

AN EXAMINATION OF JUDICIAL TENDENCIES IN PRISONER SECURITY
CATEGORISATION CASES.

By

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A thesis submitted to the School of Law of the University of Birmingham
for
the degree of Master of Jurisprudence.

School of Law
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April 2012

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ABSTRACT

This thesis combines both a traditional and an empirical approach to determine judicial tendencies in prisoner security categorisation cases. Three major themes are identified in the survey of cases. Firstly, judges tend to support the prison authorities instead of prisoners in categorisation decisions. Secondly, judges are mainly concerned with the impact of categorisation on a prisoner's release date and not the conditions of imprisonment. Thirdly, judges tend to support the prison authorities when prisoners whose index offences are violent or sexual challenge their categorisation decision and it is argued that this is as a result of judicial deference to the prison authorities. The thesis concludes that the judges are deferential to the prison authorities regarding categorisation decisions and examines the various ways that this deference manifests itself, including the exclusion of Article 5 from the categorisation context. It is then argued that this deference is both unnecessary and unjustified. The consequences of the judges' approach both on prisoners and on the prison authorities are discussed, and it is suggested that judicial tendencies in categorisation cases have a limiting effect on the development of prisoners' rights.

The thesis reflects the state of the law on 28th April 2010.

ACKNOWLEDGMENTS

The writing of any thesis is almost never an entirely solitary endeavour, and this thesis is no exception. I am indebted to a number of people who have offered me support, encouragement and guidance throughout my time researching and writing this thesis.

Firstly, I would like to wholeheartedly thank my supervisor, Professor John Baldwin, who has guided me so expertly through the entire process of writing this thesis. His encouragement, comments and insights have been invaluable and I consider myself extremely fortunate to have had the benefit of his supervision.

In addition, I would like to thank Lisa Anderson and the staff of the Harding Law Library for their invaluable assistance in searching for and obtaining various documents. My friends and colleagues within the School of Law have been a constant source of support throughout the process and have both picked me up and kept my feet on the ground on numerous occasions.

Lastly I would like to thank my friends and family. In particular I would like to thank my parents who have lent me so much support over the years, and Surj who has endured a great many evenings listening to me talking about my research and has had to share my enthusiasm.

Any errors that remain are, of course, my own.

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CHAPTER ONE

Introduction.

‘If the rule of law is to mean anything, it has to mean that the prison system is no less answerable to the courts than any other limb of the state, both how it serves and protects the public and for how it treats those in its custody.’¹

It was stated by Lord Wilberforce in *Raymond v Honey*² 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’ and this remains the classic statement on prisoners’ rights today. There is, however, a strong perception amongst commentators on prison law that the courts remain hesitant in their role as guardians of prisoners’ rights. This thesis will examine this perception and the manner in which the courts engage in decisions with regard to prisoner security categorisation in England and Wales.

The courts and the approaches that judges take are particularly important in the context of prison law. Not only are prisoners a particularly vulnerable section of society, but the primary legislative framework, the Prison Act 1952, is a brief and skeletal statute. Furthermore, with a solitary exception relating to disciplinary proceedings against a prisoner, the Act creates no clear statutory rights for prisoners.³ The principal aim of the Act is to grant the Secretary of State the maximum discretion in the management of prisons whilst minimising the creation of any rights and limiting the Secretary of State’s legal accountability.⁴ Indeed, the Act reflects an overriding concern to clarify political

¹ S Sedley LJ, Forward to S Livingstone et al (2008).

² [1983] 1 AC 1, p10.

³ See Prison Act 1952 s 47(2).

⁴ L Lazarus (2004), p129-131.

lines of control and accountability in lieu of legal accountability.⁵ The Act provides for political accountability, not only through the traditional means of ministerial responsibility, but also through monitoring and complaints bodies such as Independent Monitoring Boards and HM Prisons Inspectorate.⁶ Political accountability is also provided by the Prisons and Probation Ombudsman, following the recommendations made in the Woolf Report.⁷ The function of the Ombudsman is to investigate complaints from prisoners who have exhausted internal Prison Service complaints procedures and who remain unsatisfied. This includes complaints relating to security categorisation decisions. The Ombudsman is, however, subject to two substantial limitations. Firstly, the Ombudsman has no power to bind Her Majesty's Prison Service or the Secretary of State and as a result may merely make recommendations. Secondly, as a creation of the Secretary of State under his general powers relating to prisons and prisoners,⁸ the Ombudsman's terms of reference remain at the discretion of the Secretary of State, and the independence of the Ombudsman may thus be doubted. This has not stopped various Ombudsmen, past and present, from actively seeking to assert their independence both by being highly critical of the Prison Service and also by seeking for their role to be put on an appropriate statutory footing to guarantee its 'conspicuous independence from the Ministry of Justice and Home Office.'⁹ In a scheme designed to provide political accountability for prisons, there is little provision regarding the role of the courts. Indeed, as was noted by Shaw LJ:

'in the scheme envisaged by the [Prison] Act and shaped by [the Prison] Rules, the courts have no defined place and no direct or immediate function.'¹⁰

⁵ L Lazarus (2004), p129-131.

⁶ Both Independent Monitoring Boards and HM Prisons Inspectorate were created through amendments to the Prison Act. The original act made reference to Visiting Committees and Boards of Visitors.

⁷ Home Office (1991).

⁸ Prison Act 1952, s1.

⁹ Prisons and Probation Ombudsman (2008).

¹⁰ *R v Hull Board of Visitors, ex parte St Germain* [1978] 1 QB 425, p454.

For many years the courts invoked s4(2) of the Prison Act¹¹ as an ouster clause, preventing the High Court from exercising supervisory jurisdiction over disciplinary and administrative decisions made by prison governors. This was on the basis that the power to ensure compliance with the Prison Act and Prison Rules lay solely with the Minister of Justice, and judicial review could only be sought in relation to his acts or omissions in carrying out that task. It was not until the decision of the House of Lords in *R v Deputy Governor of Parkhurst Prison, ex parte Leech*¹² that the argument that section 4(2) had any relevance to jurisdiction was dismissed in strong terms, being labelled ‘fundamentally fallacious’.¹³ In the absence of legislative guidance, it has been left to the courts to carve out their own place and function within the realm of prison law.

The role of the courts is of particular importance to prisoners. Prisoners, by the fact of their imprisonment, cease to have control over their environment and regime and are instead almost wholly reliant on the prison authorities to regulate their daily lives. Indeed it was recognised in the Woolf Report that ‘a prisoner, as a result of being in prison, is peculiarly vulnerable to arbitrary and unlawful action.’¹⁴ As the courts are the only independent body with the power to bind the Secretary of State, their role and the manner in which they fulfil their role are of critical importance. This thesis examines judicial attitudes when faced with cases relating to security categorisation. Although the issue of security categorisation is being examined in this thesis, it is hoped that this examination may also shed light on judicial attitudes to challenges against the prison authorities brought by prisoners more generally.

¹¹ ‘[Officers of the Secretary of State] shall visit all prisons and examine the state of buildings, the conduct of officers, the treatments and conduct of prisoners and all other matters concerning the management of prisons and shall ensure that the provisions of this Act and of any rules made under this Act are duly complied with.’

¹² [1988] 1 AC 533.

¹³ Per Lord Bridge, p562.

¹⁴ Home Office (1991), para 14.293.

1.1. The Prison Rules and the Courts.

The Prison Rules have been said to contain the ‘meat’ of prison law and the requirement to categorise prisoners is contained in Rule 7. The status and justiciability of the Rules have not always been clear and require some examination.

The power to make the Prison Rules is contained in s47(1) of the Prison Act:

‘The Secretary of State may make rules for the regulation of prisons... and for the classification, treatment, employment, discipline and control of persons required to be detained within.’

Under s52(1) of the Act, the Rules are exercisable by statutory instrument and are subject to the negative resolution procedure. The current Rules are the Prison Rules 1999.

For many years, however, the courts consistently held that the Rules were regulatory, not mandatory, and that non-observance of the Rules did not give rise to a cause of action.¹⁵ In *Payne v Home Office*,¹⁶ a case concerning the application of the rules of natural justice to categorisation decisions, it was held that, although the Rules provided for the humane and constructive treatment of prisoners, they gave prisoners privileges not rights. Indeed, Cantley J stated that the appropriate safeguards against abuse were provided by complaint to the governor or by petition to the Secretary of State. The justification for such an approach is well summarised by Goddard LJ in the following dictum in *Arbon v Anderson*¹⁷:

‘It would be fatal to all discipline in prisons if governors and warders had to perform their duty always with the fear of an action before their eyes if they in any way deviated from the rules.’¹⁸

This statement, although made without any empirical evidence,¹⁹ resonated throughout judicial thinking on prison law until *Leech* in 1988, discouraging the courts from

¹⁵ See, for example, Lord Denning’s judgment in *Becker v Home Office* [1972] 2 QB 407.

¹⁶ Unreported, May 2 1977.

¹⁷ [1943] KB 252.

¹⁸ p255.

intervening in prison life on the basis that any interference would render the task of running prisons more difficult.²⁰ In the seminal case of *Leech*, whilst it was acknowledged that this may be an issue, Lord Bridge opined that prisoners who felt that they had been unfairly treated and had no effective means of redress would be a far greater source of unrest. He concluded that any possible damage to prison discipline from ‘frivolous and vexatious applications’ for judicial review would be offset by ‘the advantages that access to the court will provide for the proper ventilation of genuine grievances.’²¹ This is one facet of increasing what Lord Woolf would later term, ‘legitimacy.’²²

Nowadays it is clear that the Prison Rules are justiciable in public law and that the Human Rights Act 1998 applies both to the Rules and action taken under them. In 1981, at a time when the Rules were still viewed as ‘regulatory directions only’ and not susceptible to judicial supervision,²³ Professor Zellick examined the Prison Rules 1964, arguing that the rules were not a homogenous mass and that some rules were plainly intended to be actionable.²⁴ Although the situation is now settled and the Prison Rules 1964 have been replaced by the Prison Rules 1999, Zellick’s analysis of the Rules is still relevant to understanding judicial attitudes towards the Rules. Indeed, the intensity of review, and the manner of intervention demonstrated by the courts have tended to reflect Zellick’s views on justiciability.²⁵

¹⁹ Similar views expressed in *R v Deputy Governor of Camphill Prison, ex p King* [1985] QB 735 were dismissed as ‘subjective judicial impression’ by Lord Bridge in *Leech*. See also G Richardson and M Sunkin (1996).

²⁰ G Richardson and M Sunkin (1996), p83.

²¹ p568.

²² Home Office (1991). Legitimacy refers to the claim by people exercising power to hold and use their power in a justified way (Y Jewkes and J Bennett (eds) (2008)). In the context of prisoners, legitimacy broadly requires that prisoners be treated fairly, both in terms of their conditions of imprisonment and the way that they are treated by the prison authorities.

²³ Per Lord Denning; *Becker v Home Office* [1972] QB 407.

²⁴ G Zellick (1981a) and G Zellick (1982).

²⁵ L Lazarus (2004), p157.

Zellick proposed that the Prison Rules could be divided into five broad categories: ‘rules of general policy objectives’, ‘rules of a discretionary nature’, ‘rules of general protection’, ‘rules as to institutional structure and administrative functions’ and ‘rules of specific individual protection’ and argued that each category was justiciable to a different degree. ‘Rules of general policy objectives’, ‘rules of a discretionary nature’ and ‘rules of general protection’ were all considered to be non-justiciable, while ‘rules as to institutional structure and administrative functions’ and ‘rules of specific individual protection’ were considered to be justiciable.

It is in Zellick’s second category, ‘rules of a discretionary nature’, that Rule 7 relating to prisoner categorisation is found. Indeed, most of the rules relating to prisoners’ basic needs and daily regime are found in this second category. These rules leave substantial discretion in the hands of the Secretary of State, either expressly or by use of terms such as ‘so far as practically possible’, ‘may’ and ‘subject to any directions of the Secretary of State’. Despite remarking that this is the classic and appropriate manner by which to limit judicial review, Zellick conceded that judicial intervention is available if statutory discretion is not exercised correctly.²⁶ The correct exercise of discretion is indicated in Prison Service Orders and Instructions. These, however, have no legal status and consequently prisoners are forced to rely on general principles of judicial review. These principles then have to be transmuted into a prison law context. However, the extent of the courts’ intervention is variable and frequently depends on their view of the subject matter, and the courts are often said to be reticent about intervening in matters of operational and managerial discretion.²⁷

²⁶ G Zellick (1981), p612.

²⁷ L Lazarus (2004), p159. See chapter 7 of Lazarus’ text for a fuller discussion.

Rules of specific individual protection were the first category of rules to receive judicial attention. These rules are generally found in the area of discipline and order and afford protection to prisoners by imposing certain procedural safeguards. Zellick argued that the rules of specific individual protection require judicial oversight to ensure their correct implementation. He opined that rules of this type imposing procedural safeguards ‘were hardly included in the Rules so that the prison authorities could obey them or not as they preferred.’²⁸ Indeed, ‘strict compliance goes hand in hand with judicial oversight.’²⁹

The courts have since accepted that the Prison Rules are justiciable and as a consequence judicial interventions have improved the law relating to categorisation. The changes that have been introduced into categorisation have mostly been procedural safeguards.³⁰ Indeed, many of the standards that have been introduced into the area of categorisation are very similar in nature to the procedural safeguards required in the area of prison discipline. This is, perhaps, unsurprising given that judicial enforcement of these procedural safeguards marked the first real foray into the judicial protection of prisoners.

The most important safeguard in matters of prison discipline is the prisoner’s right to make representations found in Rule 54(3) which states:

‘At an inquiry into a charge against a prisoner he shall be given a full opportunity of hearing what is alleged against him and of presenting his own case.’

The courts have adopted this safeguard and brought it into the area of security categorisation. Indeed, many of the minimum standards of procedural fairness discussed in Chapter 2 and Chapter 3 concern the quality of representations a prisoner may be able to make regarding his or her categorisation.

²⁸ G Zellick (1981), p615.

²⁹ G Zellick (1981), p614.

³⁰ These are discussed in much greater depth in Chapter 2 and Chapter 3.3.

It is suggested that many of the procedural safeguards introduced into the area of categorisation reflect Griffith's thesis that judges tend to act in a conservative manner to preserve the status quo.³¹ When advancing the law relating to categorisation, judges have been conservative in their approach and have borrowed minimum standards of procedural fairness that had already been adopted by the prison authorities in the area of prison discipline.

1.2. Prison Service Orders and the courts.

Rule 7 of the Prison Rules 1999 states that:

‘Prisoners shall be classified... having regard to their age, temperament and record and with a view to maintaining good order and facilitating training.’

This Rule requires that prisoners be categorised and provides an outline of the considerations that should be taken into account. This outline is ‘filled in’³² by administrative guidance and directions contained in Prison Service Orders (PSO) and Instructions (PSI) which replaced the old system of Circular Instructions, Instructions and Advice to Governors and Standing Orders. The relevant guidance for categorisation is found in PSO 0900 and PSI 03/2010. The contents of these documents are examined in the next chapter. The legal status of PSOs and PSIs will, however, be briefly discussed here.

Prison Service Orders and Prison Service Instructions represent Prison Service policy and any policy that is not permitted by the Prison Rules, the Prison Act, the Human Rights Act and the common law will not be lawful. Hence, in *Raymond v Honey*,³³ Standing Orders restricted a prisoner's access to the courts when complaining about a prison officer. The House of Lords held that the Prison Act did not contain any provision for restricting a prisoner's right of unimpeded access to the court. Similarly the House of Lords held that

³¹ See J Griffith (1997), p342.

³² S Livingstone et al (2008).

³³ [1983] 1 AC 1.

the rule-making power of s47 of the Prison Act was not sufficient to allow the creation of a rule interfering with such a basic right. Lord Wilberforce stated:

‘The standing orders... cannot confer any greater power than the [Rules] which, as stated, must themselves be construed with the statutory power to make them.’³⁴

Although any violation of a prisoner’s rights or any unlawful action taken pursuant to a PSO or a PSI can be challenged by way of judicial review, generally the policy - i.e. the PSO or PSI - itself cannot be subject to judicial review. Nevertheless there are exceptions to this rule. In *Gillick v West Norfolk Area Health Authority*,³⁵ Lord Bridge stated:

‘If a government department, in a field of administration in which it exercises responsibility promulgates in a public document, albeit non-statutory in form, advice which is erroneous in law, then the court, in proceedings in appropriate form commenced by an applicant or plaintiff who possesses the necessary locus standi, has jurisdiction to correct the error of law by an appropriate declaration.’³⁶

This result has been achieved in the field of prison law, most notably in the cases of *R v Governor of Parkhurst Prison, ex parte Hague*³⁷ and *R (Daly) v Secretary of State for the Home Department*.³⁸ In *R (Pate) v Secretary of State for the Home Department*³⁹ the High Court declared that categorisation policy was unlawful but refused to grant a declaration reformulating the policy. The policy, found in the Security Manual and Advice to Governors, had the effect that any prisoner whose escape would be highly dangerous must be placed in Category A no matter how unlikely that escape might be. Turner J ruled:

‘I hold that such part of the policy which does not differentiate between the escape potential of individual prisoners is illegal and must be quashed. For cogent reasons given on behalf of the Secretary of State, I decline to grant the declaration sought. Amongst other reasons it would require the court to pronounce on a matter which it is for the Secretary of State to determine as a matter of Prison Service policy. It is

³⁴ p13.

³⁵ [1986] 1 AC 112.

³⁶ p193.

³⁷ [1992] 1 AC 58.

³⁸ [2001] 2 AC 532.

