Michaelmas Term
[2015] UKSC 58
On appeal from: [2014] CSIH 18A

JUDGMENT

Shahid (Appellant) *v* Scottish Ministers (Respondent) (Scotland)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Sumption
Lord Reed
Lord Hodge

JUDGMENT GIVEN ON

14 October 2015

Heard on 18 February 2015

Appellant
Kenny McBrearty QC
Chris Pirie
Tony Kelly
(Instructed by Taylor & Kelly)

Respondent
Gerry Moynihan QC
Douglas Ross

(Instructed by Scottish Government Legal Directorate Litigation Division)

LORD REED: (with whom Lord Neuberger, Lady Hale, Lord Sumption and Lord Hodge agree)

1. On 8 November 2006 the appellant and his two co-accused were convicted of the racially-aggravated abduction and murder of a 15 year old boy, who was selected at random and abducted from a public street, repeatedly stabbed, and set alight with petrol. The appalling nature of that crime was reflected in the sentences imposed.

2. The appellant was extradited from Pakistan in order to stand trial, and on 6 October 2005 was remanded in custody pending his trial. On 7 October 2005 he was removed from association with other prisoners and placed in solitary confinement, otherwise described as segregation. Apart from the period immediately prior to and during his trial, when he was accommodated in mainstream conditions, he remained in continuous segregation until 13 August 2010. Altogether, he spent 56 months in segregation.

3. For a prisoner in Scotland to spend almost five years in segregation is exceptional. The situation of the appellant and his co-accused was exceptional primarily because of the media coverage which they attracted as a result of the nature of their crime. They were notorious as the perpetrators of a crime which, because of its racist nature, and the fact that the victim was a child, was liable to result in their being attacked by other prisoners. In consequence, there were persistent fears for their safety if they were accommodated in mainstream conditions.

4. In these proceedings, the appellant seeks orders declaring that certain periods of his segregation were contrary to the relevant Prison Rules, and that there were violations of his Convention rights under articles 3 and 8 of the European Convention on Human Rights ("ECHR"), as given effect by the Human Rights Act 1998. He also seeks an award of damages as just satisfaction under section 8 of that Act. The Ministers expressly acknowledge that the nature of the crime committed does not justify a contravention of the appellant's Convention rights. As Lord Steyn observed in *R* (*Roberts) v Parole Board* [2005] UKHL 45; [2005] 2 AC 738, para 84, even the most wicked of men are entitled to justice at the hands of the state.

5. The appellant first applied for legal aid to bring this application for judicial review in February 2007, when he had been in segregation for about 15 months. Legal aid was finally granted in June 2010, when he had been in segregation for about four and a half years. The application was heard a year later, by which time his segregation had ended. Following a four day hearing, the Lord Ordinary, Lord

Malcolm, refused the application on 18 November 2011: [2011] CSOH 192; 2012 SLT 178. An appeal was refused by an Extra Division, comprising Lord Menzies, Lord Drummond Young and Lord Wheatley, on 31 January 2014: [2014] CSIH 18A; 2014 SC 490.

The Prison Rules

6. It may be helpful to begin with the relevant Prison Rules. Section 39 of the Prisons (Scotland) Act 1989 allows the Scottish Ministers to make rules for the regulation and management of prisons. The rules that are relevant to this appeal are the Prisons and Young Offenders Institutions (Scotland) Rules 1994 (SI 1994/1931) as amended ("the 1994 Rules"), which were in force when the appellant entered the prison system on 7 October 2005, and the Prisons and Young Offenders Institutions (Scotland) Rules 2006 (SSI 2006/94) ("the 2006 Rules"), which replaced them on 26 March 2006. They were in turn replaced by the Prison and Young Offenders Institutions (Scotland) Rules 2011 (SSI 2011/331) ("the 2011 Rules") with effect from 1 November 2011. It is common ground that it is sufficient for the purposes of this appeal to refer to the 2006 Rules, the relevant provisions of which are identical to the corresponding provisions of the 1994 Rules as they stood at the material time.

7. Rule 94(1) of the 2006 Rules confers a power on the governor (an expression defined for this purpose, by rule 5, as including any authorised unit manager) to order the segregation of a prisoner for specified purposes:

> "(1) Where it appears to the Governor desirable for the purpose of -
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> (a) maintaining good order or discipline;
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> (b) protecting the interests of any prisoner; or
>
> (c) ensuring the safety of other persons,
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> the Governor may order in writing that a prisoner shall be removed from association with other prisoners, either generally or during any period the prisoner is engaged or taking part in a prescribed activity."

The governor is required by rule 94(4) to specify in the order the reasons why it is made and to record in the order the date and time it is made. He is also required to explain to the prisoner the reasons why the order is made and provide the prisoner with a copy of the order.

8. Rule 94(5) is critical to one of the issues in this appeal. It provides:

> "(5) A prisoner who has been removed from association generally or during any period that the prisoner is engaged in or taking part in a prescribed activity by virtue of an order made by the Governor in terms of paragraph (1) shall not be subject to such removal for a period in excess of 72 hours from the time of the order, except where the Scottish Ministers have granted written authority on the application of the Governor, prior to the expiry of the said period of 72 hours."

9. Rule 94(6) is also critical. It provides:

> "(6) An authority granted by the Scottish Ministers under paragraph (5) shall have effect for a period of one month commencing from the expiry of the period of 72 hours mentioned in paragraph (5) but the Scottish Ministers may, on any subsequent application of the Governor, renew the authority for further periods of one month commencing from the expiry of the previous authority."

10. Finally, in relation to rule 94, it is relevant to note that, under rule 94(9), any order under rule 94(1), or any authority under rule 94(5), ceases to have effect when a prisoner is transferred from one prison to another. Under rule 94(10), a prisoner who has been removed from association under rule 94 must be visited by a medical officer as soon as practicable and as often as is necessary, but at least once every seven days.

11. Rule 80(1), (5), (6) and (9) of the 1994 Rules corresponded to rule 94(1), (5), (6) and (9) of the 2006 Rules respectively.

The non-observance of time limits

12. The first issue in the appeal arises from the failure of the authorities, on a number of occasions, to comply with the time limits imposed by rule 94 and its

predecessor. It is common ground that three of the orders made on behalf of the Ministers, authorising the appellant's continued segregation under rule 94(5), were granted after the 72 hour period had expired. On each occasion, authority for continued segregation was purportedly granted with effect from the time when the 72 hours had expired. It is also common ground that 11 of the renewals of authority on behalf of the Ministers under rule 94(6) or its predecessor were granted after the previous authority had expired. The renewals again purported to be backdated so as to leave no interval when authorisation was absent.

