crime (Sentences) Act 1997* provides the Secretary of the State with the power to release any prisoner, including one serving a whole life order, the Prison Service Order remains in force that release will only be ordered in certain exhaustively listed, and not merely illustrative, circumstances provided for the so called *Lifer Manual*[11], namely if a prisoner is terminally ill or physically incapacitated and other additional criteria can be met (where the risk of re-offending is minimal, further imprisonment would reduce the prisoner's life expectancy, there are adequate arrangements for the prisoner's care and treatment outside prison, and early release will bring some significant benefit to the prisoner or his or her family). The Grand Chamber proceeded to find that the English and Welsh regime for reviewing whole-life sentences violated Article 3, because the Manual's restrictive and apparently exhaustive grounds for sentence reduction did not accommodate other legitimate penological grounds for a commutation. It was unclear how the Home Secretary would exercise his or her discretion to reduce a life sentence outside of the basis in the Manual[12].

In one domestic case, *Bieber*[13], the Court of Appeal observed that while the section 30 power had been used sparingly, there was no reason why it should not be used by the Secretary of State to effect the necessary compliance with Article 3 of the Convention. Lord Phillips of Worth Matravers CJ in giving the judgement of this Court concluded that the regime was compatible and a whole life order was reducible because of the power of the Secretary of State under section 30 of the 1997 Act. He stated:

"At present it is the practice of the Secretary of State to use this power sparingly, in circumstances where, for instance, a prisoner is suffering from a terminal illness or is bedridden or similarly incapacitated. If, however, the position is reached where the continued imprisonment of a prisoner is held to amount to inhuman or degrading treatment, we can see no reason why, having particular regard to the requirement to comply with the Convention, the Secretary of State should not use his statutory power to release the prisoner."[14]

But the Court of Appeal also stated that any Article 3 challenge where a whole life term had been imposed should therefore be made, not at the time of the imposition of the sentence, but at the stage when the prisoner contended that, having regard to all the material circumstances, including the time that he had served and the progress made in prison, any further detention would constitute degrading or inhuman treatment.

[11] HM Prison Service, Prison Service Order, Order 4700, *Indeterminate Sentence Manual, Formerly Lifer Manual*.
[12] *Vinter and others v the United Kingdom*, cit., paras 125-130.
[13] *R v Bieber*, 23 July 2008, [2009] 1 WLR 223.
[14] *Ibidem*, para 48.

In *Oakes*[15] the Court of Appeal read again the section 30 as not just giving a power of release to the Secretary of State, but as imposing a duty on him to exercise that power and to release a prisoner if it can be shown that his or her continued detention has become incompatible with Article 3, for example, when it can no longer be justified on legitimate penological grounds. Despite the Court of Appeal's judgments, the Secretary of State has not altered the terms of his explicitly stated and restrictive policy on when he will exercise his section 30 power. Notwithstanding the reading given to the section 30 by the Court of Appeal, it must be stated again that the Prison Service Order remains in force and provides that release will only be ordered in certain exhaustively listed, and not merely illustrative circumstances. These are highly restrictive conditions. Even assuming that they could be met by a prisoner serving a whole life order, the Court considered that the Chamber was correct to doubt whether compassionate release for the terminally ill or physically incapacitated could really be considered release at all, if all it meant was that a prisoner died at home or in a hospice rather than behind prison walls. Indeed, in the Court's view, compassionate release of this kind was not what was meant by a "prospect of release" as such mentioned in *Kafkaris*[16]. As a result, the terms of the Order in themselves would be inconsistent with *Kafkaris* and would not therefore be sufficient for the purposes of Article 3. Therefore, the Grand Chamber concluded that section 30 did not, because of the lack of certainty, provide an appropriate and adequate avenue of redress in the event an offender sought to show that his continued imprisonment was not justified. It concluded:

"At the present time, it is unclear whether, in considering such an application for release under section 30 by a whole life prisoner, the Secretary of State would apply his existing, restrictive policy, as set out in the Prison Service Order, or would go beyond the apparently exhaustive terms of that Order by applying the Article 3 test set out in *Bieber*. Of course, any ministerial refusal to release would be amenable to judicial review and it could well be that, in the course of such proceedings, the legal position would come to be clarified, for example by the withdrawal and replacement of the Prison Service Order by the Secretary of State or its quashing by the courts."[17]

The ECtHR held that such possibilities are not sufficient to remedy the lack of clarity that exists at present as to the state of the applicable domestic law governing possible exceptional release of whole life prisoners. The judgement seems to represent an explicit rejection of executive compassionate release as an appropriate release mechanism. Simon Creighton, the solicitor of Mr. Vinter in the proceeding before the ECtHR, defines the review as emerged from the judicial reasoning "*Vinter review*" in order to underline the difference between this and the review by the Parole Board currently required in England and Wales after an offender has served a minimum period set by the sentencing court, namely a "post-tariff review". The key difference is that in a "*Vinter review*" all the penological justifications for the original sentence - including

[15] *R v David Oakes and others*, 21 November 2012, [2012] EWCA Crim 2435.
[16] "The imposition of a life sentence on adult offenders for especially serious crimes such as murder is not in itself prohibited by or incompatible with Article 3 or any other article of the Convention but if the life sentence is a matter of law or practice irreducible, this may raise an issue under Article 3", ECtHR, *Kafkaris v. Cyprus*, Application no. 21906/04, para. 97, 12 February 2008.
[17] *Vinter and Others v. UK*, cit., para 129.

the seriousness of the offence - must be reviewed to determine whether the balance between them has changed and continued detention is justified. In contrast, the *post-tariff review* is limited to a review of the risk to society posed by the offender, as detention for the minimum period is deemed sufficient for retribution and deterrence.

"At the 25-year stage the *Vinter review* will look at all the penological justifications for punishment and see whether the balance between them has changed to the extent that the prisoners should be released. This passage of time may lead to a re-evaluation of the salience of one or more of the initial factors and thus also of the balance between them. After 25 years have elapsed the seriousness of the offence may be seen in a different light. For example, a moral panic, which led to the setting of a particularly high minimum period for a firearm related offence, may have abated with the decline of such offences in the quarter of a century since it was committed. Or the prisoner may be found to have behaved blamelessly in prison for many years and to pose a low risk to the public. In contrast, at the *post-tariff review* the punishment part of the sentence is regarded as completed. The only and less onerous question that remains is whether the prisoner concerned would still pose a risk to the public if he were to be released. *Vinter review* should meet the same requirements as the *post-tariff review*. In the same way as the Parole Board conducting a *post-tariff review* can order the release of a person who does not pose further risk to society, a *Vinter review* should lead to the body conducting it making a final decision on whether to order a release on the narrower criterion that such a review must deploy. Given the similar procedural requirements of the two forms of review, an immediate and logical reform would therefore be to extend the jurisdiction of the Parole Board to conduct *Vinter reviews* and to ensure that they are conducted by the specialist lifer panels which the Parole Board is required to deploy for post-tariff reviews[18]".

In the opinion of Simon Creighton himself and in the view of Van Zyl Smit and Weatherby held in the cited essay, the British government should have recognize a right to rehabilitate in its own prison legislation[19] and set appropriate judicial mechanism to ensure its comprehensive implementation in order to not suffer serial defeats before the ECtHR in matters of prisoners' rights. But as we will consider below the following domestic judgements represent an example of "functional disobedience"[20] relating to the *Vinter* decision and the *Hutchinson* case will incorporate these national decisions overruling the "*Vinter review*".

1. 2 The *Hutchinson* case: a contradictory example of rejection of executive compassionate release

The *Hutchinson* case[21] represent a break in the judicial approach concerning the life imprisonment which arises from *Vinter*. The case originated in an application against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms by a British national, Mr Hutchinson, who alleged that his whole life sentence gave rise to a violation of Article 3 of the Convention. On 14 September 1984, at Sheffield Crown Court, he was convicted of aggravated burglary, rape and three counts of murder. The trial judge sentenced

[18] See D. Van Zyl Smit, P. Weatherby, S. Creighton, *Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What Is to Be Done?*, Human Rights Law Review, January 2014, 14, p. 79.
[19] In *Vinter* the Court recalled a wide perspective of "rehabilitation" linked to the ECHR article 6 and 8 and it cited the judicial reasoning of the German Supreme Court concerning the rehabilitation as the basis of the *habeas corpus*.
[20] Giuseppe Martinico uses this expression in his essay *"Constitutional Courts (or Supreme) and 'functional disobedience'"* edited by "diritto penale contemporaneo", G. Martinico, "Corti Costituzionali (O Supreme) e 'disobbedienza funzionale'", http://www.penalecontemporaneo.it/upload/1430150015MARTINICO_2015.pdf.
[21] ECtHR, *Hutchinson v. The United Kingdom Judgement*, Application no. 57592/08, 3 February 2015.

the applicant to a term of life imprisonment and recommended a minimum tariff of 18 years to the Secretary of State for the Home Office. On 15 January 1988 the Lord Chief Justice recommended that the period should be set at a whole life term. On 16 December 1994, the Secretary of State informed Hutchinson that he had decided to impose the measure cited above. On 16 May 2008, the High Court affirmed that there was no reason for deviating from the Secretary of State's decision, holding that the argument of the seriousness of the offences could justify a whole life order as mere starting point. On 6 October 2008, the Court of Appeal dismissed the applicant's appeal.

In the *Hutchinson* decision not only the ECtHR mentioned the section 30 of the *Crime (Sentences) Act* 1997 but it also quoted the Chapter 12 of the Indeterminate Sentence Manual (*Lifer Manual*) which is generally considered as the statement containing the criteria for the exercise of the Secretary State discretion relating to the prisoner's release on compassionate grounds. In the Court's view this provision is not binding or exhaustive and it must be applied under the umbrella of the ECHR Article 3. Most of all the Strasbourg judge referred to the section 3[22] and the section 6 of the Human Rights Act 1998[23] introducing the theme of the compatibility of the whole life order scheme with the scheduled Convention rights including Article 3.

In this decision the ECtHR did not confirm the *Vinter* approach stating that "the domestic law of England and Wales is clear as to 'possible exceptional release of whole life prisoners'".[24] In contrast with the Grand Chamber's view in *Vinter*[25], the European Court stated that the fact the policy set out in the *Lifer Manual* has not been revised it is of no consequence. In order to establish if the law of England and Wales needs to change in relation to the life imprisonment, it is absolutely necessary to make clear what the law of England and Wales is. In its judgement the Court offered four criteria to affirm that the English and Welsh law "provide to an offender "hope" or the "possibility" of release in exceptional circumstances which render the just punishment originally imposed no longer justifiable"[26]. Primarily, it affirmed that under the section 30 the offender subject to the whole life order is therefore required to demonstrate to the Secretary of State that although the whole life order was just punishment at the time the order was made, exceptional circumstances have since arisen. The power of review stems from 'exceptional circumstances' and in the Courts' opinion

[22] Sec. 3 (Interpretation of legislation): " (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. (2) This section (a) applies to primary legislation and subordinate legislation whenever enacted; (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility", Section 3, *Human Rights Act 1998*.

[23] More broadly, the *Human Rights Ac*t provisions, including Article 2 have been thought as a relevant mean to develop dynamics of cooperative relations between the domestic Court and the ECtHR. The HRA Section 2 stated that: "A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights, (b) opinion of the Commission given in a report adopted under Article 31 of the Convention, (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or (d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen".

[24] *Hutchinson v. The United Kingdom Judgement*, cit., para 29.

[25] The fact that the Lifer Manual had not been amended meant that prisoners subject to whole life orders derived from it only a partial picture of the exceptional conditions capable of leading to the exercise of the Secretary of State's power under section 30, see *Vinter and Others v The United Kingdom*, cit., para 128.

[26] *Hutchinson v. The United Kingdom Judgement*, cit., para 35.

this term is of itself sufficiently certain. As provided by the section 30 of the *Crime (Sentences) Act 1997*, the Secretary of the State must then consider whether such exceptional circumstances justify the release on compassionate grounds. On this second point, the Strasbourg judge underlined that the policy set out in the Indeterminate Sentence Manual is highly restrictive and aims to circumscribe the matters which will be considered by the Secretary of the State. It held that "the Manual cannot restrict the duty of the Secretary of State to consider all circumstances relevant to release on compassionate grounds; he cannot fetter his discretion by taking into account only the matters set out in the Lifer Manual"[27]. Thirdly, following the *Bieber* and the *Vinter* case, the Court stated that the term "compassionate grounds" must be read in a manner compatible with Article 3. It added that they must not be restricted to what is set out in the *Lifer Manual* because it is a term with a wide meaning that can be elucidated, as in the way the common law develops, on a case by case basis. Fourth, the decision of the Secretary of the State must be reasoned by reference to the circumstances of each case and is subject to scrutiny by way of judicial review. The ECtHR emphasised that this kind of reasoning is entirely consistent with the rule of law which impose to consider such requests on a individual basis. The applicant's submission is focused on the argument of the high difficulty to pass the standard set out in *Vinter* in order to render a whole life order reducible. As cited in the previous paragraph, in this judgement the Court held that where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 of the Convention on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration[28]. The dispute between the parties in the present case centred on whether the Secretary of State's discretion to release a whole life prisoner under section 30 of the *Crime (Sentences) Act 1997* is sufficient to make the whole life sentence imposed on the applicant legally and effectively reducible. The Strasbourg judge concluded that regardless of the policy set out in the Indeterminate Sentence Manual, the Secretary of State had to consider all relevant circumstances, in a manner compatible with Article 3.

The ECtHR quoted the Court of Appeal in *R v Loughlin* and *R v. Newell* [29], in this decision the Court affirmed that domestic law therefore did provide to an offender sentenced to a whole life order hope and the availability of *de jure* and *de facto* possibilities for release in the event of exceptional circumstances which meant that the punishment was no longer justified. The judgement was of a specially constituted Court of Appeal in *Attorney General's Reference* and it determined that whole-life sentences are compatible with Article 3 provided that a review mechanism exists when a sentence is imposed[30]. The Court found that the Grand Chamber in *Vinter* had misconstrued the England and Wales' review mechanism. It held that the Home Secretary's power to review a whole-life sentence under section 30 of the *Crime (Sentences) Act 1997* arises whenever exceptional circumstances exist. The Manual provides guidelines on certain grounds for sentence relief but cannot fetter the Home Secretary's discretion, which (by virtue of Section 6 of the Human Rights Act 1998) he or she is bound to exercise in conformity with Article 3. The Court of Appeal found that the term “exceptional circumstances” was a “term with wide meaning” that could be developed through the

[27] *Ibidem*, para 32.
[28] *Vinter and Others v UK*, cit., para. 122.
[29] *R v. Newell* and *R v. Mc Loughlin*, 24 January 2014, EWCA Crim 188, 2014.
[30] *Ibidem*, paras 14-22.

common law[31]. The Fourth Section recalled that it must accept the national court's interpretation of domestic law, therefore the power to release under section 30 of the 1997 Act, exercised in the way delineated in the Court of Appeal's judgements in *Bieber* and in *Oakes* and more recently in *Newell* and *Loughlin* cited above, is sufficient to comply with the requirements of Article 3. The Strasbourg judge stated that there is no violation of Article 3. This approach could be deemed consistent with the idea that the domestic Courts and the ECtHR have a shared judicial responsibility in the implementation of the judgements of the European Court of the Human Rights[32]. More exactly, the ECtHR endorsed the authoritativeness of an English Court's decision on the meaning of the national law dissenting from *Vinter*.

But primarily it is necessary to emphasise that the argument that the section 30 power will have to be exercised in a manner compatible with Article 3 simply does not address the requirements of certainty set out in the *Vinter* decision. As Naomi Hart held, there are two grounds for questioning the result in *Hutchinson*, the first relates chronology and the second concern is over the ECtHR's uncritical acceptance that the English and Welsh regime provides whole-life prisoners with a realistic and discernible prospect of release[33]. Undoubtedly both *Vinter* and *McLoughlin*[34] established that a review mechanism must be available and visible to a prisoner at the time a whole-life sentence is passed. For Hutchinson, that was in December 1994, thus an adequate review mechanism was not provided by the national law when Hutchinson's whole-life sentence was imposed - essential to Article 3 compliance. The Human Rights Act 1998 was not yet enacted, so there was no legislative imperative for the Home Secretary to exercise his or her discretion compatibly with Article 3. Concerning the second aspect, in *Vinter*, the Grand Chamber found not only that the Manual unlawfully restricted the grounds for sentence relief, but also that the general scope of exceptional circumstances cognisable by the Home Secretary was unclear.

Paradoxically the *Hutchinson* judgement seems to represent an explicit rejection of executive compassionate release as an appropriate release mechanism but it is in real contrast with the "*Vinter review*". It overrules the idea that the British government should recognize a right to rehabilitation in its own prison legislation and set up appropriate judicial mechanism to guarantee its comprehensive implementation. Neither the *Hutchinson* decision can be considered a way to mark the unjustified approach of the Secretary of the State who however did not modify his restrictive '*praxis*', to the contrary it is likely that the judgement has a strong political meaning related to the objective to loosen the pressure of the ECtHR on the United Kingdom. The Grand Chamber has heard the Hutchinson's appeal on 21 October 2015.

In the hearing, Judge Pinto de Albuquerque pointed out the contrast of the arguments held by the Attorney General before the Grand Chamber with the official position of the United Kingdom arising from the website. Visiting the UK government website, it is possible to find the following statement: "Whole life term

[31] *Ibidem*, paras 31-36.

[32] See ECtHR, *Dialogue between judges, "Implementation of the judgments of the European Court of Human Rights: a shared judicial responsibility?"*, Proceedings of the Seminar 31 January 2014, Strasbourg, http://www.echr.coe.int/Documents/Dialogue_2014_ENG.pdf.

[33] See N. Hart, *Whole-life sentences in the UK: volte-face at the European Court of Human Rights*, Case Comment, Cambridge Law Journal, 2015.

[34] The *McLoughlin* ruling on the relationship between the Manual and the section 30 of the *Crime (Sentences) Act* was handed down in 2014 and related to a whole-life sentence imposed in 2013.

means there is no minimum term set by the judge and the person is never considered for the release"[35]. As emphasised by the solicitor of Mr. Hutchinson before the Grand Chamber, "a more compelling argument relating the real nature of the whole tariff order is that the number of the prisoners released is akin to zero"[36]. As underlined during the hearing, a critical issue concerns the scope of the judicial scrutiny carried out by the national Courts in applications for the judicial review of the negative decisions by the Secretary of State in relation to the release of whole life prisoners. In theory, the Courts can order to the Secretary of State the release of the whole life prisoner if the whole life sentence is no longer justified on legitimate penological grounds, but it is not the real set-up of the English and Welsh Courts[37].

2. Expulsion as a violation of the ECHR article 3. The *Soering case* and the *Chahal case*.

In the landmark *Soering* judgment the issue was whether a state party to the ECHR could be fixed with responsibility for the ill treatment of individual that would occur in another state (in that case, after extradition). The European Court of Human Rights recalled that under article 1 of the ECHR, signatory states are bound to secure the rights and freedom of the convention 'to everyone within their jurisdiction'. This jurisdictional limit is essentially territorial. Signatories to the ECHR are not, generally required to protect the rights of individuals in other states and are not required to impose human rights standards on states that are not parties to ECHR. Nevertheless, as the ECtHR went on:

"It would be hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which Preamble refers, were a Contracting state knowingly to surrender a fugitive to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed"[38].

The same would apply to a risk of inhuman or degrading treating or punishment. The ECtHR found a violation of article 3, thereby recognizing the extra-territorial effect of the ECHR. Consequently, liability under article 3 arises in relation to any action, including expulsion, which exposes an individual to prohibited ill treatment[39]. *Soering* establishes that the extradition of an individual may breach article 3 where there are substantial grounds for believing that the individual faces a real risk of being subject to prohibited treatment. Its approach was confirmed in cases such as *Chahal*[40] as well as in the domestic courts[41]. Because the prohibitions in article 3 are absolute[42], they apply regardless of any past misconduct or risks posed by the

[35] https://www.gov.uk/types-of-prison-sentence/life-sentences, last updated: 12 November 2014.
[36] ECtHR, Grand Chamber, *Hutchinson* hearing, Strasbourg, 21 October 2015.
[37] The *Hutchinson* hearing before the Grand Chamber deal with these issues.
[38] ECtHR, *Soering v. The Uinted Kingdom*, Application no. 14038/88, 07 July 1989, para. 86.
[39] *Ibidem*, para 91.
[40] ECtHR, *Chahal v. The United Kingdom*, Application no. 22414/93,15 November 1996.
[41] See for example, *R (Ullah) v. Special Adjudicator*, 2004, UKHL; *R (Bagdanavicius) v. Secretary of State for the Home Department*, 2005, UKHL; *R (Wellington) v Secretary of State for the Home Department*, 2008, UKHL, 2009 AC; *AS (Lybia) v. Secretary of State for the Home Department*, 2008, EWCA, 2008 HRLR; *R (Nasseri) v. Secretary of State for the Home Department*, 2009, UKHL.
[42] ECtHR, *Sufi and Elmi v. The United Kingdom*, *Applications nos. 8319/07 and 11449/07*, 28 November 2011, para 212.

applicant and irrespective of the policy aims of the state. A person who has committed a criminal offence - however serious - remains entitled to the protection of the ECHR Article 3. Even in national security cases, there is no balancing exercise as *Chahal* made clear and as more recently affirmed by the Court of Appeal in *AS (Libya)*. Nor does an individual need to show any particular reason for the prohibited treatment[43]. The absolute nature of the prohibition in ECHR article 3 also requires that decision-makers must give rigorous scrutiny to expulsion cases raising Article 3 issues. As the ECtHR has stated in *Chahal*, 'examination of the existence of a real risk of ill-treatment must necessarily be a rigorous one'[44]. The domestic courts have also approved the notion of rigorous scrutiny.

3. The refusal of artificial insemination prisoners' partners in relation to the scope of the protection provided by the ECHR 8. The *Dickson* case.

Treatment relating to detention which does not reach the ECHR article 3 threshold may nonetheless breach the ECHR Article 8[45]. The Court has been asked on many occasions to adjudicate complaints triggering both Article 3 and 8. The interplay between the two provisions is due to the fact that the notion of private life is so wide that there may be circumstances in which Article 8 could be regarded as affording a protection in relation to conditions during detention which do not attain the level of severity required by Article 3[46]. Conversely, the Court has found that in some circumstances the finding of a violation under Article 3 makes it unnecessary to examine the complaint raised under Article 8[47]. From a general point of view, the progressive development of the scope of Article 8 constitutes one of the key features of the evolutive interpretation of the Convention by the Court. Although the Contracting States' margin of appreciation, the Strasbourg Court affirmed that a well-pondered balance between this aspect and the relevant objective of the protection of human rights can implies that positive obligations stem from Article 8[48].