³⁹ [2002] EWHC 1018 (Admin). This case is discussed in much greater detail in Chapter 3.2.

for the Secretary of State to determine a lawful policy within the framework set out in this judgment.⁴⁰

Despite their huge impact on daily life, PSOs and PSIs themselves have no legal status and are no more than non-statutory guidance to prison governors.⁴¹ They may, however, give rise to a legitimate expectation that prisoners will be treated lawfully in the light of whatever policy has been adopted.⁴² Nevertheless, prisoners cannot use the doctrine of legitimate expectations to enhance substantive law claims.⁴³ Thus, if the Secretary of State were to change the PSOs and PSIs in force, then the only substantive legitimate expectation a prisoner may have is to be treated lawfully in light of the new policy; the prisoner would not be able to rely on the benefit conferred by the previous policy.

In *R v Secretary of State for the Home Department, ex p Hargreaves*,⁴⁴ the Home Secretary changed his policy regarding prisoners' eligibility for home leave. The applicants applied for judicial review claiming that their legitimate expectations regarding their eligibility for home leave had been frustrated by the change in policy. This argument was rejected by the Court of Appeal on two grounds: firstly, that the prisoners could only legitimately expect that their cases would be considered in light of the policy in force at the time and that the Secretary of State was entitled to change his policy; and secondly, that as the issue in the case was a substantive issue, and not a procedural issue, the court was limited to reviewing the decision on grounds of *Wednesbury* unreasonableness. This approach was upheld in *R v North and East Devon Health Authority, ex parte Coughlan*.⁴⁵

'The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to

⁴⁰ Paras 39-40.

⁴¹ S Livingstone et al (2008), para 1.49.

⁴² *Findlay v Home Secretary* [1985] AC 318.

⁴³ *R v Home Secretary ex parte Hargreaves* 25 March 1997, CO/2051/96. See also S Foster (1997).

⁴⁴ [1997] 1 WLR 906.

⁴⁵ [2001] QB 213.

reviewing the decision on *Wednesbury* grounds ... This has been held to be the effect of changes of policy in cases involving the early release of prisoners.⁴⁶

Prisoners' legitimate expectations regarding security categorisation were also considered in the case of *R (Vary) v Secretary of State for the Home Department*.⁴⁷ Beatson J followed *Coughlan* and *Hargreaves* and found that, in the context of security categorisation, all a prisoner could expect is that his or her case would be considered in light of the policy that the Secretary of State had adopted at that time.⁴⁸

1.3. Avenues of legal redress against the Prison Service.

*R v Governor of Parkhurst Prison, ex parte Hague*⁴⁹ is one of the seminal cases in prison law and clarified which forms of legal challenge are available to a prisoner against the Prison Service. In *Hague* the House of Lords declared that all managerial and operational decisions taken by prison authorities are amenable to judicial review. As a consequence a prisoner may challenge his or her categorisation by way of judicial review.

Despite opening up all managerial and operational decisions taken by the prison authorities to judicial review, the Court sounded a note of caution, echoing Shaw LJ's statement in *R v Board of Visitors of Hull Prison, ex parte St Germain*⁵⁰ that judicial intervention in such matters would generally be 'impolitic.' Indeed, despite the judiciary having opened up the realms of the prison authorities' decision and policy making to judicial scrutiny, judges have limited the possible private law challenges that a prisoner may bring. Lazarus suggests that the decision in *Hague* is an example of the courts giving with one hand and taking away with the other.⁵¹

⁴⁶ Para 57.

⁴⁷ [2004] EWHC 2251 (Admin).

⁴⁸ See Paras 75-79.

⁴⁹ [1992] 1 AC 58.

⁵⁰ [1979] QB 425.

⁵¹ L Lazarus (2004), p213.

There are numerous procedural safeguards in place to protect public authorities in judicial review.⁵² Thus in *O'Reilly v Mackman*,⁵³ the Court ruled that it was an abuse of process for a prisoner to proceed by way of a private law action when claiming against the prison authorities in order to evade the procedural rules afforded by judicial review. In addition judicial review is not an appeal and will not examine the substantive decisions. Indeed, the challenges that may be brought via judicial review are limited to the grounds of illegality, irrationality, procedural impropriety and acting incompatibly with the Human Rights Act. This has had a very limiting effect on the challenges that prisoners may bring against the prison authorities. Such is this limiting effect that Livingstone *et al* in the third edition of *Prison Law* cited *Hague* in support of the proposition that:

‘[The courts have not given] any real endorsement of prisoners having any rights which they might assert against the authorities, or rights which might shape or constrain the exercise of power’.⁵⁴

There are three forms of action available to prisoners in the law of tort; negligence, assault and battery and misfeasance in a public office. Excluded from the private law claims available against the prison authorities are claims for breach of statutory duty and false imprisonment.⁵⁵

Hague was segregated under Prison Rule 43,⁵⁶ which allowed for a prisoner to be segregated for the purposes of good order and discipline or for his or her own protection. In this instance however, Rule 43 had been used to avoid the procedural safeguards in place for when a prisoner was to be segregated for a disciplinary purpose. Subsequently it was accepted by the Home Office that the procedure leading to Hague’s segregation was unlawful under Rule 43.

⁵² See Civil Procedure Rules, Part 54.

⁵³ [1983] 2 AC 237.

⁵⁴ p533.

⁵⁵ See *R v Governor of Parkhurst Prison, ex parte Hague* [1992] 1 AC 58.

⁵⁶ The relevant Prison Rules in *Hague* were the Prison Rules 1964. The equivalent rule in the Prison Rules 1999 is Rule 45.

The claimant's argument, based on breach of statutory duty, was rejected by the House of Lords on the basis that the Prison Act 1952 and Prison Rules were concerned with the management and administration of prisons and were not intended to confer private law rights on prisoners. This is of relevance to categorisation as the power to categorise prisoners is found in the s47(1) of the Prison Act and the criteria to be taken into consideration during categorisation are included in Rule 7 of the Prison Rules 1999. As a consequence of the ruling in *Hague*, a prisoner may not sue for breach of statutory duty if he or she is not categorised according to the requirements set out in Rule 7. Damages are, however, still an available remedy under s8 Human Rights Act 1998 if a public authority has acted incompatibly with the Human Rights Act.⁵⁷

The House of Lords ruling on the issue of whether a prisoner could sue the Prison Service for breach of statutory duty serves to underline judicial attitudes towards prisoners' rights more generally. The judges' approach in *Hague* was well summarised by Lazarus when she stated:

'The House had two competing constitutional rationales to choose from. It could either follow a rights-based argument or it could defer to its interpretation of legislative intention. The court, clearly uncomfortable with the pragmatic implications of a decision in *Hague's* favour, opted for an orthodox line on the question. Instead of adopting as its starting premise the prisoner's right to an adequate remedy, the Court started from the alternative premise of parliamentary sovereignty.'⁵⁸

The element of the decision in *Hague* that dealt with the breach of statutory claim was actually relatively unsurprising as the House of Lords was being asked to overrule existing precedent. Furthermore, the courts have shown a 'remarkable reluctance to find that the

⁵⁷ There has been debate as to whether to categorise the cause of action in s8 as a freestanding tort or as breach of statutory duty. See, for example: D Fairgrieve (2001), Law Commission No 266 (2000), A Lester and D Pannick (2000) and Lord Woolf (2000). This paper adopts the position of P Craig (2008) p980 that there are marked differences in the jurisprudence regarding section 8 and traditional torts and therefore regards s8 as a distinct cause of action.

⁵⁸ L Lazarus (2004), p215.

conditions for breach of statutory duty have been met in major cases concerning public bodies.⁵⁹

It is the manner by which the House of Lords rejected the possibility of a prisoner suing the Prison Service for breach of statutory duty that has the greatest implications for prison law and the law relating specifically to categorisation. It is clear from the primacy placed on parliamentary sovereignty over prisoners' rights in the judgment that prisoners can expect little judicial protection. As the Prison Act makes very little provision for prisoners' rights, the judges' approach means that prisoners have limited recourse in private law against Prison Service actions and decisions that contravene the rules that the Prison Service itself has created.

1.4. Judicial tendencies according to J.A.G. Griffith.

This thesis draws upon Griffith's argument advanced in *The Politics of the Judiciary*⁶⁰ that the British judiciary tends to act in certain predictable ways and that their judgments tend to follow distinctive patterns. His central thesis is that judges are conservative in their approach in that they tend to support the status quo. He contends that 'on every major social issue which has come before the courts during the last thirty years... the judges have supported the conventional, established and settled interests'⁶¹ and that the reason for this relates to their position as part of the established authority.

Indeed, Griffith argues that judges are performing the task they were created to perform, which 'is to support the institutions of government.'⁶² Griffith argues that this conservative approach does not make for judges who are strong and effective guardians of liberty. He states:

⁵⁹ P Craig (2008), p977.

⁶⁰ J Griffith (1997).

⁶¹ J Griffith (1997), p340.

⁶² J Griffith (1997), p343.

‘[J]udges do not stand out as protectors of liberty, of the rights of man, of the unprivileged, nor have they insisted that holders of great economic power, private or public, should use it with moderation. Their view of the public interest, when it has gone beyond the interests of the governments, has not been wide enough to embrace the interests of political, ethnic, social or other minorities.’⁶³

In an examination of a wide range of issues and cases to support his position, Griffith includes a brief discussion of the issues relating to prisoners.⁶⁴ This reveals a reluctance on the part of judges to engage in matters of internal prison management, including security categorisation.

Perhaps because of the polemic nature of *The Politics of the Judiciary*, there is, according to Gee, ‘a tendency to caricature Griffith’s work which, when combined with the familiarity of “The Political Constitution” and *The Politics of the Judiciary*, can leave Griffith’s ideas ... appearing, today, clichéd.’⁶⁵ Griffith does not seek to criticise judges for their conservative approach, he accepts that their attitudes are due to ‘the kind of people they are and the position which they hold in society’.⁶⁶ Nor is he advocating that judges become more activist, even stating that it is ‘idle to criticize institutions for performing the task they were created to perform.’⁶⁷ He is, however, anxious to ensure that their conservative approach is ‘openly acknowledged and accompanied by the realisation that judges are “not ... the strong and natural defenders of liberty”’.⁶⁸

In the fifteen years since *The Politics of the Judiciary* was last published, prison law and the law relating to security categorisation have developed significantly. The Human Rights Act 1998 has also come into force. Griffith himself was deeply sceptical of rights and rights discourse believing it to ‘corrupt’ legal and political discourse.⁶⁹ Indeed in *Public*

⁶³ J Griffith (1997), p342.

⁶⁴ J Griffith (1997), pp 171-175.

⁶⁵ G Gee (2008), p21-22.

⁶⁶ J Griffith (1997), p336.

⁶⁷ J Griffith (1997), p343.

⁶⁸ G Gee (2008), p30.

⁶⁹ T Poole (2008), p264.

Rights and Private Interests,⁷⁰ he saw it as ‘one of the more dangerous fictions of our time and one that may prove to be very costly is that individuals have personal, inherent, natural rights.’⁷¹ He even viewed the enactment of the Human Rights Act 1998 as raising the possibility of judges deciding cases on the basis of their own politics and interpretation of ‘where the public interest lies’.⁷² Serious doubts have been expressed about the extent to which these fears have come to pass,⁷³ and an attempt is made in this thesis to assess this in relation to security categorisation.

In the prologue to *The Politics of the Judiciary*, Griffith states:

‘Judicial review of administrative action is no novelty. Its development during this century, and especially over the last thirty-five years, has brought great benefits and has been a restraint on overweening princes. But, as Lord Devlin and others have warned, there are dangers in going too far and claiming too much.’⁷⁴

He continues to acknowledge that ‘where the line is to be drawn will always be controversial.’⁷⁵ It is where the line is drawn in security categorisation cases, and the level of judicial deference shown to the prison authorities, that will hold the key to assessing whether the judiciary remain conservative in their approach.

1.5. Conclusion.

Prisoners clearly retain many rights, including the right of access to the courts. Nevertheless, these rights have to be balanced against the operational needs of the Prison Service. The enforcement of these rights has traditionally been very difficult. The Prison Act 1952 aims to hold the prison authorities to account through political, not legal means, and for many years the courts were willing to uphold this approach. It is only since the decision of *Hague* that all operational and managerial decisions taken by the prison

⁷⁰ J Griffith (1981).

⁷¹ J Griffith (1981), p5.

⁷² J Griffith (2000), p159.

⁷³ See T Poole (2008), pp264 – 268.

⁷⁴ J Griffith (1997), xvii.

⁷⁵ J Griffith (1997), xvii.

authorities have been vulnerable to judicial review. Despite the increased justiciability of decisions taken by the prison authorities, it has been suggested that judges remain reluctant to engage in low level decision making within prisons, despite the vast implications that such decisions can have for a prisoner.⁷⁶ This thesis investigates whether the courts might be said to be reluctant to engage in such low level decision making. Using categorisation decisions as an example, this thesis seeks to assess judicial attitudes towards challenges brought by prisoners regarding their categorisation.

⁷⁶ S Livingstone (1995).

CHAPTER TWO

Categorisation: the framework.

Categorisation policy focuses on the risk and dangerousness of a prisoner's escape, as opposed to separating prisoners based on their offence or likelihood to corrupt other prisoners. Maintaining security and preventing escapes is one of the primary concerns of any prison system.¹ As King notes, 'prisons which fail to keep prisoners inside the walls are a contradiction in terms and manifestly fail to protect the public.'² It is not surprising, then, that the Prison Service's Statement of Purpose begins 'Her Majesty's Prison Service serves the public by keeping in custody those committed by the courts.'³ Running a prison system that is virtually escape proof would actually be quite straightforward, albeit very expensive, but such a system would be likely to reduce opportunities for rehabilitation and offend human rights standards.⁴

Not every prisoner requires the same level of security to prevent escape. A system of security categorisation is essential to provide the right balance between offering the greatest opportunities for prisoners to take part in rehabilitative programs and the expense of keeping each individual prisoner in custody. The current system of security categorisation aims to ensure that the level of security is commensurate with the risk that an individual's escape would pose. The *National Security Framework (NSF)* states that categorisation seeks 'to ensure that each prisoner is held in conditions of safety and security in line with the levels of risk posed in terms of: escape or abscond; to the public in

¹ R King (2007).

² R King (2007), p329.

³ Available at <http://www.hmprisonservice.gov.uk/abouttheservice/statementofpurpose/>.

⁴ R King (2007), p329.

the event of an escape or abscond; to the state; to himself/herself; to others within the prison or from other prisoners.’⁵

The criteria for the categorisation of adult male prisoners,⁶ based on the recommendations of the Mountbatten Inquiry,⁷ have remained largely unchanged since the 1960s and are restated in PSO 0900. The four categories are:

‘Category A: 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 be to make escape impossible.

Category B: Prisoners for whom the very highest conditions of security are not necessary but for whom escape must be made very difficult.

Category C: Prisoners who cannot be trusted in open conditions but who do not have the resources or will to make a determined escape attempt.

Category D: Prisoners who can be reasonably trusted in open conditions.’⁸

While security is the primary factor to be considered in categorisation, PSO 0900 allows the consideration of control to be included in the decision making process. Paragraph 1.2.1 states:

‘Prisoners must be categorised objectively according to the likelihood that they will seek to escape and the risk that they would pose should they do so. In the majority of cases, consideration of these two factors alone will be sufficient to determine the prisoner’s security category. However, a small number of prisoners while presenting little risk of escape or risk to the public, and who would ordinarily be assigned to a low security category will, because of their custodial behaviour, require a higher category so that they may be sent to a prison with levels of supervision commensurate with the risk they pose to control. The categorisation Forms therefore permit consideration of control to influence the final security category. The security category must take account of the above considerations alone.’

⁵ The *National Security Framework* is not a public document and is only available on the Prison Service Intranet. Nevertheless, I have been able to obtain Functions 1 and 2 of this document in a redacted form.

⁶ Female prisoners have different categorisation criteria which are also contained within PSO 0900. The different categories are: Category A, Closed Conditions, Semi-Open Conditions and Open Conditions. There is only one case brought by a female prisoner in the empirical study and this is a Category A dispute. The definition of Category A for female prisoners is identical to the definition for adult male prisoners. PSO 0900 also provides for four categories for male young offenders. These categories are: Category A, Restricted Status, Closed Conditions and Open Conditions.

⁷ Home Office (1966).

⁸ PSO 0900, para 1.1.1.

Paragraph 1.2.3 states that, ‘all prisoners must be placed in the lowest security category consistent with the needs of security and control.’ The starting point when categorising a prisoner is that ‘all prisoners must be regarded as probably suitable for Category D’⁹ unless a number of factors relating to the dangerousness of the prisoner listed in paragraph 1.2.4 apply.

While PSO 0900 provides the guidance for categorisation of convicted determinate sentence adult male prisoners into categories B to D, PSI 03/2010 contains the guidance in relation to Category A prisoners. PSI 03/2010 gives the following modified definition of a Category A prisoner:

‘A Category A prisoner is a prisoner whose escape would be highly dangerous to the public, or the police or the security of the State, and for whom the aim must be to make escape impossible.

In deciding whether Category A is necessary, consideration may also need to be given to whether the stated aim of making escape impossible can be achieved for a particular prisoner in lower conditions of security, and that prisoner categorised accordingly. However, this will only arise in exceptional circumstances, since escape potential will not normally affect the issue of categorisation, as it is rarely possible to foresee all the circumstances in which an escape may occur.’¹⁰

It is clear that prisoners are placed in Category A on a different basis from those placed in other categories. Category A is primarily concerned with the risk a prisoner would pose if he or she were to be unlawfully at large irrespective of the risk that the prisoner will escape. Categories B-D are concerned with balancing the risk that a prisoner may escape with the risk that the prisoner would pose if he or she were to do so.

It must be noted that modification contained in PSI 03/2010, applicable to Category A, would only apply in exceptional circumstances. Following the decision in *R (Pate) v*

⁹ PSO 0900, para1.2.4.