13. It is argued on behalf of the appellant that the late authorisations under rule 94(5) were invalid, and that the appellant's segregation during the period purportedly authorised was therefore unlawful. Furthermore, it is argued, the purported renewals of the invalid authorisations under rule 94(6) were equally invalid. In addition, it is argued, all late renewals under rule 94(6) were invalid, and all subsequent renewals following upon a late renewal were also invalid. On that basis, it is argued that the appellant's segregation was unauthorised for periods totalling 32 months: about 14 months arising from invalid authorisations under rule 94(5), and a further 18 months arising from late renewals under rule 94(6). On behalf of the Ministers, on the other hand, it is argued that the lateness of the orders had no effect upon their validity.

14. The courts below accepted the Ministers' submissions on this point. They focused upon the limited extent to which the orders were late, when considered in the context of the appellant's segregation as a whole, and took the view that, notwithstanding their lateness, they achieved the intended purpose of ensuring that segregation was maintained only for so long as was necessary, and that the position of the prisoner was regularly reviewed. In those circumstances, they inferred that the legislator could not have intended the lateness of the authorisations to invalidate continued segregation.

15. The critical issue is the construction of the legislation. Considering rule 94(5) in the first place, it plainly means that segregation by virtue of an order made under rule 94(1) should not continue beyond the initial 72 hours from the time of the order, unless authority has been granted before the 72 hours have expired:

> "A prisoner ... shall not be subject to such removal for a period in excess of 72 hours from the time of the order, except where the Scottish Ministers have granted written authority on the application of the Governor, prior to the expiry of the said period of 72 hours."

The words "shall not be subject to such removal ... except" mean that what follows is a pre-condition to lawful segregation for a period in excess of 72 hours from the time of the order. The words "have granted ... prior to the expiry of the said period" mean that, in order for the condition to be satisfied, authority must have been granted before the 72 hour period expires.

16. Rule 94(5) has to be read together with the provision in rule 94(6) that an authority granted under paragraph (5) "shall have effect for a period of one month commencing from the expiry of the period of 72 hours mentioned in paragraph (5)". Rule 94(6) does not specify when the authority must be granted, but it makes it clear when it must take effect, namely from the expiry of the 72 hour period beginning when the governor's order was made under rule 94(1).

17. The apparent effect of the provisions is therefore (1) that a late authority under rule 94(5) cannot operate so as to authorise segregation more than 72 hours after the initial order under rule 94(1), since that would be contrary to the requirement in rule 94(5) that the prisoner should not be segregated beyond the expiry of the 72 hour period unless authority has been granted prior to its expiry, and (2) that a late authority under rule 94(5) cannot therefore be of any effect, since rule 94(6) provides that a (valid) authority must take effect from the expiry of the 72 hour period, but we know from rule 94(5) that a late authority cannot do so. The implication is that authority under rule 94(5) cannot be granted late. On a natural reading of rule 94(5) and (6), there must be a seamless sequence of authorisations: the governor's order under rule 94(1), effective for the first 72 hours, and the Ministers' authority, granted prior to the expiry of that period, and effective for the succeeding month.

18. That reading of the legislation establishes a logical structure. It is also consistent with its purpose. The reason for requiring the Ministers' authority under rule 94(5), as explained by the House of Lords in *Somerville v Scottish Ministers (HM Advocate General for Scotland intervening)* [2007] UKHL 44; 2008 SC (HL) 45; [2007] 1 WLR 2734, and reiterated by this court in relation to the corresponding English rule in *Bourgass and Hussain v Secretary of State for Justice (Howard League for Penal Reform intervening)* [2015] UKSC 54; [2015] 3 WLR 457, is to provide a safeguard for the protection of the prisoner. The requirement that local prison management must obtain the authority of the Ministers within 72 hours ensures that the need for segregation is reviewed within a short time by officials external to the prison, on the basis of information which is up to date, and that segregation is maintained only for as long as is necessary. Authorisations which are 17, 44 or 47 hours late, as occurred in this case, defeat the intention of the legislation.

19. The courts below were concerned about the practical consequences of the legislation, so understood. The Lord Ordinary gave the example of a prisoner being

held in segregation for his own safety, where the documentation in support of an application under rule 94(5) was received one hour late. Was there nonetheless a continuing duty on the Ministers to consider the governor's request? Or must the prisoner be returned to the mainstream population, even if he might be killed or seriously assaulted there? The Lord Ordinary commented that most people would consider it quite unreal that, if the Ministers decided to go ahead and grant the authority, both it and all subsequent renewals would be rendered unlawful. I shall return to that example.

20. In the light of considerations of that kind, the courts below concluded that purposive arguments favoured treating a late authorisation as valid, within reasonable limits. No amount of purposive interpretation can however entitle the court to disregard the plain and unambiguous terms of the legislation. The consequence of the failure to obtain authority for continued segregation prior to the expiry of the 72 hour period is ineluctably spelled out by the legislation itself: the prisoner "shall not be subject to … removal for a period in excess of 72 hours from the time of the order". That consequence cannot be avoided by relying, as the courts below sought to do, upon such authorities as *R v Soneji* [2005] UKHL 49; [2006] 1 AC 340. Those authorities were concerned with situations where the legislation was silent as to the consequences of failure to comply with a time limit, and where the intended consequences therefore had to be inferred from the underlying purpose of the legislation. The present case is fundamentally different.

21. The only principle of statutory interpretation which might enable the plain meaning of legislation to be circumvented is that it can be given a strained interpretation where that is necessary to avoid absurd or perverse consequences: see, for example, *Inland Revenue Comrs v Hinchy* [1960] AC 748, 768 (Lord Reid), and *R (Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20; [2003] 4 All ER 209, paras 25 (Lord Hoffmann) and 116 (Lord Millett). Indeed, even greater violence can be done to statutory language where it is plain that there has been a drafting mistake: *Federal Steam Navigation Co Ltd v Department of Trade and Industry* [1974] 1 WLR 505, 509 (Lord Reid), and *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586, 592 (Lord Nicholls of Birkenhead).

22. In the present case, however, there has not been any drafting mistake. Nor does the legislation have absurd or perverse consequences. On the contrary, as I have explained, the plain meaning of the legislation is consistent with its purpose. The problem which concerned the Lord Ordinary – that the prison management might be compelled to return a prisoner to the mainstream even though the result might be to endanger his safety or that of another prisoner – nevertheless had a straightforward solution, as I shall explain. I say "had" because the 2006 Rules are no longer in force: as explained earlier, they have been replaced by the 2011 Rules. The corresponding provision in the 2011 Rules, namely rule 95, is expressed

differently from rule 94 of the 2006 Rules, and no question arises in these proceedings (and this court has heard no argument) as to its meaning or effect.

23. In relation to rule 94 of the 2006 Rules, the Lord Ordinary considered that in practice, if the 72 hours expired without authority for continued segregation having been granted, and if it then remained necessary for the prisoner to be segregated, the governor would make a fresh order under rule 94(1). A new period of 72 hours would then begin, and a fresh application could be made under rule 94(5).