The European Court of Human Rights has rejected the notion that there are broad implied limitations on prisoners' rights:

"The court accepts, moreover, that the 'necessity' for interference with the exercise of the right of a convicted prisoner to respect for his correspondence must be appreciated having regard to the ordinary and reasonable requirements of imprisonment. The 'prevention of disorder or crime', for example, may justify wider measures of interference in the case

[43] The protection offered by ECHR article 3 is thus wider than the protection of the Refugee Convention, with its five qualifying reasons for persecution, exclusion clauses under article 1F and limitation on protection from refoulement for those who have been convicted of particularly serious crimes under article 33.
[44] *Chahal v. The United Kingdom*, cit., para 96.
[45] ECtHR, *Raninen v. Finland*, Application no. 152/1996/771/972, 16 December 1998, para 63.
[46] *Ibidem*.
[47] *Yazgül Yilmaz v. Turkey*, Application no. 36369/06, 1 February 2011, this judgement concerns a forced gynaecological examination which, in principle, would fall within the ambit of Article 8.
[48] On this issue, see I. Roagna, *Protecting the right to respect for private and family life under the European Convention on Human Rights*, Council of Europe human rights handbooks, Council of Europe, Strasbourg, 2012.

of such a prisoner than in that of a person at liberty. To this extent, but to this extent only, lawful deprivation of liberty within the meaning of article 5 does not fail to impinge on the application of article 8"[49].

The ECtHR Grand Chamber in *Dickson v UK* has defined two grounds on which interference with prisoners' rights may properly be justified: first, that the interference is the "necessary and inevitable consequence" of imprisonment; or second that there is an adequate link between the interference and the circumstances of the individual prisoner. Fear of offending public opinion is not a permissible justification for interference:

"A person retains his or her Convention rights on imprisonment, so that any restriction on those rights must be justified in each individual case. This justification can flow, *inter alia*, from the necessary and inevitable consequences of imprisonment or (as accepted by the applicants before the Grand Chamber) from an adequate link between the restriction and the circumstances of the prisoner in question. However, it cannot be based solely on what would offend public opinion"[50].

It is uncontroversial that where the interference with rights protected by ECHR article 8 extends beyond the necessary and inevitable consequence on detention, ECHR article 8 may be breached notwithstanding that the underlying detention is lawful. A difficulty arises where the interference is said to be the 'necessary and inevitable consequence' of detention or imprisonment which is itself lawful. The 'necessary and inevitable consequence' should not be interpreted as meaning the consequences normally associated in the related country. Rather, the ECtHR now applies a strict proportionality test requiring exploration of less restrictive alternatives. Finding that a blanket ban on arrangements for the artificial insemination prisoners' partners breached ECHR article 8, the ECtHR Grand Chamber in *Dickson* stated that although the inability to beget a child might be a consequence of imprisonment, it is not an inevitable one.

The case originated in an application made by two British nationals, Kirk and Lorraine Dickson, husband and wife, on 23 November 2004. The first applicant was convicted of murder and sentenced to life imprisonment with expected release date in 2009. The second applicant met the earliest, while she was also imprisoned, through a prison pen-pal network. In 2001 the applicants married. Since the applicants wished to have a child, they applied for facilities for artificial insemination relying on the length of their relationship and the fact that, given the first applicant's earliest release date and the second applicant's age, it was unlikely that they would be able to have a child together without the use of artificial insemination facilities. In a letter dated 28 May 2003, the Secretary of State refused their application holding that his general policy states that requests for artificial insemination by prisoners are carefully considered on individual merit and will only be granted in exceptional circumstances. The decision had been examined in detail by the High Court and the Court of Appeal, and those courts had found that the Policy was rational and lawful. The

[49] ECtHR, *Golder v The United Kingdom*, Application no. *4451/70*, 21 February 1975, para 45; ECtHR, *Hirst v The United Kingdom, Application no. 74025/01*, 6 October 2005, paras 69-70; ECtHR, *Dickson v The United Kingdom*, Application no. *44362/04*, 4 December 2007, para 70.

[50] *Dickson v The United Kingdom*, cit., para 68; as to the point that offence caused to public opinion is not justification, likewise *Hirst v The United Kingdom*, cit., para 70.

applicants underlined that a refusal of artificial insemination facilities would extinguish their right to found a family and they alleged a violation of articles 8 and 12 of the ECHR.

As stated by the ECtHR, the refusal was based on a Policy which had never been subjected to parliamentary consideration and which allowed for no real proportionality examination domestically: the margin of appreciation had no role to play in such circumstances[51]. The Court held that social factors (interests of the putative child and of society) said to underlie the Policy were not contemplated by the second paragraph of Article 8. The concept of the wider public interest was vague, ill-defined and there was, in any event, no evidence that providing the requested facilities would undermine public confidence in the penal system, the refuse was inconsistent with the principle of rehabilitation. The suggestion that the best interests of the child were relevant to the grant of facilities was offensive, inappropriate, paternalistic and unconvincing as it suggested that the only way to protect that child's interest was to ensure it was never born. The argument of the inevitable absence of one parent, including that parent's financial and other support, for a long period would have negative consequences for the child and for society was insulting to single parents and, indeed, against domestic legal developments which minimised this factor in its jurisprudence in other non-prisoner artificial insemination cases.

It was unfair to state that their relationship had not been tested: the strength of any relationship (prisoner or other) was uncertain, there was no link between imprisonment and dissolution of relationships and, indeed, the first applicant's imprisonment had not weakened their relationship.[52] The Court considered that Article 8 is enforceable to the applicants' complaints in that the refusal of artificial insemination facilities concerned their private and family lives, which notions incorporate the right to respect for their decision to become genetic parents. Recalling *Hirst*, the ECtHR stated that a person retains his or her Convention rights on imprisonment, so that any restriction on those rights must be justified in each individual case. This justification can flow, *inter alia*, from the necessary and inevitable consequences of imprisonment or from an adequate link between the restriction and the circumstances of the prisoner in question. However, it cannot be based solely on what would offend public opinion. Before the Grand Chamber, the Government relied on the suggestion that losing the opportunity to beget children was an inevitable and necessary consequence of imprisonment. The Court therefore found that "the absence of such an assessment as regards a matter of significant importance for the applicants must be seen as falling outside any acceptable margin of appreciation so that a fair balance was not struck between the competing public and private interests involved. There has, accordingly, been a violation of Article 8 of the Convention"[53].

The ECtHR held that it is not necessary to examine the complaint under Article 12 of the Convention. Despite the reasons given by the government, the policy could amount to a blanket ban and an arbitrary limitation arising from the imprisonment. To the contrary since the inability to beget children is not an inevitable consequence of imprisonment, Article 8 suffers no restrictions when applied to detainees. The

[51] *Dickson v United Kingdom*, cit., para 51.
[52] *Ibidem*, paras 54-55.
[53] *Ibidem*, para 85.

policy applied by the Secretary of State placed an inordinately high "exceptionality" burden on the applicants and, in the absence of any careful weighing up of the competing interests in the case, either by the Secretary of State or by Parliament, it was in breach of their right to respect for their private and family life. In other cases involving access to fertility treatment and the assessment of a child's welfare, decisions about access are taken by a licensed provider of fertility services, subject to the oversight of the Human Fertilisation and Embryology Authority[54]. Although this issue was not raised before the Grand Chamber, the ECtHR noted that this policy had never been considered by Parliament. At present, a new Human Fertilisation and Embryology Bill is being discussed in the United Kingdom.

4. The disenfranchisement of prisoners as breach of Article 3 Protocol no. 1 to the Convention.

4.1. The *Hirst* case, a first assessment of the automatic and indiscriminate blanket ban to the prisoners' right to vote.

In 2001, three convicted prisoners challenged an Electoral Registration Officer's decision not to register them to vote. The High Court dismissed their applications, which in the case of two of them was for judicial review, and in the case of the third (*Hirst v HM Attorney General*), was for a declaration of incompatibility under the Human Rights Act 1998, ruling that it was a matter for Parliament, rather than the courts, to decide whether prisoners should have the vote. On 30 March 2004 the ECtHR gave its judgement in the case of *Hirst v The United Kingdom*. John Hirst, a prisoner serving a life sentence for manslaughter at Rye Hill Prison in Warwickshire, had challenged the ban on prisoners' voting. He had first challenged the ban in the High Court, but lost in 2001 when the court ruled that it was compatible with the European Convention for prisoners to lose the right to a say in how the country was governed. Seven judges at the ECtHR ruled that the United Kingdom's ban on prisoners' voting breached Article 3 of Protocol no. 1 of the European Convention on Human Rights, which guarantees free election under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. The Department of Constitutional Affairs stated that prisoners should lose the right to vote while in detention because if they commit a crime that is serious, they should lose the right to have a say in how you are governed. This judgement questions that position. The Government subsequently appealed the decision. The appeal was held on 27 April 2005 but the final decision was not announced until 6 October 2005.

In its judgment, *Hirst v The United Kingdom* (No. 2)[55], the Grand Chamber of the European Court of Human Rights stated, by a majority of 12 to 5, that there had been a violation of Article 3 of Protocol No. 1 to the European Convention on Human Rights. In its decision the Court found that prisoners generally continued to enjoy all the fundamental rights and freedoms guaranteed under the Convention, except for the right to

[54] Regulations concerning this body are provided by Human Fertilisation and Embriology Act, 2008, Sections 5-10.
[55] Grand Chamber, *Hirst v. The United Kingdom* (No. 2), Application no. 74025/01, 6 October 2005, *cit. supra*.

liberty, where lawfully imposed detention expressly fell within the scope of Article 5 (right to liberty and security). There was, therefore, no question that prisoners forfeit their Convention rights merely because of their *status* as detainees following conviction. Nor was there any place under the Convention system, where tolerance and broadmindedness were the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion. That standard of tolerance did not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set out in the Convention. Article 3 of Protocol No. 1, which enshrined the individual's capacity to influence the composition of the law-making power, did not therefore exclude that restrictions on electoral rights be imposed on an individual who had, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations. However, the severe measure of disenfranchisement was not to be undertaken lightly and the principle of proportionality required a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned. As in other contexts, an independent court, applying an adversarial procedure, provided a strong safeguard against arbitrariness. The Court responded to the UK Government's submission that the ban was restricted to only around 48,000 prisoners, namely those convicted of crimes serious enough to warrant a custodial sentence and not including those on remand. The Court considered that 48,000 prisoners was a significant figure and that it could not be claimed that the bar was negligible in its effects. It also included a wide range of offenders and sentences, from one day to life and from relatively minor offences to offences of the utmost gravity. Also, in sentencing, the criminal courts in England and Wales made no reference to disenfranchisement and it was not apparent that there was any direct link between the facts of any individual case and the removal of the right to vote. As to the weight to be attached to the position adopted by the legislature and judiciary in the United Kingdom, there was no evidence that Parliament had ever sought to weigh the competing interests or to assess the proportionality of a blanket ban. It could not be said that there was any substantive debate by members of the legislature on the continued justification, in the light of modern day penal policy and of current human rights standards, for maintaining such a general restriction on the right of prisoners to vote. It was also evident that the nature of the restrictions, if any, to be imposed on the right of a convicted prisoner to vote was in general seen as a matter for Parliament and not for the national courts. The domestic courts did not therefore undertake any assessment of the proportionality of the measure itself. The Court also found that, although the Representation of the People Act 2000 had granted the vote to remand prisoners, Section 3 of the Representation of the People Act 1983 remained a 'blunt instrument' which stripped of their Convention right to vote a significant category of people and it did so in a way which was indiscriminate. It applied automatically to convicted prisoners in prison, irrespective of the length of their sentence and regardless of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right had to be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1. the Court therefore held that there has been a violation of Article 3 of Protocol No. 1. Considering that the Contracting States had adopted a number

of different ways of addressing the question of the right of convicted prisoners to vote, the Court left the United Kingdom legislature to decide on the choice of means for securing the rights guaranteed by Article 3 of Protocol No. 1.

4.2.1. The *Greens and M.T.* case and the enactment of the pilot judgement against United Kingdom.

The case originated in two applications against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms by two British nationals, Mr Robert Greens and M.T. on 14 November 2008. The applicants were serving a determinate sentence of imprisonment at HM Prison Peterhead and they alleged a violation of Article 3 of Protocol No. 1 to the Convention as a result of the refusal to enrol them on the electoral register for domestic elections and for elections to the European Parliament. They further complained under Article 13 that they did not have an effective remedy. On 23 June 2008 Mr Robert Green and M.T. posted voter registration forms to the Electoral Registration Officer (ERO) for Grampian, but the ERO replied referring to previous applications for registration which were refused in 2007 under sections 3 and 4 of the Representation of the People Act 1983, as amended, on the basis of the applicants' *status* as convicted persons currently detained. The ERO requested clarification of whether there had been a change in circumstances in the applicants' cases. The applicants wrote to the ERO arguing that in light of the Court's decision in *Hirst* and of the Registration Appeal Court's decision in *Smith v Scott*[56], the officer was obliged to add their names to the electoral register. The ERO refused the applicants' registration on the basis of their *status* as convicted persons detained in a penal institution. As result, the applicants were ineligible to vote on 4 June 2009, when elections to the European Parliament took place and on 6 May 2010 for the general elections in the United Kingdom.

As quoted in the present judgment, the Joint Committee on Human Rights, considered domestic developments in the execution of the Grand Chamber's judgment in *Hirst* and noted its overriding disappointment is at the lack of progress in this case. The Joint Committee regretted that the Government had not yet published the outcome of its second consultation, which closed in September 2009. This appeared to show a lack of commitment on the part of the Government proposing a solution for Parliament to consider. Despite the imminent general election, the Government has not brought forward proposals for consideration by Parliament. The Committee reiterates its view, often repeated, that the delay in this case was unacceptable. Where a breach of the Convention is identified, individuals are entitled to an effective remedy by Article 13 ECHR. So long as the Government continues to delay removal of the blanket ban on prisoner

[56] *Smith v Scott*, 2007 SC 345.

voting, it risks not only political embarrassment at the Council of Europe, but also the potentially significant cost of repeat litigation and any associated compensation.[57]

On 2 November 2010 a short debate took place in the House of Commons following a question to the Government regarding their plans to give prisoners the right to vote. In the course of that debate, the Minister emphasised that the Government was under a legal obligation to change the law following the *Hirst* judgment. He said that the Government was actively considering how to implement the judgment and that once decisions had been made, legislative proposals would be brought forward. On 3 November 2010, in response to a question in the House of Commons, the Prime Minister also emphasised that the Government was required to come forward with proposals to implement the Court's judgment in Hirst. On 4 March 2010 the Committee of Ministers adopted a decision in which they noted that notwithstanding the Grand Chamber's judgment in *Hirst*, a declaration of incompatibility with the Convention under the Human Rights Act by the highest civil appeal court in Scotland in the case of *Smith v. Scott* and the large number of persons affected, the automatic and indiscriminate restriction on prisoners' voting rights remained in force; reiterated their serious concern that a failure to implement the Court's judgment before the general election and the increasing number of persons potentially affected by the restriction could result in similar violations affecting a significant category of persons, giving rise to a substantial risk of repetitive applications to the European Court; and strongly urged the authorities rapidly to adopt measures, even if of an *interim* nature, to ensure the execution of the Court's judgment before the then pending general election. The ECtHR criticised the Government's delay in implementing the Court's judgment in *Hirst*, pointing out the concerns expressed by the Joint Committee on Human Rights regarding the delay. According to statistics provided by the Equality and Human Rights Commission EHRC, there were approximately 70,000 serving prisoners in the United Kingdom in February 2009. They estimated that more than 100,000 prisoners were likely to have been affected by the ban at one time or another since the Court's judgment in *Hirst*. Recalling *Hirst*, the Court reiterated that although the margin of appreciation applicable to Article 3 of Protocol No. 1 is wide, it is not all-embracing. Section 3 of the 1983 Act has not been amended since *Hirst* and it remains a 'blunt instrument'. This provision imposes a blanket restriction on all convicted prisoners. It applies automatically to such prisoners, irrespective of the length of their sentence and regardless of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1. Furthermore, the blanket restriction introduced by Section 3 of the 1983 Act has been extended to elections to the European Parliament by Section 8 of the 2002 Act, which is parasitic upon the former section. The applicants also complained that they had no effective remedy to address their complaints under Article 3 of

[57] See "*Enhancing Parliament's role in relation to human rights judgments*", 15th Report of 2009-10, Joint Committee on Human Rights, March 2010, paras 108 and 116-117.

Protocol No. 1, in violation of Article 13[58]. The EHRC explained that as Article 46 of the Convention, which required Contracting States to abide by the final judgment of the Court in any case to which they were parties, was not included in the rights protected by the Human Rights Act 1998, the domestic courts were unable to enforce it directly due to the dualist nature of the British legal system. The Government was not obliged to reform legislation incompatible and concluded that the mechanism was inadequate to satisfy the guarantees of Article 13. The Court accordingly concluded that there has been no violation of Article 13.

The Court considered that notwithstanding the wide margin of appreciation afforded to the respondent State by its judgment in *Hirst*, in light of the lengthy delay in implementing that decision and the significant number of repetitive applications now being received by the Court, it is appropriate to make findings under Article 46 of the Convention in the present cases. The Court recalled that Article 46 of the Convention, as interpreted in the light of Article 1, imposes on the respondent State a legal obligation to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to secure the right of the applicant which the Court found to be violated. The Court has previously indicated that if the respondent State fails to adopt such measures following a pilot judgment and continues to violate the Convention, the Court would have no choice but to resume examination of all similar applications pending before it and to take them to judgment so as to ensure effective observance of the Convention.

ECtHR emphasised that the finding of a violation of Article 3 of Protocol No. 1 in the present case was the direct result of the failure of the authorities to introduce measures to ensure compliance with the Grand Chamber's judgment in *Hirst*. The failure of the respondent State to introduce legislative proposals to put an end to the current incompatibility of the electoral law with Article 3 of Protocol No. 1 is not only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs, but also represents a threat to the future effectiveness of the Convention machinery. In light of the lengthy delay which has already occurred and the results of the delay in terms of follow-up applications, the Court encouraged the speediest and most effective resolution of the situation in a manner which complies with the Convention's guarantees. However, while the Court does not considered appropriate to specify what should be the content of future legislative proposals, it is of the view that the lengthy delay to date has demonstrated the need for a timetable for the introduction of proposals to amend the electoral law to be imposed. Therefore, the Court concluded that the respondent State must introduce legislative proposals to amend Section 3 of the 1983 Act and, eventually, Section 8 of the 2002 Act, within six months of the date on which the judgment became final, with a view to the enactment of an electoral law to achieve compliance with the Court's judgment in *Hirst* according to any time-scale determined by the Committee of Ministers.

[58] "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity", ECHR, Article 13.

4.2.2. The reluctance to remedial measures

Before new legislation was introduced, a parliamentary motion in February 2011 demonstrated the depth of Parliament's opposition to remedial measures. Jack Straw, the former Secretary of State for Justice with responsibility for the Labour government's earlier failure to comply with the *Hirst* ruling, and Conservative Member David Davis joined forced to utilize a new power for backbench members to debate topics of their own choosing; in this case, to debate the propriety of maintaining the existing ban on all prisoners' abilities to vote. Debate occurred on the motion in favour of maintaining the current situation and, by implication, a vote on parliament's authority in determining whether the restriction on voting rights is valid. Neither the government nor opposition front benches voted on the motion, which carried by 234 votes to 22[59].

The debate provided evidence that the UK expressed its opposition to *Hirst* and *Greens M.T.* cases in terms of the rule of law and the sovereignty of parliament. The government also requested that the *Greens M.T.* case be referred to the Grand Chamber of the Court, and argued that the margin of appreciation should be broad enough to exclude a ban on prisoners voting in the UK so as to reflect parliament's strong view that the ban is justified. In April 2011 the Grand Chamber of the European Court of Human Rights rejected the UK government's request to rehear the case, which triggered a sixth month deadline, dating from 11 April 2011, for the government to introduce legislation compliant with the court's jurisprudence. Despite losing this argument for a rehearing, the Government was able to gain yet another delay after Attorney General Dominic Grieve made a submission as a third party in *Scoppola v. Italy*[60], which raised the same issues that arose in *Hirst* and in *Greens and M.T.*[61]. Grieve argued that the European Court had not given sufficient weight to different approaches between states to the same social issue and urged the court to not follow the road of seeking to impose restrictive uniform solutions. Prime Minister Cameron indicated that he would continue supporting parliament's earlier decision against allowing prisoners to vote, arguing that this issue should be a matter for parliament to decide, not a foreign court[62]. In November 2012, the Lord Chancellor Chris Grayling made a statement to the House of Commons that the government was publishing a draft bill, the Voting Eligibility (Prisoners) Draft Bill, while the Government set up a Joint Parliamentary Committee to carry out pre-legislative scrutiny on the draft Bill.[63]. In a Command Paper to the Joint Committee on Human Rights entitled Responding to Human Rights Judgments 2013-14, which was published in December

[59] See http://www.parliament.uk/business/committees/committees-a-z/commons-select/backbench-businesscommittee.
[60] ECtHR, Grand Chamber, *Scoppola v. Italy* (No. 3), Application No. 126/05, 22 May 2012.
[61] In the Scoppola decision the ECtHR held that there was no violation of the Article 3 of the Protocol no. 1, however the delivery of the judgement in the case of *Scoppola v Italy* meant that the UK Government had six months from the date of the judgment (22 May 2012), to bring forward legislative proposals to amend the law on prisoners' voting rights.
[62] See http://www.theguardian.com/society/2012/oct/24/prisoners-vote-david-cameron.
[63] The bill sets out three options for parliament: a ban for prisoners who are sentenced to four years or more, a ban for prisoners sentenced to more than six months, and a ban for all convicted prisoners, the Voting Eligibility (Prisoners) Draft Bill, 2012–13, CM 8499, United Kingdom.

2014, the Government indicated that prisoners would not be granted the vote prior to the General Election of 2015[64].

Concerning the domestic jurisdiction, George McGeoch and Peter Chester (both prisoners serving life sentences for murder) brought cases in 2010 challenging the blanket ban on voting by prisoners. Appeals by both McGeoch[65] and Chester[66] were heard by the Supreme Court in June 2013. The Supreme Court considered whether McGeoch could claim a right under European Union law to vote in local elections and European Parliamentary elections and in the case of Peter Chester the Court considered whether the ban on voting in UK Parliamentary and European Parliamentary elections was incompatible with Article 3 of Protocol 1 of the ECHR and/or whether the blanket ban was incompatible with EU law. The Supreme Court unanimously dismissed both appeals.