¹⁰ PSI 03/2010, para1.2.

*Secretary of State for the Home Department*¹¹ these cases would have to be very exceptional indeed. Although Turner J in *Pate* ruled that the previous Prison Service policy was unlawful on the basis that it constituted an inflexible policy, he refused to grant a quashing order for the decision to retain Pate's Category A status. This was in spite of Pate suffering from Asperger's, an ulcerated leg which potentially required amputation and generally poor health. As a consequence, it follows that a prisoner would have to be less physically mobile or have other factors that further reduced his or her ability or propensity to effect an escape than Pate.

Surprisingly, given the amount of information publicly available with regard to prisoner security categorisation, the National Offender Management Service (NOMS) does not publish the number of Category A prisoners. The numbers of prisoners held within the dispersal estate are freely available via the NOMS Annual Report: Management Information Addendum, and this even indicates how many prisoners are allocated to each prison. NOMS and the Prison Service must surely know the exact number of Category A prisoners at any given time, and this information must surely be held centrally by the Directorate of High Security.

When the number of Category A prisoners was initially requested from NOMS, they stated that they were 'unable to access any information regarding prisoners/staff due to the Data Protection Act.' It is difficult to understand why this would be the case. No personal data was requested, nor was any data pertaining to any individual. Again, it is difficult to understand why NOMS should be reluctant to disclose this information.

It was necessary to make a request under Section 1 of the Freedom of Information Act 2000 to obtain the figures. This FOI request revealed that in England and Wales, on 24

¹¹ [2002] EWHC 1018 (Admin).

May 2010, there were 928 Category A prisoners and that on 29 July 2011 this number had increased to 951.

2.2. Escape Risk Classification.

As stated above, Category A is subdivided into three escape risk classifications. These classifications are:

‘Standard Escape Risk: A prisoner charged with a serious offence which would make them highly dangerous if at large. No specific intelligence has been received either internally or from external agencies to suggest that the threat of an escape attempt is likely at this time.

High Escape Risk: As Standard Escape Risk, however, intelligence received either internally or from external agencies would suggest that the individual has access to the type of resources and associates that could provide assistance in attempting to facilitate an escape and the propensity to activate them.

Exceptional Escape Risk: As High Escape Risk, however, recent intelligence received either internally or from external agencies would suggest that an escape attempt is being planned and the threat is such that the individual requires conditions of heightened security in order to mitigate this risk.’¹²

As with the criteria for Category A, the criteria for escape risk classification have been altered by PSI 03/2010. There is now a clear gradation between High Escape Risk and Exceptional Escape Risk in place of the highly subjective criteria contained in the previous guidance provided by PSO 1010 which result in prisoners being seemingly arbitrarily classified as High Escape Risk and Exceptional Escape Risk.¹³ On 29 July 2011, there were 62 High Escape Risk prisoners and 2 Exceptional Escape Risk prisoners.¹⁴

2.3. The impact of classification on allocation.

Allocation is the process by which prisoners are assigned to a particular prison. While in practice both the initial categorisation decision and initial allocation will frequently be

¹² PSI 03/2010, p5.

¹³ As reported by an anecdotal analysis in S Livingstone (2008), para 4.21.

¹⁴ This compares to 63 High Escape Risk prisoners and no Exceptional Escape Risk prisoners in April 2010. These figures were also obtained through FOI requests.

taken on the same day by the same officer, the two processes are separate and any decisions on allocation cannot be allowed to influence the categorisation decision.¹⁵

There are three priorities which govern the allocation of prisoners:

- the needs of security and control,
- the need to make maximum use of available spaces in prisons,
- the needs of individual prisoners.¹⁶

Prisoners should always initially be considered for allocation to a prison designed for the prisoner's category.¹⁷ PSO 0900 1.6.6. does allow for a prisoner to be allocated to a prison of a higher security category, but each instance must be referred to an officer of Senior Officer rank or above for confirmation and the reasons recorded. Similarly, as a last resort a prisoner may be allocated to a higher category prison solely on the grounds that there are no places available in prisons of the correct category.¹⁸ Again, this fact must be specifically recorded.¹⁹ PSO 0900 stresses that 'it is not acceptable, under any circumstances, to modify the process or outcome of prisoners' security categorisation in order to achieve a better match between prisoners and available spaces.'²⁰ Category A prisoners are allocated to dispersal prisons, which also hold Category B prisoners.

In addition to categories A to D, there is a further category, Category U (Unclassified). This category is for all remand prisoners or prisoners who have been convicted but are awaiting sentence who are not deemed to require Category A security. Remand or unsentenced prisoners may still be given provisional Category A status if they are considered highly dangerous to the public. Remand prisoners are assumed to require

¹⁵ PSO 0900, para1.6.1.

¹⁶ PSO 0900 1.6.3.

¹⁷ PSO 0900 1.6.4.

¹⁸ PSO 0900 1.6.9.

¹⁹ PSO 0900 1.6.9.

²⁰ PSO 0900 1.6.9, Exceptional Escape Risk prisoners are always held in a Special Secure Unit within the high security estate.

Category B security and are normally allocated to local prisons. PSO 0900 does make it clear, however, that there is no reason, in principle, why such a prisoner could not be held in a Category C prison if adequate information is available to suggest that Category B accommodation is not required for that prisoner.

2.4. Indeterminate Sentence Prisoners (Lifers).²¹

There are numerous different types of indeterminate sentence being served by current prisoners. Prisoners serving such sentences are known as Indeterminate Sentence Prisoners (ISPs) or lifers. ISPs include prisoners serving the following sentences: mandatory life,²² discretionary life sentence,²³ automatic life²⁴ and indeterminate sentence for public protection (IPP).²⁵ Although the PSI 03/2010 applies to Indeterminate Sentence Prisoners, PSO 0900 does not. Instead PSO 4700, the Indeterminate Sentence Manual, prescribes an

²¹ The definition of 'life prisoner' includes prisoners serving an indeterminate sentence for public protection (IPP) under ss225-226 of the Criminal Justice Act 2003. This is in spite of the fact that an IPP prisoner may apply to have their licence terminated 10 years after release whereas other life sentence prisoners are subject to a licence for the rest of their lives.

²² This is the mandatory punishment for murder. The specific sentence varies according to the age of offender at the date of conviction. An offender over the age of 21 who is convicted of murder receives a sentence of 'life imprisonment' (s1(1) Murder (Abolition of Death Penalty) Act 1965), an offender convicted of murder who is under the age of 21 at the date of conviction is sentenced to 'custody for life' (s93 Powers of Criminal Courts (Sentencing) Act 2000) unless the offender is aged between 10 and 17 in which case the relevant sentence is 'detention during Her Majesty's pleasure' (s90 Powers of Criminal Courts (Sentencing) Act 2000).

²³ Prior to the enactment of the Criminal Justice Act 2003 (CJA 2003), discretionary life sentences were imposed for a number of different offences where the maximum sentence was life imprisonment. If the offender was aged between 18 and 21 when the offence was committed the relevant sentence is 'custody for life' and if the offender was aged between 10 and 18 at the commission of the offence the relevant sentence is 'detention for life'. After the enactment of the CJA 2003 a discretionary life sentence must be imposed on all offenders who are considered sufficiently dangerous to engage s225 of the CJA 2003 if the index offence carries a maximum sentence of life imprisonment. If the offender was aged between 18 and 21 when the offence was committed the relevant sentence is 'custody for life' and if the offender was aged between 10 and 18 at the commission of the offence and dangerousness criteria of s226 CJA 2003 are satisfied the relevant sentence is 'detention for life'.

²⁴ Section 2 of the Crime (Sentences) Act 1997 provided that any offender aged 18 or over who was convicted of a second serious violent or sexual offence shall receive an automatic life sentence.

²⁵ Section 225 of the Criminal Justice Act 2003 provides that the sentencing court must impose an IPP when an offender aged 18 or over is convicted of a serious violent or sexual offence as specified in Sch 15 of the Act for which the maximum penalty is 10 years or great and the court is of the opinion that the offender poses a significant risk of causing serious harm to the public. Section 226 CJA provides the relevant provisions for offenders under 18 and requires that the court impose a sentence of detention for public protection (DPP).

entirely different basis for the categorisation and allocation of ISPs. A typical male ISP will ordinarily go through the following stages:

- remand centre/local prison,
- First Stage – High Security/Category B,
- Second Stage – High Security/Category B/ Category C,
- Third Stage – Category D/Open/Resettlement.²⁶

All male lifers (with the exception of Category A prisoners) take the category of the prison in which they are held.

ISPs generally spend 18 months or more in a First Stage establishment, although there is provision for this to be reduced for those with short tariffs or those who make exceptionally good progress.²⁷ Here an Offender Assessment System (OASys), in addition to any specialist assessments, will be completed with a view to formulating a sentence plan projection setting out the offending behaviour concerns that need to be addressed during custody, and work on offending behaviour will begin.²⁸

During the Second Stage, prisoners remain in Category B until considered suitable to be transferred to conditions of lower security. While in Category B, prisoners carry out much of work prescribed by their sentence plan to address their offending behaviour and they are expected to show significant and sustained progress before being transferred to Category C. While in Category C, any offending behaviour work outstanding will be completed, and once this is completed, the emphasis is shifted to preparing prisoners for open prison and resettlement. Once the prisoners have demonstrated that their risk of reoffending and escaping/absconding is sufficiently low, they will be transferred to conditions of minimum security - the Third Stage. In open conditions, the prisoners are tested in circumstances as

²⁶ PSO 4700 4.1.1.

²⁷ PSO 4700 4.4.1.

²⁸ PSO 4700 4.4.3.

similar as possible to those in the community. Such prisoners are encouraged to gain work experience in order to prepare them for life after release. Being tested in open conditions ‘is essential for most life sentence prisoners (lifers). It allows the testing of areas of concern in conditions nearer to those in the community than can be found in closed prisons.’²⁹ Nevertheless, PSO 4700 does allow for short tariff lifers (those life sentences with a serving tariff of around 30 months or less) to be released directly from a closed prison if they are judged safe to release when their tariff expires.³⁰ It draws a comparison with determinate sentence prisoners serving 4-5 years of whom 80 percent are released directly from closed prisons.³¹

2.5. The need for prisoners to be correctly categorised.

Getting a prisoner’s categorisation right is essential for the smooth and efficient running of the prison system, the importance of which is acknowledged in PSO 0900. It helps to ensure that prisoners do not escape, abscond or threaten control whilst not holding prisoners in higher conditions of security than are necessary. The correct categorisation of prisoners balances the security issues with the individual needs of the prisoners to help prisoners to use their sentence constructively, tackle their offending behaviour and prepare them for release.³² What is not mentioned in PSO 0900, however, is the vastly increased cost of maintaining prisoners in high security prisons and the increased importance of security categorisation to an indeterminate sentence prisoner.

The cost per prisoner varies dramatically depending on the security level that a prisoner is allocated to, as is demonstrated by Table 1:

²⁹ PSO 4700 4.13.3.

³⁰ PSO 4700 4.13.4.

³¹ PSO 4700 4.13.4.

³² PSO 0900 Introduction paragraph 3.

Table 1: Average cost of housing a prisoner according to the category of prison to which that prisoner is allocated.³³

Prison Type	Cost per Prisoner per annum
Male Dispersal	£53,454
Male Category B	£29,683
Male Category C	£22,713
Male Open	£19,781

These figures merely give the cost of holding a prisoner in a certain category prison and many different categories of prisoner may be held in a particular category prison. This is especially true of the dispersal estate which has a population of 2906, of which 928 are Category A prisoners.³⁴ PSO 0900 also allows for low category prisoners to be allocated to higher security prisons to form work parties³⁵ and for a prisoner to be allocated to a higher security prison on the grounds that there is no alternative space available in prisons of the correct category.³⁶ A prisoner will never be allocated to a lower security category.

It is therefore important from a financial point of view that a prisoner is not over-categorised. Aside from the obvious cost per prisoner, the Parole Board normally requires that a prisoner be tested in open (Category D) conditions before he or she is released on licence. Indeed, no prisoner would ever be considered suitable for immediate release on licence directly from Category A by the Parole Board.³⁷ It was further acknowledged by Lord Woolf CJ in *R (Hirst) v Secretary of State for the Home Department*,³⁸ that ‘the recategorisation of a prisoner from Category C to Category B significantly affects the

³³ Figures from Ministry of Justice (2010a).

³⁴ Ministry of Justice (2010a).

³⁵ PSO 0900 1.6.10.

³⁶ PSO 0900 1.6.9.

³⁷ *R v Secretary of State for the Home Department, ex parte Duggan* [1994] 3 all ER 277.

³⁸ [2001] EWCA Civ 378.

prospects of his being released on licence.³⁹ Given the greatly increased number of life sentence prisoners since the enactment of the Criminal Justice Act 2003,⁴⁰ and the delay that over-categorisation has on the progression through the system leading to the eventual release of such prisoners, over-categorisation could be very expensive. This is in addition to over-categorisation being a continuing and unnecessary punishment for the prisoner involved. In *R (McLeod) v Prison Service*,⁴¹ Newham J rejected the submission that a determinate sentenced prisoner who was eligible for parole should receive the same procedural safeguards as a discretionary lifer, as was the case in *Hirst*. The rationale for this was that the consequences of an adverse recategorisation are greater in the case of a discretionary lifer. Although a determinate sentenced prisoner will definitely be released at the end of his or her sentence, the impact of categorisation on his or her opportunities for parole are very similar, if not the same. The categorisation of a prisoner reflects the Prison Service's assessment of a prisoner's dangerousness, a factor which is highly relevant before the Parole Board. The authors of *Prison Law* must surely be correct when they note that 'the impact on prospects of release may in many cases be little different for [determinate sentenced prisoners and discretionary lifers].'⁴²

As will become apparent, several of the categorisation cases involve a 'catch-22' situation, whereby a prisoner is required to undertake a rehabilitative course in order to have his or her categorisation downgraded or to be granted parole. However, this course is only available in a lower security prison. In cases such as these, it is imperative that the risk that a prisoner poses be commensurate with his or her higher security categorisation, or else the prisoner's release will be delayed for no real reason.

³⁹ [2001] EWCA Civ 378, para 18.

⁴⁰ There were 13,200 ISPs in August 2010 (Ministry of Justice (2010b)).

⁴¹ [2002] EWHC 390.

⁴² S Livingstone et al (2008), para 4.16.

In addition to a prisoner's release date being affected by his or her security categorisation, categorisation has a very significant effect on the regime a prisoner experiences while serving his or her custodial sentence. Although the dispersal system was designed to offer 'a liberal regime within a secure perimeter',⁴³ there are many restrictions imposed on Category A prisoners. This results in Category A prisoners suffering greater 'pains of imprisonment.'⁴⁴ As we shall see in the next chapter, there are a disproportionate number of prisoners who dispute their Category A status⁴⁵ and this reflects the greater disadvantages and pains of being in Category A, and the determination of Category A prisoners to have their categorisation downgraded.

In the unreported case of *Payne v Home Office*, Cantley J summarised six disadvantages to a prisoner resulting from being placed into Category A:

1. There are only a relatively small number of prisons suitable for his safe accommodation; this may result in his being detained in a prison which is more distant from persons from whom he wishes to have visits than some less secure prison would be;
2. He can have visits only from a solicitor, a probation officer, a prison visitor or a person who has been passed as suitable by the Home Office;
3. His cell is a specially secure one and it is liable to be searched more frequently than other cells; he is also under closer surveillance, and this may sometimes result in his sleep being disturbed when the officer who is looking into his cell cannot be sure in a dim light that there is more than a carefully arranged heap of bedclothes on his bed;
4. He cannot attend general vocational training classes or concerts, nor can he attend the ordinary church services, although he has regular visits from the chaplain and can take communion in his cell if he wishes;
5. He can attend only educational classes of not more than two students, and so he has less frequent opportunity to attend educational classes

⁴³ Home Office (1968).

⁴⁴ G Sykes (1958).

⁴⁵ See Chapter 3.

6. He is not likely, to say the least, to be put on parole while he is a category A prisoner.⁴⁶

Alison Liebling has also noted some of the pains of being a Category A prisoner. She notes the problem of negative labelling and of being in ‘the deep end’, a point she illustrates with this statement by a prisoner:

‘You’re at the bottom of the ladder and the top of the ladder, if you know what I mean. You’re the worst, so this holds you up. You don’t progress. It’s high status, in the bad sense. You are generalised. But you’ve got a nice cell, good association, great work, good staff. It’s humane in that I don’t feel threatened. It’s a clean and safe environment. But it’s a very negative place. There are not a lot of positive vibes. You don’t get good news in these places. People get bad news – and that has ramifications for all of us. This is not ‘alright’. Do you know what I mean?’⁴⁷

While Category A prisoners are obviously subjected to the highest levels of security, and hence the most limited regimes, there are significant differences between the regimes and restrictions experienced by Category B, C and D prisoners. Roy King and Kathleen McDermott noted many of these differences in *The State of Our Prisons*.⁴⁸ They found that the pattern of strip searching followed the security gradient,⁴⁹ as did prisoner perceptions of how closely they were supervised and the restrictions on their movement.⁵⁰ King and McDermott also reported that prisoners feel safer in lower security prisons.⁵¹ Since a prisoner is allocated as far as is possible to a prison of his or her security category, the advantages to a prisoner of being in as low a security category as possible are clear.

In light of the adverse consequences of being placed in a high security category, prisoners who believe that they are over-categorised are bound to feel aggrieved and unjustly

⁴⁶ 2 May 1977, cited from S Livingstone et al (2008), para 4.23.

⁴⁷ A Liebling (2002), p135.

⁴⁸ R King and K McDermott (1995).

⁴⁹ R King and K McDermott (1995), p83.