24. That view may or may not be correct. Rule 94 does not expressly preclude the making of more than one order under rule 94(1) on the same grounds, and it is arguable that such an order would be valid if it were made reasonably and in good faith, in the event of a failure to comply with the timetable envisaged by rule 94. It might on the other hand be argued that the repeated use of rule 94(1) in such circumstances is impliedly precluded, on the view that the safeguards created by rule 94(5) could otherwise be circumvented. It has also to be noted that rule 80(7) of the 1994 Rules originally conferred on the governor an express power to make a further order under rule 80(1) on the expiry of the 72 hour period; but that power was confined to removal from association in relation to a prescribed activity only, and was in any event repealed by amendment in 1998: the Prisons and Young Offenders Institutions (Scotland) Amendment Rules 1998 (SI 1998/1589), rule 32(4).

25. The court has heard no argument on the question whether a further order might be made as the Lord Ordinary suggested, and it would be inappropriate to determine it without inviting further submissions. Since another solution exists to the problem which concerned the Extra Division, as I shall shortly explain, and bearing in mind that the 2006 Rules have been superseded and no longer raise any live problem, it is unnecessary to determine the question. An analogous question may arise under the 2011 Rules, but, as I have explained, the relevant rule is differently expressed, and no question as to its effect is raised in these proceedings.

26. What is however clear is that any duty arising under the 2006 Rules would be overridden by a conflicting duty imposed by primary legislation. In particular, the governor's duty under section 6(1) of the Human Rights Act to protect the safety of prisoners, in accordance with their article 2 and 3 Convention rights, would override any duty arising from rule 94 to return a prisoner to mainstream conditions, where that would involve a serious risk to life or limb. This is another issue on which the court was not addressed, but the point is too clear to admit of argument. The precise mechanism by which rule 94 would be overridden is open to argument: it may be that it should be read down so as to be consistent with Convention rights, or it may be that it is simply to be disregarded in so far as it is inconsistent with those rights. The practical result is the same in either case.

27. So far as renewals of authority are concerned, rule 94(6) provides that the Ministers "may, on any subsequent application of the governor, renew the authority for further periods of one month commencing from the expiry of the previous authority". The power of renewal is predicated upon there being a valid grant of authority, but no time limit is imposed on the decision to renew that authority, other than the general implication that it must be made within a reasonable period.

28. On the facts of the present case, there were, as I have explained, three occasions when authority under rule 94(5) was purportedly granted after the 72 hour period had expired. No attempt has been made to rely upon the Human Rights Act as providing a lawful basis for the continuation of the appellant's segregation on those occasions. In these circumstances, the only conclusion open is that the authority was invalid and, as such, was incapable of renewal. The consequence is that the appellant's segregation during periods totalling about 14 months lacked authorisation under the rules.

29. That conclusion does not in itself entitle the appellant to any remedy in damages. Rule 94 does not confer on a prisoner any right to damages in the event that his segregation is unauthorised: *R v Deputy Governor of Parkhurst Prison, Ex p Hague* [1992] 1 AC 58; *Bourgass and Hussain v Secretary of State for Justice* [2015] 3 WLR 457. Furthermore, it is responsibly accepted on behalf of the appellant that he suffered no prejudice as a result of authority being granted late. The breaches of rule 94(5) bear, however, on the issues arising under article 8 of the ECHR, to which I shall return.

Article 3 of the ECHR

30. Article 3 provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

On behalf of the appellant, it was submitted that his segregation violated that guarantee.

31. As the European Court of Human Rights said in *Ahmad v United Kingdom* (2012) 56 EHRR 1, para 205, the circumstances in which the solitary confinement of prisoners will violate article 3 are now well established in its case law:

> "207. ... Solitary confinement is one of the most serious measures which can be imposed within a prison and, as the Committee for the Prevention of Torture has stated, all forms of solitary confinement without appropriate mental and physical stimulation are likely, in the long term, to have damaging effects, resulting in deterioration of mental faculties and social abilities. Indeed, as the Committee's most recent report makes clear, the damaging effect of solitary confinement can be immediate and increases the longer the measure lasts and the more indeterminate it is.
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> 208. At the same time, however, the court has found that the prohibition of contact with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment. In many states parties to the Convention more stringent security measures, which are intended to prevent the risk of escape, attack or disturbance of the prison community, exist for dangerous prisoners.
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> 209. Thus, whilst prolonged removal from association with others is undesirable, whether such a measure falls within the ambit of article 3 of the Convention depends on the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned.
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> 210. In applying these criteria, the court has never laid down precise rules governing the operation of solitary confinement. For example, it has never specified a period of time, beyond which solitary confinement will attain the minimum level of severity required for article 3. The court has, however, emphasised that solitary confinement, even in cases entailing relative isolation, cannot be imposed on a prisoner indefinitely"

32. In the present case, it is accepted that the conditions of the appellant's segregation were not such as in themselves to breach article 3. The space and layout of the cells were satisfactory, and there was integral sanitation, although it was not screened. Although a report lodged on behalf of the appellant concluded that the ventilation in the relevant segregation units (including the one at HMP Barlinnie) fell short of accepted standards, and that the level of natural light also fell below desirable standards, that view might be contrasted with the report by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT"), following a visit to Barlinnie in 2012, that the cells in the segregation unit had adequate lighting, including access to natural light, and

adequate ventilation (Report to the Government of the United Kingdom on the Visit to the United Kingdom carried out from 17 to 28 September 2012). On any view, the conditions were compatible with respect for the appellant's human dignity, and adequate to secure his health and well-being.

33. It is also accepted that the measures imposed on the appellant did not in themselves breach article 3. Although the regime prevented contact with the general prison population, it did not involve the appellant's total isolation from other prisoners or from other human contacts. He was confined to his cell for between 20 and 22 hours per day. He was permitted to associate with other prisoners at times when he was released from his cell. He generally had access to one hour of exercise per day in the segregation unit yard. He often had access, for about an hour at a time, to a gym located in the segregation unit. He was entitled to receive visits and to use prison telephones. He had daily access to showers and newspapers. He occasionally had his hair cut. He was occasionally visited by an Imam. He occasionally attended court. After March 2008 all the cells in which he was accommodated had electric power, and a television was provided. Prior to that date, he was provided with a battery powered television in his cell. The impression conveyed by the documentation is that the staff of the various segregation units generally did their best to treat him as well as they could within the restrictions inherent in the rule 94 regime. On the other hand, no work or other occupation was provided or permitted in his cell, and education courses were not generally available. He was not permitted to attend religious services, although from May 2009 he attended a class for Muslim prisoners at HMP Glenochil.

34. The objective pursued was the protection of the appellant from attack by other prisoners, in accordance with the duties imposed on the prison authorities both by domestic law and under the ECHR. It is not disputed that the intelligence received by the authorities was such as to give rise to a genuine and reasonable concern that he was at risk of serious injury or worse.