The Court ruled that with regard to EU law, this does not provide an individual right to vote paralleling that recognised by the ECtHR in its case-law. However, the Supreme Court also maintained the position determined in Strasbourg that the UK's blanket ban was contrary to the ECHR rights to vote, although it refused to make a further 'declaration of incompatibility' with the Human Rights Act 1998, considering that it was unnecessary in the circumstances.

In two recent judgments in August 2014 and February 2015 (*Firth and others v The United Kingdom*[67] and *McHugh and others v The United Kingdom*[68]) relating to a large number of outstanding claims by prisoners, the European Court of Human Rights noted the continuing violation of Article 3 to Protocol No. 1 to the Convention, but did not award the applicants any compensation or legal expenses.

4. 3. The continuation of the violation of Article 3 to Protocol No. 1 to the Convention. The *Firth and others* and *McHugh and others* case.

The case of *Firth and others v. The United Kingdom* concerned ten prisoners who, as an automatic consequence of their convictions and detention pursuant to sentences of imprisonment, were unable to vote in elections to the European Parliament on 4 June 2009. The Court concluded that there had been a violation of Article 3 of Protocol No. 1 because the case was identical to the case *Greens and M.T.*

The Court had regard to the recent steps taken in the United Kingdom with the publication of a draft bill and the report of the Parliamentary Joint Committee appointed to examine the bill. Given that the legislation remained unamended, the Court concluded that there had been a violation. In spite of the finding of a

[64] "Responding to human rights judgments", Report to the Joint Committee on Human Rights on the Government, Response to human rights judgments 2013-2014, Ministry of Justice; https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389272/responding-to-human-rights-judgments-2013-2014.pdf.

[65] Supreme Court, *R (Chester) v Secretary of State for Justice*, 10 and 11 June 2013 - 16 October 2016.

[66] Supreme Court, *McGeoch v The Lord President of the Council and another (Scotland)*, 10 and 11 June 2013 - 16 October 2016.

[67] ECtHR, *Firth and Others v. United Kingdom*, Application no. 47784/09, 12 August 2014.

[68] ECtHR, *McHugh and others v The United Kingdom*, Application no. 51987/08 and 1, 014 others, 10 February 2015.

violation, the Court rejected the applicants' claim for compensation and legal costs. It referred to its remarks in *Greens and M.T.* where it had indicated that it would be unlikely to award costs in future follow up cases. It explained that the applicants, in lodging their applications, had only been required to cite Article 3 of Protocol 1, alleged that they were detained pursuant to a sentence of imprisonment of the date of the election on question and confirmed that they had been otherwise eligible to vote in that election. The Strasbourg judge found that the lodging of such an application was straightforward and did not require legal assistance. It therefore concluded that the legal costs claimed had not been reasonably and necessarily incurred. The case of *McHugh and others* related to a large number of 'legacy cases'. The 1,015 were all prevented from voting in one or more elections in 2009, 2010 or 2011. The ECtHR concluded that there had been a violation of Article 3 of Protocol No. 1 because the case was identical to other prisoner voting cases in which a breach of the right to vote had been found and the relevant legislation had not yet been amended. However, as with the case of *Firth and others*, it rejected the applicants' claim for compensation and legal costs.

The decision of the European Court has been proscriptive, explaining what approaches are impermissible, but has been less able to be prescriptive and to identify what measures must be taken. The case on prisoners' right to vote illustrates the limitations of this approach where several years after the judgment was delivered, no changes have yet been implemented[69].

5. The *McDonnel* case and the persisting unfulfillment of the procedural and investigative obligation in respect of the death in custody under the ECHR Article 2

The case originated in an application against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms by an Irish national, Ms Elizabeth McDonnell, on 15 March 2011. The applicant complained in particular under Article 2 that the State had not fulfilled its procedural, investigative obligation in respect of the death in custody of her son in that there had been an excessive delay in the inquest proceedings. On the 30 March 1996, Mr James McDonnel, detained in Crumlin Road Prison in Belfast, knew his father had died and asked to move to a single cell. The prison officers denied this possibility. Mr McDonnel decide to go to the Punishment and Segregation Unit (PSU) of the prison. There was then a scuffle between several prison officers and Mr McDonnell, which resulted in his being wrestled to the ground and physically restrained. He was brought to a standing position and, while still restrained, was taken to the PSU. A body search was carried out at the PSU with his consent. He was also examined by a medical officer, who noted that he had suffered bruising and grazing and was experiencing discomfort in his chest. Statements later taken from prison officers and prisoners diverged as regards, *inter alia*, the circumstances of the incident, the level of restraint used and whether Mr McDonnell had been beaten. On the same day Mr McDonnell was found unconscious in his cell in the PSU having suffered a heart attack. A

[69] S. Creighton, *Law and Litigation as a Tool for Reform*, Prison Service Journal, 2015.

number of unsuccessful attempts were made to resuscitate him. He was declared dead. The autopsies reported that McDonnel had suffered a fracture to the hyoid bone in the neck, consistent with being grasped by a hand, and that it appeared that had suffered a heart attack some 12-24 hours prior to his death, Mr McDonnell's thyroid cartilage was also fractured and that there was bruising to the area. Some medical evidence did not exclude that the stress suffered while being restrained had contributed to the cause of death, others showed that the injuries James McDonnell suffered approximately one hour prior to his death were a direct and proximate cause of his death. Notwithstanding these outcomes, prosecution did not take place.
In 2001 the applicant made a complaint to the Police Ombudsman about the investigation into her son's death. In February 2002 investigators from the Ombudsman's Office met with Professor Vanezis to discuss certain prisoners' statements. On 2 May 2003 Professor Vanezis provided a further report to the Ombudsman confirming his view that Mr McDonnell had died from a heart attack but that stress relating to the restraint had contributed to his death. The Court cited the conclusions of the Ombudsman who affirmed that the investigation into the death of James McDonnell was thorough and complete. "The family of Mr McDonnell were not kept up to date with the investigation. This was not uncommon in 1996. However, with the advent of the emphasis on Family Liaison in any investigation into a sudden death, it is hoped that different standards would be applied today"[70].

The inquest was provisionally listed to commence on 3 February 2009. Only on 18 May 2011, and in the light of this Court's judgment in *Šilih v. Slovenia*[71], the Supreme Court overruled the judgments of the House of Lords concerning the applicability of Article 2 to pre-Human Rights Act deaths and accepted that such inquests should be compliant with Article 2. At the end, the inquest commenced before the Senior Coroner on 17 April 2013. At the start of the inquest, the Coroner made a decision to grant anonymity to the prisoner officer witnesses, this decision represent the conclusion of an endless debate which contribute to cause the striking delay. The applicant commenced judicial review proceedings regarding the anonymity order made in respect of the prison officer witnesses at the inquest. She contended that this aspect of the inquest failed to comply with Article 2 of the Convention because it denied the inquest the requisite degree of transparency and accountability since the identities of those concerned were withheld from the next of kin and their conduct was not subject to public scrutiny. She did not seek the quashing of the jury's verdict.
The judicial review hearing took place on 24 and 25 February and a decision was issued on 15 May 2014. The court rejected the applicant's challenge. According to the latest information available to the Court, the applicant was considering whether to lodge an appeal against the decision. The Government held that the complaints under Article 2, other than the complaint about investigative delay of itself, are therefore inadmissible as premature and/or on the ground that domestic remedies have not yet been exhausted within the meaning of Article 35 § 1 of the Convention. They were of the view that the inquest process which had now taken place showed that, even if the inquest had taken place earlier, the result would have been no different. The Court considered that the complaint under Article 2 about investigative delay of itself is not

[70] ECtHR, *McDonnel v The United Kingdom judgement*, Application no. 19563/11, 9 December 2014, para 28.
[71] ECtHR, *Šilih v. Slovenia*, Application no. 71463/01, 9 April 2009.

manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other ground[72]. It must therefore be declared admissible, along with the related complaint under Article 13 of the Convention. In fact, the consequence of the referral of the case to the Department of Public Prosecution in 2013, with the potential that entails for, *inter alia*, further proceedings of a criminal and/or disciplinary nature, is that the investigative process into the death of Mr McDonnell has still not finished eighteen years after his death. The applicant complained about this last circumstance and about the delay in the commencement of the inquest. She relied on Article 2 of the Convention and she further contended that the delays encountered were not justified.

The Court stated that "it is well-established that Article 2 requires an investigation to begin promptly and to proceed with reasonable expedition, and that this is required quite apart from any question of whether the delay actually impacted on the effectiveness of the investigation"[73]. Recalling Hugh Jordan[74], McCaughey,[75] and Hemsworth[76], the Strasbourg judge added that "while there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating an alleged use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts"[77]. The ECtHR concluded that whatever the individual responsibility, or lack of responsibility, of those public officials involved in the investigation process, these delays cannot be regarded as compatible with the State's obligation under Article 2 to ensure the effectiveness of investigations into suspicious deaths, in the sense that the investigative process, however, it be organised under national law, must be commenced promptly and carried out with reasonable expedition. To this extent, the foregoing finding of excessive investigative delay, of itself, entails the conclusion that the investigation was ineffective for the purposes of Article 2 of the Convention. There has, accordingly, been a violation of Article 2 under its procedural aspect by reason of excessive investigative delay. The Court also held that no separate issue arises under Article 13 of the Convention in that respect. The Strasbourg judge has found that the investigative delay in the present case breached the procedural guarantees of Article 2 of the Convention[78]. In so doing, it considered the inquest process itself was not structurally capable throughout the relevant period of time of providing the applicants with access to an investigation which would commence promptly

[72] The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly illfounded, or an abuse of the right of individual application, ECHR, Article 35 § 3 (a).
[73] ECtHR, *McDonnel v The United Kingdom*, cit., para 86.
[74] ECtHR, *Hugh Jordan v The United Kingdom*, Application no. *24746/94*, 4 May 2001, para 108 e paras 136-140.
[75] ECtHR, *McCaughey and Others v. The United Kingdom*, Application no. *43098/09*, 16 July 2013, para 130.
[76] ECtHR, *Colette and Michael Hemsworth v the United Kingdom*, Application no. 58559/09, 16 July 2013, para 69.
[77] *Ibidem*.
[78] The importance of carrying out a proper risk assessment on all inmates on the basis of safety and security could be considered pertaining to the field of the ECHR Article 2 guarantees. The Strasbourg Court has affirmed this principle in the Edwards' judgement in relation to a prisoner who was killed by a cellmate, ECtHR, *Paul and Audrey Edwards v. the United Kingdom*, Application no. 46477/99, 14 March 2002. On the general scope and the effects of a risk management approach see G. Cliquennois and B. Champetier, *The development of a risk management approach to conditional release, life sentences and deaths by the Council of Europe*, National Centre for Scientific Research, University of Strasbourg, SAGE, France.

and be conducted with due expedition. It falls to the Committee of Ministers, acting under Article 46 of the Convention, to address the issue of what – in practical terms – may be required of the respondent Government by way of compliance. For the third time, the Court stated that this compliance must involve the State taking, as a matter of some priority, all necessary and appropriate measures to ensure, in the present case and in similar cases concerning killings by the security forces in Northern Ireland where inquests are pending, that the procedural requirements of Article 2 are complied with expeditiously. This decision strictly concerns the Northern Ireland but it could be relevant in order to make more effective the task of the Prison and Probation Ombudsmen in the UK relating to the deaths in custody in the framework of the ECHR Article 2.

PART II - National legal systems for prisoners rights protection

1. Judicial remedies for the protection of prisoners' rights

Since the early 1970s prison litigation played a leading part in the development of public law as a whole. The landmark cases: Silver, Golder, Saint Germain, Leech, Hague introduced the judicial intervention and made it increasingly relevant in prison life. Litigation for prisoners on prison law issues will generally be in public law proceedings for judicial review or private claims for damages.

1. 1. Judicial review

Foremost, judicial review is not an appeal but it is a technical remedy allowing the courts to assess the legality of administrative actions. More precisely, judicial review is the jurisdiction by which the higher courts supervise the public law acts or omissions of public bodies and tribunals (such as decisions of magistrates' courts or the Parole Board) or of other public bodies performing public functions. The general rule in judicial review is that the court will consider whether the decision has been lawfully made[79].
Judicial authority is an ordinary jurisdiction. Judicial intervention in prison issues amounts to judicial review. Because of judicial review is not an appeal, generally it does not provide a means to challenge the underlying merits of a decision but it is relevant that the approach in detention challenges[80] and generally in human rights cases differs in some aspects. The entry into force of Human Rights Act 1998 has significantly broadened the reach of judicial review. According to the section 6 of the HRA it is unlawful for public

[79] L. Dubinsky, H. Arnott, A. Mackenzie, *Foreign National Prisoners, Law and Practice*, Legal Action Group, London, 2012, p. 817.
[80] The salient aspect of the judicial review in the field of the admistrative detention of the foreign national prisoners deserves to be picked out because in the assessment of the lawfulness of admistrative detention, the Court act as primary decision-maker. "That is, when hearing challenges to the lawfullness of a detention the court does not exercise a supervisory, review function but rather forms its own judgement of the lawfulness of the detention", *ibidem*, p. 627.

bodies to act in a such way as to breach the rights under the ECHR incorporated by the HRA 1998 and such breaches can be challenged through judicial review. Persons or bodies performing statutory functions are generally seen as public bodies[81]. The UN Human Rights Committee confirmed this view holding that states remain accountable for violations of prisoners' rights in privatised penitentiaries and must ensure, through effective monitoring that private contractors respect and protect those rights. The Rule 88 of the European Prison Rules clearly provides that "where privately managed prisons exist, all the European Prison Rules shall apply"[82].

The Rule 54 of the Civil Procedures Rules (CPR), defines "a claim for judicial review as a means to review the lawfulness of an enactment, or a decision, action or failure to act in relation to the exercise of a public function"[83].

The courts can establish whether an Act of Parliament is consistent with EU law and if it is not give precedence to the EU law. They can also, in accordance with the primary legislation, make a declaration that a statutory provision is incompatible with rights under the ECHR. Secondary legislation, policy documents, Prison Service Orders can be declared unlawful. The courts declare that the legislation is inconsistent but they cannot disapply legislation which infringes a Convention right[84].

With the case *Golder v United Kingdom* cited above, the ECtHR had a crucial role in the overturning of the domestic judicial deference to the argument that public policy should inhibit the courts from examining and reviewing the actions of prison administrators[85]. The *Golder* decision affirmed the idea that the rights of the prisoners could not be automatically infringed or suspended by the *status* of detention. That leading judgement was in contrast with the view that inmates are not entitled to rights but to privileges "*octroyés*" at the discretionary power of the Secretary of the State. The Commission unanimously expressed the opinion that Article 6 para. 1 guarantees a right of access to the courts and that in Article 6 para. 1, whether read alone or together with other Articles of the Convention, there are no inherent limitations on the right of a convicted prisoner to institute proceedings and for this purpose to have unrestricted access to a lawyer; and that consequently the restrictions imposed by the present practice of the United Kingdom authorities are inconsistent with Article 6 para. 1. The Commission furthermore held that the right of access to the courts guaranteed by Article 6 para. 1 is not qualified by the requirement "within a reasonable time"[86]. One year later the national jurisdiction shared the perspective of the ECtHR, in *R v Board of Visitors of Hull Prison ex p St Germain*[87] Jeffrey Laing LJ affirmed that the statutory obligation to make the rules are merely declaratory on one of the basic rules of natural justice, namely that every party to the controversy has the right to a fair hearing. "Despite the deprivation of his general liberty, a prisoner remains invested with

[81] S. Creighton, H. Arnott, *Prisoners, Law and Practice*, Legal Action Group, London, 2009, p. 607.
[82] "Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules", Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies, Part V, Rule 88.
[83] Civil Procedure Rules, Part 54 Judicial Review and Statutory Review, Rule 54.1.
[84] Human Rights Act 1998, Section 3-4.
[85] *Golder v. The United Kingdom*, cit.
[86] *Ibidem*, para 21.
[87] *R v Board of Visitors of Hull Prison ex p St Germain*, CA 1 January 1979, QB 425.

residuary rights appertaining to the nature and conduct of his incarceration (...). An essential characteristic of the right of a subject is that it carries with it a right of recourse to the courts unless some statute decrees otherwise". [88]

The judge held that he must know what evidence has been given and what statements have been made effecting him; that he then must be given a fair opportunity to correct or contradict them. In that case, the Court of Appeal established that the supervisory jurisdiction of the High Court extended to the disciplinary decisions of Prison Boards of Visitors and consequently that these boards could be required to observe natural justice[89].

Following the case of *R v Secretary of State for the Home Department ex p Mc Avoy*, *R v Deputy Governor of HMP Parkhust ex p Leech*, *R v Deputy Governor HMP Parkhust ex p Hague*, judicial review gradually increased to the whole range of disciplinary powers such as disciplinary transfer[90], governor's adjudications[91] and segregation[92]. In *Hague and Weldon* Lord Bridge held that the availability of judicial review as a means of questioning the legality of action purportedly taken in pursuance of the Prison Rules is a beneficial and necessary jurisdiction which cannot properly be circumscribed by considerations of policy or expediency in relation to prison administration.

The purpose of judicial review is to ensure that individual is given fair treatment by the authority to which he has been subjected. Grounds for review in a prison law context are no different from those in any other area of law, thus decisions can be challenged on the basis of illegality, procedural impropriety, irrationality or in cases concerning the rights protected by the Human Rights Act 1998 proportionality[93].

This is reflected in the remedies available if an application for judicial review is successful. These are the following: a mandatory order that is a judicial remedy issued from a higher court to compel or to direct a lower court or a government officer to fulfil mandatory duties correctly (formerly known as an *order of mandamus*); a quashing order that nullifies a decision which has been made by a public body, such an order is usually issued when the public body has acted *ultra vires*, namely outside of the scope of its powers (historically known as an *order of certiorari*); a prohibiting order that prevents the public body from doing

[88] *Ibidem*. *Raymond v Honey* opens to the same perspective, the case arose from the action of a prison governor who blocked a prisoner's application to a court. The House of Lords affirmed that "under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication", *Raymond v Honey*, [1983] 1 AC 1, p. 10. Reiterating the principle that a prisoner remains invested with all civil rights which are not taken away expressly or by necessary implication, in *R v Secretary of State for the Home Department, Ex p Anderson*, Robert Goff LJ stated that "At the forefront of those civil rights is the right of unimpeded access to the courts; and the right of access to a solicitor to obtain advice and assistance with regard to the initiation of civil proceedings is inseparable from the right of access to the courts themselves", Queen's Bench Divisional Court, *R v Secretary of State for the Home Department, Ex p Anderson* [1984] QB 778, p. 790.

[89] *R v Board of Visitors of Hull Prison ex p St Germain*, cit.

[90] *R v Secretary of State for the Home Department ex p Mc Avoy*, 1984. In this case the court reviewed the legality of the transfer of a remand prisoner from Brixton to Winchester Prison. Whilst Webster J was clear that the transfer decision was reviewable, overriding security reasons led him to refuse to quash the decision.

[91] *R v Deputy Governor of HMP Parkhust ex p Leech*, 1988.

[92] *R v Deputy Governor HMP Parkhust ex p Hague*; *Weldon v Home Office*, 1992.

[93] See P. Von Berg, edited by, *Criminal Judicial Review, A Practioner's Guide to Judicial Review in the Criminal Justice System and Related Areas*, Oxford, 2014.

something unlawful (in the past known as an *order of prohibition*)[94]; a declaration that is a judgment by the Administrative Court which clarifies the respective rights and obligations of the parties to the proceedings, without actually making any order[95]; damages that is available as a remedy in judicial review in limited circumstances, not merely because a public authority has acted unlawfully, in respect of this claims under European law or the Human Rights Act 1998 are included[96]. Judicial review proceedings are mandatory where the claimant seeks a mandatory, prohibiting or quashing order[97]. In practice, judicial review is the principal method by which excess or abuse of power by public bodies can be identified and addressed, it has played a key role in developing and promoting human rights, particularly since the implementation of the HRA 1998. The issues raised are often of common interest to other authorities or public bodies and a decision of the Court can provide authoritative guidance to them on disputed points of interpretation or practice. This is not unique to judicial review but this features often in the public law field because the grounds for review, almost by definition, involve issues of law. Complaints procedures and ombudsmen simply cannot deliver a general or authoritative decision, no matter how effective they might be in an individual case[98].

A public body must always act lawfully and a decision made in the breach of the law, whether deliberately or accidentally, will be unlawful and will therefore amenable to intervention. There is illegality where a decision maker has no statutory power to make an action or decision or exceeds the powers given to him (for example a prison governor imposes a punishment of additional days after a disciplinary hearing). Abuses or misuses of power or discretion may come under this ground such as failing to take in account relevant considerations, ignoring relevant considerations, having an improper purpose, improperly delegating a decision or fettering discretion[99]. In the case *Congreve v Secretary of State for the Home Office*[100] the primary intention of the Minister of Justice regarding the Individualised Education Programme measures represented an abuse of his powers because he performed his task in order to make prison conditions harsher and not to crack down on drugs getting into prisons. Consequently the removal of a benefit can be an abuse of power. There have been occasions where the courts held that decisions about prisoners have been taken without lawful authority, either because a Prison Rule exceeded the legitimate limits on a prisoner's rights or because the policy contained in Prison Service Orders is itself unlawful. In *R v Secretary of State for the*

[94] A prohibiting order is different from a preventing order because it acts prospectively by telling a public body not to do something in contemplation.

[95] If the court declared that a proposed rule by a public authority was unlawful, a declaration would resolve the legal position of the parties in the proceedings. Subsequently, if the authority were to proceed ignoring the declaration, the applicant who obtained the declaration would not have to comply with the unlawful rule and the quashing, prohibiting and mandatory orders would be available.

[96] Damages are also available when there is a recognised private law cause of action such as negligence or breach of statutory duty.

[97] Civil Procedure Rules, Rule 54.2.

[98] See "A new focus for legal aid", Response of the Constitutional and Administrative Law Bar Association, http://www.adminlaw.org.uk/events_consultations/consultation_papers.php.

[99] Where "the adjudicator did not exercise discretion fairly or did not have an open mind about the circumstances of the case", National Offender Management Service, *Prisoner Discipline Procedures*, Issue Date: 1 November 2013 (Update), Expiry Date: 18 September 2015, para 3.15.

[100] *Congreve v Secretary State for the Home Office*, [1976] QB 629.