⁵⁰ R King and K McDermott (1995), p86.

⁵¹ R King and K McDermott (1995), p139.

treated. This runs contrary to the aim of achieving justice in prisons that was considered so important by the Woolf Report.⁵² As is stated at paragraph 14.19:

‘There must be justice in our prisons. The system of justice which has put a person in prison cannot end at the prison doors. It must accompany the prisoner into the prison, his cell, and to all aspects of his life.’

Lord Woolf considered that ‘the achievement of justice will itself enhance security and control.’⁵³ Getting categorisation right and giving prisoners the ability to challenge their categorisation is clearly a major component of achieving justice, hence improving security and control and limiting the likelihood of prison disturbances such as those of April 1990.

It is essential for public protection that the most dangerous prisoners do not escape and pose danger to the public. The fact that no Category A prisoner has escaped since January 1995 demonstrates the value of Category A and the high security estate.⁵⁴ The fact that only one prisoner escaped from prison in 2008/9 (from a local prison) while there were only four escapes from prison escorts (three from a local prison and one from a Category C prison) also indicates that prisons are fulfilling their role of secure containment of prisoners.⁵⁵ It should be noted that an escape-proof prison system may be neither desirable nor economical, while some of the problems of over-categorisation have been noted above. Furthermore, it was noted by Sir James Hennessey, the then Chief Inspector of Prisons, that it is not possible to ‘justify the expense of keeping prisoners, whose escape would be a nuisance rather than a threat, in a high security prison just in case they do try to get away.’⁵⁶ In essence, Hennessey is acknowledging that although some prisoners may pose a danger to the public, many prisoners would not. The ‘natural processes of caution’⁵⁷

⁵² Home Office (1991).

⁵³ Home Office (1991), para 14.437.

⁵⁴ Ministry of Justice (2010).

⁵⁵ Ministry of Justice (2010).

⁵⁶ Home Office (1984), para 3.5.

⁵⁷ Home Office (1984), para 3.5.

should not lead to prisoners being held in higher conditions of security than is commensurate with their level of dangerousness if they were to escape.

2.6. Conclusion.

Whilst it is acknowledged that security is paramount, this chapter has attempted to illustrate the importance of getting categorisation right, and not adopting an overly defensive categorisation process whereby prisoners are unnecessarily placed in too high a security category. The courts play an important role in this since they are the ultimate arbiters of prison law, and therefore of the categorisation process. How judges approach the issue of categorisation then is therefore vital.

CHAPTER 3

Survey of Security Categorisation Cases.

3.1. Introduction and sampling technique.

This chapter presents a survey of recent cases on security categorisation. An attempt is made to examine whether judges dealing with security categorisation cases are likely to lean in particular directions. In order to do this, cases decided over a ten year period from 1 January 2000 to 1 October 2010 relating to security categorisation were studied. 1 January 2000 was chosen as the starting point as it was considered that this was the earliest date that a categorisation decision made after the coming into force of the Prison Rules 1999 could come before the courts.

These cases were selected using Westlaw UK, Lexis Library and the BAILII databases. I made the following searches in the search box on the Westlaw UK homepage:

- “security categor!” prison!
- recategor! prison!

The first search returns every document contained on the Westlaw UK database containing the phrase ‘security category’ (or any other word that commences ‘categor’) and the word ‘prison’ within the same document. The second search returns every document held on the Westlaw UK database containing the words ‘prison’ and ‘recategorise’ (or any other word that commences ‘categor’).

I made the following searches in the ‘advanced query’ box on the Case Law Search page of the BAILII website¹:

- “security categor*” prison*
- recategor* prison*²

¹ www.bailii.org.

The search terms had to be altered slightly when searching Lexis due to a slightly different search mechanism. I made the following searches in the search box on the Case tab on Lexis Library:

- security categor! and prison!
- recategor! and prison!

Those cases which merely mentioned categorisation, but in which it was clear that categorisation was not the issue, were excluded. Only cases where an aspect of a prisoner's categorisation decision was disputed were included in this study.

As a result of these searches, all of the reported cases on prisoner categorisation were included in this study. Of course not all cases that come before the courts are reported, and unreported cases do not serve as a precedent and may often be no more than a repetition of what has already been reported. As a result, these will normally be excluded from the law reports.³

It is possible despite the BAILII searches, that some unreported cases may have been excluded from this study, although it is likely that this number will not be large.⁴ As the vast majority of prisoners are funded by legal aid, frivolous cases without prospect of success are unlikely to come before the courts. In fact, full legally aided representation will be refused if the prospects of success are unclear or poor, borderline or if the case does not seem to be of overwhelming importance to the client or have a wider public interest.⁵ Even if the case is likely to succeed, full representation will be refused 'unless the likely benefits to be gained from the proceedings justify the likely costs, such that a reasonable private

² The asterisk in these searches fulfils the same function as the exclamation mark in the Westlaw UK searches.

³ <http://www.lawreports.co.uk/AboutICLR/history.htm> accessed 15/06/10.

⁴ This is especially so given that all of the cases in this survey were applications for judicial review and such cases are heard by the High Court in the first instance.

⁵ Legal Services Commission Volume 3: Funding Code 5.7.2 available: http://www.legalservices.gov.uk/docs/civil_contracting/Funding_code_criteria_Jul07.pdf accessed 15/06/10.

paying client would be prepared to litigate, having regard to the prospects of success and all other circumstances’⁶ Even a case which has significant wider public interest will be refused legal aid unless ‘the likely benefits of the proceedings to the applicant and others justify the likely costs, having regard to the prospects of success and all other circumstances.’⁷

The following information was recorded about cases included in the sample:

- Which court heard the case
- The date of the judgment
- The nature of the action (judicial review or a private law claim)
- The judge
- The type of sentence
- The index offence
- The length of the sentence/tariff
- Whether the prisoner was post-tariff or eligible for parole
- The age of the prisoner
- The issue in dispute (for example, was the decision procedurally unfair or irrational?)
- The outcome
- The relief granted

Recording this information was not always straightforward and a certain level of interpretation and analysis was required at times before deciding which category certain

⁶ Ibid, para 5.7.4.

⁷ Ibid 5.7.5.

cases should be allocated to. This was especially so when coding the nature of the dispute and the reasons of the judge.

Another difficulty that presented itself was the overlap between parole decision cases and categorisation cases. Many of the issues in categorisation are linked with those of parole and the two decisions are often closely related. Great care was taken to ensure that only categorisation cases were included in the study. However, when examining the cases it was occasionally necessary to include discussion of parole.⁸

The mere fact that a case has succeeded or failed is not, of course, indicative in itself of any judicial bias or inclination. The outcome of any case depends largely on the merits of the case and the dismissal of a frivolous challenge by a prisoner does not indicate judicial bias against prisoners.⁹ The figures obtained from the survey are used to highlight possible tendencies and attitudes which have not previously been considered.

57 cases involving security categorisation were included in this survey. These cases do not represent every decision over the ten year period since only the final judicial decision has been included in this study. Where a case has been appealed from the High Court, only the decision of the Court of Appeal has been included in the survey.¹⁰ None of the cases have reached the House of Lords or the Supreme Court. The vast majority of the cases in this study are decisions of the High Court of Justice. Only five cases were decided by the Court of Appeal,¹¹ the outcome of which is presented in Table 2 below:

⁸ This is especially so when examining the ‘gist’ cases (p56) and judges’ approach to courses (p79).

⁹ Frivolous cases with little chance of success are unlikely to come before the courts due to the issues of obtaining legal aid discussed above.

¹⁰ A brief discussion of the cases that reached the Court of Appeal and the relationship between the High Court and the Court of Appeal in security categorisation cases is provided below.

¹¹ As was noted above, only the final decision has been included in the survey of cases.

Table 2: The result of categorisation cases heard by the Court of Appeal.

Case	Successful before the High Court?	Successful before the Court of Appeal?
<i>R (Hirst) v Secretary of State for the Home Department</i>	No	Yes
<i>R (Manjit Sunder) v Secretary of State for the Home Department</i>	No	No
<i>R (Williams) v Secretary of State for the Home Department</i>	No	Yes
<i>G v Secretary of State for the Home Department</i>	No	Yes
<i>R (MacKenzie) v Minister for Justice</i>	No	Yes

It is interesting that of these five cases, four were successful.¹² The only unsuccessful case heard by the Court of Appeal was, in fact, merely a permission to appeal hearing. It is of note that the Court of Appeal overturned the High Court in four of the cases. This compares to 39 percent¹³ of the cases appealed from the Queen’s Bench Administrative Court¹⁴ being allowed by the Court of Appeal in 2009.¹⁵ It might be thought that Court of Appeal judges are more sympathetic to prisoners than High Court judges, but there is no evidence for this. It is likely that Court of Appeal judges are more inclined to make overarching statements of policy than High Court judges and, as is argued later, the judges are more willing to rule on policy and procedure involved in making a categorisation decision than the actual categorisation decision itself.

It is important to note that every single case in this study is an application for judicial review or a judicial review. As has been discussed in chapters 1 and 2, this is mainly due to the decision of *ex parte Hague*.¹⁶ There are many limitations in any challenge by way of judicial review that are not present in other forms of recourse to the courts. All claims

¹² This success rate of 80 percent compared to a success rate of 40 percent for prisoner categorisation cases in which the final hearing was in the High Court.

¹³ 66 cases were allowed from a total of 170 disposals.

¹⁴ The five decisions appealed all emanated from the Queen’s Bench Administrative Court.

¹⁵ Ministry of Justice (2010), p169.

¹⁶ [1992] 1 AC 58.

must be brought promptly and in any case not later than three months after the grounds to make the claim first arose.¹⁷ In addition there are many limitations when seeking to challenge the substantive decision, as opposed to challenging a procedural aspect of the decision. Judicial review is not an appeal against an administrative action; it is a review of the legality of the action undertaken and the procedure followed when undertaking the action. It is not the function of the Court in judicial review to substitute its view for the view of the decision maker or to opine on the merits of the substantive decision.

In the context of judicial review, the courts are wary of overruling the exercise of a public authority's discretion. This approach is frequently referred to as 'judicial deference'. The effect that judicial deference has when a decision is reviewed is that the courts will apply a less rigorous standard of substantive review. There has been much discussion regarding the merits of judicial deference and its place within our legal system.¹⁸ Although much of this literature has focused on the Human Rights Act 1998, arguments regarding judicial deference are not limited to the field of human rights and are applicable throughout the field of judicial review.

Lord Hoffmann famously criticised the term 'deference' in *R (Prolife Alliance) v BBC*¹⁹ stating:

'Although the word "deference" is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are.'²⁰

¹⁷ Civil Procedure Rules 1998, Part 54.5.

¹⁸ See for example: R Edwards (2002), Lord Hoffmann (2002), J Jowell (2003a), J Jowell (2003b), M Hunt (2003), T Allan (2004), R Clayton (2004), R Clayton (2006), D Dyzenhaus (2005), Lord Steyn (2006), T Allan (2006), A Kavanagh (2008) and A Kavanagh (2010).

¹⁹ [2003] UKHL 23.

²⁰ Para 75.

The limitations of the label ‘deference’ are recognised. However, the use of this label should not ‘fetter our substantive thinking’.²¹ The term ‘deference’ in this context is both understood and sanctioned by its wide usage both in the UK and abroad.²² What, however, is actually meant by the term? Lord Lester of Herne Hill and David Pannick, writing in the context of the European Convention on Human Rights (ECHR), propose the following:

‘[Deference] concerns not the legal limits to jurisdiction but the wise exercise of judicial discretion having regard to the limits of the courts’ institutional capacity and the constitutional principle of separation of powers.’²³

Aileen Kavanagh proposes the following definition:

‘Judicial deference occurs when judges assign varying degrees of weight to the judgments of the elected branches, out of respect for their superior expertise, competence or democratic legitimacy.’²⁴

These two definitions encapsulate much of what deference is about, namely that ‘the courts can (and should) provide a valuable mechanism for protecting rights and the rule of law whilst nonetheless admitting and articulating the limits of the judicial role which underlie the doctrine of deference.’²⁵ This thesis will adopt Kavanagh’s definition, which is preferred on the basis that it explicitly acknowledges that deference occurs along a sliding scale. It can range from ‘minimal deference’²⁶ which ‘applies across the board to all legislative and executive decisions ... it accounts for, and characterises, the role [of the Court as] the secondary decision-maker’²⁷ to ‘substantive deference’²⁸ whereby the courts exercise a very high level of judicial self-restraint.

Whether deference shown by the courts is justified must also be judged on the basis of this sliding scale. An appropriate degree of judicial deference can be desirable in certain

²¹ Lord Steyn (2005), p350.

²² Lord Steyn (2005).

²³ Lord Lester and D Pannick (2004), para 3,10.

²⁴ A Kavanagh (2010), p223.

²⁵ A Kavanagh (2010), pp249-250.

²⁶ A Kavanagh (2010), p228.

²⁷ A Kavanagh (2010), p228.

²⁸ A Kavanagh (2010), p228.

circumstances. However, an excessive degree of deference is highly undesirable. As Lord Lester and David Pannick warn, ‘it is essential that the courts do not abdicate their responsibilities by developing self-denying limits on their powers.’²⁹ This chapter focuses on establishing whether judges are unduly deferential to the prison authorities in prisoner security categorisation cases, while Chapter Four examines whether the judges’ approach can be considered to be justified.

3.2. Theme 1: Judges tend to support the prison authorities over prisoners in categorisation decisions.

In *Becker v Home Office*³⁰ it was stated that ‘if the courts were to entertain actions by disgruntled prisoners, the governor's life would be made intolerable. The discipline of the prison would be undermined.’ Lord Denning MR made this statement 39 years ago, before there was any real recognition of prisoners’ rights and at a time when the management of prisons was regarded as a matter solely for the prison authorities, not one in which courts should interfere.³¹ Since this statement was made, there have been many developments in prison law and prisoners’ rights. Nonetheless, a degree of judicial deference to the prison authorities can still be seen, and this is particularly so in categorisation decisions. This assertion is very much in accordance with Griffith’s thesis in *Politics of the Judiciary*.³² If judges are naturally inclined to support the institutions of government against those of the individual citizen, then it is hardly surprising that a person who is being punished for a legal infraction may have difficulties in persuading a judge to support his or her case. This may lead to judges being unwilling to rule in a prisoner’s favour when a challenge is made against the prison authorities.

²⁹ Lord Lester and D Pannick (2004), para 3,10.

³⁰ [1972] 2 QB 407.

³¹ S Livingstone (1995).

³² J Griffith (1997).

Despite the advances in prison law³³ and the law relating to security categorisation over the years,³⁴ many commentators on prison law still believe that the judiciary is hesitant in its role as guardians of prisoners' rights. This chapter argues that this perception is supported by the cases involving security categorisation.

The judiciary's reluctance to engage in matters of security categorisation manifests itself in many ways. The first, and perhaps the most influential, way is the limiting of challenges that a prisoner may make against his or her security categorisation to judicial review. The possibility of a prisoner challenging his or her categorisation in tort has been all but eliminated by the House of Lords in *R v Deputy Governor of Parkhurst Prison, ex parte Hague*.³⁵ Furthermore, the courts have consistently ruled that issues of human rights are not engaged by categorisation decisions. Indeed, all of the cases in this study are applications for judicial review. As judicial review is normally the only avenue of seeking redress before the courts, this necessarily means that categorisation decisions are tempered by the deference that is such a feature of judicial review.

The grounds of review, as articulated by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*,³⁶ are limited to illegality, irrationality and procedural impropriety. In addition, s6(1) Human Rights Act 1998³⁷ has introduced a new, statutory, ground of review. This is a free-standing statutory ground of review³⁸ that has the effect

³³ These include the acknowledgement that Article 6 ECHR is engaged in disciplinary cases if additional days are imposed (see *Ezeh and Connors v UK* (2004) 39 EHRR 1). They also include the courts reviewing parole decisions and requiring the Parole Board to meet the standards of natural justice (see *R v Home Secretary, ex parte Doody* [1994] 1 AC 531).

³⁴ Such as the requirement of minimum standards of procedural fairness in categorisation decisions (see, for example, *R v Secretary of State for the Home Department, ex parte Duggan* [1994] 4 All ER).

³⁵ [1992] 1 AC 58.

³⁶ [1985] AC 374.

³⁷ This states that it is 'unlawful for a public authority to act in a way which is incompatible with a Convention Right'.

³⁸ P Craig (2008), p565.

that a petition can now also be made if convention rights are engaged and if an action or inaction by a public authority is considered to be incompatible with the ECHR.

The limiting of categorisation challenges to judicial review is in no small part due to the decisions of *O'Reilly v Mackman*³⁹ and *R v Deputy Governor of Parkhurst Prison, ex parte Hague*.⁴⁰ In *O'Reilly v Mackman*, the House of Lords examined the scope of the High Court's supervisory jurisdiction, holding it to be an abuse of process for a prisoner to evade the procedural rules governing applications for judicial review by proceeding by way of a private law action. Lord Diplock concluded that:

‘It would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.’⁴¹

Although this rule is of general application, it clearly offers greater protections to public authorities by requiring the claimant to satisfy the procedural requirements of judicial review laid down by Part 54 of the Civil Procedures Rules, many of which are not necessary in a private law action.

Although *Hague* was not a categorisation case, the effect of the ruling by the House of Lords means that a prisoner cannot sue the prison authorities for breach of statutory duty or for false imprisonment. The House of Lords held that it was ‘inconceivable’⁴² that Parliament had intended the rule making power of s47 Prison Act 1952 to confer private law rights of action on prisoners if there were a breach of the Prison Rules, thereby removing the possibility of a prisoner suing the prison authorities for breach of statutory duty. It was stated by Lord Bridge that:

³⁹ [1983] 2 AC 237.

⁴⁰ [1992] 1 AC 58.