35. The duration of the segregation was 56 months in total, divided into two periods of 11 and 45 months.

36. The prison authorities were aware of the risks which segregation, especially for a prolonged period, can pose to mental health. The effects on the appellant were regularly monitored. Prison medical officers visited him at least once every seven days. They did not find that he was medically unfit to be segregated. He was examined in January 2007 by a psychologist at Barlinnie, who reported that he appeared to be coping well. When interviewed by a psychologist instructed by his lawyers for the purpose of these proceedings in May 2010, towards the end of his period in segregation, his demeanour indicated low mood. He reported anxiety about going outside the segregation unit, hearing voices, which the psychologist

considered to be a reaction to his environment, and a loss of confidence. Without under-estimating the unpleasantness of the symptoms reported by the appellant, it is not suggested in the report, or in any other evidence before the court, that he suffered any severe or permanent injury to his health.

37. Considering the facts of this case against the criteria applied in the case law of the European Court, the treatment of the appellant did not attain the minimum level of severity required for a violation of article 3. It is important to bear in mind that the isolation which he experienced was partial and relative. The fact that his segregation was imposed in the interests of his own safety is also relevant. There is no doubt that the duration of his segregation was undesirable, and indeed exceptional by the standards of prisons in the United Kingdom. There are also respects in which his conditions might have been improved, in particular by making greater provision for the pursuit of purposeful activities. The procedural protections available were not as effective as they should have been, particularly as a result of the prolonged delay in obtaining legal aid. Nevertheless, comparison with such cases as *Ramirez Sanchez v France* (2006) 45 EHRR 1099, where the applicant was held for eight years in solitary confinement, under much more stringent conditions than the appellant, indicates that segregation of the duration experienced by the appellant, under the conditions in which he was held, does not entail a violation of article 3.

Article 8 of the ECHR

38. Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
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> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

39. It is accepted on behalf of the Ministers that segregation is an interference with the right to respect for private life guaranteed by article 8(1), and therefore requires to be justified under article 8(2). That concession reflects the approach adopted by the European Court in *Munjaz v United Kingdom* [2012] 1 MHLR 351. The questions that arise are accordingly (1) whether the appellant's segregation

pursued a legitimate aim, (2) whether it was in accordance with the law, and (3) whether it was necessary and proportionate in order to achieve the legitimate aim pursued. The Ministers bear the burden of establishing that these requirements were met.

Legitimate aim

40. There is no doubt that the segregation pursued a legitimate aim, namely the protection of the appellant's safety.

"In accordance with the law"

41. Whether the segregation was "in accordance with the law" is a more difficult question. In the first place, as I have explained, there were periods during which the appellant was held in segregation without valid authorisation under the Prison Rules. During those periods, his segregation was not in accordance with the law, and accordingly his rights under article 8 were breached.

42. It was also argued that his segregation was not in accordance with the law because the protections provided by the law were not effective in practice. Two related points were made. First, it was argued that the reasons given for the decisions to segregate the respondent, or to apply for the continuation of his segregation, were formulaic and repetitive, and did not indicate that genuine consideration had been given to the question whether it was necessary for his segregation to continue. Secondly, many of those decisions appeared to have given formal effect to prior decisions taken by a body with no status under the Prison Rules, namely the Executive Committee for the Management of Difficult Prisoners ("ECMDP").

43. In order to address these arguments, it is necessary to consider the history of the appellant's segregation. First, however, it may be helpful to explain the nature and role of the ECMDP (subsequently re-named the Prisoner Monitoring and Assurance Group). It is a non-statutory body, composed of prison governors and chaired by a senior official of the Scottish Prison Service ("SPS"), whose terms of reference include:

> "1. To manage the location, movement and progression of all prisoners ... held out of association for three months or more under rule 80 of the [1994 Rules, and]

> 2. To monitor the provision of appropriate accommodation and regimes for difficult prisoners ..."

The guidance on segregation issued by the SPS in November 2006 states:

> "ECMDP also carry out an important corporate monitoring role of the rule 94 process. The membership of the above committee comprises senior managers from all mainstream establishments and its role is to consider the management of difficult prisoners, some of whom are held for lengthy periods of time on rule 94 conditions. The committee regularly reviews the progress of such prisoners and at times recommends action to assist with the progress and re-integration of difficult prisoners to mainstream conditions."

According to a report by the Scottish Public Services Ombudsman on the appellant's case, to which it will be necessary to return, the ECMDP determines where such prisoners are to be held, and is accountable to the SPS Director of Custody, who has executive authority for the placement of all prisoners held out of association for three months or more under rule 94 and for the management policy applicable to them.

44. On 6 October 2005 the appellant was remanded in custody at Barlinnie pending his trial. The following day, he was segregated under rule 95(2) of the 1994 Rules, pending adjudication of a charge of assaulting another prisoner in his hall. It was noted that he had declined protection. On 10 October 2005, he was segregated under rule 80(1) of the 1994 Rules. Numerous applications for authority to continue his segregation were subsequently made. The same reasons for making the applications were generally repeated verbatim, or with minor changes. They were to the effect that the crime with which the appellant was charged had caused "highly racial motivated feelings" within the local prisoner population and had rendered the appellant a target for retribution. There does not appear to have been any specific intelligence report indicating a risk to the appellant's safety during this period, other than a threat, on 7 October 2005, of revenge by the victim of the assault that day.

45. During this period, the appellant was discussed at a meeting of the ECMDP on 12 January 2006. The minute records that he was "to remain within segregation unit until trial commences". That minute pre-dated the start of the trial by almost nine months. On its face, it recorded a decision as to how rule 94 or its predecessor would be applied during the intervening period.

46. On 18 September 2006 the appellant was transferred to HMP Edinburgh in anticipation of his trial. He was accommodated in the mainstream regime there until the conclusion of the trial on 8 November 2006. No incidents between the appellant and other prisoners were recorded during this period. On his return from court after his conviction, he was placed in segregation.

47. On 9 November 2006 the appellant was returned to HMP Barlinnie and was immediately segregated, for the same reasons as previously. He remained in segregation there until 28 January 2007, the necessary applications for authority being made by the local management and granted by officials. The last such application, granted on 12 January 2007, stated that to admit the appellant to a mainstream regime at that time would result in disorder. The only specific intelligence report during this period dated from 9 November 2006, and was to the effect that the appellant and his co-accused would be killed if they were located at HMP Glenochil. It was also recorded on 25 January 2007 that there had been a heated exchange of words between the appellant and another prisoner, with threats being made.

48. During this period, the cases of the appellant and his co-accused were discussed at a meeting of SPS senior management on 15 November 2006. It was minuted that reliable intelligence indicated that they were at very real risk of attack were they to be located in mainstream circulation in any prison in Scotland. Their location in a protection regime would not offer a significantly diminished prospect of violence. It was decided that they would be held out of circulation under rule 94 while consideration was given to their medium and longer term management. It was agreed that they should be held in segregation units that offered a similar range of facilities, namely Edinburgh, Glenochil, Kilmarnock, Perth and Shotts. The regime to be delivered in the units would need to be coordinated. A further meeting would therefore be held to identify a model approach and a process for coordinating and monitoring delivery. On the face of this document, it had been decided that the appellant would continue to be held in segregation, in advance of formal decisions being made under rule 94.