Home Department ex p Leech[101] for example, the provision contained in section 47 which aimed to limit the rights of prisoners to correspond with their lawyers was deemed to interfere with the privileged relationship between solicitors and prisoners and so it was held to be *ultra vires* the Prison Act 1952. The decision is important for several reasons. First, it re-stated the principles that every citizen has a right of unimpeded access to the court, that a prisoner's unhampered access to a solicitor for the purpose of receiving advice and assistance in connection with a possible institution of proceedings in the courts forms an inseparable part of the right of access to the courts themselves and that section 47(1) of the 1952 Act did not authorise the making of any rule which created an impediment to the free flow of communication between a solicitor and a client about contemplated legal proceedings. Legal professional privilege was described as an important auxiliary principle serving to buttress the cardinal principles of unimpeded access to the court and to legal advice. Secondly, it was accepted that section 47(1) did not expressly authorise the making of a rule such as rule 33(3), and the court observed that a fundamental right such as the common law right to legal professional privilege would very rarely be held to be abolished by necessary implication[102].

Prison Service policies can come under challenge to establish the extent to which they are compatible with the Prison Act and the Rules. Policies must be applied without admitting exceptions. In the case of category A prisoners[103], the policy that they would be detained in category A conditions to protect the public no matter how unlikely an escape might be was held to be unlawful as it failed to take account of cases where highly dangerous prisoners might be physically incapable of an escape[104].

There is procedural impropriety where the decision maker does not follow the legislative requirements as to fairness. The minimum standard of fairness will be an explicit disclosure of the substance of the matters (relevant materials) on which the decision-maker intends to proceed and an opportunity to submit writing representations. In some case, the importance of the rights at stake may require an oral hearing to be provided[105].

The leading case on procedural fairness in the context of administrative decision making involved the procedures that had to be followed by the Secretary of State when setting the review of the tariff for

[101] *R v Secretary of State for the Home Department ex p Leech*, [1994] QB 198.

[102] *Ibidem*, p. 212. In the light of the *Leech* decision, a new prison rule was made, now rule 39 of the Prison Rules 1999. It provides, so far as material: "(1) A prisoner may correspond with his legal adviser and any court and such correspondence may only be opened, read or stopped by the governor in accordance with the provisions of this rule. "(2) Correspondence to which this rule applies may be opened if the governor has reasonable cause to believe that it contains an illicit enclosure and any such enclosures shall be dealt with in accordance with the other provision of these Rules. "(3) Correspondence to which this rule applies may be opened, read and stopped if the governor has reasonable cause to believe its contents endanger prison security or the safety of others or are otherwise of a criminal nature. "(4) A prisoner shall be given the opportunity to be present when any correspondence to which this rule applies is opened and shall be informed if it or any enclosure is to be read or stopped." This rule, it is accepted, applies only to correspondence in transit from prisoner to solicitor or vice versa. The references to opening and stopping make plain that it has no application to legal correspondence or copy correspondence received or made by a prisoner and kept by him in his cell.

[103] Prisoners whose escape would be highly dangerous to the public or the police or the security of the state and for whom the aim must to be make escape impossible.

[104] *R (Pate) v Secretary of State for the Home Department*, 2002.

[105] Civil Procedure Rules 54. 11 A.

prisoners serving mandatory life sentences[106]. In the above-cited *R v Secretary of State for the Home Department ex p Doody* the House of Lords held the failure to allow the prisoners affected to know what material was being considered or to give reasons for the decision reached rendered the process unlawful.
In the leading case, Lord Mustill drew up the scope of the fairness in that judgement and established principles which could be deemed fundamental requirements of fairness in the administrative decision making process:

"1.Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. 2. The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. 3. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. 4. An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. 5. Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. 6. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer"[107].

The application of these six principles to prison administration has been widespread and policies promulgated by the Prison Service dealing with Home Detention Curfew and the Incentives and Earned Privileges Regimes will allow for prisoners to have the opportunity to know of the information that is being considered and to submit representations. The Court have paid particular attention to the nature of the right at stake at influencing these standards and so higher standards are applied to decisions that have the potential to impact on liberty such category A decisions or the removal of lifers from open conditions than to decisions affecting the categorisation of determinate prisoners or allocation to differential regimes under the Incentive and Earned Privileges Regime[108].
In *R v Secretary of State for the Home Department ex p* S.P.[109] a juvenile was segregated without being given the opportunity of making representations. The Court held that again as a matter of fairness that opportunity should have been provided. The decision applied to those in the young offender institution section but not to adults reflecting the additional impact of segregation on a young offender. *R v Parole Board ex p Tinney* represents a case of successful challenge before the Parole Board of England and Wales because the applicant pointed to procedural failing concerning fairness namely he contended that the Board misapplies any statutory direction it is required to follow[110]. In *R v Parole Board ex p Headly* the Court stated that the Parole Board has broken the requirements of procedural fairness[111].

[106] The Secretary of State no longer retains this power since the enactment of the Criminal Justice Act 2003.
[107] *R v Secretary of State for the Home Department ex p Doody*, cit., para 14.
[108] On the impact of the enforcement of these parameters of fairness see S. Creighton and H. Arnott, *Prisoners, Law and Practice*, cit.
[109] *R v Secretary of State for the Home Department ex p* S.P., [2004] EWHC 1418.
[110] *R v Parole Board ex p Tinney*, 2005, EWHC 863.
[111] *R v Parole Board ex p Headley*, 2009, EWHC 663.

Where the policy provides for a procedure or a set of criteria to be considered when making a decision, these can create a legitimate expectation that they will be followed. A legitimate expectation can be changed and in the field of imprisonment it is unlikely to create a substantive benefit rather than a procedural right. Although prisoners will have a legitimate expectation that the policies and procedures set down in Prison Service documents such as Prison Service Orders will be followed, if the policy is subsequently changed then the right is simply to have their case considered under the new policy, even where this has changed to the detriment of the prisoner. In *R v Secretary of State for the Home Department ex p Hargreaves*[112] Lord Justice Pill held that it must then be considered whether an expectation was created and, if so, whether it is one which the law regards as a legitimate expectation which cannot be defeated by the change of policy. That will depend on all the circumstances, including the nature of the expectation, the change of policy involved and any justification given for that change in the light of the expectation claimed to exist. In his opinion, the Court can quash the decision only if, in relation to the expectation and in all the circumstances, the decision to apply the new policy in the particular case was unreasonable in the *Wednesbury* sense.

1. 2. Judicial review relying on Human Rights Act 1998

Concerning the unreasonableness, the judgement of *AP Picture Houses Ltd v Wednesbury Corporation*[113] gave the standard of unreasonableness of public body decisions that would be them liable to be quashed on judicial review. The court held that it could not intervene to overturn the decision of the defendant merely because the court disagreed with it. To have the right to intervene, the court would have to conclude that in making the decision, the defendant took into account factors that ought not to have been taken into account, or the defendant failed to take into account factors that ought to have been taken into account, or the decision was so unreasonable that no reasonable authority would ever consider imposing it. The test laid down in that case is known as "the *Wednesbury* test". The term "*Wednesbury* unreasonableness" is used to describe the third criterion, of being so unreasonable that no reasonable authority could have decided that way. This case has cited in the courts' decisions of England and Wales as a reason for courts to be hesitant to interfere in the administrative law bodies. Over past few decades, especially after the enactment of the Human Rights Act 1998, there has been a shift in the judiciary towards a less strict abstentionist approach, recognising that in certain circumstances it is necessary to undertake a more searching review of administrative decisions. The European Court of Human Rights requires the reviewing court to subject the original decision to "anxious scrutiny" as to whether an administrative measure infringes a Convention right.
R v Secretary of State for the Home Department ex p Simms[114] can be considered one of the most notable decisions in this sense, in that case the Court Appeal considered that the policy of the Home Secretary and

[112] *R v Secretary of State for the Home Department ex p Hargreaves*, 1996, EWCA Civ 1006.
[113] Court of Appeal, *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation*, 7 November 1947, CA.
[114] *R v Secretary of State for the Home Department ex p Simms*, 8 July 1999.

the administrative decisions of the Governors pursuant to that policy were unlawful because they went on to prohibit prisoners contact with the press[115]. There was at stake a fundamental or basic right, namely the right of a prisoner to seek through oral interviews to persuade a journalist to investigate the safety of the prisoner's conviction and to publicise his findings in an effort to gain access to justice for the prisoner. The Court stated that in those circumstances even in the absence of an ambiguity there came into play a presumption of general application operating as a constitutional principle. The judge's view contrary to the interpretation of the Secretary of State' allowed to affirm that paragraphs 37 and 37(A) of the Prison Act 1952 were not *ultra vires* and they left untouched the fundamental and basic rights asserted by the prisoners in the proceeding.
Recalling *Silver v. United Kingdom*[116], Lord Steyn affirmed that an oral interview is simply a necessary and practical extension of the right of a prisoner to correspond to journalists about his conviction. The political part is a crucial limb of the judicial reasoning and it was introduced by Lord Hoffman:

"Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document. The Human Rights Act 1998 will make three changes to this scheme of things. First, the principles of fundamental human rights which exist at common law will be supplemented by a specific text, namely the European Convention. But much of the Convention reflects the common law[117]. That is why the United Kingdom government felt able in 1950 to accede to the Convention without domestic legislative change. So the adoption of the text as part of domestic law is unlikely to involve radical change in our notions of fundamental human rights. Secondly, the principle of legality will be expressly enacted as a rule of construction in section 3 and will gain further support from the obligation of the Minister in charge of a Bill to make a statement of compatibility under section 19. Thirdly, in those unusual cases in which the legislative infringement of fundamental human rights is so clearly expressed as not to yield to the principle of legality, the courts will be able to draw this to the attention of Parliament by making a declaration of incompatibility. It will then be for the sovereign Parliament to decide whether or not to remove the incompatibility. What this case decides is that the principle of legality applies to subordinate legislation as much as to acts of Parliament. Prison regulations expressed in general language are also presumed to be subject to fundamental human rights. The presumption enables them to be valid. But, it also means that properly construed, they do not

[115] "First, until the Home Secretary imposed a blanket ban on oral interviews between prisoners and journalists in or about 1995, such interviews had taken place from time to time and had served to identify and undo a substantial number of miscarriages of justice. There is no evidence that any of these interviews had resulted in any adverse impact on prison discipline. Secondly, the evidence establishes clearly that without oral interviews it is now virtually impossible under the Home Secretary's blanket ban for a journalist to take up the case of a prisoner who alleges a miscarriage of justice. In the process a means of correcting errors in the functioning of the criminal justice system has been lost", Lord Steyn, in *R v Secretary of State for the Home Department ex p Simms.*
[116] ECtHR, *Silver and Others v The United Kingdom*, Application no. *5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75*, 25 March 1983, in this case, the subject matter was the censorship of prisoners' correspondence. The censorship of prisoners' correspondence was considered ancillary to prison rules restricting the contents of correspondence. The Commission, therefore, and the Court had to evaluate what restraints upon the content of correspondence were permissible. The main review is contained in the Opinion of the Commission. At p. 509, para. 344, and following the Commission dealt with the prohibition of letters containing material intended for publication. It recognised that uncontrolled communications could have adverse consequences for prison order and discipline and that it was therefore necessary to carry out a balancing exercise but it concluded that a blanket prohibition was not necessary.
[117] See *Derbyshire County Council v Times Newspapers Ltd*, [1993] A.C. 534, 551.

authorise a blanket restriction which would curtail not merely the prisoner's right of free expression, but its use in a way which could provide him with access to justice"[118].

In the opinion of Lord Hobhouse of Woodborough, the policy of the blanket exclusion of journalists is both unreasonable and disproportionate and cannot be justified as a permissible restraint upon the rights of the prisoner. The court determined that the relevant decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker, foremost because of the substantial interference with human rights. Section 6 (1) of the Human Rights Act defines courts and tribunals as public bodies meaning their judgments must comply with human rights obligations except in cases of declarations of incompatibility.

The case of *R v Secretary of State for the Home Department ex p Daly*[119] examined the Prison Service's policy of searching prisoners' cells by requiring the prisoner to be absent during the entire search[120].

Mr Daly, a long term prisoner, challenged the lawfulness of the policy, submitting that section 47(1) of the Prison Act 1952, which empowered the Secretary of State to make rules for the regulation of prisons and for the discipline and control of prisoners, did not authorise the laying down and implementation of such a policy. Mr Daly accepted the need for random searches of prisoners' cells for the purpose of security, preventing crime and maintaining order and discipline and that such searches may properly be carried out in the absence of the resident prisoner. He also tolerated the need for prison officers to examine legal correspondence held by prisoners in their cells to make sure that it is *bona fide* legal correspondence and that such correspondence is not used as a convenient hiding place to secrete drugs or illicit materials of any kind, or to keep escape plans or any records of illegal activity. Consequently, he did not claim that privileged legal correspondence is immune from all examination. He contended only that such examination should ordinarily take place in the presence of the prisoner whose correspondence it is[121]. The Court stated that the policy

[118] *R v Secretary of State for the Home Department ex p Simms*, Lord Hoffman.

[119] *R v Secretary of State for the Home Department ex p Daly*, 23 may 2001, UKHL 26.

[120] On 31 May 1995 the Home Secretary introduced a new policy ("the policy") governing the searching of cells occupied by convicted and remand prisoners in closed prisons in England and Wales. The policy was expressed in the Security Manual as an instruction to prison governors in these terms: "17. 69 Staff must accompany all searches of living accommodation in closed prisons with a strip search of the resident prisoner. 17. 70 Staff must not allow any prisoner to be present during a search of living accommodation (although this does not apply to accommodation fabric checks). 17. 71 Staff must inform the prisoner as soon as practicable whenever objects or containers are removed from living accommodation for searching, and will be missing from the accommodation on the prisoner's return. 17. 72 Subject to paragraph 17. 73, staff may normally read legal correspondence only if the Governor has reasonable cause to suspect that their contents endanger prison security, or the safety of others, or are otherwise of a criminal nature. In this case the prisoner involved shall be given the opportunity to be present and informed that their correspondence is to be read. 17. 73 But during a cell search staff must examine legal correspondence thoroughly in the absence of the prisoner. Staff must examine the correspondence only so far as necessary to ensure that it is *bona fide* correspondence between the prisoner and a legal adviser and does not conceal anything else. 17. 74 When entering cells at other times (when undertaking accommodation fabric checks) staff must take care not to read legal correspondence belonging to prisoners unless the Governor has decided that the reasonable cause test in 17. 72 applies."

[121] He contended this argument for two related reasons: first, because knowledge that such correspondence may be looked at by prison officers in the absence of the prisoner inhibits the prisoner's willingness to communicate with his legal adviser in terms of unreserved candour; and secondly, because there must be a risk, if the prisoner is not present, that the officers will stray beyond their limited role in examining legal correspondence, particularly if, for instance, they

cannot be justified in its blanket form because the infringement of prisoners' rights to maintain the confidentiality of their privileged legal correspondence is greater than is shown to be necessary to serve the legitimate public objectives. In his report the Prison Ombudsman concluded that he upheld the prisoner's complaint affirming that is a valid one and that, in searching prisoners' legal papers in their absence, the Prison Service is compromising the legal privilege which ensures that correspondence between a solicitor and his client will remain confidential. Lord Bingham of Cornhill reached the same conclusions and he affirmed that his decision is founded on an orthodox application of common law principles derived from the authorities and an orthodox domestic approach to judicial review. He stated that the same result was achieved by reliance on the European Convention because the article 8 (1) gave Mr Daly a right to respect for his correspondence. While interference with that right by a public authority may be permitted if in accordance with the law and necessary in a democratic society in the interests of national security, public safety, the prevention of disorder or crime or for protection of the rights and freedoms of others, the policy interferes with Mr Daly's exercise of his right under article 8 (1) to an extent much greater than necessity requires.

In this instance, therefore, the common law and the convention yield the same result. The judge recalled the *Smith and Grady v United Kingdom* case[122], in which the European Court held that the orthodox domestic approach of the English courts had not given the applicants an effective remedy for the breach of their rights under Article 8 of the convention because the threshold of review had been set too high. The *Daly* decision underlined that following the incorporation of the convention by the Human Rights Act 1998 and the bringing of that Act fully into force, domestic courts must themselves form a judgment whether a convention right has been breached (conducting such inquiry as is necessary to form that judgment) and, so far as permissible under the Act, grant an effective remedy. Lord Steyn introduced the proportionality test and affirmed that the intensity of review is somewhat greater under the proportionality approach. He held that first, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith*[123] is not necessarily appropriate to the protection of human rights. The intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.

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see some name or reference familiar to them, as would be the case if the prisoner were bringing or contemplating bringing proceedings against officers in the prison.

[122] ECtHR, *Smith and Grady v United Kingdom*, Applications nos 33985/96 and 33986/96, 27 September 1999.

[123] *R v Ministry of Defence, Ex p Smith* [1996] QB 517.

The decision illuminated the distinction between "traditional" (that is to say in terms of English case law, *Wednesbury*) standards of judicial review and higher standards under the European Convention. In the *Daly* case seemingly compliance with the European Convention for the Protection of Human Rights and with the common law produce the same result. But really it represented the first post Human Rights Act example of how the enforcement of the principle of legality could bear different outcomes in respect of the same matters when addressing the fundamental rights protected by the Convention. Notwithstanding *Daly* was decided on the application of a common law recognised as a sufficient source of the fundamental right to confidential communication with a legal adviser for the purpose of obtaining legal advice, it must be emphasised that in situations where the primary legislation requires a public authority to act in a particular manner, HRA 1998 makes provision either for the legislation to have words inserted or be read in a manner which will ensure compatibility with Convention rights[124] or for declaration of incompatibility to be sought[125]. When a court is considering making a declaration of incompatibility, the relevant minister is entitled to be joined as a party to the proceedings[126].

Applications for judicial review relying on HRA 1998 is a strongly relevant feature of the recent development of prison law. In relation to the setting of tariff for lifers, primary legislation has been considered under this framework because the provisions of the *Criminal Justice Act 1991* that required the Secretary of State to set the tariff were held to be in contravention of article 6 as the Lords did not consider they could be read compatibly with the Convention, a declaration of incompatibility was issued which resulted in the new legislative regime in the *Criminal Justice Act 2003*[127]. In contrast when the new legislation was enacted and it prohibited the High Court from holding oral hearing when re-setting tariffs, as previously underlined, the Lords considered that words could be read into the statute under HRA 1998 Section 3 conferring discretion to convene an oral hearing where necessary[128].

As recalled above, the European Court of Human Rights requires the reviewing court to subject the original decision to "anxious scrutiny" as to whether an administrative measure infringes a Convention right. Since *Ezeh and Conners v United Kingdom*[129], the ECHR Article 6 applies to prison disciplinary hearings where additional days can be added to prison sentences. Although, quoting the dissenting opinions in *R. v. United Kingdom*[130], the relationship between the right to be heard by a tribunal, within the meaning of Article 6, and the right to an effective remedy before a national authority, within the meaning of Article 13, should be considered more thoroughly.

As underlined above, relating the whole tariff order, in the pending *Hutchinson* case, the Strasbourg Court quoting and not using in a proper manner the *Bieber* and *McLoughin* decisions, does not find a violation of Article 3 in the meaning of the Convention. The violation in the meaning of the Convention becomes no-

[124] HRA 1998, Section 3.
[125] HRA 1998, Section 4.
[126] HRA 1998, Section 5.
[127] R (Anderson) v Secretary of State for the Home Department, 2002.
[128] R (Hammond) v Secretary of State for the Home Department, 2005.
[129] ECtHR, *Ezeh and Conners v United Kingdom*, *Applications nos. 39665/98 and 40086/98*, ECHR, 9 October 2003.
[130] ECtHR, *W, B and R. v United Kingdom*, 8 July 1987.

violation in the interpretation of the domestic Courts.

2. Procedural requirements

Procedural requirements of an application of judicial review are provided for by the cited Civil Procedure Rules Part 54. The general principle is that applications for judicial review must be made promptly and in any event not later than 3 months after the grounds to make the claim first arose[131]. The decisions issued about prisoners that may be subject to a challenge will generally fall within the powers conferred on the Governor of the prison, the Secretary of State, the Parole Board or in disciplinary cases, the district judge conducting the independent adjudication.

Preliminary, it is necessary to introduce some aspects on disciplinary cases. The disciplinary decision must be announced and recorded on the record of the hearing. The Prison Service Orders confirms that the adjudicator must give reasons for decisions and, in case of groundless decisions, prisoners are entitled to challenge. The failure to set out the reasons does not imply the unlawfulness of the decision *per se*, because the Rules do not involve a statutory duty. The changes to the Rules introduced in 2005 removed the power of the Secretary of State to review the Independent Adjudicator's hearing.

As matter of fact, the reviewer is a senior district judge (SDJ) from the magistrates' court system appointed by the Secretary of State for Justice who has the power to reduce, substitute or quash the punishment when it appears that the punishment was 'manifestly unreasonable' (manifestly unreasonableness is one of the unlawfulness criteria). If a governor or a director believes that an IA adjudication is flawed then this must be referred back to the IA at the Chief Magistrate's Office as neither the governor nor the Secretary of State has any power to interfere with the decisions of the Independent Adjudicator. Whether the adjudication was conducted by a governor[132] or by and Independent Adjudicator the final remedy is judicial review[133].

De jure, cases involving loss of liberty as a punishment are heard by district judges, while governors adjudicate charges where only the lesser punishments can be imposed[134].

The judicial review court will not quash findings of guilt on the basis of minor technical breaches of procedure, but will examine whether such breaches have resulted in unfairness. There is no mechanism for

[131] Civil Procedure Rules, Rule 54. 5.

[132] Governors can delegate their power to a trained operational manager and directors to an officer senior enough to be in charge of the prison in the director's absence. While controllers retain statutory power to conduct adjudications it is anticipated they will no longer routinely do so once directors and their staff are suitably trained.

[133] The governors and the district judges are the same for inmates in pre-trial detention and convicted prisoners. The judicial review ensure that separate authorities have in charge the control of the power on disciplinary decisions.

[134] In sum, disciplinary charges are heard by governors (directors or controllers in private prisons) where the charge is insufficiently serious to justify a punishment of additional days. Where the charge is serious enough potentially to warrant an award of additional days, it is referred to an Independent Adjudicator for hearing. The Prison Rules require the governor to determine whether the charge is so serious that additional days should be awarded for the offence, if the prisoner is found guilty and if so, it must referred to an Independent Adjudicator. Consequently, prisoners serving life sentences who cannot receive additional days on their sentences will ordinary never have their cases referred to an Independent Adjudicator.

reviewing or appealing findings of guilt because of the appeal mechanism is restricted to the level of punishment awarded[135].

As cited above, in 2002 the ECtHR[136] confirmed the charges where prisoners can have days added to their sentence engages Article 6 necessitating radical changes to the disciplinary system[137].

An effective access to a Court requires access to legal aid. As stated by the relevant rules on this general matter, judicial review should be used where no adequate alternative remedy, such as a right of appeal, is available and claimants are strongly advised to seek appropriate legal advice as soon as possible when considering proceedings[138].