⁴¹ [1983] 2 AC 237, p285.

⁴² Per Lord Bridge [1992] 1 AC 58, p161.

‘The concept of a prisoner’s “residual liberty” as a species of freedom of movement within the prison enjoyed as a legal right which the prison authorities cannot lawfully restrain seems to me quite illusory. The prisoner is at all times lawfully restrained within closely defined bounds and if he is kept in a segregated cell at a time when, if the rules had not been misapplied, he would be in the company of other prisoners in the workshop, at the dinner table or elsewhere, this is not the deprivation of his liberty of movement, which is the essence of the tort of false imprisonment, it is the substitution of one form of restraint for another.’⁴³

By ruling that a prisoner has no residual liberty regarding the limits placed on his or her freedom of movement, the decision in *Hague* ruled out any possibility of a prisoner suing for false imprisonment on the basis of a wrongful categorisation.⁴⁴ This is because ‘a prisoner at any time has no liberty to be in any place other than where the regime permits [and so] he has no liberty capable of deprivation so as to constitute the tort of false imprisonment.’⁴⁵ Indeed, although prisoners’ release dates may be significantly delayed by a wrongful categorisation decision, they would still be lawfully detained and unable to make a claim in tort. It should be noted that the court in *Hague* did little more than confirm the existing jurisprudence which rejected the possibility of prisoners claiming for false imprisonment.⁴⁶ *Hague* also excluded the possibility of prisoners suing for breach of statutory duty. Despite limiting the tortious claims that could be brought by prisoners seeking to contest their security categorisation, it was the decision of *Hague* that ruled that all managerial and operational decisions taken by the Prison Service are amenable to judicial review. This is the only method to challenge a categorisation decision before the courts.

The limitations of judicial review as the principal method of challenging a security categorisation decision are exacerbated by the courts’ insistence that the ECHR has no

⁴³ [1992] 1 AC 58, p164.

⁴⁴ Residual liberty constitutes the rights and freedoms that survive the punitive element of a custodial sentence. They can be legitimately limited by the administrative implantation of a custodial sentence.

⁴⁵ Per Lord Jauncey, p177.

⁴⁶ See for example *Williams v Home Office (No2)* [1981] 1 All ER 1211 and *R v Board of Visitors of Gartree Prison, ex parte Sears* The Times, 20 March 1985.

bearing on security categorisation. This limits any substantive review of a decision to irrationality as opposed to proportionality.

Article 5 of the ECHR has been held not to be relevant to categorisation decisions on the grounds that it does ‘not apply to the case of the accommodation within confinement that a prisoner will face but rather to the question of whether he shall be confined.’⁴⁷ This is in spite of repeated judicial statements that categorisation can and does affect a prisoner’s prospect of release. Despite this stance being branded illogical by some critics,⁴⁸ it remains in accordance with the European Court of Human Rights’ decision of *Ashingdane v UK*⁴⁹ in which it was held that Article 5 only relates to the decision to detain and not the quality, nature or restrictiveness of detention. This approach was affirmed in *R (Munjaz) v Mersey Care NHS Trust*⁵⁰ when the House of Lords ruled, in the context of an ill patient detained in a mental hospital that:

‘In my opinion the seclusion of a patient who is lawfully detained at [the hospital] under the conditions laid down in the policy does not amount to a separate deprivation of liberty which engages Article 5.’⁵¹

Lord Bingham applied the House of Lords’ conclusions to prisoners, stating:

‘I would not, for example, understand Article 5(4) as enabling a prisoner lawfully detained to challenge his prison category.’⁵²

Nevertheless, given the judicial recognition of the impact of categorisation on decisions to the length of a prisoner’s detention, the domestic courts must surely have been able to bring categorisation decisions within the remit of Article 5, especially in the case of Category A lifers had they been so inclined.

⁴⁷ *R (MacKenzie) v Secretary of State for Justice* [2009] EWCA Civ 669.

⁴⁸ *S Livingstone et al* (2008), para 4.28.

⁴⁹ (1985) 7 EHRR 528.

⁵⁰ [2005] UKHL 58.

⁵¹ Per Lord Hope [2005] UKHL 58, para 86.

⁵² [2005] UKHL 58, para 30.

Article 6 has also been excluded from the categorisation context on the basis that ‘an administrative decision to re-categorise a prisoner is not a determination of his civil rights or of a criminal charge.’⁵³ Indeed this refusal to extend Article 6 to categorisation decisions ‘is part of a general trend on the part of the courts to keep Article 6 out of the prison context.’⁵⁴

The judicial reluctance to incorporate Articles 5 and 6 into the categorisation context is an indication that the courts are disinclined to intervene in categorisation decisions, preferring to rule only on whether a decision was irrational instead of engaging in a review of the proportionality of the decision. As Lord Diplock stated in *Bromley London Borough Council v Greater London Borough Council*,⁵⁵ the threshold of irrationality would only be met if a decision was deemed ‘so devoid of any plausible justification that no reasonable body of persons could have reached [it].’ Given the much higher threshold that is required for an irrationality challenge, it is inevitable that fewer prisoners will be able successfully to challenge their categorisation even if that categorisation seems prima facie wrong. This is illustrated by Langan J who stated in *R (Manhire) v Secretary of State for Justice*⁵⁶ that:

‘A decision may appear to be surprising, but that does not mean that it must fail a challenge by way of judicial review. The burden on an applicant who asserts that a decision is irrational is a heavy one.’⁵⁷

The refusal to extend categorisation decisions into the remit of Articles 5 and 6 has resulted in the only possible substantive review of a categorisation decision being on the basis of irrationality. A review of the proportionality of a decision involves a much greater

⁵³ *R v Secretary of State for the Home Department, ex parte Manjit Sunder* [2001] EWCA Civ 1157, para 6.

⁵⁴ S Livingstone et al (2008), para 4.27.

⁵⁵ [1983] 1 AC 768, at p821.

⁵⁶ [2009] EWHC 1788 (Admin).

⁵⁷ Para 34. It should be noted that the claimant in *Manhire* was actually successful in claiming that his categorisation decision was irrational. This was on the basis that, as a Zimbabwean national, the likelihood of him being deported upon release was negligible and therefore it was highly unlikely he would seek to abscond in order to avoid deportation. Furthermore, it was held to be highly improbable that, in light of his ‘exemplary’ prison record, the claimant would jeopardise his release date by absconding from open conditions.

intensity of review of the substantive decision than irrationality. In reviewing the proportionality of a decision ‘the court considers: whether the measure was necessary to achieve the desired objective; whether the measure was suitable for achieving the desired objective; whether it none the less imposed excessive burdens on the individual.’⁵⁸ Thus in examining the proportionality of a decision, the judge is engaged in the balancing of competing interests and has to examine the substance of the decision.

By imposing the higher threshold of irrationality, judges are according a high degree of deference to the prison authorities in categorisation decisions. The resulting difficulties are potentially very frustrating for prisoners’ rights lawyers. The ‘Recent Developments in Prison Law’ bulletins in *Legal Action*, authored by prison law practitioners, use words such as ‘problematic’,⁵⁹ ‘highly deferent’⁶⁰ and ‘very difficult’⁶¹ when discussing categorisation review and have furthermore referred to Category A decisions as being ‘notoriously difficult’⁶² to challenge. The effect that the high threshold of irrationality has on Category A decisions is particularly disconcerting in light of the fact that, in addition to life sentence prisoners, this class of claimant has received a higher degree of judicial protection. As noted above, the effect of limiting categorisation challenges to judicial review severely limits any substantive review of the categorisation decision. Consequently, any substantive review of the categorisation decision itself, as opposed to policy or the procedure followed when making the decision, is limited to an irrationality challenge.

Although the irrationality standard of review is inherently deferential, even within the boundaries of irrationality there are varying levels of judicial deference that may be demonstrated. Le Sueur identifies four categories of intensity of review contained within

⁵⁸ Feldman (2009), para 16.12.

⁵⁹ *Legal Action* February 2010, p26.

⁶⁰ *Legal Action* August 2009, p20.

⁶¹ *Legal Action* February 2009, p16.

⁶² *Legal Action* February 2010, p26.

the ambit of irrationality. These are presented in the following table which is taken from his article ‘The rise and ruin of unreasonableness?’.⁶³

⁶³ A Le Sueur (2005).

Categories of Intensity of Review (Source: A Le Sueur (2005)).

Type of review	Test
Non-justiciable	See, e.g. <i>R. (on the application of Campaign for Nuclear Disarmament) v Prime Minister</i> [2002] EWHC 2777; [2003] A.C.D. 36.
Light-touch review	<p>“so absurd that the decision-maker must have taken leave of his senses” (<i>Nottinghamshire County Council</i> [1986] AC 240)</p> <p>“The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational. That is good law and, like most good law, common sense. Where decisions of a policy-laden, esoteric or security-based nature are in issue, even greater caution than normal must be shown in applying the test, but the test itself is sufficiently flexible to cover all situations” (<i>R v Ministry of Justice ex p. Smith</i> [1995] 4 All ER 427 per Sir Thomas Bingham)</p>
Ordinary Wednesbury	<p>“a decision that elicits the exclamation ‘my goodness, that is certainly wrong!’” (<i>R. v Devon County Council ex p. George</i> [1989] AC 573)</p> <p>“so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it” (<i>CCSU v Minister for the Civil Service</i> [1985] AC 374 at 410, per Lord Diplock)</p>
<p>“anxious scrutiny”,</p> <p>“enhanced level scrutiny”,</p> <p>“rigorous examination”</p> <p>“super Wednesbury”</p>	<p>“Reasonableness in such cases is not, however, synonymous with ‘absurdity’ or ‘perversity’. Review is stricter and the courts ask the question posed by the majority in <i>Brind</i>, namely, ‘whether a reasonable Secretary of State, on the material before him, could reasonably conclude that the interference with freedom of expression was justifiable’. This test lowers the threshold of unreasonableness. In addition, it has been held that decisions infringing rights should receive the ‘most anxious scrutiny’ of the courts.” (de Smith, Woolf and Jowell, <i>Judicial Review of Administrative Action</i> 5th Edn at para 13-060, approved by Roch L.J. in <i>R. v. Saville Inquiry Ex p. A and others</i> [1999] EWHC Admin 556)</p> <p>Can the decision ‘confidently enough said to have been correct’? (<i>Gurung v Secretary of State for the Home Department</i> [2003] EWCA Civ 654, per Buxton L.J.).</p> <p>The court may not interfere with the exercise of an administrative decision on substantive grounds save where the court is satisfied ... that it is beyond the range of responses open to a reasonable decision-maker but in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above. (<i>R. v Ministry of Defence ex p Smith</i>, per Sir Thomas Bingham)</p>

It is important to note that these are not discrete categories. Instead they are points along a sliding scale of review in judicial review hearings. This point was well illustrated when, referring to the dictum of Sir Thomas Bingham in *R v Ministry of Defence, ex parte Smith*,⁶⁴ Laws LJ in *R (Mahmood) v Secretary of State for the Home Department*⁶⁵ stated:

‘that approach and the basic *Wednesbury* rule are by no means hermetically sealed the one from the other. There is, rather, what may be called a sliding scale of review; the graver the impact of the decision in question upon the individual affected by it, the more substantial the justification that will be required.’⁶⁶

Despite this sliding scale of review, the judges may still afford a high degree of deference to the prison authorities in categorisation decisions. This point is illustrated by Silber J in *R (M) v Secretary of State for Justice*:⁶⁷

‘If I had any doubt about my conclusion that the decision to retain the claimant in closed conditions was not *Wednesbury* unreasonable I would have accorded some deference to the Secretary of State even though this was a case calling for intense scrutiny.’⁶⁸

Silber J is explicitly stating that he would use a more deferential standard of review, even though the circumstances of the case and the impact of the decision on the prisoner would ordinarily merit ‘intense scrutiny’. This is clear evidence of the deference that judges afford the prison authorities in security categorisation cases.

The Irrationality Cases

The case of *R v Secretary of State for the Home Department ex parte Daly (Classification of Prisoner)*⁶⁹ was one of the few successful irrationality cases. Comments made by the sentencing judge were included in the claimant’s gist document⁷⁰ and as a result the

⁶⁴[1996] QB 517.

⁶⁵[2001] WLR 840.

⁶⁶Para 19.

⁶⁷[2009] EWHC 768.

⁶⁸Para 60.

⁶⁹21st June 2000, CO 4552/99.

⁷⁰This is a document that contains the gist of all relevant facts and materials which are relevant to a prisoner’s security categorisation.

Category A review team had wrongly treated his index offence as murder not manslaughter. The Category A review team subsequently accepted their mistake and a result re-examined his categorisation and prepared a new gist document. This new gist document stated:

‘It noted that you have expressed concern that on a previous review of your categorisation the Category A review team wrongly took into account the post-trial remarks made by Mr Justice Hobhouse when sentencing you. Hobhouse J had remarked that: ‘I consider that George Daly was more deeply involved than the verdicts showed and that his evidence that he did not know that anybody was going to be killed was frankly incredible.’ The Review Team accepts that the decision as to your categorisation must proceed on the basis that of the crimes for which you were convicted, not any other offence of which you were suspected or charged.’⁷¹

In the absence of ‘a strong and compelling countervailing reason’ for including Hobhouse J’s comments in the new gist document, it was held that the inclusion of these comments was irrational and unreasonable in the *Wednesbury* sense. The categorisation decision itself was not deemed irrational, merely the inclusion of an irrelevant consideration was irrational. *Daly* is not then a case where the categorisation decision itself was reviewed. Although this case is an example of a successful challenge on the irrationality ground, it is not an example of a successful challenge of the actual categorisation decision. Irrationality was argued in 22 cases on prisoner categorisation, ten of which were successful. Nevertheless out of the 57 cases in this study, the categorisation decision itself, as opposed to how this decision was made, has actually only been successfully reviewed on two occasions. These cases are *R (Lowe) v Governor HMP Liverpool*⁷² and *R (Allen Manhire) v Secretary of State for Justice*.⁷³ The case of *Lowe* displays some peculiar reasoning on the part of the Prison Service. Indeed Kay J summarised the Prison Service’s approach in the following way:

⁷¹ Para 23.

⁷² [2008] EWHC 2167 (Admin).

⁷³ [2009] EWHC 1788 (Admin).

‘The decision maker seems to think that exercising a right to challenge categorisation evinces a will to make a determined escape attempt. That is set against a background in which Mr Lowe’s efforts to have himself recategorised downwards have consistently been successful. If it was the case that he was threatening judicial review proceedings in 2006, it seems to me the only reasonable inference is that the governor at that stage accepted the argument that category C was the proper category for Mr Lowe. As regards his challenges to the decisions in December 2007 and January 2008, he was successful in those because those decisions were quashed by consent. It would be almost Kafkaesque to say that by successfully exercising a right to challenge your categorisation from category C to category B, you thereby increase the risk that you will escape and therefore you should be re-categorised back up from category C to category B.’⁷⁴

The courts seem to be willing to ensure that procedures comply with the law and have through their jurisprudence introduced changes in the operation of the categorisation procedure. However, they are less willing, once a procedure or rule is in place, to intervene in its operation and implementation.

The judges’ approach to prisoner categorisation cases is especially evident in two types of case: cases where ‘*Pate* exceptional circumstances’ are argued and ‘gist’ cases.

Pate exceptional circumstances

‘*Pate* exceptional circumstances’ is a phrase that has been coined by the author to describe cases where Category A prisoners dispute their categorisation based on the fact that Category B conditions would still render impossible any chance of them escaping. Due to the unique aim of Category A, namely making escape impossible, *Pate* exceptional circumstances are only ever arguable by Category A prisoners.

This class of cases has its roots in the decision of Turner J in *R (Pate) v Secretary of State for the Home Department*.⁷⁵ Here it was held that the policy of making escape as near impossible as could be was not of itself unlawful. There must, however, be scope for discretion in examining whether this policy can be met with a lower categorisation

⁷⁴ [2008] EWHC 2167 (Admin), para 51.

⁷⁵ [2002] EWHC 1018.

decision. There are six examples where *Pate* exceptional circumstances were argued in this study, including the *Pate* decision itself. These cases can be divided into two groups: prisoners who argue that they would be physically incapable of escape and prisoners who argue that there are circumstances that mean they have no motivation to escape.

Table 3: Outcome of the ‘*Pate* exceptional circumstances’ cases.

Case Name	Pate Category	Outcome
<i>R (Pate) v Secretary of State for the Home Department</i>	Physically incapable	Succeeded
<i>R (Roberts) v Secretary of State for the Home Department</i>	Lacking motivation	Failed
<i>R (MJ) v Secretary of State for the Home Department</i>	Lacking motivation	Failed
<i>G v Secretary of State for the Home Department</i>	Lacking motivation	Succeeded
<i>R (Kenealy) v Secretary of State for Justice</i>	Lacking motivation	Failed
<i>R (Nicholls) v Secretary of State for Justice</i>	Physically incapable	Failed

Table 3 shows that only two cases succeeded in arguing *Pate* exceptional circumstances. As previously mentioned, the decision of *Pate* itself concerned a sixty year old prisoner who suffered from Asperger’s syndrome and a severely ulcerated leg that would possibly require amputation. *Pate* argued that it would be physically impossible for him to escape and that consequently Category A policy at the time made no allowance for the fact the objective of Category A⁷⁶ could be fulfilled even if he were to be held in a lower security category.

Turner J agreed that this policy was inflexible and ruled that it was unlawful:

⁷⁶ The aim of making escape impossible for prisoners whose escape would be highly dangerous to the public, police or the security of the state.