49. A meeting was then held on 22 November 2006 of the managers responsible, as the minute stated, for "the segregation units within HM Prisons Shotts, Glenochil, Barlinnie, Perth and Edinburgh where these prisoners will be held". A timetable was agreed for their transfers between segregation units. In relation to the appellant, it was agreed that he would spend December 2006 and January 2007 in the segregation unit at Barlinnie, February and March 2007 in the segregation unit at Edinburgh, April and May 2007 in the segregation unit at Perth, June and July 2007 in the segregation unit at Shotts, August and September 2007 in the segregation unit at Glenochil, October and November 2007 in the segregation unit at Edinburgh, December 2006 and January 2008 in the segregation unit at Barlinnie. The segregation unit manager where he was currently held would submit the next

application for authorisation with an agreed content, and would circulate it to the other segregation units to ensure consistency. The minutes of the meeting were to be supplied to the assistant director of prisons and to the official at SPS headquarters who subsequently granted many of the authorisations. On the face of this document, the managers agreed in advance that their powers under rule 94 would be exercised to keep the appellant in segregation for a further period of over a year.

50. At a meeting of the ECMDP on 5 December 2006 it was agreed that the appellant would be dealt with through the ECMDP for all future management and progression issues. On 17 January 2007 a meeting was held of SPS officials and the relevant segregation unit managers. It was agreed that the appellant and his co-accused would be transferred "as per the plan".

51. On 28 January 2007 the appellant was transferred to Edinburgh and immediately segregated. The reason given was that he "is managed through ECMDP and the rule 94 is applied for to keep him in Edinburgh segregation unit". It was during this period in Edinburgh that authority for segregation beyond the first 72 hours was, for the first time, granted late and subsequently renewed. The applications stated that to admit the appellant to mainstream would result in disorder. The last of the applications included a note of a case conference which stated that the appellant "would be held in segregation until a decision was taken by the ECMDP to relocate [him] to a mainstream regime". On its face, that implied that local management regarded themselves as required to maintain the appellant's segregation unless and until the ECMDP decided otherwise. During this period, an intelligence report was received on 9 March 2007 to the effect that the appellant and his co-accused would be stabbed if they went into the mainstream at Glenochil. There was also a report of the appellant being racially abused by other prisoners while on his way to the gym.

52. On 3 April 2007 the appellant was transferred to Perth and immediately segregated. The application for authority for continued segregation beyond the initial 72 hours stated that the appellant "is managed by the ECMDP and any major decisions on his management are currently made by them". When that was renewed in May 2007, the reason given for the application was that the appellant "remains in segregation subject to a national directive". Authority was renewed again in June 2007, the reason for the application being that the appellant "remains subject to removal from general association subject to HQ direction". The application included a letter from the manager of the segregation unit, who stated that the appellant was admitted there "as part of a national agreed programme". The apparent implication of these documents is again that local management did not regard it as their responsibility to make an independent judgment under rule 94.

53. On 2 July 2007 the appellant was transferred to Shotts and immediately segregated. The reasons given narrated that the appellant "was transferred to HMP Shotts segregation unit", and referred to the need for time to determine his future management at Shotts so as to protect his safety. This period in Shotts was the second during which authority for continued segregation was granted late and subsequently renewed. The application for authorisation included a note of a case conference recording that Shotts was looking at integration into the mainstream, possibly at the National Induction Centre or NIC, which was located there. It was also noted that the appellant would receive his visits in the main visiting room, so that the reactions of other prisoners towards him could be monitored. The authorisation was renewed in August 2007, when the application stated that a protocol had been formulated and would be implemented to allow his phased integration into the NIC. During this period, there were intelligence reports to the effect that the appellant would be killed if he were admitted to a particular hall.

54. A further renewal was granted in September 2007. The application stated that attempts at reintegration within the NIC had resulted in protests and information that prisoners were prepared to assault the appellant should the attempts be continued. The appellant had also attempted to assault a prisoner. Local management did not consider it safe to try any further integration at that time. Further renewals were granted during October, November and December 2007. The applications stated that the appellant was held "under ECMDP conditions" due to concerns about his safety and the safety of others. A further renewal was granted on 7 January 2008. A note of a case conference stated that his case would be discussed at an ECMDP meeting on 8 January 2008, and that future decisions were dependent on outcome of that meeting. At that meeting, it was noted that Barlinnie had agreed to take the appellant.

55. On 15 January 2008 the appellant was returned to Barlinnie and was immediately segregated. The reason given was that he had been admitted into the segregation unit as "part of an agreement at the recent ECMDP", and that there remained considerable bad feeling from a lot of the prison population. Segregation was felt to be appropriate "until a long term management plan be put in place via ECMDP". Authority for continued segregation was granted later in January and February 2008, when the application included a note of a case conference stating that the appellant was to remain in Barlinnie under rule 94 conditions, and that this was the "decision by ECMDP". Further renewals were granted during March and April 2008. The notes of the most recent case conference stated that the decision that he should remain in Barlinnie under rule 94 conditions was a "decision by ECMDP", and that the future action required was the responsibility of ECMDP. On their face, these documents bear the same implication as those discussed earlier.

56. At a meeting of the ECMDP on 12 March 2008, it was minuted that the appellant would "remain on long term rule [94]", and that there would be a need for periodical transfers between establishments. On its face, that again confirms that the

appellant's continued long-term segregation was pre-determined. At the meeting of ECMDP on 14 May 2008, it was decided that he should be kept at Barlinnie. A further renewal was granted on 16 May 2008, the reason for the application stating that the appellant's admission into the segregation unit at Barlinnie was "part of an agreement at the recent ECMDP", and that there was still considerable bad feeling towards the appellant.

57. In the meantime, the appellant had complained to the Scottish Prisons Complaints Commissioner ("the SPCC"), who exercised a statutory jurisdiction under Part 12 of the 2006 Rules. On 2 June 2008 the SPCC wrote to the ECMDP, expressing disappointment that there had been little or no progress since he had first looked at the case, 16 months earlier. He asked the ECMDP to consider the mental suffering and irreparable harm which many prisoners experienced through extended periods of segregation. He asked the ECMDP to treat the matter as a priority and to make a decision on the most appropriate placement for the appellant outside of a segregation unit. There was no response from the ECMDP, and its minutes contain no indication that the matter was discussed. SPS however replied to the effect that the appellant continued to be held appropriately on rule 94 conditions.