It is a general principle of public law that internal remedies should be exhausted before an application for judicial review can proceed.

In relation to claims against the Prison Service, the only available internal remedy is to make use of the formal complaints scheme, although as a letter from a solicitor should be treated in judicial review and sending an appropriate letter before claim will effectively exhaust all available internal remedies. Guidance on the contents of the letter before claim and the pre-action protocol[139] can be found on the Court Service website[140] and on the Ministry of Justice website[141].

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[135] A guilty outcome at an independent adjudication may also adversely affect applications for parole, recategorisation, or the Home Detention Curfew (HDC) scheme, see http://www.duncanlewis.co.uk/Independent-adjudications.html.

[136] *Ezeh and Connors v UK*, cit.

[137] The Howard League for Penal Reform Report edited in 14 December 2015 reveals that the number of adjudications where extra days could be imposed has increased by 47 per cent since 2010. The report states that the principle of independent adjudication does not legitimate the overuse of adjudications because the imposition of additional days is very expensive and counterproductive. Paradoxically, the disciplinary responsibility arises from the detrimental condition of detention, namely the increasing overcrowding and the front-staff cuts. In the opinion of the Chief Executive of the Howard League for Penal Reform, Frances Crook, the Ministry of Justice should curtail the use of additional days in all but the most serious cases. Despite the formal strengthening of the guarantees and the pivotal role of the district judges, the Report states that most adjudications are tried by a prison governor before whom there is no really right to legal representation, except in very limited circumstances. Cases that are sufficiently serious to attract the risk of additional days are referred to a visiting district judge. As the NGO's underlined, additional days cannot be imposed beyond the final end date of the sentence, therefore the overwhelming majority of challenging prisoners could be released without any period on licence in the community[137]. According to the data provided by Andrew Selous, the Minister for Prisons, Probation, Rehabilitation and Sentencing in an answer to a Written Question tabled on 26 June 2015 by the shadow Minister Andrew Slaughter, 132. 321 additional days were imposed on inmates in public prisons and 27. 176 on detainees in private prisons.

[138] Pre-action Protocol for Judicial review, Introduction, para 5.

[139] "1. This Protocol applies to proceedings within England and Wales only. It does not affect the time limit specified by Rule 54. 5(1) of the Civil Procedure Rules (CPR), which requires that any claim form in an application for judicial review must be filed promptly and in any event not later than three months after the grounds to make the claim first arose. Nor does it affect the shorter time limits specified by Rules 54. 5(5) and (6), which set out that a claim form for certain planning judicial reviews must be filed within six weeks and the claim form for certain procurement judicial reviews must be filed within thirty days. 2. This Protocol sets out a code of good practice and contains the steps which parties should generally follow before making a claim for judicial review. 3. The aims of the protocol are to enable parties to prospective claims to (a) understand and properly identify the issues in dispute in the proposed claim and share information and relevant documents; (b) make informed decisions as to whether and how to proceed; (c) try to settle the dispute without proceedings or reduce the issues in dispute; (d) avoid unnecessary expense and keep down the costs of resolving the dispute; and (e) support the efficient management of proceedings where litigation cannot be avoided", *Pre-action protocol for judicial review*, Introduction, paras 1-2-3, https://www. justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv#introduction.

[140] www. hmcourts-service.gov.uk/csm/1220.htm.

[141] www. justice.gov.uk/civil/procrules_fin/contents/protocols/prot_jrv.htm.

Since the rationalization of the complaints scheme to provide for responses to complaints to be dealt with at the appropriate level, it is necessary to proper identify the legal identity of the decision maker so that the correct defendant can be named. Decisions made by the various arms of National Offender Management Service Agency and the Prison Service will be either made on the authority of the Secretary of State, or the Governor, or both.

The Prison Act of 1952 requires and empowers the Secretary of State to make decisions in respect of a range of matters affecting prisoners and all decisions made either at ministerial level or by staff employed centrally by NOMS or at Prison Service Headquarters are done so on the delegated authority of the Secretary of State. Generally, all matters which have to be dealt with on the reserved subject complaint forms will be decisions taken on behalf of the Secretary of State. This will include decisions in relation to category A prisoners, repatriation decisions and compassionate release. Importantly, it will also include challenges to the contents of policy documents such as Prison Service Orders. PSOs are permanent directions which replace the current mixture of Standing Orders, Circular Instructions, Instructions to Governors, and manuals containing mandatory requirements. PSOs take precedence over other mandatory items and should be the first point of reference. Prisoners generally have access to these through prison libraries, and the Orders are publicly available unless "given a protective marking"[142]. Those with a protective marking "may be disclosed in limited circumstances where this is considered to be in the public interest for example in the course of legal proceedings"[143].

Conversely, a number of decisions are either conferred directly upon the governor of a prison, or are devolved to the governor by the Secretary of State. The Prison Rules give the governor direct responsibility for disciplinary matters such as segregation and prison adjudications and a range of other decisions are delegated to the Governor as a matter of policy by the Secretary of State including: categorization other than category A decisions; temporary release; the conduct of visits and other communications with the outside world; the Incentives and Earned Privileges Scheme, Home Detention Curfew[144] and the transfer of prisoners. For prisoners held in contracted out prisons, the *Offender Management Act 2007*[145] gave Directors powers in relation to formal and informal disciplinary matters and so for the purposes of public law challenges it is possible to simply substitute the director for the governor. Although the director is employed by a private company, he or she is clearly carrying out public functions so as to be challengeable in judicial review proceedings. There is inevitably some interplay between the two decision makers. In the case of governor's adjudications, the proceedings are conducted by, or behalf on, the governor but is possible to apply to have these decisions review by the Secretary of State. Where an application for review has been

[142] PSO 0001.
[143] *Ibidem.*
[144] It is necessary to underline that Home Detention Curfew as introduced in January 1999 (prisoners serving sentences of more than three months but less than four years were allowed to release) was extensively amended by the *Criminal Justice Act 2003*. Statutory exclusions from HDC are provided by PSI 31/2003, *inter alia* they concern prisoners convicted of a sexual offence who are subject to notification requirements, prisoners liable to removal from the United Kingdom, prisoners subjected to a hospital order, hospital direction or transfer direction. About other detailed provisions, see PSI 31/2003.
[145] *Offender Management Act* 2007, Sec. 16-20.

made and rejected, the proceedings would fall to be commenced against both the governor and the Secretary of State. There may be instances where the governor has reached a decision that is in accordance with a policy contained in a PSO but where it is contended that the contents of that policy are unlawful. An example of this has risen where the PSO on temporary release required prison governors to reject all applications from prisoners without with outstanding, unpaid confiscation orders. The challenge made was the governor for reaching the decision to refuse temporary release and the Secretary of State for promulgating an unlawful policy[146].

The Parole Board is a statutory body with its own legal identity and so challenges to decisions made by the board or its secretariat will name that body as the defendant. There is no process of appealing or reviewing Parole Board decisions internally, other than directions made in advance of oral parole hearings[147] and so it is possible to proceed directly to the pre-action protocol. It is in delay cases, where responsibility might fall between both the Secretary of State and the Parole Board and so proceedings may need to contemplated against both.

Despite the relevant role of the judiciary concerning a number of high profile cases decided in favour of prisoners, judicial review is a very technical and cumbersome remedy that is not readily accessible to most prisoners[148].

As a general rule, the formal principle of 'effective judicial review' presupposes that the court to which a matter is referred may require the relevant authority to notify its reasons for its decision. Although the European Court has held on occasion that judicial review is not always an effective remedy, this pre-existed the enactment of Human Rights Act, and so applications for judicial review are normally be considered to constitute an effective remedy. Nevertheless, the Wednesbury standard of review applied in fundamental rights cases, not in prison issues, has been considered an ineffective remedy under the ECHR Art. 13[149].

An urgent procedure is provided for by the general mechanism of the judicial review and it can be assessed by the Administrative Court. If the claimant want to make an application for permission to be heard or considered by a Judge as a matter of urgency or to seek an *interim* injunction, he has to fill in a Request for Urgent Consideration[150] which can be obtained from the relevant Administrative Court Office or from the HMCTS website. The form established the reasons for urgency and the timescale sought for the consideration of the permission application, namely within 72 hours or sooner if necessary, and the date by which the substantive hearing should take place. If the claimant is seeking an *interim* injunction, he must, in addition, provide a draft order; and the grounds for the injunction. A judge will consider the application within the time requested and may make such order as he considers appropriate. The judge may refuse the application for permission at this stage if he considers it appropriate, in the circumstances, to do so. If the Judge directs that an oral hearing must take place within a specified time, the Administrative Court Office

[146] *R (Adelana) v Governor of HMP Downview and Secretary of State for Justice*, 28 October 2008, [2008] EWHC 2612 .
[147] *Parole Board Rules*, 2008, Rule 8.
[148] In the light of his experience, a solicitor interviewee gives this perspective on the judicial review.
[149] *Smith and Grady v United Kingdom*, cit.
[150] It represents the so-called Form N463.

will liaise with the applicant and the representatives of the other parties to fix a permission hearing within the time period directed. Where a manifestly inappropriate urgency application is made, consideration may, in appropriate cases, be given to making a wasted costs order[151].

In the judicial review of the disciplinary decisions, the Article 6 of the Human Rights Act could be applied. It is not for the prisoner to prove his innocence and a finding of guilt can only be made when evidence proving the charge is producing at the hearing. In the *Tarrant* decision the Court, setting out a consideration on the procedural difficulties faced by the prisoner (whether the prisoner has been able to interview relevant witnesses prior the hearing), affirmed that the criminal standard of proof has been properly applied in the case[152]. In the civil action for damages, the standard of proof is the civil standard, namely the balance of probabilities.

Collecting of evidence is difficult when a prisoner prepares litigation, the documents and the recording of the complaints are not immediately available because of prison officials must be told to provide them. Although documentary evidence can be obtained from prison authorities, through Data Protection Act applications since the DPA Act 1998[153] or even through the Prison Service's policies, it can still be hard for prisoners to have contemporaneous records made in relation to the relevant facts of the litigation. Under the provision of the Rule 50A of the Prison Rules 1999 any prisoner can be placed under constant observation by means of an overt closed circuit television system while he is in a cell or in other place in the prison if the governor considers that such supervision is necessary for the prevention, detection, investigation or prosecution of crime[154] but if a member of staff commits a crime against a prisoner, the latter most likely will no access to Close Circuit Television Recordings. Lacking legal representation, the access to physical evidence could be impossible. As Simon Creighton and Hamish Arnott wrote, the particular disadvantage that prisoners face in this regard means that they need to be pro-active to ensure that contemporaneous evidence is prepared and retained. In his point of view, prisoners should be encouraged to keep their own records where possible, for example in the form of a diary where a complaint is being made about ongoing behaviour. In cases where distress and frustration are to be pleaded, the lack of a contemporaneous record will significantly weaken the claim. Official complaints forms should be submitted and applications can provide independent verification of a complaint. Given that injuries are not properly recorded, legal advisers have a relevant role. Legal advisers need to act promptly by making formal applications for material to preserved of for complaints to be recorded prior to a visit to the prisoner due to the inevitable time lapse that occurs between an incident taking place and the instructions being received by the solicitor. The records disclosed should normally include medical records prepared and obtained whilst the person is in custody. Disclosure should take place within

[151] "Administrative Court Guidance", https://www.justice.gov.uk/downloads/courts/administrative-court/applying-for-judicial-review.pdf

[152] *R v Secretary of State for the Home Department ex p Tarrant and others*, QB, 251, 1985.

[153] "A disclosure with lawful authority only if the disclosure is made for the purposes of any proceedings, whether criminal or civil and whether arising under, or by virtue, of this Act", s. 59 (2), Data Protection Act, 1999

[154] Rule 50A, Observation of prisoners by means of an overt closed circuit television system, Prison Rules 1999.

40 days but may be longer if the records are voluminous[155]. The Protection Data Act establishes an enforcement procedure if the subject evaluates that the data disclosure is inadequate or if the application is not complied with. Complaints can be made to the Information Commissioner who can issue enforcement notices and the deny of the disclosure is amenable to judicial review under the CPR Part. 8.
Rule 54. 17 of Civil Procedure Rules states that any person may apply for permission to file evidence or to makes representations at the hearing for judicial review[156]. Civil Procedure Rules 54. 18 establishes that the Court may decide the claim for judicial review without a hearing only where all the parties agree. The applicant can challenge a lower Court decision.

3. Human rights breaches under judicial review

The exception to the principle that claims for damages arising from any unlawful actions are devolved to the Queen's Bench Division or the County Court for determination is connected to the Human Right Act 1998 claims. The right to claim damages normally derives from a finding of violation of rights protected by the Convention[157]. In this respect the ECHR Article 41 is wholly reflected in the Section 8 of the Act[158]. Under Article 41 there are three pre-conditions to an award of just satisfaction: (1) that the Court should have found a violation; (2) that the domestic law of the member state should allow only partial reparation to be made; and (3) that it should be necessary to afford just satisfaction to the injured party. There are also pre-conditions to an award of damages by a domestic court under section 8: (1) that a finding of unlawfulness or prospective unlawfulness should be made based on breach or prospective breach by a public authority of a Convention right; (2) that the court should have power to award damages, or order the payment of compensation, in civil proceedings; (3) that the court should be satisfied, taking account of all the circumstances of the particular case, that an award of damages is necessary to afford just satisfaction to the person in whose favour it is made; and (4) that the court should consider an award of damages to be just and appropriate. A domestic court may not award damages unless satisfied that it is necessary to do so, but if

[155] I am indebted to Simon Creighton and Hamish Arnott for the exhaustive assessment of this issue, see S. Creighton and H. Arnott, *Prisoners, Law and Practice*, cit. p. 639.
[156] Civil Procedure Rules, Rule 54. 17.
[157] Section 8 of the Human Rights Act contains this provision: "(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. (2) But damages may only be awarded by a court which has power to award damages, or to order the payment of compensation, in civil proceedings. (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including - (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and (b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour the order is made. (4) In determining - (a) whether to award damages, or (b) the amount of the award, the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention."
[158] Article 41 of the ECHR, repeating the substance of article 50 of the original version, now provides: "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High

satisfied that it is necessary to do so it is hard to see how the court could consider it other than just and appropriate to do so. In deciding whether to award damages, and if so how much, the court is not strictly bound by the principles applied by the European Court in awarding compensation under article 41 of the Convention, but it must take those principles into account. It is, therefore, to Strasbourg that British courts must look for guidance on the award of damages. This interpretation has been expressed by Lord Bingham of Cornhill in *R (Greenfield) v Secretary of State for the Home Department*[159]. In this decision, on the one hand, the judge considered the entitlement of an applicant or claimant to damages under the European Convention and under section 8 of the Human Rights Act 1998 and, on the other hand, the principles adopted in Strasbourg in relation to claims for compensation for violations of article 6. In the cited case, Richard Greenfield while serving a two year sentence of imprisonment at HM Prison Doncaste made an application to be compensated for the loss of the opportunity arising from disciplinary proceedings that breached article 6 and for anxiety and frustration. Lord Bingham of Cornhill recalled the Kingsley decision[160] to hold that just satisfaction under the ECHR does not imply the payment of damages and requires a causal connection between the violation found and the loss for which an applicant claims to be compensated. The Lord did not consider that it could be established that representation at the disciplinary hearing would achieve a different result. The ECHR Article 5 provision mentioned in the judicial reasoning has been interpreted as enshrining the right to have a mechanism to apply for compensation provision and not the right to be awarded compensation[161].

There should be 'appropriate and sufficient' redress, which means *inter alia* that the compensation should be paid without undue delay (namely six months from the date on which the decision awarding compensation became enforceable).

Article 13 also allows a State to choose between a remedy which can expedite pending proceedings or a remedy *post factum* in damages for delay that has already occurred. However, there is very little in the Court's case-law to shed light on how such a preventive remedy could look like. England and Wales provided for a remedy *post factum* in damages for delay.

Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party".

[159] *R (Greenfield) v Secretary of State for the Home Department, 16 February 2005*, [2005] UKHL 14 .

[160] "The Court recalls that it is well established that the principle underlying the provision of just satisfaction for a breach of Article 6 is that the applicant should as far as possible be put in the position he would have enjoyed had the proceedings complied with the Convention's requirements. The Court will award monetary compensation under Article 41 only where it is satisfied that the loss or damage complained of was actually caused by the violation it has found, since the State cannot be required to pay damages in respect of losses for which it is not responsible." ECtHR, *Kingsley v. The United Kingdom*, *Application no. 35605/97*, 28 May 2002, para 40.

[161] "Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation", Convention for the Protection of Human Rights and Fundamental Freedoms, Article 5.

4. Administrative remedies.

4.1. The prisoners' right to raise complaints.

The prisoners' right to raise complaints about the prison regime or their treatment in prison through a formal set of procedures is a relatively recent development. Prior the 1990, prisoners could raise concerns about their treatment in custody by making a complaint to the governor, although there was no prescribed method for making that complaint; by submitting a complaint to the Board of Visitors (now the Indipendent Monitoring Board); or by submitting a petition to the Secretary of State. For long periods of time, the guidance issued by the Secretary of State even required prisoners to make use of these procedures at the same time as seeking legal advice until the ECtHR held this to be a breach of Article 6[162], or before seeking legal advice, a practice that was found to be unlawful in the domestic courts[163].

In 1990 a request/complaints procedure and the appointment of the Prisons and Probation Ombudsman were introduced. In the perspective of the *Report of an Inquiry into Prison Disturbances* in April 1990 known as *Woolf Report*[164], the Prisons and Probation Ombudsman should be appointed to control the independence of the administrative authorities but currently the Ombudsman remains a non-statutory body and this does not enable him to bind the Secretary of State or the Prison Service. The Prison Act 1952 and the Prison Rules 1999 can be deemed as a framework for the regulation and management of prisons, allowing the executive to formulate the policies that govern life in prison. The Prison Service Performance Standards are a managerial audit tool, rather than a source of protection for prisoners[165]. Regarding the guarantees of independence of the administrative bodies, the above-cited Woolf Report establishing an internal complaints procedure recommended that there should be an "Independent Complaints Adjudicator" providing a final avenue of appeal for prisoners unsatisfied with the Prison Service's attempts to resolve complaints[166]. The complaints process in prisons was implemented and improved, the recommendation for a complaints adjudicator that is independent of the Prison Service has not been effectively put in effect with the PPO.

Prisoners' complaints procedures were subject to a stricter review in 1999/2000 in reply to the alarm expressed by Her Majesty Chief Inspector of Prisons in his Report that the complaints procedure was ineffective[167]. The Prison Service Order 2510 arose from the recognition that the old system was slow,

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[162] *Silver and Others v United Kingdom*, cit.

[163] *R v Secretary of State for the Home Department ex p Anderson*, [1984] QB 778.

[164] *"The Woolf Report, A Summary of the main findings and recommendations of the inquiry into prison disturbances"*, Prison Reform Trust, (edited by), London, 1991. In the purpose of the Prison Reform Trust, the pamphlet represents an accurate summary of the conclusions of the Lord Justice Woolf, *Ibidem*, p. 8. The Report's 12 major recommendations and the 204 proposals on matter of detail constituted an agenda for a total overhaul of the present system and shaped a new penal policy.

[165] S. Creighton, H. Arnott, *Prisoners, Law and Practice*, cit., pp. 2-3.

[166] *"The Woolf Report, A Summary of the main findings and recommendations of the inquiry into prison disturbances"*, cit. Appendix 1, Major Recommendation 12.

[167] Annual Report of HM Chief Inspector of Prisons for England and Wales 1999-2000, HMSO, London 2001.

cumbersome and difficult to use. The procedures specified in the new Order put great emphasis on ensuring that prisoners know how to make a formal complaint and have ready access to the means to do so[168].

In the aims of the reform, the new procedures should be based on the general principles that the establishments should take full responsibility for dealing with requests or complaints internally, with recourse to headquarters only in the case of reserved subjects or confidential access, and that staff should take responsibility for the decisions and actions which they take and be prepared to explain them[169]. This aspect is strictly related to the classification of the complaint and, consequently, to the time limits provided for by the Prison Service Orders for each category of complaint.

The complaints process is conceived as a formal process in order to meet the requirements introduced by the rethinking of the Prison Service policy. Prisoners should be given information about the complaints procedures during the 'early days' stages of their time in custody and in their induction process, including details about the role of the Prison and Probation Ombudsman[170]. The amended complaint procedure encapsulated the formal principle that the system should led to prisoners being really able to complain.

In the last document concerning the Prison Complaints with expiry date on 31 December 2016, the NOMS Agency Board defined an effective system for dealing with prisoner complaints in the following manner:

"An effective system for dealing with prisoner complaints underpins much of prison life. It helps to ensure that the Prison Service meets its obligation of dealing fairly, openly and humanely with prisoners. It also helps staff by instilling in prisoners greater confidence that their needs and welfare are being looked after, reducing tension and promoting better relations. A prison's equilibrium is more likely to be maintained if prisoners feel they have an accessible and effective means of making a complaint, an outlet for their grievances and confidence that their complaints will be considered properly, with reasons given for decisions"[171].

4. 2 The Prison Service Order, "Prisoner's request and complaints procedure".

The statutory underpinning the complaints system can be found in Prison Rules 1999 (especially in Rule 11), and Young Offender Institution Rules (in Rule 8) which provide that a request or complaint to the governor or independent monitoring board relating to a prisoner's imprisonment shall be made orally or in writing by the prisoner, that on every day the governor shall hear any request and complaints that are made to him and that a written request or complaint may be made in confidence. Rule 78 (1) of the Prison Rules 1999[172] and Rule 82 (1) of the Young Offender Institution Rules 2000[173] also impose a statutory duty on Independent Monitoring Boards to hear complaints from prisoners. Despite the fact that there is a statutory requirement

[168] Prisoner' s Requests and Complaints Procedure, Prison Service Order 2510, HM Prison Service, para 6. 2. 1.
[169] Prison Service Order 2510, Underlying principles, para 1. 2. 1.
[170] Early days in custody - Reception in, first night in custody, and induction to custody, Ministry of Justice, National Offender Management Service, 1 January 2012, p. 13
[171] Ministry of Justice, National Offender Management Service, *Prisoner Complaints*, Issue Date: 29 December 2011 (Update 1 April 2012), Expiry Date: 31 December 2016, para 1. 3.
[172] "The independent monitoring board for a prison and any member of the board shall hear any complaint or request which a prisoner wishes to make to them or him", Prison Rules 1999, Rule 78 (1).
[173] "The independent monitoring board for a young offender institution and any member of the board shall hear any complaint or request which an inmate wishes to make to them or him", Young Offender Institution Rules 2000, Rule 82 (1).

for each Prison Service establishment in England and Wales and for each Immigration Removal Centre in the UK[174] to have an IMB[175], their role is to monitor the day-to-day life in their local prison or immigration removal centre that is separate from the Prison Service itself and so they do not represent part of the formal internal complaints.