‘The objective may be capable of being met with a lower categorisation in which event there is plainly scope, and I would hold duty, for the exercise of discretion ... I hold that such part of the policy which does not differentiate between the escape potential of individual prisoners is illegal.’⁷⁷

Nothing was said about Pate’s actual categorisation. The discussion and conclusion of the judge conspicuously failed to mention Pate’s very limited escape potential, and dealt solely with the administrative law aspects of inflexible policies. No consideration or acknowledgment was made of Pate’s individual circumstances. Although this case was successful, the decision demonstrates a reluctance to overrule categorisation decisions made by the Prison Service, with the courts limiting themselves to ruling only on the legality of the decision. Furthermore, despite ruling that the Category A policy was illegal, Turner J declined to grant a declaration that: ‘the policy of allocating prisoners to Category A in any individual case without taking evidence of whether their risk of escape could be safely managed within a lower security categorisation was unlawful.’⁷⁸ In doing so he stated:

‘It would require the court to pronounce on a matter which it is for the Secretary of State to determine as a matter of Prison Service policy. It is for the Secretary of State to determine a lawful policy within the framework set out in this judgment.’⁷⁹

Although *Pate* succeeded, the case seems to epitomise the ‘hands-off’ nature of the judiciary when it comes to categorisation decisions. If the courts had adopted a more intense standard of review, they would have been able to engage more fully with the substance of the decision and thus would have, directly or indirectly, indicated what a lawful policy might entail.

The other successful case, *G v Secretary of State for the Home Department*⁸⁰ was brought by a prisoner who was a protected witness. G argued that he had no motivation to escape

⁷⁷ [2002] EWHC 1018, paras 38-39.

⁷⁸ Para 22.

⁷⁹ Para 40.

as he would stand to lose the advantage of being on the police witness protection programme and furthermore would be at risk from those he was being protected from if he were to escape. This, it was argued, constituted an exceptional circumstance which meant that his risk of escape could be safely managed within Category B.

The Court of Appeal accepted that this could constitute an exceptional circumstance and quashed the decision refusing to downgrade G's security category on the basis that they had failed to take this exceptional circumstance into account. This decision had a wider implication in that it ruled that *Pate* exceptional circumstances go beyond the physical capability of a prisoner to escape.

Yet again, however, this was a decision dealing with the legality of Category A policy as opposed to whether the claimant's position could constitute an exceptional circumstance. The ruling focused on what factual scenario may give rise to an exceptional circumstance and not whether, on the facts of the case, an exceptional circumstance did arise. All three judges refused to decide on whether G's situation did in fact give rise to an exceptional circumstance, preferring instead to defer to the decision of the Director of High Security. Indeed, not one claimant in this study has successfully argued that their circumstances constituted a *Pate* exceptional circumstance.

This highlights how truly exceptional the circumstance must be. The difficulties in arguing that a prisoner's circumstances constitute a *Pate* exceptional circumstance are, in part, due to the fact that the prisoner must demonstrate that it is irrational not to declare the circumstances exceptional. A further difficulty is to be found in the deference that judges

⁸⁰ [2006] EWCA Civ 919.

have to security. This is highlighted by the case of *R (Roberts) v Secretary of State for the Home Department*⁸¹ when Elias J stated:

‘The definition of standard escape risk prisoners recognises that many prisoners will have few resources and little inclination to escape, but nonetheless would take an opportunity to do so if they could. If it is a legitimate policy, as it surely is, to seek to eliminate any risk of escape for category A prisoners, then the starting point must be that category A safeguards are required. They are fuller and are considered more appropriate than the category B safeguards.

The *Pate* case recognises that this cannot be a universal rule, but, as I think everybody can see, it is going to be an exceptional case where that principle does not apply. As Miss Lewis points out in her witness statement, even for those with very limited resources to escape there is a possibility of human error, or corruption, or they may tag along perhaps in the course of mass escape with other prisoners.’⁸²

This statement was made in spite of the fact that the judge had acknowledged that Roberts would be reluctant to escape. However, Elias J was still concerned that Roberts might seek to escape ‘if the opportunity presented itself.’⁸³ Although the likelihood of escape may be higher in Category B conditions, Category B is still a high security category from which escape is extremely difficult.⁸⁴ It is, therefore, highly unlikely that any potential escape opportunity would ever materialise to tempt Roberts into attempting to escape.

The case of *R (Nicholls) v Secretary of State for Justice*⁸⁵ illustrates the same point. Nicholls suffered from cystic fibrosis and was unable to walk for more than five minutes or run more than 200 metres. Despite this the judge deferred to the Director of High Security who laid great emphasis on issues of security. The judge stated:

‘Not all methods of escape require stamina; some escapes are achieved by guile or with the help of others. Perhaps it is said he might not last very long if he were on the run. But without evidence to the contrary he must be assumed to be capable of offending in that time.’

⁸¹ [2002] EWHC 679 (Admin).

⁸² Paras 65-66.

⁸³ Para 69.

⁸⁴ PSO 0900 1.1.1.

⁸⁵ [2009] EWHC 2091.

It must be remembered, that if Nicholls had been successful, he would have been a Category B prisoner, the second highest security category. He would still have had to overcome significant security in order to escape. It seems extraordinary that it was not deemed to be impossible for him to escape from such conditions. Nevertheless the judge concluded:

‘It does not appear to me that the decision in the present case can be shown to have failed to take proper account of either of them. None of the matters identified by [the claimant] therefore throws doubt on the rationality or legality of the decision under challenge.’

The lack of success in these cases has had the effect that counsel no longer seem to bother raising the argument in cases where *Pate* exceptional circumstances could be argued. Hence, in *R (H) v Secretary of State for Justice*,⁸⁶ the claimant did not argue before Cranston J that *Pate* exceptional circumstances applied when the Director of High Security dismissed the Local Category A Advisory Panel’s recommendation that the risks *H* posed could be managed in Category B conditions. Indeed, ‘as a Protected Witness Unit (PWU) prisoner his likelihood of escaping was very low, as he would lose the protection afforded to him by the police and put himself at substantial risk while at large. Additionally, his PWU status had reduced the possibility of having external contacts that could provide assistance prior to or following any escape.’⁸⁷ Although the courts have had a positive impact on categorisation policy in this area, it is worrying that their reluctance to engage with the decisions themselves has meant that some claimants have given up arguing the point. It seems that the courts are prepared to make statements of principle and policy in this area, however, they prefer to shy away from overruling categorisation decisions themselves and remain deferential to the prison authorities’ assessments of security and dangerousness.

⁸⁶ [2008] EWHC 2590 (admin).

⁸⁷ Para 5.

It is to be hoped that the positive influence the courts have had on categorisation policy with the introduction of *Pate* exceptional circumstances is not undone by judges not upholding the principles they have introduced. The harm that can be caused by judges being reluctant to engage with certain types of challenge is evidenced by the serious problems and deficiencies in gisting procedure that were to be found around the late 1990s and early 2000s.

Gist Cases

Although cases from 2000 to 2010 have been included in this survey, the necessary starting point in order to understand why judges act the way they do in gist cases is the decision of the House of Lords in *R v Secretary of State for the Home Department, ex parte Doody*.⁸⁸ In *Doody* it was held that mandatory life sentence prisoners were entitled to minimum standards of procedural fairness in relation to the fixing of their tariffs. The courts required that mandatory life sentence prisoners be afforded the opportunity to make written representations regarding their tariff. In order that these representations could be effective, the Secretary of State was then required to inform the prisoner of the judicial recommendation of the prisoner's tariff period and any other judicial opinion that had been expressed and could be relevant. The Secretary of State was also required to give reasons if he or she departed from the judge's opinion.

These minimum standards of procedural fairness were then applied to life sentence prisoners' Category A decisions in *R v Secretary of State for the Home Department, ex parte Duggan*.⁸⁹ Rose LJ ruled that, as no Category A lifer would ever be considered for release on licence, a Category A decision affected the ultimate release date for a life sentence prisoner and as a result fairness demanded that reasons be given. Consequently, subject to public interest immunity, a Category A prisoner is entitled to know the gist of

⁸⁸ [1994] 1 AC 531.

⁸⁹ [1994] 3 All ER 277.

any fact or opinion affecting his or her recategorisation prior to any decision being made. This is so that the prisoner can make meaningful representations regarding his or her categorisation and be informed about what steps he or she may need to take to achieve a lower security categorisation. This requirement was extended to include the recategorisation decisions of Category B-D post-tariff life sentence prisoners in *R (Hirst) v Home Secretary*.⁹⁰

In the early cases included in this study, the judges seemed content merely to see that the gist document existed so that procedural fairness could be seen to be fulfilled. In *R v Secretary of State for the Home Department, ex parte Grove*,⁹¹ it was complained that the gist document⁹² relating to Grove's categorisation review contained inaccurate information and unsubstantiated allegations. It wrongly stated that his index offence was manslaughter when actually his index offence was murder and that he was involved with drugs and was bullying other inmates. The judgment of Morrison J begins by highlighting the inadequacies of the gist document, stating:

'The purpose of the gist is to enable a serving prisoner to put forward meaningful and useful representations to the review team before they make the decision, as a result of the gist being provided to them. I think it is said with force that the statement to which I have just referred does not enable this applicant to put forward full or meaningful representations in relation to very unspecific allegations.'⁹³

Morrison J continued:

'It is accepted that they wrongly stated the offences for which he had been sentenced in the first place, and, although such an error may be thought to be in the applicant's favour, it can be said that since he is provided with the gist it would not lead to much confidence in the process if one could see at once that a fundamental mistake had been made of this sort.'⁹⁴

⁹⁰ [2001] EWCA Civ 378.

⁹¹ 12 June 2000, CO/3551/1999, QB.

⁹² This is the document in which contains the gist of all materials and facts relevant to the prisoner's categorisation decision.

⁹³ Para 9.

⁹⁴ Para 13.

Nevertheless he dismissed the application for judicial review stating:

‘In future gist documents are to be more carefully prepared and those documents should be as full as is practicable, consistent with the constraints there are in relation to decisions of this sort.’⁹⁵

Even when dismissing the case, Morrison J is implicitly acknowledging that Groves’ gist document was inadequate but considered that these failings did not taint the categorisation decision. This was despite observing that such a fundamental mistake undermined confidence in the gisting process as a whole. This seems a remarkable degree of deference to afford the Prison Service.

In *R (Manjit Sunder) v Secretary of State for the Home Department*,⁹⁶ a case which has been labelled ‘extremely conservative’,⁹⁷ Lord Justice Tuckey stated:

‘The present case was modelled on the statement in *McAvoy* which had been held to be sufficient in that case ... the cases are indistinguishable.’⁹⁸

This statement in itself is unremarkable. However, when read in light of criticisms of the gisting systems in *R (Lord) v Secretary of State for the Home Department*,⁹⁹ the picture changes. During evidence in *Lord*, it was stated that ‘it is “wholly exceptional” for gists to be worded otherwise than the claimant’s gist was in the present case.’¹⁰⁰ Consequently it becomes clear that in *Manjit Sunder*, Lord Justice Tuckey was condoning the systematic practice of providing standardised and formulaic gist documents, a practice that was heavily criticised in *Lord* two years later. Although the courts are anxious not to impose too great an administrative burden on the Prison Service, such conservative judgments are illustrative of the courts supporting the Prison Service instead of the prisoner.

⁹⁵ Para 25.

⁹⁶ [2001] EWCA Civ 1157.

⁹⁷ S Livingstone et al (2008), para 4.27.

⁹⁸ *Manjit Sunder*, Para 8.

⁹⁹ [2003] EWHC 2073 (admin).

¹⁰⁰ para 35.

*R (Ian McLeod) v HM Prison Service*¹⁰¹ is a further example of a similarly conservative judgment. In this case the gist was:

‘You were transferred from HMP Kirkham to closed conditions as a result of security information from many sources and over a period of time. This information all indicated that you were bullying other prisoners and involved in other illegal activities.’¹⁰²

Newman J held this to be an adequate gist, indicating that a gist document with this level of information was standard practice, before continuing to discuss whether the claimant could or should have been given more information. He concluded that sufficient information had been given stating:

‘The claimant has made representations, they run to a number of pages in his own manuscript, and representations about the fairness and the process from his solicitors. He has not been prevented from making representations on the facts which have been put against him as set out in the gist. Obviously, what he can say or what he desires to say in response to those matters must depend upon his own judgment as to how to respond to them. But it is the opportunity that he has had which is important. He has denied them. One knows not whether that is a denial which is a denial to everything or whether it is a denial which, if it was investigated, would lead to a denial as to the substance but an admission of certain facts, one simply does not know. If his position is that there is simply not an iota of substance in any of it, then in a sense there is nothing much more [that] he can say even if he was given more detail.’¹⁰³

Whilst the claimant had been able to make representations, it is clear from this passage that it is unlikely that representations made on the basis of this gist could be worthwhile, as required by *ex parte Duggan*. Newman J himself clearly did not know the quality or thrust of the representations that the claimant had made in denying his involvement in bullying other prisoners and illegal activities. Instead, the judge assumed the one scenario in which the quality of the gist and the amount of information given made no difference, namely a blanket denial by the prisoner. Indeed, he stated that the only matter of importance was that the claimant had the opportunity to make representations. It is suggested that this

¹⁰¹ [2002] EWHC 390 (admin).

¹⁰² Para 49.

¹⁰³ Para 51.

decision is clear evidence of the proposition that judges tend to ally themselves with the prison authorities, not prisoners.

The decisions in *R (Matthew Williams) v Secretary of State for the Home Department*¹⁰⁴ and *R (Lord) v Secretary of State for the Home Department*¹⁰⁵ appear to represent two notable exceptions to this general theme. Both of these cases were seminal in that they changed the law concerning categorisation procedure. It is also important to note that *Lord* was not decided on common law principles but sought instead merely to bring categorisation procedures in line with what Parliament had already decided by statute in the Data Protection Act 1998. Both cases required a change of policy by the Prison Service, but were not rulings on the implementation of the policy itself. Although the Court found in favour of the prisoners, these cases do not contradict the proposition that the judges are reluctant to find in favour of prisoners. Instead, these cases merely highlight that, as is the case with Pate exceptional circumstances, although judges are prepared to rule on the legality of Prison Service policy, they are unwilling to encroach on the implementation of that policy.

The lack of effective judicial supervision and engagement with gisting procedures had allowed the Prison Service to get away with providing insufficient or inadequate gists. The case of *R (Lord) v Secretary of State for the Home Department* is notable not only for requiring that Category A prisoners be granted full disclosure of any information or opinion pertinent to their categorisation, subject to public interest immunity, under section 7(1) of the Data Protection Act 1998, but also for the inadequacies in gisting procedure revealed in evidence and the strong criticisms that Munby J made in *obiter*. He stated:

¹⁰⁴ [2002] EWCA Civ 498.

¹⁰⁵ [2003] EWHC 2073.

‘Ms Lewis describes what happened in this case as an ‘unfortunate error’ and a ‘slip’. I should like to be able to agree but confess to having some difficulty. The evidence (much of which, as I have already observed, the Secretary of State has not sought to controvert) demonstrates that Category A reports have become standardised in format and formulaic in their terms; that they very rarely disclose any differences of opinion; and that the use of phrases such as ‘reports state’ and ‘reports advise’ is standard. Ms Steyn told me on instructions that the drafting of Category A reports is done by a very small group of people in the Category A Review Team: six in all. I find it hard to imagine that anyone in a team as small and expert as this would have made such a ‘slip’ if it really was the recognised and acknowledged practice in a case such as this to make clear in the gist that the views expressed were not unanimous.

I am sorry to have to say this but to put the point bluntly, in the light of all the materials I have seen I cannot share Ms Lewis's confidence that the present gist system as a whole is operating satisfactorily let alone fairly. It may be that it is. I am not in a position to say that it is not. But the picture revealed in this case does little to encourage the conviction that it is. Nor does the Ombudsman's report.’¹⁰⁶

From the above extract, it is clear that the Prison Service was not complying with the requirements laid down in *Duggan* and *McAvoy*. This illustrates the problems that can arise when the courts adopt a ‘hands-off’ approach and are unduly deferential to arguments made by the Prison Service.

It is also important to note that these criticisms were made in *obiter*. Lord’s claim was that under section 7 of the Data Protection Act 1998, he was entitled to full disclosure of his Category A reports. Indeed the judgment relating to the Data Protection Act contains very little engagement with the facts of the case and is almost exclusively decided on grounds of policy and statutory interpretation as opposed to common law doctrine. Furthermore, it seems remarkable that the inadequacy of gisting procedures was only remarked upon by the court when it had accepted that the case would be decided on the alternative grounds of the Data Protection Act 1998.

¹⁰⁶ Paras 64-65.

The standard of gist that is required to satisfy the requirement to give reasons for a categorisation decision was clarified in the cases of *R (Willmott) v Secretary of State for Justice*¹⁰⁷ and *R (D’Cunha) v Parole Board*.¹⁰⁸ In *Willmott* Langstaff J stated:

‘In my view, reasons have to be appropriate to convey the reason why a decision has been taken to those who need to read the reason and to understand the reason. Where, as here, the reasons are addressed to a Category A prisoner, they need to be sufficiently clear for the Category A prisoner to understand why the decision has been taken as it has. That does not require any particular formality, nor does it require any particular length. It does not necessarily require that the prisoner be told of every single consideration that has entered into the mind of the decision maker that has either been adopted or dismissed. One cannot expect the quality of draftsmanship in a decision such as this which one would expect in a Trust Deed or a judgment of the Court of Appeal. One cannot even necessarily expect the quality that one would find in the reasoning of a tribunal.’¹⁰⁹

With this standard¹¹⁰ in mind, it was held that sufficient reasons had been given and that, despite the support for his conclusions being ‘thin’,¹¹¹ the director had properly dealt with the material before him. In *D’Cunha* it was held that the decision letter does not need to include an exhaustive summary of the evidence of every witness or the reasons why the panel agreed or disagreed with that evidence. Instead, what is required is that the decision letter makes clear that evidence has been disagreed with and gives reasons for this disagreement. Both *Willmott* and *D’Cunha* limit the extent to which the prison authorities are obliged to give reasons for decisions. Although the standard of the gist which prisoners are given need not be of the quality of the Court of Appeal judgment, it is essential that gist documents do contain sufficient information to allow prisoners to be able to challenge their security categorisation. It is to be hoped that future gist documents will contain sufficient information and that the prison authorities will not slip back into providing the kind of gist documents that were so heavily criticised in *Lord*.