58. Further authorisations were granted during June, July, August and September 2008. It was reported that threats had been made by other prisoners when the appellant was being escorted from the segregation unit for legal visits. There was a further renewal on 17 October 2008, when the note of the case conference stated that it had been decided by ECMDP that the appellant was to remain in Barlinnie on rule 94 conditions until further notice. On 21 October 2008 the ECMDP minuted that "a move to mainstream conditions cannot be considered at this time". There was a further renewal on 17 November 2008, when the application recorded that the appellant's brother, one of his co-accused, had been placed in normal circulation in HMP Dumfries, but that the ECMDP had decided that the appellant should remain at Barlinnie. The case conference note recorded the ECMDP's decision that the appellant was to remain under rule 94 conditions. On 26 November 2008 the SPCC elicited the information that his recommendations had not been considered by the ECMDP. There was a further renewal in December 2008, when the appellant stated that both his co-accused were now in normal circulation in Dumfries and had not experienced any problems.

59. On 13 January 2009 the ECMDP agreed that "Barlinnie will initiate discussions with Glenochil to arrange a smooth transition to their segregation unit", and that the move would take place during the coming weeks. In the meantime, there were further renewals.

60. On 13 March 2009 the appellant was transferred to Glenochil and immediately placed in segregation. The segregation unit's profile for the appellant

recorded that he came there "as a result of ECMDP under rule 94 conditions". Authorisation for continued segregation was granted, and renewed in April 2009, when it was reported that the appellant had been verbally abused by other prisoners. It was also reported that local management were carrying out risk assessments in order to assess whether the appellant could be located in association with other prisoners. A further exchange between the appellant and other prisoners, involving threats, occurred later in April 2009. In May 2009 he began attending a class with other Muslim prisoners. An ECMDP meeting that month minuted, in relation to the appellant: "Stay Glenochil segregation". Further renewals were granted during May, June, July and August 2009. During that period, there was a further report, in July 2009, of threats of violence towards the appellant. At an ECMDP meeting on 2 September 2009 it was noted that Glenochil had difficulty integrating the appellant into the mainstream, and that Shotts had agreed to take him in the hope of his being moved to the NIC.

61. On 9 September 2009 the appellant was transferred to Shotts and immediately segregated. This period in Shotts was the last during which authority for continued segregation was granted late and subsequently renewed. The application for renewal in November 2009 included a note of a case conference earlier that month, when the appellant was told that his case management had been referred back to the ECMDP, which was meeting that day, and "depending on the recommendations a rule 94 extension will be applied for". In the event, the ECMDP noted a recent increase in intelligence regarding risks to his safety if he were returned to a mainstream hall. Several intelligence reports of threats to the appellant's safety, if he were moved to the NIC, were received during this period.

62. Further renewals were granted during December 2009, and January and February 2010, when it was reported that there was resistance by other prisoners to the appellant's integration into the mainstream. Further orders were made during March, April and May 2010. It was explained that the feasibility of reintegration at the NIC had again been explored but was considered to be unsafe. The papers also record that the appellant had indicated his unwillingness to be subject to a protection regime. There was further intelligence of a threat to his safety during that period.

63. By this time, the appellant had complained to the Scottish Public Services Ombudsman. In its report, dated 21 April 2010, it found that it was clear that the ECMDP was not regularly reviewing the appellant's case, and that there was no evidence of its having been reviewed at all between May 2007 and January 2008. It recommended that the SPCC should urgently establish from the SPS whether there was any long term plan for the appellant's management and reintegration.

64. At an ECMDP meeting on 18 May 2010 it was noted that the attempts made at Shotts to integrate the appellant into mainstream conditions had not gone well,

and that Edinburgh had agreed to take him. On 11 June 2010 the appellant was returned to Edinburgh and immediately segregated. Authority for continued segregation was granted during June and July 2010.

65. As I have explained, the Scottish Public Services Ombudsman had recommended that the SPCC urgently establish whether there was any long term plan for the appellant's management and reintegration. During June 2010, legal aid was also granted for the present proceedings. Following the appellant's transfer to Edinburgh, management there undertook an appraisal of how he might be integrated into the mainstream. On 7 July 2010 a management plan for the appellant was prepared. It set out a carefully staged series of measures, designed to result in the appellant's integration during August 2010. As counsel for the Ministers acknowledged, no similar plan had been drawn up earlier. It was successfully implemented. The appellant gradually spent greater amounts of time in the mainstream over a period of weeks, with appropriate supervision and support from staff, until he was ultimately able to be integrated into the mainstream on 13 August 2010. Before this court, counsel for the Ministers explained that the appellant had been successfully integrated on that occasion, unlike the previous attempt at Shotts during 2007, in part because there was an active judicial review challenge. As he put it, the judicial review proceedings forced the authorities' hand.

66. Having summarised the factual background, it is necessary to return to the argument that the decisions made by local prison management under rule 94 were essentially a formality, the true decision-making function being exercised by the ECMDP.

67. In considering this argument, the Lord Ordinary accepted that the role of the ECMDP did not fit easily within the Prison Rules, and that it was clear that the local governors were looking to that body for guidance. He also expressed the view, however, that it was plain that the local governors and the Ministers were satisfied that the appellant should not be in the mainstream prison environment, and that the appropriate procedure was followed at the end of each month. He concluded that, even if the role adopted by the ECMDP was outside the Prison Rules, it did not amount to a violation of article 8. It is not entirely clear whether the Lord Ordinary accepted that the local management had not regarded it as their responsibility to make an independent judgment, but he appears to have considered that they had in any event shared the ECMDP's view that continued segregation was appropriate. The Extra Division expressed their view somewhat more clearly, describing the role of the ECMDP as essentially advisory. In relation to these conclusions, it should be noted that they were inferences drawn from the same documents as are before this court: no other evidence was adduced in relation to this matter, either orally or by affidavit.

68. The starting point, in considering this issue, is the rule of domestic administrative law that a statutory power of decision-making must be exercised by the person on whom the power has been conferred. The point is illustrated by *R v Deputy Governor of Parkhurst Prison, Ex p Hague*. The case arose from the fact that the governor of one prison had purported to authorise the segregation of a prisoner on his arrival at another prison to which he was being transferred, as required by an instruction issued by the Home Office. The prisoner's continued segregation at his new prison, after the initial period of segregation expired, was then automatically authorised on behalf of the Secretary of State, in accordance with the same instruction. Both authorisations were held by the Court of Appeal to be ultra vires: [1992] 1 AC 58, 102 et seq. The governor of one prison had no power to order the segregation of a prisoner held in another prison: the decision could only be taken by the governor of the prison where the prisoner was currently held. Nor could the Secretary of State lawfully authorise segregation as a matter of routine, without a genuine exercise of his discretion both as to whether his authority should be given and, if so, for how long. The point is also illustrated by *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533, 563, where the House of Lords explained that the Home Office had no authority to direct a prison governor as to how to exercise his disciplinary functions. The same is true, mutatis mutandis, of the SPS and the ECMDP vis-à-vis the powers of the governor under rule 94.