Applications (or requests) are separated out from the complaints process in order to ensure that there is no confusion between the aims of answering grievances and meeting everyday needs[176]. Requests or applications are first dealt with on the wing or landing, usually in a office out of the hearing of other prisoners, with governors holding similar sessions at the weekends[177]. Prisons may use written forms, although this is not mandatory and an application book should be maintaned to record outcomes. Where an application does not resolve a problem, prisoners can move on to make a complaint. In contrast, the complaints process is required to be a formal process in order to meet the overarching requirements of the system. Prisoners must be informed about the complaints procedures during the 'early days' stages of their time in custody[178]. It is a fundamental principle of any complaints system that it should be easy to make a complaint. All prisoners should know how to make a formal complaint and have ready access to the means to do so[179].

There are four forms that are utilised for making a complaint: form COMP 1 for ordinary complaints, COMP 1A for confidential matters or appeal, COMP 2 for confidential matters and form ADJ 1 when seeking to have governor's disciplinary reviewed[180]. The aim for complaints to be dealt with a local level, unless the matter is a reserved subject that must be dealt with at Headquarters and so if the first stage is not resolved by the COMP 1, the prisoner can proceed to appeal the decision on the COMP 1A, again using the form COMP 1A to the governing governor. On this occasion the form will be answered by a member of the prison's management team. This exhausts the internal complaints procedure.

The first stage requires a form COMP 1 to be completed by the prisoner which is then placed in a locked box on the wing. Although the old practice of seeking to limit prisoners' access to complaint forms is not approved, there remains provision to limit access to forms where staff consider that the system is being abused. Guidance suggests that a limit of one form day might be imposed or alternatively asking the prisoner to prioritise their complaints for reply[181]. Provision should be made to provide complaints forms and leaflets about the complaints procedures in foreign languages for prisoners who do not speak English[182] and to provide suitable access to the complaints process for prisoners with learning, literacy or visual disabilities[183].

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[174] IMB are also attached to a number of a Short Term Holding Facilities (STHFs') across UK. Currently, they are approximately 140 IMBs in total. See http://www.imb.org.uk.
[175] IMB members are independent, unpaid and work an average of 2-3 days a week.
[176] *Ibidem*, para 3. 1. 5.
[177] *Ibidem*, para 3. 1. 2.
[178] Ministry of Justice, National Offender Management Service, *Prisoner Complaints*, cit., para 2.1.2.
[179] *Ibidem*, para 2. 1. 1.
[180] "Complaint forms must be made freely available to prisoners on the wing near the place where the box for the receipt of completed forms is situated", *Ibidem*.
[181] *Ibidem*, para 8. 7. 3.
[182] *Ibidem*, para 6. 5.
[183] *Ibidem*, para 6. 6.

Prisoners who do not have a good grasp of the English language may be allowed to submit a complaint in their own language if they wish. The complaint, the reply and any subsequent stage may require translation, which will necessarily take longer than normal. Complaint forms and the short and long version text leaflets for prisoners are available on the Intranet in 19 foreign languages[184]. The boxes are emptied each working day by an officer designated this task[185], and each prison must have a complaints clerk who is responsible for logging and registering complaints and a complaints co-ordinator responsible for the overall management structure of the complaints processes in the establishment[186].

Complaints should normally be submitted within three months of the incident or circumstances which give rise to the complaint, or the date on which they became known to the prisoner. However, there is room for discretion to consider complaints submitted after this time limit in exceptional circumstances, where there are good reasons for the delay or where the issues raised are so serious as to override the time factor. PSO 2510 para 13. 2 provide for the recommended timetable to complaints[187].

The complaints system must ensure that any equality aspect of any complaint is recognised, recorded and investigated. All complaints with the 'discrimination, harassment or victimisation' box ticked should be handled through the equalities incident reporting arrangements[188]. There is a separate pink form (COMP 2) for confidential access complaints. The ordinary and confidential access complaint forms also include a box for the prisoner to tick if the complaint is about violence, including threats or intimidation. This is to enable violence reduction procedures to be implemented where necessary, in accordance with the arrangements set out in Prison Service Orders 2750. If a complaint is about alleged misconduct by staff, the procedures set out in Prison Service Orders 1300 must be followed. Responsibility for investigations normally rests with line management. However, in most cases of complaints made by prisoners involving allegations against members of staff, any investigation will be commissioned by the governing governor or, in case of a confidential access complaint to the Deputy Director of Custody (DDC), by the DDC (although the DDC may delegate commissioning to the Governor if appropriate). Once complaints have been collected and registered, they will be allocated for reply. Generally, first stage complaints will be allocated at prison officer level unless the complaint is a confidential access complaint, the complaint is about a reserved subject, the complaint is about a member of the staff or the complaint is otherwise inappropriate for a wing officer to deal with (for instance a complaint about medical treatment).[189] Where the complaint is submitted on a confidential access scheme it should be given to the person to whom it is addressed without being opened. If it is decided that the subject is not properly one that justifies confidential access, instead of breaking

[184] Ministry of Justice, National Offender Management Service, *Prisoner Complaints,* cit., para 2. 1. 5.
[185] *Ibidem*, para 5. 3. 1.
[186] *Ibidem*, paras 5. 1 and 5. 2.
[187] Within 3 weekdays a response should be given in relation to Stage 1, within 10 weekdays a response to complaint against members of staff should be given in relation to Stage 1, within 10 weekdays a response should be given to complaint involving another establishment in relation to Stage 1. Concerning Stage 2, the terms recommended are 7, 10 e 10 weeksdays respectively. Regarding Stage 3, the terms provided are the same, namely 7, 10 e 10 weekdays. In relation to the case of confidential access to governing governor, 7 weekdays are recommended.
[188] PSI 32/2011.
[189] *Ibidem*, para 7. 4. 2.

confidentiality (as used to happen), the complaints clerk should return the form to the prisoner with advice that the complaint can be resubmitted under the normal procedures[190]. It is important for the prisoner to be aware that confidential access does not mean complaint will be kept whilst it is being investigated[191] and that the confidentiality merely extends to the initial submission of the matter.

If a prisoner continually submits complaints to such an extent that it is viewed as an abuse of the process, the prison has the authority to intervene and use its discretion to determine how to manage the situation. A prisoner's right to make a complaint must in no instance be completely withdrawn. A denial of access to complaint forms, or a blanket refusal to consider further complaints from a persistent complainant, could place a prisoner at risk by denying him or her recourse if he or she has a genuine grievance[192]. Complaint responses must address the issues raised.

4. 3 Specific categories of complaints

Certain subject matters require the prison to take additional steps to ensure the complaint is investigated and answered correctly. PSO 2510 provides the following special categories of complaints. First should be passed to the Race Relations Liaison Officer (RRLO) to dealt with[193]. The RRLO should report, the complaint forms have a box to tick to identify whether there is a racial aspect and the form the matter to the prison's race relations monitoring team and should respond to the complaint unless this aspect of the complaint is 'minor or tangential' in which case the RRLO should pass the matter to an appropriate member of staff to reply[194]. Reserved subjects that contain a racial aspect should be copied to the RRLO before being passed onto the relevant department at headquarters[195]. Chapter 11 of Prison Service Orders 2510 contains guidance on how to deal with complaints against members of staff. The prison remains responsible for instigating formal disciplinary procedures and whether to instigate a formal investigation in accordance with Prison Service Orders 1300 on Investigations. A central discipline policy team at headquarters provides guidance to local establishments on these matters. In cases where it is decided that the allegations are unfounded, the prisoner can be given a written warning not to repeal the allegations and can even be given a formal order to this effect that can result in disciplinary proceedings if not followed[196]. If the form indicates that the complaint concerns bullying, the anti-bullying procedures should be followed[197]. Complaints made about matters that have occurred at a different prison should be sent to that prison for a draft reply or for the provision of information to enable the holding prison to provide the response[198]. The holding prison should seek to agree responses with the establishment that it is subject of the complaint.

[190] *Ibidem*, para 9. 2. 1.
[191] *Ibidem*, para 9. 3. 1.
[192] Ministry of Justice, National Offender Management Service, *Prisoner Complaints*, cit., para. 2.1.11.
[193] *Ibidem*, para 12. 1.
[194] *Ibidem*, para 12. 1. 5.
[195] *Ibidem*, para 12. 1. 7.
[196] *Ibidem*, para 11. 8. 2 .
[197] PSO 2510 12. 2. 1. e PSO 1702
[198] PSO 12. 3. 1.

4.4 Reserved subjects

Complaints about reserved subjects will be dealt with by the Deputy Director of Custody or relevant units in National Offender Management Service headquarters. These commonly include complaints about governors' adjudications where form ADJ 1 should be used of complaints about category A matters. COMP 1 forms should still be used for all matters other than adjudications. There is no second stage of right of appeal where the matter is a reserved subject. Prison Service Orders 2510 provided for a list of reserved subjects at Annex H: complaints against the governing governor (dealt with Briefing and Casework Unit or Directorate of High Security Prisons); litigation against the Prison Service (dealt with Operational Litigation Unit or Directorate of High Security Prisons)[199]; deportation/repatriation requests (dealt with UK Border Agency)[200]; matters affecting category A prisoners; adjudications; mother and baby units; compassionate release and special remission applications; artificial insemination and marriage request. The list also includes matters relating to parole and those affecting life sentenced persons. In relation to prisoners serving sentences, most day to day operational matters are now dealt with locally and so complaints should in fact be dealt with at prison itself. Complaints about parole matters will be passed to the Public Protection Unit for response[201].
A prisoner who is dissatisfied with the response they received may pursue their complaint with the Prison Probation Ombudsman[202].

4. 5 Decisions

As one would expect with a formal based system, the Prison Service' s own guidance indicates that written responses to complaints are necessary and the responses must contain sufficient information to enable the prisoners to understand how the matter has been considered and resolved. The answer is being given on behalf of National Offender Management Service, and not simply from the individual who is replying or their functional area. The complaint must therefore be answered by someone who is capable of providing an adequate and meaningful reply, and others must be consulted before replying where necessary. Responses

[199] The accompanying information required by the PSO is a letter from the prisoner or his or her legal representative setting out details of the claim, with the prisoner's full name and prison number.
[200] In this case the required accompanying information concerning representations about refusal for leave to enter the UK, notice of illegal entry of deportation are considered within a formal statutory appeal procedure. A report from the governor should accompany the prisoner's complaint and the governor should confirm, where appropriate, any health problem or change in domestic circumstances mentioned by the prisoner. Where, known the prisoner's nationality and IND file number, see https://www.justice.gov.uk.
[201] The Parole Board is an executive Non-Departmental Public Body (NDPB) sponsored by the Access to Justice unit of the Ministry of Justice. Parole Board members are appointed by the Secretary of State under *the Criminal Justice Act, 2003*, Schedule 19. It is independent of the Prison Service and so the body itself cannot respond to complaints. There is no internal formal mechanism for appeal against the response to a complaint about a reserved subject. According to the solicitors' view, this aspect is relevant for the prisoners who have to submit this kind of complaints.
[202] Ministry of Justice, National Offender Management Service, *Prisoner Complaints*, cit., para 2. 6. 2.

must use language which is easy to understand and takes account of any individual needs. If a prisoner is dissatisfied with the response to his or her complaint, they may resubmit the complaint using an appeal form, setting out the reasons why. An appeal should normally be made within 7 calendar days of the prisoner having received the initial response, unless there are exceptional reasons why this would have been difficult or impossible. The appeal form should be submitted in the same way as the original complaint form. Prisoners must receive a response to their appeal within 5 working days of the appeal being logged[203].

The response to a complaint or appeal must properly address the points made by the prisoner, irrespective of whether the compliant is upheld or rejected. Decisions must not be taken arbitrarily or give the impression that they have been taken arbitrarily. Responding to a written complaint is an opportunity for the establishment to demonstrate a positive commitment to fairness and to the welfare of prisoners in its care. A prisoner is more likely to accept a decision if trouble is taken to explain it, even if he or she is still not entirely satisfied. If complaint is upheld, either in whole or in part, the response must say what action is being taken to provide any appropriate redress[204]. The response to an appeal must not simply repeat the response already given, even if it was correct, but must add to the explanation of why the original decision was made. Where an appeal is upheld, the response must explain why the original response is being overturned. Every effort must be made to resolve the complaint. The response to an appeal is the final scrutiny of a complaint by the National Offender Management Service.

Resolution of complaints within a reasonable time is conceived as one of the main parameters of the effectiveness of the complaints system. Time limits for responses run from the date the complaint or appeal is registered by the complaints clerk[205]. As emphasised above, time limits apply for each stage of the procedures. It is not mandatory to meet a deadline if a case is complex, or because of staffing difficulties, or because reports are required from outside agencies. Although establishments are not expected to meet the targets in every case, delays should be regarded as exceptional. *Interim* replies should be forwarded within the time limit for a response to a complaint[206].

An urgent procedure is provided for the Prison Service Orders where the claimant alleges that he has been assaulted by a member of the staff and where the governing governor or the Area Manager considers that there is evidence that a criminal offence may have been committed. The Discipline Policy Team in Personnel Management Group must be consulted by telephone without delay so that consideration can be given to whether the matter should be referred to the police. If the police are called in, the Discipline Policy Team will advise whether the internal investigation should be suspended.

According to the survey of the HM Chief Inspector of Prisons on Swaleside too many complaints received late responses; around 70 submitted in April 2014 were already late, and 57 from January and a similar number from February were also outstanding. It founded that there was no structured quality assurance system to oversee quality and timeliness, and no structured identification of emerging trends. Some

[203] Ministry of Justice, National Offender Management Service, *Prisoner Complaints*, cit., paras 2. 7. 1 e 2. 7. 2.
[204] PSO 2510, Introduction to Part 8.
[205] Prison Service Orders 2510, para 13. 2.
[206] Where it take longer to investigate a complaint, the prisoner will receive a reply explaining the reason for the delay.

establishments ensured prisoners could complain easily, even though this could generate more complaints. In the survey on Woodhill, more prisoners said that it was easy to make a complaint, and forms were freely available on all wings. Clear instructions on how to make a complaint and the subsequent appeal process were displayed in residential units[207].

The Prison Service Order provides for the prisoners to allege supporting evidence. The burden of proof imposed on the claimant is slightly lightened where the prisoner makes a complaint against a member of staff. If the complainant alleged that a member of staff has committed an assault, the victim must be examined by a Medical Officer as soon as possible and the outcome recorded[208]. In general, where a prisoner makes a complaint against a member of staff, the governing governor and the Area Manager have great discretionary powers in order to start the investigation and to evaluate the well-foundness of the prisoners' allegations.

If the prisoner remains dissatisfied after having received the appeal response, he or she is able to seek the assistance of the Prison and Probation Ombudsman.

PART III. Soft law and National Human Rights and non-jurisdictional structures and authorities (such as ombudsmen, human rights commissions and equality bodies)

1.1 Independent Monitoring Boards

Under the Prison Act 1952 it is a requirement that every prison is monitored by an Independent Monitoring Board (IMB). The Board's members are appointed by the Secretary of State from volunteer members of the community in which the prison is situated.

The IMB will hear prisoners' complaints and consider decisions and replies given by an establishment through the internal system. The IMB will examine an establishment's complaint log periodically and will bring to the attention of the governor any shortcomings which it sees in the operation of the complaints system.

As underlined above, Rule 78 (1) of the Prison Rules 1999 imposes a statutory requirement on the each prison's IMB to hear any request or complaint made by a prisoner. As the duty falls upon the IMB, it is the responsibility of each individual IMB to make necessary arrangements to discharge this duty. Prisons can access the IBM by submitting a complaint and prison staff are under a duty to ensure that any request to speak to a member is passed to the board promptly[209]. Although there is a statutory requirement for each prison to have an IMB, their role is that of being a watchdog that is separate from the Prison Service itself and, as emphasised above, they do not form part of the formal internal complaints procedures.

[207] Annual Report, HM Chief Inspector of Prisons, 2014-2015, p. 43.
[208] Prison Service Orders 2510, para 11. 3. 7.
[209] Prison Service Orders 2510, para 2. 2. 2.

The formation of the Association of Independent Monitoring Boards by the Ministry of Justice has attempted to introduce more uniform practice amongst the different IMBs and also to collate and publish the information that they are able to provide on problems and trends in the prison system[210]. There is no requirement to make complaints to the Independent Monitoring Boards (IMBs) before commencing a judicial review application as although the IMB have the duty to consider prisoners's complaints, they have no power to either adjudicate upon the complaint or take action. Their role is limited to raising the matter with the appropriate authorities on behalf of the prisoners. The right of petition has long since been dismissed as not providing an effective remedy.

2. The role of the Prison and Probation Ombudsman

Although the remit of the Ombudsman has expanded significantly since the creation of the office in the 1994[211], the lack of a statutory footing persists in being a critical aspect.

The Ombudsman's terms of reference permit him to investigate complaints submitted by individual prisoners; by individuals who are, or have been, under the supervision of the National Probation Service or housed in NPS accommodation or who have had pre-sentence reports prepared on them by the NPS; by individuals held in immigration removal centres.

In relation to prison complaints, the Ombudsman's remit extend to the action of prison staff, people working in prison and agents of the Prison Service. This include IMB members and education staff and also encompasses contracted out prisons and escort services. The following are not included in his remit: decisions involving the clinical judgement of doctors; policy decisions taken by a minister and the official advice to ministers upon which such decisions are based; the merits of decisions taken by ministers, save in cases which have been approved by ministers for consideration; matters falling outside of the jurisdiction of the Prison Service and National Probation Service such as issues about conviction, sentence or immigration *status* and the decisions and recommendations of outside bodies including the judiciary, the police, the Crown Prosecution Service and the Parole Board[212]. Decisions relating to release on home detention curfew are within his remit as they made by Prison Service without ministerial involvement.

A prisoner can complain to the Prisons and Probation Ombudsman, but he must have completed the internal complaints procedures first. He must normally send his complaint to the Ombudsman within three months of receiving the final response to his complaint from the governor or NOMS Headquarters and within twelve months of the initial incident. This will normally entail the submission of the relevant COMP forms (or the probation service's complaints forms) although where the matter has been raised by a legal adviser on behalf of the prisoner at the appropriate level, the Ombudsman will tend to accept the complaint for investigation.

[210] *Behind Closed Doors 2013*, Independent Monitoring Boards, The Sixth Annual Report of the National Council for Independent Monitoring Boards, see www.imb.org.uk.
[211] His jurisdiction being extended to the probation Service in September 2001.
[212] PSO 2520, para 1. 4.

In cases where there has been no reply to the final appeal for six weeks, the Ombudsman will treat this as the final determination. The complaint must be made within one month of the final determination although the Ombudsman will exercise discretion to extend that time limit in exceptional circumstances. Conversely, the Ombudsman may decide not to accept a complaint or to continue any investigation where it is considered that no worthwhile outcome can be achieved or the complaint raises no substantial issue. The Ombudsman is also free not to accept for investigation more than one complaint from a complainant at any one time unless the matters raised are serious or urgent[213].

There is no requirement for any particular form to be completed to make a complaint. Prisons are under a duty to provide information about the Ombudsman to prisoners, including displaying posters and leaflets in prison libraries, in reception and on all prisoner notice boards as well as ensuring that a video is used appropriately, for example on reception or induction at a prison[214]. The Ombudsman has provided a form for prisoners to use if needed and the prison must provide writing materials for complaints and pay the postage[215]. All complaints must be treated as confidential by prison staff as must incoming correspondence from the Ombudsman to the prisoner[216]. The Prison Service has no role in assessing eligibility. The Ombudsman will normally accept letters from legal advisers. The Ombudsman is granted unfettered access to Prison and Probation Service documents for the purposes of assessing the eligibility of complaints and to conduct the investigation itself. The standard investigation procedure involves the Ombudsman considering the relevant material although the investigators may decide to interview the prisoner and other relevant parties, either in person on the telephone. Once the initial investigation is completed the Ombudsman will submit a draft copy of the Report to the Director General of the Prison Service to be checked for factual accuracy and to ensure that disclosure to the prisoner will not breach confidentiality. The draft report is then disclosed to the prisoner to check for factual accuracy. The report disclosed to the prisoner must not contain information that is against the interest of national security; probably to prejudice the security of the prison; likely to put at risk a third party source of information; eventually to detrimental on medical and psychiatric grounds to the mental or physical health of a prisoner; likely to prejudice the administration of justice including legal proceedings; capable of attracting legal privilege[217].

It is aimed to complete the investigations within twelve weeks. In an attempt to cope with growing numbers of complaints, the Ombudsman has increasingly made use of a less formal procedure for determining less serious complaints where the prisoner and the Prison Service are simply sent a letter at the conclusion of the investigation containing the outcome. The Ombudsman does not have any binding powers and in case where a complaint is wholly or partially upheld, he can simply issue a recommendation. The Director General of the Prison Service (or the chief probation officer of the relevant probation board) then has four weeks in which to reply.

[213] www. ppo.gov.uk/about-us/terms-of-ref/index.html.
[214] PSO 2520 para 2. 1.
[215] PSO 2520 para 3. 1.
[216] PSO 2520 paras 3. 5, 3. 6.
[217] PSO 2520 para 4. 17.

As the Ombudsman cannot bind the Prison and Probation Services, a complaint to his office is not a necessary precursor to applying for judicial review. The Ombudsman is not confined to the narrow judicial review grounds for reviewing decisions but he can also reach a decision about the substantive merits of the case. For matters involving the less serious aspects of the prison regime and prison administration, a complaint to the Ombudsman may well be more pragmatic than resorting to judicial review[218].

2. 1. The responsibility of the Ombudsman in accordance with the ECHR Article 2

In response to concerns about the proper discharge of the state's duty to investigate death in custody in accordance with article 2 of the ECHR, the Ombudsman has had responsibility for investigating all death of prisoners, young people held in young offender institutions, residents of probation approved premises, residents of immigration removal centres and those under immigration service managed escort. This covers all deaths, including apparent suicides and deaths from natural and other causes[219]. In the light of the current death rate in prison, the PPO's role can be vital. In 18 of 42 reports of Her Majesty Chief Inspector of Prison, the body was critical of many aspects of the care and support for prisoners at risk of suicide or self-harm. The purpose of a PPO investigation into the death of a detainee is to understand what happened, provide an explanation to bereaved families, assist the coroner's inquest in achieving fulfillment of the investigative obligation arising under article 2 of the European Convention on Human Rights, by ensuring as far as possible that the real facts are brought to light and any relevant failing is exposed, any commendable action or practice is identified[220].