¹⁰⁷ [2011] EWHC 1109 (Admin).

¹⁰⁸ [2011] EWHC 128 (Admin).

¹⁰⁹ Para 26.

¹¹⁰ Which has been described by H Arnott, N Collins and S Creighton in the August 2011 ‘Recent Developments in Prison Law’ bulletin as ‘lean[ing] more towards the Secretary of State’s position than the [prisoner’s].’

¹¹¹ Para 39.

The *gist* cases and *Lord* follow the same pattern as the *Pate* exceptional circumstances cases. Judges are prepared to declare that a procedure must be followed. However, when a prisoner challenges an actual decision or circumstance, the courts are reluctant to engage in the merits of the case and in that sense defer to the Prison Service. As was noted above, in only two cases (out of a total of 57 cases) has a successful challenge been made to the categorisation decision itself. This seems a remarkably low figure and indicates the serious problems that prisoners face in challenging a security categorisation. It is also telling that the only Category A challenges that have been successful have been argued on procedural grounds. The judges have proved highly reluctant to review the merits of the actual categorisation decision.

It is clear that the courts have been proactive in requiring minimum standards of procedural fairness in cases in which a categorisation decision has a direct impact on a prisoner's prospects of release. Categorisation decisions, especially those impacting on a prisoner's prospects of release, are now far more in line with the values that Livingstone believed judicial review seeks to inculcate: values of formality, transparency and accountability in decision making.¹¹² Nevertheless, the cases in this study also demonstrate what Livingstone called the 'darker side of judicial review.'¹¹³ While standards of procedural fairness have greatly improved, the cases suggest an unwillingness to uphold the interests of the prisoner and a natural tendency to support the Prison Service. Despite the policy advances that have been introduced by the courts, judges still provide sturdy support for the prison authorities and fail to protect prisoners' interests.

¹¹² S Livingstone (1995).

¹¹³ *Ibid*, p167.

3.3. Theme Two: Judges are mainly concerned with the impact of categorisation on release dates, not conditions of imprisonment.

As we have seen, judges are reluctant to rule against the prison authorities in categorisation decisions. There are, however, certain circumstances in which they are more sympathetic to prisoners' rights and interests. One such circumstance is where a categorisation decision influences a prisoner's prospect of release or the date of his or her release. However, judges are not concerned with the impact that categorisation has on the conditions in which the prisoner is detained.

This is seen again and again in the cases in this study. It is the reasoning behind the gist document and the explanation why Article 5 has been kept out of the categorisation context. This study demonstrates Theme Two in a number of ways: the greater success rates of life sentence prisoners over determinate sentence prisoners; the greater success rates of prisoners who are post-tariff or eligible for parole, and the different approaches of the judges between Category A prisoners and other prisoners. The only major exception to this theme is '*Pate* exceptional circumstances.' However, as will be seen, even *Pate* exceptional circumstances do conform to the theme because, as was demonstrated previously, the courts have been loath to actually enforce this policy.

Good examples of judges' concern with the prospects of a prisoner's release are to be found in the cases of *R v Secretary of State for the Home Department, ex parte Doody*¹¹⁴ and *R v Secretary of State for the Home Department, ex parte Duggan*.¹¹⁵ As already noted, it was held in *Doody* that mandatory life sentence prisoners were entitled to minimum standards of procedural fairness in fixing their tariff. These minimum safeguards were then adopted into security categorisation by Rose LJ in *Duggan*. He accepted that

¹¹⁴ [1994] 1 AC 531.

¹¹⁵ [1994] 3 All ER 277.

being classed as a Category A prisoner had a direct effect on a prisoner's prospect of release, stating:

'So long as a prisoner remains in category A, his prospects for release on parole are, in practice, nil. The inescapable conclusion is that which I have indicated, namely, a decision to classify or continue the classification of a prisoner as category A has a direct impact on the liberty of the subject.'¹¹⁶

The consequences of being a Category A prisoner were commented on in the judgment.

However, it is clear when reading the case in its entirety that these consequences were immaterial to the final decision. As Rose LJ states:

'I see no reason, however, for initial categorisation procedures on admission to prison to be subject to the same requirements as those which are appropriate later. Clearly, speedy categorisation of those who may be dangerous is essential in the public interest. Those placed in category A will almost always, if not inevitably, be serving substantial sentences, so that the impact of initial categorisation is unlikely materially to affect their prospects of release. I see nothing unfair in that initial categorisation being undertaken without the substance of reports being revealed or reasons being given. But on the first and subsequent annual reviews, fairness, in my view, requires that the gist of reports be revealed in order to give the opportunity for comment and that reasons be given subsequently.'¹¹⁷

Rose LJ's comments regarding initial categorisation make it clear that his reasoning for requiring greater standards of procedural fairness for Category A life sentence prisoners is purely based on considerations relating to the prospect of release, not the enhanced pains of being a Category A prisoner, something to which he had previously alluded. This line of thinking continued in *R v Secretary of State for the Home Department, ex parte Peries*¹¹⁸ where the claimant sought to require the same procedural fairness requirements that had been argued in *Duggan* be applied to Category D to Category C recategorisation decisions. This case was unsuccessful because it was held that a Category D prisoner does not necessarily have a greater prospect of release than a Category C prisoner.

¹¹⁶ p288.

¹¹⁷ p288.

¹¹⁸ [1998] COD 150.

That the judges are primarily concerned with the possibility of a prisoner's prospect of release as opposed to his or her conditions of imprisonment is evident in many of the types of challenges that have come before the courts. It is most apparent in the procedural fairness cases, perhaps unsurprisingly given the decision of *Duggan*. The requirements of procedural fairness in *Duggan* were expanded beyond merely having to provide a 'gist document' into oral hearings and full disclosure in 'exceptional cases' by *R (Matthew Williams) v Secretary of State for the Home Department*.¹¹⁹ The difference in the judges' approaches to '*Williams* exceptional circumstances' and '*Pate* exceptional circumstances' is striking evidence that the judges are not concerned with the conditions of imprisonment in categorisation cases. Whilst both types of exceptional circumstance are discussed at length in this thesis, for present purposes it is sufficient to note that *Williams* exceptional circumstances may arise when prisoners argue that they pose a reduced risk to the public even if they were to escape, while *Pate* exceptional circumstances arise when prisoners do not require their current level of security to be held securely but would still be considered highly dangerous to the public if they were to escape. The only case in which *Pate* exceptional circumstances have been successfully argued was in *G v Secretary of State for the Home Department*¹²⁰ and that case was decided on the basis that what could constitute a *Pate* exceptional circumstance had been too narrowly interpreted. Nevertheless in *G* it still was opined by Hallett LJ that the victory was likely to be 'pyrrhic'. In contrast, in three cases out of seven it has been successfully argued that *Williams* exceptional circumstances applied. The fact that judges are not interested in the conditions of detention but confine themselves to the prospect of release is evidenced by the differences in their approaches to *Pate* and *Williams* exceptional circumstances.

¹¹⁹ [2002] EWCA Civ 498.

¹²⁰ [2006] EWCA Civ 919.

Support for the assertion that the judges are far more sympathetic to prisoners when a categorisation decision may influence their prospects of release can be found in the various judicial approaches to different types of challenges that have been brought and the types of prisoner who have brought the challenges. The trend can also be seen in the difference in the number of post-tariff life sentence prisoners who have been successful compared to non-post-tariff life sentence prisoners, and the difference in the success rate of Category A prisoners when compared to prisoners in other security categories.

Post-tariff life sentence prisoners

Post-tariff life sentence prisoners have served the punitive term that is imposed for the purposes of retribution and deterrence and are only being detained because they are deemed to pose a danger to the public. Their prospects of release can be made almost impossible by being placed in Category A and delayed until they have served some time in open (Category D) conditions.¹²¹ This stance has been confirmed by the courts; in *R (Hill) v Secretary of State for the Home Department*,¹²² it was stated that:

‘It should be understood that the importance of transfer to open prison for a life prisoner is considerable... a period in open prison under category D is essential for eventual release.’¹²³

A period in open conditions normally follows satisfactory progression through Category B and Category C conditions.¹²⁴ The judges are sensitive to the implications of categorisation to post-tariff life sentence prisoners, and this is illustrated by the increased success rate of cases brought by this type of prisoner. Table 4 below details the number of successful categorisation challenges that have been brought by different types of prisoners.

¹²¹ The Indeterminate Sentence Manual (PSO 4700) states that ‘For most mandatory and discretionary lifers, an average period of 2 years in open conditions... precedes release on licence. The purpose of open conditions... is to prepare lifers for release’.

¹²² [2007] EWHC 2164 (Admin).

¹²³ Para 5.

¹²⁴ Indeterminate Sentence Manual (PSO 4700), para 4.8.1.

Table 4: Number of successful categorisation challenges for different types of prisoner.

Type of Prisoner	Number of Cases	Number of Successful Cases	Percentage Successful Cases
Post-Tariff Life Sentence Prisoners	19	11	58%
Non-Post-Tariff Life Sentence Prisoners	8	3	38%
Category A Prisoners	25	13	52%
Other Category Prisoners	32	13	41%
All Cases	57	26	46%

This increased success rate supports the view that judges are more inclined to intervene if the release date of the prisoner is at stake.

The increased success rate of Category A challenges can also be explained by the judiciary being concerned primarily with the impact of categorisation on a prisoner's prospect of release. This is because a Category A prisoner will not be deemed safe to be released by the Parole Board. As a result, the courts have required a far greater number of procedural safeguards when carrying out a Category A review. Indeed, it is in the field of Category A reviews that the courts have had the greatest impact.

In *R v Secretary of State for the Home Department, ex parte Duggan*,¹²⁵ Rose LJ ruled that because no Category A lifer would ever be considered for release on licence, higher standards of procedural fairness applied to Category A recategorisation decisions. Thus, subject to public interest immunity, a Category A lifer is entitled to know the gist of any fact or opinion affecting his or her categorisation and the reasons for any decision made. This is so that the prisoner can make meaningful representations regarding his or her categorisation and know what steps he or she has to take to achieve a lower security categorisation. It is important to note that Rose LJ only regarded recategorisation decisions

¹²⁵ [1994] 3 All ER 277.

as requiring these minimum standards of fairness because, he said, that any initial categorisation decision was unlikely to affect the date of release because of the tariff length for such a prisoner.

As has been seen, the courts have been instrumental in the development of minimum standards of procedural fairness and it is in the area of security categorisation that the courts have advanced prisoners' rights and prison law more than any other. However, they remain wary of imposing excessive administrative burdens on the Prison Service and ultimately compromising security. This wariness means that the courts require much lower standards of procedural fairness if the liberty of the subject is not directly in question, and judicial fears of compromising security manifest themselves in a cautious approach to violent and sexual offenders.¹²⁶

In *R(Williams) v Secretary of State for the Home Department*,¹²⁷ it was argued that the claimant's exceptional circumstances meant that, in order to satisfy the requirement of fairness, an oral hearing regarding his categorisation and full disclosure of all materials relating to his categorisation, subject to public interest immunity, should be granted. *Williams* was involved in the Parkhurst prison escape of 1995 and it was argued that this in itself constituted an exceptional circumstance requiring an oral hearing. The Court of Appeal dismissed this stating:

'We are less impressed with Mr Owen's submission that the claimant's escape in 1995, and its notoriety, was itself a feature justifying an oral hearing. If so, that would give an escapee a greater opportunity for an oral hearing than a prisoner who had steadily worked his way through his sentence. We do not see why the review team should be obliged to make its procedures more attractive to those who escape and, by comparison at any rate, less advantageous to those who do not.'¹²⁸

¹²⁶ See below for a fuller discussion of judicial approaches to categorisation decisions involving violent and sexual offenders.

¹²⁷ [2002] EWCA Civ 498.

¹²⁸ Para 33.

Judge LJ did, however, accept the argument that a difference of opinion between the Category A Review Team and the Parole Board in the case of a post-tariff life sentence prisoner could constitute an element of an exceptional circumstance. Whilst acknowledging that categorisation reviews and parole hearings were ‘two distinct processes, addressing linked but different questions’, it was accepted ‘that apparent inconsistencies of decision may occasionally happen.’¹²⁹ This does not invalidate the decision of the Category A Committee or the Category A Review Team if they disagree with the Parole Board’s assessment of a prisoner’s categorisation, although in any categorisation review the views of the panel should be taken into account. Indeed it was stated that ‘this does not produce the lamentable consequence that the recommendations of the panel are irrelevant to the categorisation decision... it was rightly accepted that these must always be considered by the review team.’¹³⁰

Where there is a difference of opinion between the bodies, however, an exceptional circumstance may arise, requiring an oral hearing and full disclosure. The court was concerned that a post-tariff life sentence prisoner ‘may be trapped in an unending process’¹³¹ and the way to mitigate this risk would be to allow the prisoner, in exceptional cases, access to all the material available to the review team and be permitted an oral hearing. It is abundantly clear from the case that the court was only concerned with Williams’ prospects of release. A difference of opinion between the Parole Board and the review team was not sufficient in itself to constitute an exceptional circumstance, but could be sufficient when combined with the fact that Williams was a Category A prisoner whose release would be practically impossible unless his categorisation was downgraded.

¹²⁹ Para 27.

¹³⁰ Para 30.

¹³¹ Para 31.

It was even stated that ‘the review team failed to recognise the special circumstances of this case. At the risk of repetition, the claimant was a post-tariff life sentence prisoner.’¹³²

The effect of *Williams*, therefore, is that being a post-tariff life sentence prisoner is a key element in determining whether there are exceptional circumstances requiring an oral hearing. This is because in these circumstances categorisation has a direct effect on a prisoner’s prospects of release and only in these circumstances would an exceptional circumstance warrant an oral hearing.

Nevertheless, an oral hearing is not automatically required just because a prisoner’s circumstances fulfil the requirements of a *Williams* exceptional circumstance. Thus in *R (Downs) v Secretary of State for Justice*,¹³³ in which there was a disagreement between two psychologists as to Downs’ suitability for the Sex Offenders Treatment Programme, it was held that an oral hearing must add something to proceedings for a *Williams* exceptional circumstance to arise. Downs was a Category A prisoner who was approaching the end of his tariff. In the circumstances Burton J held that an oral hearing was not required as there was nothing to be gained from cross-examining the psychologists and the subsequent decision was deemed to be procedurally fair.

The rationale in *Williams* was further explored in *R (Hirst) v Secretary of State for the Home Department*.¹³⁴ Hirst was a Category B post-tariff life sentence prisoner who argued that he was entitled, as a matter of fairness, to be informed of the reasons for his recategorisation from Category C to Category B and that he should have been able to make representations before the decision was made. The thrust of the case was concerned with

¹³² Para 32.

¹³³ [2010] EWHC 3594 (Admin).

¹³⁴ [2001] EWCA Civ 378.

the eventual release of the prisoner and the fact that the retrograde categorisation impeded his progress through the prison system. This is highlighted by the following extract:

‘Although it appears to me that it cannot be said that a prisoner would not be released on licence for the first time from Category B in any circumstances, it would be highly unusual if this were to be done. Indeed, it would be unusual if it were to be done from Category C. It follows therefore that the recategorisation of a prisoner from Category C to Category B significantly affects the prospects of his being released on licence. The reason is obvious. It is of the greatest assistance to the Parole Board, in assessing the risk that a prisoner poses to the public, to have information as to how that prisoner has performed under the less confined circumstances of an open prison. Without the help of seeing how the prisoner reacts to an open prison, it is difficult for the Parole Board accurately to assess the degree of risk.’¹³⁵

It was accepted that, as a post-tariff lifer, a retrograde categorisation from Category C to Category B would delay his release by at least two years. Lord Woolf stated:

‘The obligations of fairness in those circumstances should involve considerable safeguards of his position. He has, as Mr Fitzgerald submitted, a special status, having been detained well beyond his tariff period.’¹³⁶

May LJ was explicit in limiting the class of prisoner to whom these increased standards of procedural fairness applied stating:

‘I would wish to emphasise ... that this case relates, and relates only, to prisoners serving sentences of discretionary life imprisonment who have served the tariff part of their sentence in full. These prisoners are in a special position because, as has to my mind been demonstrated, a regression from Category C to Category B will very probably have a material effect on the prisoner's eventual release date.’¹³⁷

The same point was emphasised by *R (McLeod) v HM Prison Service*.¹³⁸ The claimant argued that he should have been given reasons for his retrograde categorisation from Category D to Category C and the opportunity to make representations prior to his recategorisation. The claimant, unlike Hirst, was a determinate sentence prisoner. Newman J stated that:

¹³⁵ Para18.

¹³⁶ Para 19.

¹³⁷ Para 29.

¹³⁸ [2002] EWHC 390 (Admin).

‘The adverse consequences to a lifer whose tariff period has expired are obviously significantly greater than the impact which recategorisation will have upon a prisoner serving a determinate sentence. That... is as true in relation to any determinate sentence. The effect of the recategorisation is that the prisoner will be moved to stricter security conditions but that change in the quality of conditions cannot be in any way approximated to the sort of consequences which the court had in mind in *Hirst*.’¹³⁹

The case of *R (Palmer) v Secretary of State for the Home Department*¹⁴⁰ similarly seeks to limit and curtail the effects of *Hirst*. Collins J stated that it would place too great an administrative burden on the Prison Service if all prisoners were entitled to make representations before a categorisation decision is made. He accepted that, with life sentence prisoners and Category A prisoners, different minimum standards of fairness applied but that these were special classes of prisoner. For other classes of prisoner, he considered it sufficient that prisoners had the opportunity to appeal their categorisation if they so wished.