69. In the present case, where neither party has sought to rely on any evidence other than the documents before the court, one has to draw reasonable inferences from those documents. In the light of the documents, relevant extracts from which have been quoted, it would be unrealistic to view the role of the ECMDP as merely advisory, or to maintain that decisions whether it was appropriate for segregation to continue were left to the independent judgment of local management. Counsel for the Ministers frankly described the ECMDP minutes as unsatisfactory, and indefensible if looked at in isolation.

70. I have quoted the minute of the meeting on 12 January 2006, recording, several months before the appellant's trial, that he was "to remain within segregation unit until trial commences". I have quoted the minute of its meeting on 11 November 2008, recording "a move to mainstream conditions cannot be considered at this time". I have also quoted the minute of its meeting in May 2009: "Stay Glenochil segregation". Other documents appear to imply that transfers between segregation units were pre-arranged, sometimes several months in advance. Other documents imply that local management at some of the prisons proceeded on the basis that their decisions to segregate the appellant, or to apply for authority to continue his segregation, implemented decisions taken by the ECMDP, and that any change in his status had to be initiated by that committee. For example, Edinburgh recorded that the appellant "would be held in segregation until a decision was taken by the ECMDP to relocate [him] to a mainstream regime". Perth recorded that he was admitted to its segregation unit "as part of a national agreed programme" and

remained there "subject to a national directive". Barlinnie recorded more than once that the appellant's admission into its segregation unit was "part of an agreement at the recent ECMDP", and that the decision that he should remain under rule 94 conditions was a decision by ECMDP.

71. At the same time, it also appears from the documents that, at some prisons, during some periods of the appellant's segregation, local management made independent assessments of the appropriateness of continued segregation in the light of the current risks to his safety. The first period which the appellant spent at Shotts is not the only example, but it is the clearest. It may not be coincidental that there was no consideration of the appellant's case by the ECMDP during that period.

72. In these circumstances, it would be inappropriate to generalise. The only reasonable conclusion which can be drawn, however, in the light of what was written by those involved, and in the absence of any other evidence, is that some of the decisions taken by local management to segregate the appellant under rule 94(1) or its predecessor, to apply for authority for his segregation to continue under rule 94(5), and to apply for the renewal of such authority under rule 94(6), were not taken in the exercise of their own independent judgment, but proceeded on the basis that the relevant judgment had already been made, or would be made, by the ECMDP. They proceeded, in other words, not on the basis that the ECMDP was performing an advisory function, but that it was taking decisions which they were expected to follow. Whether or not the ECMDP expected its decisions to be viewed in that way is beside the point. What matters is whether the power of decision was in reality exercised independently by the person to whom it was entrusted by the legislation. Nor does it matter if the subsequent decision to grant or renew authority was properly taken on behalf of the Ministers: their power of decision was predicated upon a valid application to them, which depended on the lawful exercise of the power conferred on local management.

73. Like the failure to obtain valid authorisation for some of the time spent in segregation, this breach of domestic law results in a violation of article 8. It has not however been established that it caused any prejudice to the appellant. Whenever local management carried out an independent assessment, the invariable conclusion was that segregation was necessary in order to protect the appellant's safety. When attempts were made by local management to reintegrate the appellant at Shotts and Glenochil, they were abandoned in the light of the hostile response of other prisoners and threats of violence. It has not been argued, let alone established, that the appellant's segregation might have been ended earlier if local management had not deferred to the ECMDP.

Proportionality

74. There is no doubt that the appellant's case presented the SPS management with a very difficult problem. Nevertheless, they had to apply their minds to find an appropriate solution. In view of the length of the appellant's segregation, a rigorous examination is called for by the court to determine whether the measures taken were necessary and proportionate compared with practicable alternative courses of action.

75. In its judgment in *Razvyazkin v Russia* (Application No 13579/09) given 3 July 2012, the European Court cited at para 89 the discussion of proportionality in the 21st General Report of the CPT, of 10 November 2011:

> "Given that solitary confinement is a serious restriction of a prisoner's rights which involves inherent risks to the prisoner, the level of actual or potential harm must be at least equally serious and uniquely capable of being addressed by this means. This is reflected, for example, in most countries having solitary confinement as a sanction only for the most serious disciplinary offences, but the principle must be respected in all uses of the measure. The longer the measure is continued, the stronger must be the reason for it and the more must be done to ensure that it achieves its purpose." (para 55)

76. The last sentence in that passage is reflected in a statement which the European Court has often repeated, for example in the Grand Chamber judgment in *Ramirez Sanchez* at para 139: that the reasons for segregation "will need to be increasingly detailed and compelling the more time goes by". The Extra Division commented that they had difficulty understanding what this meant: if a threat remained the same, it was difficult to see how greater detail could be given. What is meant, as it appears to me, is that because the actual or potential harm which segregation may cause to the prisoner increases the longer that segregation is prolonged, the seriousness of the risk of harm required to justify his segregation becomes correspondingly greater. In addition, the court will become correspondingly more demanding in scrutinising whether segregation is the only means of addressing the risk, given the increasing risk that segregation will itself cause serious harm to the prisoner.

77. The serious risks to the mental health of prisoners who are subject to prolonged segregation are well-known, and are recognised both in international standards and domestically.

78. An interim report submitted to the UN General Assembly in August 2011 by Juan E Méndez, the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, expressed particular concern about prolonged solitary confinement (or segregation, as it was also termed), which he defined as solitary confinement in excess of 15 days. He noted that after that length of time, "according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible" (para 26). He also noted that lasting personality changes often prevent individuals from successfully readjusting to life within the broader prison population and severely impair their capacity to reintegrate into society when released from prison (para 65).

79. The previous Special Rapporteur, Manfred Nowak, annexed to an earlier report, submitted in July 2008, the Istanbul Statement on the Use and Effects of Solitary Confinement, adopted on 9 December 2007. It stated, in a passage cited by the Special Rapporteur:

> "It has been convincingly documented on numerous occasions that solitary confinement may cause serious psychological and sometimes physiological ill effects. Research suggests that between one third and as many as 90% of prisoners experience adverse symptoms in solitary confinement. A long list of symptoms ranging from insomnia and confusion to hallucinations and psychosis has been documented. Negative health effects can occur after only a few days in solitary confinement, and the health risks rise with each additional day spent in such conditions."

80. Similar conclusions were reached by the CPT in its 21st General Report of 10 November 2011. It referred to evidence that solitary confinement "can have an extremely damaging effect on the mental, somatic and social health of those concerned", which "increases the longer the measure lasts and the more indeterminate it is" (para 53). It considered the maximum period for which solitary confinement should be imposed as a punishment to be 14 days (para 56(b)).

81. The dangers of prolonged segregation have also been accepted by government within the United Kingdom. In relation to England and Wales, the relevant Prison Service Order (PSO 1700, first issued in 2003) states at p 29:

> "Research into the mental health of prisoners held in solitary confinement indicates that for most prisoners there is a negative effect on their mental wellbeing and that in some cases the effects can be serious. A study by Grassian & Friedman (1986)

> stated that, 'Whilst a term in solitary confinement would be difficult for a well adjusted person, it can be almost unbearable for the poorly adjusted personality types often found in a prison.' The study reported that the prisoners became hypersensitive to noises and smells and that many suffered from several types of perceptual distortions (eg hearing voices, hallucinations and paranoia)."