During a typical investigation, the PPO investigator attends the establishment where the deceased was residing at the time of death and is provided with access to all relevant areas, such as their cell and the healthcare unit. The investigator conducts interviews with detainees and with staff, including healthcare staff, and has unfettered access to all relevant documentation from the establishment[221]. The interviews are intended to gather information about the treatment of the individual, the circumstances leading up to their death and the emergency response, in order to determine exactly what happened.

[218] S. Creighton and H. Arnott, *Prisoners, Law and Practice*, cit., p. 604.

[219] In the first six months of 2015, there were 123 deaths in custody: 70 people died of natural causes; 43 deaths self-inflicted; 5 homicides; 5 deaths are yet to be classified, 2014 - 2015 Annual Review, The Howard League for Penal Reform. According to the last Report of the HM Chief Inspector of Prisons, there were 228 deaths in male prisons in England and Wales in 2014–15, a 4% increase from the previous year. These included: 74 self-inflicted deaths (a drop of 13% from the 85 recorded in 2013–14); 136 deaths from natural causes (up from 126 in 2013–14); four apparent homicides (up from three in 2013–14); 14 other deaths, 10 of which were yet to be classified, Annual Report, HM Chief Inspector of Prisons, 2014-2015, p. 34.

[220] Ombudsman's terms of reference, Fatal Incidents, para 3.

[221] More precisely when the PPO begins a fatal incident investigation following a death in custody, the establishment will appoint a PPO liaison officer to act as a first point of contact for the investigator. The liaison officer must not be a member of staff whose work or responsibilities fall under the investigation. The role of the liaison officer is to provide all the required documentation to the investigator, to facilitate access to the establishment, and to organise interviews with all relevant staff and detainees.

As part of the investigation, the clinical issues relevant to the death are examined, and the PPO is supported by National Health Service commissioned clinical reviewers to assess whether healthcare was equivalent to that which might have been expected in the community. The clinical reviewer is independent of the establishment's healthcare and, where appropriate, will conduct joint interviews with the PPO investigator. A principal purpose of PPO investigations is to identify operational methods, policy, practice or management arrangements that went wrong and improvements that could be made, which could help prevent further avoidable deaths in custody. Inevitably, this means that the PPO will criticise poor practices when they are found, but the PPO does also identify and report commendable practice. Beyond these overarching principles, the precise terms of reference are set case by case. In addition to the investigation of all deaths in custody, the Ombudsman has also been tasked with conducting inquiries into near deaths where the incident raises an article 2 or 3 issue requiring some form of independent investigation.[222] At the end of an investigation, the findings are written up and presented in a report. A draft report and recommendations are shared with the establishment via the NOMS Equality, Rights and Decency Group (ERDG). ERDG coordinates responses from the governor and healthcare. The draft is also shared with the deceased's family, so that they can raise any issues if they feel that there remain unanswered questions. Once feedback has been received and incorporated, a final report is then produced. The contents of the report include a discussion of the investigation process, exploration of the key events leading up to a death, details of any issues uncovered during the investigation, a conclusion, and finally the recommendations made (where applicable).

Another purpose of the report is to support the coronial process in meeting its investigative obligations, by ensuring that all facts are uncovered and failings are exposed. The PPO aims to share the report with the coroner prior to the inquest being held, but when time is limited between the death and the inquest this is not always possible. The PPO makes recommendations with the goal of contributing to safer, fairer custody. This objective can only be achieved if establishments accept the recommendations and implement them. Governors were asked if any practices had changed in their establishment as a result of the recommendations made. Just over three quarters (52 out of 68) reported that changes had been made, while 13 reported no changes. While this sounds worrying, it is most likely an artefact of the time at which the survey is completed. Surveys are first sent to governors when the report is at draft stage, at which point some changes are unlikely to have been implemented yet. The vast majority of recommendations made by the PPO are accepted by establishments. In the 2013/14 financial year, 98% of all recommendations made within fatal incident reports were formally accepted, and a response provided detailing the actions which had been taken or would be taken to comply with the recommendation[223].

[222] See *R (On the application of JL) v Secretary of State for Justice*, 6 -7 October 2008, 26 November 2008, [2008] UKHL 68.

[223] Prison and Probation Ombudsman for England and Wales, Independent Investigations, *Post-investigation Survey, Feedback from stakeholders following the completion of fatal incident investigations, Responses collected between March 2014 and February 2015*, p. 47.

2. 2 The Ombudsman as pre-action remedy

The question of whether a complaint needs to be made to the Prisons and Probation Ombudsman before starting judicial review proceedings is more complex from a practical point of view but on a strict legal analysis, his position is little different from that of IMBs. As underlined above, the Ombudsman has no powers to bind the Prison and Probation Services to any course of action, therefore he cannot properly be classed as an effective internal remedy and so it would very difficult for a Court to require this course of action to be taken before proceeding to judicial review. From an empirical perspective, there may be cases where it is in the inmate's interests to pursue a complaint to the Ombudsman before or instead a judicial review application. Cases involving matters that will be considered trivial by the Courts, such categorisation decisions between category B and C may be better off being dealt with by the Ombudsman in the first instance. Solicitors endeavour to resolve any issue through correspondence with the prison and by using the internal Prison Service complaints and Ombudsman schemes. If this approach does not resolve the matter, challenge is mounted to the Courts. The danger is making a complaint to the Ombudsman is that any negative report about the merits of the complaint may weigh heavily against the prisoner in any subsequent judicial review[224].

2. 3 The Prison and Probation Ombudsman Post Investigation Survey

In 2014 the Post Investigation Survey was introduced last as a means to collect the views of custodial staff, healthcare professionals and coroners who had been involved in a PPO fatal incident investigation. The aim of the post-investigation survey is to understand stakeholders' perceptions of the investigation process, including communication, reporting and recommendations made. It is one of a number of avenues used by the PPO to collect routine stakeholder feedback and review his performance.

As reported in the PPO "Responses collected between March 2014 and February 2015", in the past when the PPO has had a backlog of cases, there was a need to provide *interim* feedback to governors for investigations where there was a significant amount of time between a death and the report being issued. Now that timeliness has improved, the report is deemed the best mechanism for the PPO to feedback to the governor, and other stakeholders, ensuring that the findings and recommendations presented are comprehensive and unlikely to need amending as a result of further information coming to light[225]. Concerning the liaison officers, almost all of who took part in the survey (97%) reported having the investigation process explained to them by the investigator[226]. Regarding the governors, 74% reported that they were contacted promptly.

[224] See http://www.bhattmurphy.co.uk/bhatt-murphy-45.html.
[225] Prison and Probation Ombudsman for England and Wales, Independent Investigations, *Post-investigation Survey, Feedback from stakeholders following the completion of fatal incident investigations, Responses collected between March 2014 and February 2015*.
[226] *Ibidem*, p. 21.

The complex arrangements for commissioning and providing healthcare in prisons means that there is often no clear healthcare lead within an establishment. The "responses" underline that in light of changes to the provision of healthcare, the PPO should review how it communicates with healthcare contacts. The PPO will review its communication channels with healthcare, at both commissioner and provider level, to ensure that communication is optimised during the investigation and that learning can be shared appropriately. The survey also emphasised the PPO should review its communications with coroners to ensure that adequate information is provided to help support the coronial process.

2. 4 The issue of the effectiveness of complaints system regarding women, young offenders and minority ethnic prisoners

As before, in the last year the majority of complaints to the Prison and Probation Ombudsman office come from adult male prisoners. While these data obviously arise out of the proportion of the prison population, the number of complaints from women's prisons, Young Offender Institutions (YOIs) and Secure Training Centres (STCs) is even lower than that would be expected from their proportions in the prison population[227]. The report from the Prisons and Probation Ombudsman which is edited in March 2015 sets out the findings of a project carried out to establish whether groups under-represented in the PPO complaint caseload are sufficiently able to access the service provided[228]. Focus groups[229] were held in Secure Training Centres (STCs), Young Offender Institutions (YOIs) and women's prisons. Participants were asked about how they resolve complaints, what they think of the complaints process in general and their understanding and experiences of the PPO. They were also asked if there are any barriers stopping them from coming to the Ombudsman and how they thought the system could be improved. As resulted from the focus groups, very few participants had made a complaint to the PPO. Some participants had made a complaint to the prison, but very few had appealed against the decision or used the second stage of the process. Many participants had made verbal complaints, or dealt with the issue on their own. Some had taken their problem to the

[227] In 2013/14, 95% of all complaints were made from male prisoners aged over 21 years old. In the same period, young people aged 18 and under made up 0,1% of all complaints received, yet accounted for 1% of the population. Female prisoners made up 5% of the total prison population, but accounted for only 2% of all complaints received, Prison and Probation Ombudsman from England and Wales, Independent Investigations, *Learning from PPO Investigations: Why do Women and young people in custody not make formal complaints*, March 2015, p. 6.

[228] Twelve establishments took part to the above-mentioned project: six young offender institutions (YOIs), four female prisons and two secure training centres (STCs).

[229] The case studies used in the focus groups were based on real complaints received by the PPO. The case studies were taken from the five most frequently received complaint categories from the adult male estate: property, administration, adjudications, staff behaviour, letters. The staff behaviour case proved divisive among some female participants, as they struggled to accept staff would behave in a racist way towards a prisoner (in their establishment). The circumstance meant it took longer for them to view the case as a hypothetical situation. That was a reflection of the good relations between the prisoners and the staff in that particular prison. In contrast, other participants claimed they had witnessed staff behave in a racist manner in their prison and saw the case study as something that could happen to them.

Independent Monitoring Board (IMB) or Barnardo's advocates[230].

The Report emphasises that the reasons participants did not use the internal complaint system were mainly to do with fear of reprisal and a lack of confidence in the system. There was widespread mistrust of the internal complaints system and a belief that formal complaints were a waste of time as they would not be dealt with, or would be tampered with by staff. Some participants did have good support from prison staff and were able to turn to them when problems arose. They were, therefore, less likely to need the Ombudsman if their complaints were being resolved. Participants discussed ways to improve the internal complaints system and access to the PPO; these are included in the report along with recommendations for the Prison Service and the Ombudsman[231]. PPO planned on introducing adverts which explain what the PPO does and how to make an eligible complaint are running on National Prison Radio (NPR) in 2015 to publicise the PPO in establishments. The adverts aim to dispel myths about complaints not getting to the PPO and to counter fear of reprisals. They explain the need to go through the internal complaints system first and stress the PPO's independence from the Prison Service. The PPO planned taking other actions such as the improvement of the work and the partnership with the IMB to ensure prisoners are better informed about how they can access to the PPO and such as recommendations to the Prison Service. Foremost the Prison Service should redesign the prison complaint forms to make the process clearer and include a receipt section that is given to the prisoner when their complaint has been submitted. It should also ensure that all prison staff understand the internal complaint system and at what stage complaints can be sent to the PPO and inform prisoners of it. Finally, governors should monitor the timeliness and quality of replies to internal complaints to ensure the requirements of Prison Service Instructions 02/2012 are met. Concerning the access to the legal aid, the PPO recommended that the Advocate Services promote their role in helping young people from YOIs and STCs with complaints to the Prison Service and PPO.

The most common initial response to the case studies from most participants was to resolve matters on their own, by taking it into their own hands[232]. Some participants specified that they would try to talk to a governor if they had gone to an officer and the problem had not been resolved[233]. Participants discussed the use of solicitors for a few of the case studies; they were most frequently mentioned in the adjudications case. Persons who take part in the focus groups said they would call their solicitor for advice, or to ask them to contact the prison governor[234]. The independence a solicitor had from the prison was the main reason participants would contact them if they felt they had been mistreated by prison staff. Participants only mentioned using the internal complaints system in response to two of the scenarios: the racist staff behaviour and lost property case studies.

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[230] Barnardo's is the current contractor for independent advocacy services for children and young people in STCs and under-18 YOIs.

[231] Prison and Probation Ombudsman from England and Wales, Independent Investigations, *Learning from PPO Investigations: Why do Women and young people in custody not make formal complaints*, p. 4.

[232] *Ibidem*, p. 10.

[233] *Ibidem*, p. 11.

[234] "I know I would call my solicitor, 100 per cent", "If something like that happened to me, I'd speak to my solicitor as well. I wouldn't just speak to like normal staff" are the more frequent feedback reported by the participants", *Ibidem.*

Across the sample, participants' previous negative experiences of using the internal complaint system resulted in a general lack of confidence in the system. The length of time it took prisons to process complaints was a deterrent to many participants making them. Participants often did not want to wait for a resolution; they wanted the problem to be sorted out as soon as possible. They saw the complaint system as being a slow and dragged out process, which ultimately would not solve their problem. A common concern raised in all the focus groups was the lack of detail in prisons' replies to their complaints.

Persons who take part in the focus groups felt their complaints were not taken seriously or were ignored by the prison. A few participants who had complained before said prison staff had labelled them as being 'serial complainants'. Participants saw this label as derogatory and felt they were being singled out for putting in legitimate concerns using the correct prison procedure. One participant claimed to have been limited to one complaint a week (in contravention of the Prison Service Instruction which states that complainants can only be restricted to one complaint per day). They had received a letter from the governor saying that the restriction was in place due to the number of complaints they had made[235]. As underlined above, a very common theme among all the participants was the fear of reprisal which seemed to be the major reason for not complaining[236]. Others alleged officers would treat prisoners who complained differently; this included downgrading their Incentives and Earned Privilege level, sacking them from their job or removing privileges. The women thought making a complaint would be seen as disruptive and could impact on the decision to grant them HDC or give parole.

All participants spoke about the barrier the internal complaints system created in accessing the PPO. Participants thought if the prison officer answered a complaint, which was about them or an officer they knew, then they would not receive a fair hearing.

A lack of knowledge of internal complaints system also arose from the focus groups. Some participants were unaware that they could appeal if they were unhappy with the decision and others did not know how to appeal (although this is written on the internal complaint form). Some participants did not know the difference between making a complaint to the prison and making a complaint to the IMB, or another organisation working in the prison.

Most participants had no recollection of being told about the PPO at their induction. Very few participants had used the PPO. Most participants who had sent a complaint to the PPO had been told it was not eligible for investigation, or if their complaint was investigated, it was not upheld[237]. The participants felt the PPO did not explain why they were not investigating their complaint and were frustrated at the lack of information. Among female participants especially, there was a lack of trust in the independence of the PPO. Some saw it as part of the Prison Service. This led to scepticism about the value of complaining to the PPO and they considered the PPO to be part of a biased system. Participants proposed a system, which is already in place in STCs, to improve the transparency of the internal complaints system and provide evidence of

[235] Another participant believed he had been labelled 'Mr Complaints' by staff after he started helping new prisoners fill in complaints if they were unsure of the process or had literacy problems *Ibidem*, pp. 13-14.
[236] *Ibidem*, p. 16.
[237] *Ibidem*, p. 18.

their complaint if they needed to chase the response. In STCs, young people are given a receipt slip torn off from the bottom of their complaint, within 24 hours of it being received by centre staff. The young person then has proof that the complaint has been received and the time and date it was submitted.
A number of participants said they used the IMB because they were accessible as their members were based in the establishment and they could go up and talk to them. This face-to-face interaction was important for some participants, as it contrasted with having to send a piece of paper to what they saw as a faceless organisation. Young people who had access to Barnardo's advocates in their establishment suggested the PPO should provide a similar, on-site service. This would eliminate the need to go through the prison staff, whom some of them did not trust. Participants also liked the idea of being able to discuss their complaint with one person, and build a relationship, as they are able to do with an advocate. A suggestion was made for the PPO to widen its remit so eligibility was not restricted to having to go through the internal complaints system first. Participants liked the fact they could go to the IMB with any problem they may have, and that there were no conditions attached to the help the IMB could give. This very relevant report underlines that the regime of the power imbalance between young offenders and women in custody and prison officers (in general the strong lack of trust) can be considered as the main reason for not complaining.
As emphasised in the "Report of a review of the implementation of the Zahid Mubarek Inquiry recommendations" of Her Majesty Inspectorate of Prisons Report, black and minority ethnic prisoners still have more negative perceptions of the fairness and effectiveness of complaints systems. 28% who said that they had made a complaint felt they were dealt with fairly compared with 41% of white prisoners and 22% reported being prevented from making a complaint, compared with 15 of white prisoners.[238]
According to the general last Report of Her Majesty Chief Inspector of Prisons, inmates continued to have very limited faith in complaints procedures. In this survey, only 29% of those who had submitted a complaint felt it had been dealt with fairly. Prisoners told to the above-mentioned office that they were deterred when they saw complaints collected by residential staff and complaints boxes left unlocked. Persons interviewed affirmed that complaint forms were also not always freely available, some complaints were responded to by the person being complained about, and many responses were late[239].

3. The UK's 'National Preventive Mechanism' from OPCAT

The UK ratified the Optional Protocol to the UN Convention Against Torture in December 2003. OPCAT has created a monitoring regime for conditions of detention and requires that States designate a 'national preventive mechanism' (NPM) to carry out visits to places of detention, to monitor the treatment and conditions for detainees and to make recommendations regarding the prevention of ill-treatment.

[238] HM Inspectorate of Prisons, "Report of a review of the implementation of the Zahid Mubarek Inquiry recommendations", London HMIP, 2014.
[239] Annual Report, HM Chief Inspector of Prisons, 2014-2015, p. 43.

The situation in the UK was different from the others States-Parties. There were already a number of well-established individual bodies with statutory independent inspection, monitoring or visiting powers and so, rather than dismantle existing structures and create a new body, in March 2009 the UK designated 18 existing bodies as its NPM and gave HM Inspectorate of Prisons in England and Wales responsibility for coordinating their NPM activities[240]. On 3 December 2013, three new members were designated to the NPM, reflecting the merger of bodies monitoring care and social work in Scotland into the Care Inspectorate, the separate membership of Scottish Independent Custody Visitors, and the incorporation of Lay Observers to reflect their OPCAT-compliant role in monitoring court custody and transfers in England and Wales. Consequently, the UK's NPM is currently made up of 21 visiting or inspecting bodies[241] which visit prisons, police custody, court custody, immigration detention centres, children's secure accommodation and mental health institutions. The NPM is co-ordinated by HMCIP and issued its first annual report in February 2011. In June 2013 HM Inspector of Prisons met with the Subcommittee on Prevention of Torture (SPT) in Geneva, the UN body that oversees OPCAT implementation, to discuss the work of the UK NPM and the strengths and weaknesses of its structure. All NPM members completed a self-assessment of the degree to which they comply with OPCAT requirements, based on the guidance the SPT had issued to NPMs. The key strength of the NPM is the hundreds of independent monitoring visits conducted every year, with its preventive approach further supported by the capacity of its individual members to undertake other activity such as training or commenting on legislative proposals. As a direct consequence of OPCAT, the scope of NPM members' monitoring has been extended to include new areas of custody such as police cells and military detention in the UK, although UK military detention overseas cannot be inspected.

In the opinion of the Chief Inspector of Prisons it is a challenge to coordinate the activities of so many different bodies, all of which have different powers and many of which have much wider remits than the monitoring of places of detention[242]. In his view, the responsibilities and powers that members derive from being part of the NPM need to be clearly set out in legislation. Coordination is essential to the full and effective implementation of OPCAT in the UK, given the scale and complexity of the UK NPM's unusual multi-body structure, and the fact that each member has a different mandate, power and geographical remit.

[240] The UK government explicitly required that they have a statutory basis and be able to make unannounced visits to places of detention. The government concluded that 18 bodies operating in England, Wales, Scotland and Northern Ireland met the mentioned requirements. Thus, they were formally designated in a statement to Parliament on 31 March 2009.

[241] For England and Wales: Her Majesty's Inspectorate of Prisons (HMI Prisons); Independent Monitoring Board (IMB); Independent Custody Visiting Association (ICVA); Her Majesty's Inspectorate of Constabulary (HMIC); Care Quality Commission (CQC); Healthcare Inspectorate Wales (HIW); Office of the Children's Commissioner for England (OCC); Care and Social Services Inspectorate Wales (CSSIW) Office for Standards in Education, Children's Services and Skills (Ofsted), Lay Observers (LO). For Scotland: Her Majesty's Inspectorate of Prisons for Scotland (HMIPS); Her Majesty's Inspectorate of Constabulary for Scotland (HMICS); Scottish Human Rights Commission (SHRC); Mental Welfare Commission for Scotland (MWCS); Care Inspectorate (CI); Independent Custody Visitors Scotland (ICVS), Lay Observers (LO). For Northern Ireland: Independent Monitoring Boards (Northern Ireland) (IMBNI); Criminal Justice Inspection Northern Ireland (CJINI); Regulation and Quality Improvement Authority (RQIA); Northern Ireland Policing Board Independent Custody Visiting Scheme (NIPBICVS).

[242] N. Hardwick, Introduction to "Monitoring places of detention, Fifth annual report of the United Kingdom's National Preventive Mechanism", 1 April 2013 - 31 March 2014.

The coordination function, activities and governance of the NPM are overseen by a Steering Group of five NPM members who meet regularly and are representative of members in all four nations of the UK and the different remits of organisations that make up the NPM. An NPM sub-group focused on children and young people in detention, chaired by the Office of the Children's Commissioner, serves as a mechanism for NPM members whose work includes visiting children in detention to exchange information and intelligence and to consider joint work on issues affecting detained children.

OPCAT embodies the idea that prevention of ill-treatment in detention can best be achieved by a system of independent, regular visits to all places of detention, so the effectiveness of this kind of system is linked to the real independence of government and the institutions it monitors[243]. Resource pressure continued to affect both the bodies that NPM members monitor, and the members themselves. For example, the National Offender Management Service (NOMS), which is responsible for prisons across England and Wales and directly manages public sector prisons in these jurisdictions, from April 2013 to March 2014 delivered savings of £274 million which represented 7% of its resource budget. Some NPM members reported their concerns that pressures were a significant factor in the inadequate provision of timely access to care and staffing levels (in mental health settings in England and Wales) and in detainees' safety (in prisons in England and Wales). The reintroduction of night-time confinement as a cost-saving measure in high security mental health hospitals in England and Wales demonstrates the direct impact of budget cuts on detention practices[244]. There was an unacceptable increase in the number of self-inflicted deaths in prisons in England and Wales, with 88 confirmed self-inflicted deaths between April 2013 and March 2014, a rise of 69% from the 52 recorded in 2012– 13 and the highest number for comparable periods since the year ending March 2014[245].