The risks involved in prolonged segregation are also acknowledged by the SPS. The guidance document issued in November 2006, referred to earlier, states that "there should be awareness of the impact that segregation may have on a prisoner's mental health". It states that it is an established principle that segregation should be used sparingly and for the minimum time necessary, in order to protect the physical and mental health of segregated prisoners.

82. Every prison system has prisoners who are unable, for a variety of reasons, to serve their sentences in the mainstream. This may be because they require protection from other prisoners, because of the nature of their offence, their co-operation with the criminal justice authorities, inter-gang rivalries, debts inside or outside the prison, or the general vulnerability of the person. It may be because they themselves present a threat to the safety of other prisoners, or because their behaviour is liable to jeopardise the good order of the prison. In the first instance, such prisoners can be removed from association under rule 94 and located in a segregation unit. As the European Court has emphasised, however, they cannot be held in segregation indefinitely: *Ramirez Sanchez*, para 145. The basic obligation which the prison system attempts to secure by the segregation of prisoners for the purpose of protection – to provide a safe environment for those confined to prison – is ultimately inconsistent with the use of segregation as a long-term measure.

83. There are however ways in which states can fulfil this obligation over the long term, in respect of prisoners who remain at risk of harm. One option is to identify particular locations as accommodation for prisoners who are likely to be unsuitable for mainstream accommodation for a prolonged period. Such locations might accommodate small groups of prisoners with reduced levels of association and increased officer supervision. Locations of that nature existed in Scottish prisons until relatively recently, at the Barlinnie Special Unit and similar units at Perth, Peterhead and Shotts. Broadly analogous locations continue to exist in England and Wales, in the form of High Supervision Units and Close Supervision Centres.

84. In the absence of any such unit in Scotland during the period in question, the only option considered in the appellant's case was his segregation "until a long term management plan [is] put in place via ECMDP", as the applications for authority

repeatedly stated. There was however no meaningful plan put in place until the appellant had been in segregation for 55 months.

85. Whether a successful plan might have been put in place earlier is uncertain, but by no means impossible. It is noteworthy that the appellant was accommodated safely in the mainstream remand population at Edinburgh between September and November 2006, and that he was able to be integrated into the mainstream population there within a short time of his transfer there in June 2010. The possibility cannot be excluded that he might have been integrated there earlier, if a suitable plan had been devised and implemented. It is also noteworthy that his co-accused were integrated into the mainstream at Dumfries while the appellant continued to be segregated in establishments in west central Scotland, where attitudes towards him might have been expected to be most hostile. It has not been explained why the appellant could not have joined his co-accused, or indeed could not have been placed with them during the years when all three were in segregation. Quite apart from the possibility of the appellant's being successfully transferred to a prison in another part of Scotland, it is also accepted that no consideration was given to the possibility of transferring him to a prison elsewhere in the United Kingdom, under the provisions of Schedule 1 to the Crime (Sentences) Act 1997. In deciding whether the Ministers have complied with the standards laid down in the Convention, the scope for them to find appropriate accommodation for prisoners elsewhere in the United Kingdom has to be borne in mind (*Mathew v The Netherlands* (2005) 43 EHRR 444, para 204).

86. It is however unnecessary to speculate about these and other possibilities. What is apparent is that no meaningful plan was devised until a very late stage. It is for the Ministers to establish that the appellant's segregation for 56 months was proportionate. In my judgment, in the absence of any evidence that serious steps were taken by the SPS management to address the issues arising from his segregation until four and a half years after it had begun, they have failed to do so.

Just satisfaction

87. Where the court finds that an act of a public authority is unlawful under section 6(1) of the Human Rights Act, as in the present case, section 8(1) of the Act enables the court to grant such relief or remedy, or make such order, as it considers just and appropriate. Under section 8(3) of the Act, no award of damages is to be made unless, taking account of all the circumstances of the case, including any other relief or remedy granted, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made. Section 8(4) requires the court, in determining whether to award damages, or the amount of an award, to take into account the principles applied by the European Court under article 41 of the Convention. The approach which should be adopted was explained by the House of

Lords in *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14; [2005] 1 WLR 673, and by this court in *R (Faulkner) v Secretary of State for Justice; R (Sturnham) v Parole Board of England and Wales (Nos 1 and 2)* [2013] UKSC 23 and 47; [2013] 2 AC 254.

88. The European Court has considered the application of article 41 in a number of cases concerned with violations of article 8 where prisoners were subject to segregation. In some cases, modest awards have been made in respect of non-pecuniary damage arising not from the segregation itself, but from other restrictions imposed. For example, in *Gülmez v Turkey* (Application No 16330/02) given 20 May 2008, an award was made in respect of a restriction on the prisoner's right to receive family visits. In other cases, the court declined to make an award in respect of non-pecuniary damage, holding that the finding of a violation of the Convention in itself constituted sufficient just satisfaction: see, for example, *Messina v Italy (No 2)* (Application No 25498/94) given 28 September 2000. On general principles, however, there is no doubt that an award may be made in respect of the costs and expenses necessarily incurred in order to establish the violation, or for its prevention or redress.

89. In the present case, it is not suggested that the appellant was prejudiced by the breaches of the time limit under rule 94(5), which invalidated the authorisation of 14 months of his segregation. His segregation would without doubt have continued during those periods even if the procedures had been carried out timeously. Nor has it been established that the deference of local management to the ECMDP was prejudicial to the appellant. Whether the failure to develop a management plan for his integration into the mainstream, or to consider possible transfers, resulted in the prolongation of his segregation is possible but uncertain. Three matters are however clear. One is that it is not suggested that he suffered any severe or permanent injury to his health as a consequence of the prolongation of his segregation. Another is that the degree of interference with his private life which resulted from his removal from association with other prisoners was relatively limited, given the attitude of the other prisoners towards him. The third is that he was not isolated from all contact with other prisoners, and remained entitled to receive visits and to make telephone calls.

90. In these circumstances, just satisfaction can be afforded by making a declaratory order, establishing that the appellant's Convention rights were violated, and by making an appropriate award of costs.

Conclusion

91. For these reasons, I would allow the appeal and grant declarator (1) that the appellant was segregated without lawful authority (a) between 11.15 am on 31 January 2007 and 9.55 am on 3 April 2007, (b) between 6 pm on 5 July 2007 and 4 pm on 15 January 2008, and (c) between 4.30 pm on 12 September 2009 and 4.30 pm on 13 March 2010, and (2) that the circumstances of the appellant's segregation violated his Convention rights under article 8. I would in addition find the appellant entitled to the costs of this appeal, and invite submissions in relation to the expenses of the proceedings in the Court of Session.