During the year the NPM further developed its longstanding work to evaluate strengthen approaches to monitoring the use of force and restraint and share best practice. Effective monitoring of use of force and restraint is essential to preventing the ill-treatment of detainees, and to safeguarding their rights and well-being. After concerns about repeated deaths in all forms of detention following restraint, and the findings of subsequent investigations that similar concerns had arisen in many of these cases, the Joint Ministerial Board on Deaths in Custody (for England and Wales), on which several NPM members are represented, developed

[243] On 5 March 2014, after a discussion within the NPM, a response was provided to the Committee against Torture. In its response the NPM expressed its commitment to working to strengthen the actual and perceived independence of the mechanism in line with standards set by the Optional Protocol to the Convention against Torture. Members committed to work towards making a clearer distinction between the human resources they apply to NPM activities and those applied to their broader functions, and to work towards a reduction in their reliance on seconded staff allocated to NPM activities. In addition, the UK NPM agreed to develop a set of principles to reduce the possibility of conflicts of interest of seconded staff across the NPM. It welcomed the Committee's recognition of the need to ensure the NPM is adequately resourced, See "Monitoring places of detention, Fifth annual report of the United Kingdom's National Preventive Mechanism", 1 April 2013 - 31 March 2014, p. 33.

[244] Care Quality Commission (2014) "Monitoring the Mental Health Act" in 2012/13, p. 36.

[245] HM Inspectorate of Prisons (2014) HM Chief Inspector of Prisons for England and Wales, Annual Report 2013–14, p. 10

and endorsed a set of 'Common principles of restraint'[246]. These common principles were developed on the basis of broad consultation, and set out key principles for the safe management of restraint. HMIC and HMI Prisons continued to report on their concerns that the use of force in police custody was not being adequately monitored. These concerns were shared by the Advisory Panel to the Ministerial Board on Deaths in Custody.

In September and October 2012 the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) made two official visits to the UK and its reports on both visits were published in 2014. The report into the September 2012 visit, published after considerable delay in March 2014, set out a number of recommendations in relation to the CPT's examination of the situation of female prisoners (Cornton Vale, Edinburgh and Greenock Prisons) and adult males on remand (Barlinnie and Kilmarnock Prisons). The CPT looked into the treatment and conditions of detention in several police stations and visited a medium-secure psychiatric clinic, also in Scotland. In England, the Committee examined issues relating to persons held under immigration legislation and visited two immigration removal centres (IRCs), Brook House and Colnbrook. The CPT's report on its October 2012 *ad hoc* visit, which involved the presence of a CPT delegation on a chartered immigration removal flight between London and Colombo (Sri Lanka), was broadly positive about the preparation for removal process it observed and the efforts to conduct it in a humane way. The CPT made recommendations regarding the accreditation and implementation of a revised training package for escort staff, the presence of interpreters during escort flights and the need to include psychological assessments in the recruitment of escort staff[247].

The OPCAT Article 19 provides for three fundamental NPM powers namely the power to examine the treatment of those deprived of liberty, to make recommendations with the aim of improving their treatment and conditions and to submit comments on existing or draft legislation. In the self-assessment regarding the five years of the NPM activity all members identified the lowest levels of compliance with issues relating to their visiting/monitoring functions[248]. Declared NPM's priorities in 2015 have been to develop proposals to strengthen its governance, develop consistent approaches across the NPM to reduce reliance on and potential conflicts of interest from the use of seconded staff and the protection of detainees from sanctions or reprisals for assisting or speaking to NPM members. The NPM has begun work on a major joint project looking at isolation and practices that amount to solitary confinement.[249] On 1 December 2015, the National Preventive Mechanism Annual Report on UK detention was published and for the first time it also includes a national account of the use of solitary confinement and isolation in every type of custody across the UK. Inspectors

[246] See Appendix Five, Independent Advisory Panel on Deaths in Custody: Common principles of safer restraint to "Monitoring places of detention, Fifth annual report of the United Kingdom's National Preventive Mechanism".
[247] See https://www.justiceinspectorates.gov.uk/hmiprisons/national-preventive-mechanism/.
[248] "Monitoring places of detention, Fifth annual report of the United Kingdom's National Preventive Mechanism", pp. 38-39.
[249] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/444785/hmip-2014-15.pdf.

and monitors of prisons and other detention facilities were alarmed that the use of isolation or solitary confinement was often unacknowledged and implied detrimental regimes and the lack of safeguards[250].

4. Subsidiary avenues of complaints

4. 1. 1 The Equality and Human Rights Commission

The Equality and Human Rights Commission have a statutory remit to promote and monitor human rights; and to protect, enforce and promote equality across the nine "protected" grounds – age, disability, gender, race, religion and belief, pregnancy and maternity, marriage and civil partnership, sexual orientation and gender reassignment. In the prison context, the effective impact of the task of the Commission is related to the fact that complaint monitoring includes data on equality incidents relating to protected characteristics. PSI 32/2011 sets out the process for complaints about equality issues and reflects the changes outlined in the Equality Act 2010. It includes information about the monitoring that is required for complaints referred into the equalities incident reporting arrangements. The Commission has clarified some standard of violation of prisoners right, especially concerning ethnicity[251], age[252], disability[253] and gender[254].

[250] National Preventive Mechanism Annual Report 2014-2015 on United Kingdom detention, 1 December 2015.

[251] On 30 June 2014, 26% of the prison population, 21, 937 people, was from a minority ethnic group. This compares to around one in 10 of the general population. See Table A 3.5.2. Equality and Human Rights Commission, *How far is Britain? Equality, Human Rights and Good Relations in 2010*, London: Equality and Human Rights Commission. According to the Equality and Human Rights Commission, there is greater disproportionality in the number of black people in prisons in the UK than in the United States, *Ibidem*.

[252] Age is a protected characteristic under the Equality Act. The prison service has issued Prison Service Instruction (PSI) 32/2011 which describes the duties prison staff have under the act. This gives no specific guidance to staff about working with older people in their care.

[253] The Inspectorate also found that sometimes questionable security imperatives got in the way of making reasonable adjustments required by the Equality Act 2010. HM Inspectorate of Prisons made more recommendations about disability than for any protected characteristic in 2012-2013. They remained concerned that identification of prisoners with disabilities was inconsistent, HM Chief Inspector of Prisons, Annual Report 2011-2012, Annual Report 2012-2013, London, The Stationery Office. A joint report by the prisons and probation inspectorates, published in March 2015, found that prison and probation staff were failing to identify people with learning disabilities, and opportunities to help such offenders were missed. The report followed the second joint inspection into people with learning disabilities in the criminal justice system. Prisons did not tell how many prisoners with learning disabilities they held or shared information effectively within the prison. The recommendations for improvement made by the two chief inspectors included: ensuring that prison and probation services comply with the requirements of the Equality Act 2010 by making necessary adjustments to services for those with learning disabilities; introducing a screening tool for learning disabilities across the prison estate; adapting interventions for people with learning disabilities to help reduce the risk of reoffending. *A joint inspection of the treatment of offenders with learning disabilities within the criminal justice system: phase two in custody and the community*, HM Inspectorate of Probation and HM Inspectorate of Prisons, 2015.

[254] See the last Prison Reform Trust Report *"Bromley Briefing Prison Factifile"*, 2014. According to the last general report of Her Majesty Chief Inspector of Prisons, support for gay or bisexual prisoners continued to be underdeveloped. In this survey, only 3% of men stated that they were gay or bisexual, and many told us that they did not feel safe disclosing this to staff or other prisoners, fearing victimisation. There was also little active support for gay prisoners in the prisons visited. The care for the few transgender prisoners varied between prisons, although most had a relevant written policy. Good support for transgender prisoners has been founded at Altcourse, Elmley and Wormwood Scrubs, but at Northumberland good one-to-one support from a designated member of staff was undermined by insensitive staff

4. 1. 2 The Equality Act 2010

Under the Equality Act 2010, Section 138, a person who claims to have been discriminated against, harassed, or victimised in contravention of the Act can submit a questionnaire in order to obtain information from the person he or she thinks is responsible for the contravention.

It is important to remember, when providing information in connection with a questionnaire, that any reply is (subject to the normal rules relating to the admissibility of evidence) admissible in evidence in court proceedings under the Equality Act 2010. If it appears to the court that there has been a deliberate failure to reply to a question within eight weeks, or that a reply is evasive or equivocal, the court will be entitled to draw any inference from this, although there are some exceptions. It is therefore important that full answers are provided promptly to any request for information relating to allegations of discrimination.

4. 2 The Courts as concurring or subsidiary avenue of complaints

Prisoners may instigate a civil action against National Offender Management Service or an individual member of staff. Prisoners may also bring a private prosecution. Prisoners should be allowed to discuss a prospective private prosecution and make arrangements for initiating it in correspondence or meetings with their legal adviser or any other person. Prisons must not impede any such action, but it is not for a member of staff to provide substantive advice or assistance. Prisoners who wish to institute criminal proceedings about an event which is alleged to have occurred outside the establishment should be advised that if they have any evidence that a criminal offence has been committed it should be communicated to the appropriate Chief Officer of Police. If the event is alleged to have occurred within the establishment, it is for the governor to take any necessary action. Prisoners who wish to bring an appeal (either criminal or civil) to the Court of Appeal or the Supreme Court should consult their legal advisers[255].

4. 3 The Criminal Cases Review Commission

The Criminal Cases Review Commission (CCRC) is responsible for investigating suspected miscarriages of criminal justice in England, Wales and Northern Ireland. The Commission is a last resort. It cannot normally consider any case until it has been through the appeal system. Establishments should hold full information on the CCRC and how to apply.

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continuing to refer to the transgender prisoner as a man and not always ensuring she had separate shower access, Annual Report 2014-2015, HM Chief Inspector of Prisons, p. 46.

[255] Ministry of Justice, National Offender Management Service, *Prisoner Complaints*, cit., Annex A.

4. 4 The Criminal Injuries Compensation Authority

The Criminal Injuries Compensation Authority (CICA) considers applications for payments of compensation from applicants who have sustained injury directly attributable to a crime of violence, under the Criminal Injuries Compensation Scheme. Prisoners who make a request or complaint for compensation on these grounds should be advised to apply to the CICA.

5. The main NGO' involved in prisoners' right protection and their work.

The Howard League for Penal Reform.

http://www.howardleague.org/

The Howard League for Penal Reform was established in 1866 and it has a strong and long history of working alongside the academic and research communities. Concerning legal work, its legal service for children and young people in custody was established in 2002, it consists in the activity of advice about children and young can improve their treatment and conditions. Regarding parliamentary work, the Howard League has relations with politicians at local and national level in order to achieve its political objectives, foremost this activity including lobbying. The Howard League made relevant inquiries about crucial matters as the coercive sex in prison and the use of physical restraint, solitary confinement and forcible strip searching of children in penal custody. Its campaigns cover a wide range of issues including short term prison sentences, community programmes, women, children and young adults in prison, real work in prison and prison overcrowding. According to the last Report of Howard League for Penal Reform, the charity has 11. 000 members and committed donors. Every year Howard League for Penal Reform publishes a Report on the conditions of detention.

Some of the last commitments were the appeal to the Court to obtain the entitlement to challenge legal aid cuts for prisoners and the Book for Prisoners Campaign. Since the 12 July 2015 prisoners are able to receive books directly from their friends and family members, from any concerned individual or charity. The final rule change not only allowed books to be posted in but there is no longer an arbitrary limit on the number of books people can have[256]. On 7 September Howard League sent its official submission to the government Spending Review 2015 to cut the Ministry of Justice's budget with the purpose to reduce the historically highest level of the prison population. In April 2015 the Howard League for Penal Reform expressed a strong opposition to the introduction of the criminal courts charge presenting to the House of Commons Justice Committee a dossier of cases that shows the reasons of the unfairness of the new policy. The

[256] 2014 - 2015 Annual Review, The Howard League for Penal Reform, p. 4.

imposition on criminal charge affected people who are not be able to pay. On 3 December 2015 the Secretary of State for Justice, Michael Gove announced that the criminal charge is to be abolished.
The NGO' S work in partnership with law firms and other charities contributed to the Supreme Court decision that authorising solitary confinement must be reformed. Howard League for Penal Reform campaigned to reduce child arrests and work to improve the treatment of children and improve their access to justice. In 2015, the numbers of British national children in custody has fallen by two thirds[257].

Prison Reform Trust

http://www.prisonreformtrust.org.uk/TalkingJustice

The Prison Reform Trust is an independent UK charity which was established to create a just, human and effective penal system. Its activity aims at inquiring into the workings of the system; informing prisoners, staff and wider public; and by influencing Parliament, government and officials toward reform. The Prison Reform Trust's main objectives are reducing unnecessary imprisonment and promoting community solutions to crime; improving treatment and conditions for prisoners and their families; promoting equality and human rights in the justice system. Over the last year, it has made substantive submissions to numerous government consultations on future policies relevant to inmates and former inmates, ranging from health to welfare reform. In 17 December 2015, Prison Reform Trust published an in-depth research report that reveals that segregation units and close supervision centres (CSCs) involve impoverished regimes with inadequate levels of purposeful activity and increased control of prisoners[258]. Since the early 1990, the Prison Reform Trust has worked with allied agencies, and former and serving prisoner to ensure that people in prison not to be stripped of their fundamental rights, including their right to vote.

NACRO

https://www.nacro.org.uk

The National Association for the Care and Resettlement of Offenders (NACRO) is an established charity with almost 50 years of experience, this organization has been repositioning itself as a champion of social justice which continues to put crime prevention and reduction at its core. It aims to meet society’s changing needs and support a wider range of individuals, using knowledge and experience to help the most vulnerable categories in the community in order to reach their full potential and aspirations and to fight against their marginalization. The scope of the activity includes the assessment of social exclusion, inequality of opportunity and deprivation. Throughout England and Wales it delivers interventions which are consistently

[257] 2014 - 2015 Annual Review, The Howard League for Penal Reform, p. 22.
[258] *Deep Custody: Segregation Units and Close Supervision Centres in England and Wales*, Dr Sharon Shalev and Kimmett Edgar, Prison Reform Trust, 17 December 2015.

high quality, evidence based and outcome focused so that impact in communities could maximized. NACRO offers a range of vocational courses that lead to qualifications and employment.

INQUEST

http://www.inquest.org.uk/

INQUEST was founded in 1981. It is a small charitable organisation that provides a specialist, comprehensive advice service to bereaved people, lawyers, other advice and support agencies, the media, MPs and the wider public on contentious deaths and their investigation.
Its casework priorities are deaths in custody (police, prison, immigration detention and deaths of detained patients) and its focus on deaths in custody and the monitoring of such deaths means that INQUEST is at the forefront of uncovering patterns and trends. Within this area it has particular concerns about the deaths of women, black people, young people, and people with mental health problems that reflect its commitment to challenging discrimination. This is both in terms of the treatment and care received by the deceased in custody and the experience of bereaved relatives following the death. Arising from its casework and related areas INQUEST develops policy proposals and undertake research to lobby for changes to the inquest and investigation process, reduce the number of custodial deaths and improve the treatment and care of those within the institutions where the deaths occur.

Cage

http://www.cageuk.org/category/tag/detention

Cage is and independent advocacy organisation working to empower communities impacted by the War on the Terror. The organisation highlights and campaigns against state policies. Its work has focused on working with survivors of abuse and mistreatment. Its website is one of the leading resources documenting the abuse of due process and the erosion of the rule of law in the context of the War on Terror. Its activity deal with the arbitrary detention and the torture as a routine consequence of arbitrary detention.

5. 1 The improvement of the effectiveness of the legal aid in relation to the main supporting organizations

The Legal Action Group

http://www.lag.org.uk

The Legal Action Group is a national charity committed to improving access to justice, particularly for the vulnerable and socially excluded. LAG works with lawyers and advisers to improve standards and knowledge of social welfare, family and criminal law among practioners, by publishing legal handbooks and its monthly magazine, Legal Action, and providing training for lawyers and advisers. It is also comment and campaign extensively on the delivery of publicly funded legal services, the administration of justice and social welfare, family and criminal law issues. Its primary concern is with quality and access to justice for the users and potential users of legal services. LAG promotes equal access to justice as a fundamental democratic right. Justice demands are both fairness of process and fairness of result. It seek to remove barriers to fair and effective justice, particularly for those who have difficulty enforcing their rights or defending their interests. To this end, it work to improve law and practice, administration of justice and legal services. LAG aims to influence decision-makers through policy work on access to justice, to promote the users' perspective in legal services, to make the tribunal system, more user-friendly and accessible.

Prisoners' Advice Service

http://www.prisonersadvice.org.uk/

Prisoners' Advice Service is an independent registered charity offering free legal advice and support to adult prisoners in England and Wales. PAS offers free legal advice and information to prisoners regarding their rights, conditions of imprisonment and the application of the Prison Rules. It pursues prisoners' complaints about their treatment in prison by providing advice and information and, where appropriate, taking legal action. The NGO produces the quarterly Prisoners' Legal Rights Bulletin in order to share updates on key Prison Law cases with prisoners, human rights organisations and legal professionals. Examples of issues included are parole, temporary release, life sentences, categorisation, mother and baby units, adjudications, sentence calculation, and licenses and recalls. PAS offers information to prisoners, to those within the prison sector, and responds to Government Consultations. The PAS Telephone Advice Line is run by caseworkers three days a week. Its telephone numbers are globally cleared within all prisons throughout England and Wales. PAS runs a letter clinic for written enquiries. PAS caseworkers run clinics in legal advice and legal education in prisons across England and Wales. The aim of these sessions is to provide information to prisoners as well as to empower them.

Barnardo's

http://www.barnardos.org.uk/

Barnardo's is the current contractor for independent advocacy services for children and young people in Secure Training Centres and under-18 Young Offender Institutions. Barnardo's role is to provide children and young people with a free and confidential service where they can ask for help if they feel they cannot speak for themselves, do not understand something or cannot make themselves understood. They can help young people to write a complaint or appeal to resolve issues relating to welfare, care and treatment in custody but they cannot resolve the complaint itself. The above-mentioned Prison and Probation Ombudsman from England and Wales, Independent Investigations, *Learning from PPO Investigations: Why do Women and young people in custody not make formal complaints* reported that young people knew about Barnardo's operating in their establishment and were mainly positive about their experiences. There was some uncertainty as to whether Barnardo's were an appropriate avenue for complaints. There was a general feeling among young people that Barnardo's were used for resettlement issues and not for problems that they had in the prison.

5. 2 The relevant response to the legal aid cuts introduced since December 2013

One of the most recent research of Legal Action Group dealt with the cuts imposed by the government in the wide field of the legal aid. LAG emphasises that in 2014 the government has not recognized officially the birth of the modern legal aid system, showing its highly negative approach to this important public service. In April 2013, the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 introduced a radical reduction in the type of cases covered by the civil legal aid scheme. To justify these cuts, the government has pursued a policy of traducing legal aid in the media by sticking to a few frequently repeated misrepresentations about the scheme. In spite of this, public support for legal aid remains remarkably robust and has over the last year shifted decisively against the government[259]. On 7 July 2015 the Howard League for Penal Reform and Prisoners' Advice Service went to the Court to appeal the High Court decision to bar to challenge to legal aid cuts for prisoners. In the opinion of the charities, the cuts have coincided with an unprecedented deterioration of safety standards in English and Welsh prisons and with a rise of suicides. Removing a huge range of issues from the scope of the legal aid, the cuts have been introduced in December 2013[260] and have resulted in both charities being inundated with requests for help. In the year following the cuts, calls to the Howard League's advice line increased by 45 per cent. The legal team, which provides the

[259] S. Hynes, Director of Legal Action Group, *Legal aid at 65: is the government losing the argument over cuts?*, 2014.
[260] *Criminal Legal Aid Regulation* 2013 SI 2013, No 2790, see https://www.justice.gov.uk/legal-aid/newslatest-updates/legal-aid-transformation.

only dedicated legal service for children and young people in prison in the country, is overwhelmed with requests from young people with nowhere else to turn.

Prisoners' Advice Service (PAS) represents adults (over-21s) and receives thousands of letters and calls each year. The charity simply does not have the physical or financial resources to deal with the large amount of requests that it now receives for *pro bono* assistance and representation.

The charities argued in court that there were seven key areas of work cut from the ambit of legal aid that carry an unacceptable risk of unfairness. These key areas are: 1) Cases before the Parole Board about a move towards open conditions, otherwise known as pre-tariff reviews and return to open condition cases; 2) Prisoner eligibility for one of the few available places in mother and baby units; 3) Prisoner segregation and placement in Close Supervision Centres; 4) Category A reviews; 5) Access to offending behaviour courses; 6) Resettlement and licence conditions; 7) Disciplinary proceedings (where no additional days may be awarded). Unlike other cuts to legal aid, where a safety net was introduced to allow people to apply for legal aid in exceptional circumstances, the cuts for prisoners were absolute: there was no lifeline for even the most vulnerable or incapacitated prisoner to apply for legal aid for prison law matters.

The first key point of the case hold that the removal of legal aid for a small number of important Parole Board cases is unlawful. These cases affect prisoners on life sentences and imprisonment for public protection (IPP) sentences who can only progress to open conditions if the Parole Board advises that it would be safe for them to do so. This is important because, once in open conditions, prisoners can apply to work and receive education in the community. This step is key for prisoners' rehabilitation and public safety. Making prisoners go through this stage without legal advice and representation is counter-productive and increases the risk to the public.

The second argument concerns the removal of legal aid for prisoners facing particular difficulties such as mothers threatened with separation from their babies, children and disabled prisoners who need a support package so they can be released safely, and mentally ill prisoners held in isolation. Managing people through long prison sentences is a skilful business which needs to be handled with extreme care so that they can resettle safely into the community[261]. In its decision, the Court of Appeal argued "that without the potential for access to appropriate assistance, the system could carry an unacceptable risk of unfairness, and therefore unlawful, decision making"[262]. Lord Justice Leveson concluded that the question of inherent unfairness concerns not simply the structure of the system which may be capable of operating fairly, but whether there are mechanisms in place to accommodate the arguably higher risk of unfair decisions for those with mental health, learning or other difficulties which deprive them of the ability effectively to participate in.[263]

[261] The Howard League for Penal Reform and the Prisoners' Advice Service are jointly represented in these cases by Simon Creighton of Bhatt Murphy Solicitors, Phillippa Kaufmann of Matrix Chambers, and Martha Spurrier and Alex Gask of Doughty Street Chambers, http://www.prisonersadvice.org.uk/court-of-appeal-allows-pas-and-howard-league-legal-aid-challenge/.

[262] Court of Appeal (Civil Division) on Appeal from the Queen's Bench Division, EWCA Civ 819, 28 July 2015, para 25. I thank Simon Creighton for providing me with the text of the decision.

[263] Lord Justice Leveson in the beginning of the judgment held that the Howard League and PAS are "pre-eminent in this field" and have "the very highest reputations", *Ibidem*, para 1.

On 28 July 2015 the Court of Appeal ruled that Howard League for Penal Reform and the Prisoners' Advice Service are entitled to challenge legal aid cuts for prisoners. The Court of Appeal will hear the full case in 2016.