This again demonstrates that the judges are less sympathetic to prisoners whose categorisation only impacts on the conditions of their imprisonment, not on their eventual release date. The majority of determinate sentence prisoners are automatically released on licence when they have served half of their sentence.¹⁴¹ Newman J in *McLeod* was of the opinion that, with the exception of Category A, a prisoner’s security category has little effect on a prisoner’s eventual prospect of release. The decision in *Palmer* further suggests that the judges are solely concerned with the impact of categorisation on a prisoner’s

¹³⁹ Para 24.

¹⁴⁰ [2004] EWHC 1817 (Admin).

¹⁴¹ The Criminal Justice Act 2003 provides that all prisoners sentenced for crimes committed on or after the 4th April 2005 to a term of imprisonment of twelve months or more are automatically released on licence when they have served half of their sentence. As the ‘custody plus’ provisions for prisoners sentenced to less than twelve months imprisonment have not been enacted, the relevant statute for such prisoners is the Criminal Justice Act 1991. This provides that all prisoners serving less than 12 months are released unconditionally when they have served half of their sentence. The Criminal Justice Act 1991 governs the release regime for all prisoners sentenced for offences committed between the 1st October 1991 and the 4th April 2005. It provides that all prisoners serving between four and fifteen years are eligible for release on licence when they have served half of their sentence and are automatically released on licence when they have served two thirds of their sentence. Prisoners serving fifteen years or more are eligible for release on licence when they have served half their sentence, however there is no provision for automatic release on licence for such prisoners.

eventual prospects of release. This seems an extraordinary stance to take. Indeed, the authors of *Prison Law* thought that ‘the impact on prospects of release may in many cases be little different for the two categories of prisoner.’¹⁴² This was certainly the scenario in *McLeod*. The statutory regime governing McLeod’s release was the Criminal Justice Act 1991. As he was sentenced to ten years’ imprisonment, he was part of a class of determinate sentence prisoner whose date of release could be determined by the Parole Board. Indeed, at the time of the judgment, McLeod had been eligible for release on licence for thirteen months and was seven months away from his non-parole release date. Given the impact that a prisoner’s security category can have on the Parole Board’s assessment of whether he or she is safe to be released on licence, McLeod’s recategorisation decision could have had a material impact on his date of release.

Although it has been suggested that the courts are becoming more willing to accept that the impact that recategorisation has on prisoners may require higher standards of procedural fairness,¹⁴³ this does not seem to be the case for determinate sentence prisoners. The courts have consistently intervened only when a prisoner’s prospects of release or release date may be compromised by a categorisation decision. Nevertheless, the judges have not accepted that a prisoner’s security category materially affects the prospect of parole for a determinate sentence prisoner. Furthermore, it has been argued throughout this chapter; the courts are not concerned with the impact that categorisation has on the regime that a prisoner experiences.

It is submitted that the authors of *Prison Law* are correct in their assertion ‘that much of the reasoning in *Hirst* should logically be of general application.’¹⁴⁴ Nevertheless, the courts have declined to follow that route. It is suggested that the only explanation for this

¹⁴² S Livingstone et al (2008), para 4.16 fn 35.

¹⁴³ S Livingstone et al (2008), para 4.16.

¹⁴⁴ S Livingstone et al (2008), para 4.16.

is that the judges want to limit the challenges that can be brought against categorisation decisions and accordingly allow the prison authorities to make Category B-D decisions for determinate sentence prisoners with minimal supervision of the levels of procedural fairness employed. Indeed, no prisoner in this class has successfully argued that his or her categorisation was procedurally unfair.

The case of *R (Mohammed Ali) v Director of High Security Prisons*¹⁴⁵ might seem to be an exception to this trend. The judge in *Mohammed Ali* differentiated the case from *R v Secretary of State for the Home Department, ex parte Peries*¹⁴⁶ because having a high escape risk classification (ERC) had an effect on the prisoner's prospects of parole, in addition to having a 'deleterious effect'¹⁴⁷ on the regime that he experienced. Nevertheless, despite having commented on the 'markedly more intrusive regime that applies to prisoners given a high [ERC]',¹⁴⁸ the judge retreated from this position to one concerned primarily with the prisoner's prospect of release. The judge then differentiated Mohammed Ali's situation from the situation in *R (Allen) v Secretary of State for Justice*¹⁴⁹, the only other case concerning procedural fairness and high risk ERC prisoners, on the basis that *Allen* concerned a remand prisoner and consequently his ERC had no bearing on his prospects of release. By differentiating the cases of *Mohammed Ali* and *Allen* in this way, the courts have closed the door on any future challenges being brought against a high escape risk classification decision based on the grounds of conditions of imprisonment.

As was noted earlier, the courts have made great strides in requiring that the prison authorities adhere to the values of judicial review, such as formality and accountability in

¹⁴⁵ [2009] EWHC 1732 (Admin).

¹⁴⁶ [1998] COD 150.

¹⁴⁷ Para 17.

¹⁴⁸ Ibid.

¹⁴⁹ [2008] EWHC 3298 (Admin).

decision making.¹⁵⁰ Indeed, the minimum standards of procedural fairness required in categorisation decisions have increased hugely. Nevertheless, the courts have only applied more rigorous standards to cases in which the prospect of a prisoner's release is in question. This means that these standards are only imposed in relation to a very small minority of prisoners, and the manner in which the courts have implemented this does not seem to be convincing. It is unfortunate that the courts have not accepted the impact that categorisation can have on a determinate sentence prisoner's parole date. The fact that no determinate sentence prisoner in Categories B to D has successfully argued that greater minimum standards of procedural fairness apply to their categorisation decision provides a good illustration of the fact that judges are not concerned with the impact of categorisation on prisoners' conditions of imprisonment.

3.4. Theme 3: Judges tend to support the prison authorities when prisoners whose index offences are violent or sexual challenge their categorisation decision.

The statement that 'a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication'¹⁵¹ applies to all prisoners, yet prisoners whose index offences are violent and/or sexual tend to be substantially less successful than prisoners whose index offences are not.

In principle, a prisoner's index offence may not always be relevant when judges decide categorisation cases. For example, in *R (Lord) v Secretary of State for the Home Department*¹⁵² which was decided on the basis of the Data Protection Act 1998 and *R (Vary) v Secretary of State for the Home Department*,¹⁵³ which arose due to a change of

¹⁵⁰ S Livingstone (1995).

¹⁵¹ *Raymond v Honey* [1983] 1 AC 1, 10. See also chapter 1.

¹⁵² [2003] EWHC 2073 (Admin).

¹⁵³ [2004] EWHC 2251 (Admin).

categorisation policy by the Home Secretary, it is difficult to see the need to comment on a prisoner’s index offence. It may be that outlining the index offence is a convenient starting point for the judge. In only two cases, *R (Lambert) v Stephen Shaw (Prisons and Probation Ombudsman)*¹⁵⁴ and *G v Secretary of State for the Home Department*,¹⁵⁵ was the index offence not stated in the judgment. In *G* it was possible for the Court of Appeal to rule on the appropriate categorisation for the prisoner without having regard the prisoner’s index offence. It follows that the stating of the index offence may be unnecessary and superfluous in some of the cases.

There is variation in the success rates of categorisation challenges depending on the type of offence committed, as is shown in Table 5:

Table 5: Prisoners’ success rates when challenging their categorisation according to index offence.¹⁵⁶

Type of offence ¹⁵⁷	Number of cases	Number of successful cases	Percentage of cases that were successful.
Murder	18	5	28%
Sexual Offences	12	3	25%
Weapons Offences	7	5	71%
Violent Offences	7	3	43%
Property Offences	4	3	75%
Drugs Offences	3	2	67%
Driving Offences	2	1	50%

¹⁵⁴ [2002] EWHC 2766 (Admin).

¹⁵⁵ [2006] EWCA Civ 919.

¹⁵⁶ The case of *R (Krstic) v Secretary of State for Justice* [2010] EWHC 2125 (Admin) has not been included in this section as the index offences in these cases were unique in the study. Krstic was convicted of genocide, crimes against humanity and violations of the laws and customs of war by the International Criminal Tribunal for the Former Yugoslavia. Not only are the index offences unique amongst the cases in this study but this is the only case where the prisoner was not convicted by an English court. *Krstic* was successful on the basis that the Category A Review Team failed to look beyond the gravity of the index offences when reviewing Krstic’s security categorisation and failed to ask themselves the correct question; was the prisoner highly dangerous to the public.

¹⁵⁷ Although many of these categories are self-explanatory, some need a brief note of explanation. Weapons offences are those where the index offence involved the use of a weapon. Examples include armed robbery, firearms offences or explosives offences. Property offences are those where the index offence was solely of a proprietary or monetary nature. If violence was used in the commission of a property offence, i.e. robbery, then this has been included in the ‘violent offences’ category and not in the ‘property offences’ category. Examples include theft, burglary and fraud. In both of the cases ‘driving offences’ category the index offence was causing death by dangerous driving.

Table 5 shows a considerable difference in the success rates between cases involving murder, sex or violence and those involving property or drugs offences. This supports the proposition that the judges tend to be more sympathetic to prisoners who have committed non-violent offences. There is, however, an anomalous category in Table 5, the success rate of prisoners whose index offence is weapons related.

Many of the cases in the ‘weapons offences’ category were exceptional in nature, and due to the very small numbers of such cases the results may be skewed.¹⁵⁸ The other categories support the general proposition that judges are less inclined to support challenges brought by violent or sexual offenders. The success rates of murder, sexual offences and violent offences categories are substantially lower than those of the property and drugs offences categories. Judges seem more wary of supporting prisoners who are guilty of a violent or sexual offence when they challenge their categorisation decisions. This wariness is normally articulated in terms of risk or security and sometimes in terms of public confidence in the prison system.

Further evidence in support of this proposition is found in the judicial approach to courses undertaken while the prisoner is in prison. Offence-related courses are designed to reduce the risk of re-offending. The courses most frequently referred to in the cases in this study are CALM (Controlling Anger and Learning to Manage), CSCP (Cognitive Self Change Programme), ETS (Enhanced Thinking Skills), TSP (Thinking Skills Programme)¹⁵⁹ and SOTP (Sex Offenders Treatment Programme). The importance of risk reduction courses

¹⁵⁸ These cases include *R (Williams) v Secretary of State for the Home Department* which gave rise to *Williams* exceptional circumstances, *R (H) v Secretary of State for Justice* (in which Cranston J listed five distinct factors that meant that the refusal to grant an oral hearing was contrary to the demands of procedural fairness) and *R (Spicer) v Secretary of State for Justice* (where the judge confessed ‘to having considerable sympathy for the claimant’s situation’ and remarked that the Secretary of State for Justice’s submissions were ‘somewhat faint’).

¹⁵⁹ This is the programme that has now replaced ETS.

was, for instance, stated in *R (Roberts) v Secretary of State for the Home Department*¹⁶⁰

where Elias J held that:

‘It is plainly going to be extremely difficult for some prisoners to satisfy the authorities that the risk has reduced if they fail to do the specific offence directed courses, in the long term this affects their chances of parole... it seems that good behaviour over a period and growing maturity would not, in the vast majority of cases, be likely to be considered enough to demonstrate reduction of risk.’¹⁶¹

It is clear that prisoners who are unable to undertake these courses will have great difficulty in persuading the prison authorities that their risk has reduced and that they are suitable candidates for recategorisation. Since these courses are mainly targeted at violent and sexual offenders, any difficulties in completing them significantly affect the chances of a prisoner being recategorised.

A prerequisite to be admitted on to the SOTP and CSCP courses is an admission of guilt. This means that a prisoner who has been found guilty of a violent or sexual offence who denies his or her guilt will find it ‘considerably more difficult to be able to satisfy the review team that re-categorisation is justified.’¹⁶² It was established in *R (Oyston) v The Parole Board and the Secretary of State for the Home Department*¹⁶³ that parole may not be refused simply because the prisoner denies his or her guilt. However, given the impact that categorisation has on prisoners’ chances of parole, if prisoners exclude themselves from offence related work, this may have the effect of precluding any possibility of parole. Indeed, it was stated by Laws J in *R v Secretary of State, ex parte Hepworth* that:

‘In some cases, particularly cases of persistent violent or sexual crime, a continued denial of guilt will almost inevitably mean that the risk posed by the prisoner to the public or a section of the public if he is paroled either remains high or, at least, cannot be objectively assessed. In such cases the Board is entitled (perhaps obliged) to deny a recommendation.’¹⁶⁴

¹⁶⁰ [2004] EWHC 679 (Admin).

¹⁶¹ Paras 45-46.

¹⁶² Ibid, para 42.

¹⁶³ Unreported, 1st March 2000.

¹⁶⁴ [1996] COD 330; 25 March 1997, CO/2051/91.

It was accepted in *Roberts* that this principle applies equally to categorisation, despite the fact that the considerations of the Parole Board and the Category A Review Team are not identical.¹⁶⁵ It follows that violent and sexual prisoners who deny their guilt will find it very difficult to demonstrate that they are suitable for a lower security category and they are at a considerable disadvantage as a result. In *Roberts* Elias J accepted that:

‘This compounds the injustice for anyone who has suffered the grave misfortune to be wrongly [convicted] of such terrible crime, and there will inevitably be such people. It puts pressure on the innocent to admit guilt in order to facilitate release, or, alternatively, to serve a longer sentence than they would have had to do had they committed the crime and felt properly able to admit guilt. But that seems to me to be inevitable, the system cannot operate unless the verdict of the jury is respected.’¹⁶⁶

The judgment in *Roberts* placed a great deal of weight on the completion of courses. It was argued that, where the review team does not have the benefit of offence-related work to inform its decision, it must give more weight to factors that it can assess, such as good custodial behaviour or courses which are not directly offence-related. This argument was rejected, with Elias J agreeing that ‘if the argument were correct, then it may be beneficial for prisoners to choose not to participate in courses and rely on a sustained period of good behaviour.’ This seems to be a peculiar stance to take. If, and this will be a rare case indeed, a prisoner has been able to demonstrate by a period of good behaviour or ways other than offence-related courses that he or she poses a lower risk, then participating in a course is an unnecessary rubber stamp. Nevertheless, Elias J’s statement does illustrate the importance that judges place on courses for violent or sexual offenders, and this can only operate to the detriment of such prisoners if these courses are not available.

¹⁶⁵ See *R (Williams) v Secretary of State for the Home Department* [2002] EWCA Civ 498.

¹⁶⁶ Para 41.

This is especially unfortunate given judicial deference to decision makers in resource allocation cases.¹⁶⁷ In cases where a course is unavailable to a prisoner, either due to his or her allocation or because there are not insufficient places on the course, a prisoner is in a ‘catch-22’ position¹⁶⁸ in that a prisoner cannot be recategorised without completing the course, but cannot complete the course in his or her current security category. This was the situation in *R (Williams) v Secretary of State for the Home Department*.¹⁶⁹ Although the claimant in *Williams* was successful in arguing for full disclosure and an oral hearing, the catch-22 position was only one factor of many leading to the Court of Appeal’s decision.

The problems of resource allocation and the deference afforded to the decision maker in resource allocation cases are exemplified in the case of *R (Lynch) v Secretary of State for Justice*.¹⁷⁰ Lynch was assessed as unsuitable for the CSCP and CALM programmes and claimed that the refusal to downgrade his categorisation and to deny him the opportunity to address the risk he posed placed him in a catch-22 position. Furthermore, it was stated by the prison authorities that one-to-one work was not available despite it being ‘clearly identified... that this was the appropriate, if not the only possible, way forward for the claimant.’¹⁷¹ This was due mainly to the resource intensive nature of one-to-one sessions and national policy reserving them for rare situations. Although the judge regarded this to be ‘regrettable’,¹⁷² he stated that:

‘It is not for the Court to set about directly or indirectly deciding what resources should be made available for courses, treatment programmes or the like within the prison system, how the inevitably finite resources made available for such purposes by government should be prioritised between different courses and programmes, or between different groups of prisoners.’¹⁷³

¹⁶⁷ See Lord Hoffmann (2002).

¹⁶⁸ This was the phrase used by the Court of Appeal in *R (Williams) v Secretary of State for the Home Department* to describe this scenario.

¹⁶⁹ [2002] EWCA Civ 498.

¹⁷⁰ [2008] EWHC 2697 (Admin).

¹⁷¹ Para 67.

¹⁷² Para 70.

¹⁷³ Para 70.

The judge continued that ‘no statutory duty has been put forward as specifically requiring the defendant to provide such courses or treatment.’¹⁷⁴ This leaves any prisoner who has been convicted of a violent or sexual offence with little recourse against the prison authorities in these circumstances. These difficulties for prisoners in catch-22 situations are further illustrated by Lynch bringing a second case regarding his categorisation two years later.¹⁷⁵ In this second case, the situation was little changed and the claimant remained a Category A prisoner and was unable to partake in risk reduction courses. This second case was also unsuccessful.

It was accepted in *R (H) v Minister for Justice*¹⁷⁶ that a higher degree of risk may be acceptable if a prisoner needs a particular course or training. Nevertheless, any such risk is taken solely at the discretion of the prison authorities and the courts will not intervene and dictate to the Prison Service when situation arises.

*R (Kenealy) v Secretary of State for Justice*¹⁷⁷ is another case in which the claimant denied his guilt. As a consequence of denying his guilt, the claimant was unable to undertake the SOTP and wished to undertake risk reduction work in a therapeutic community. This was impossible given the claimant’s Category A status since the highest security therapeutic community is Category B. Despite the resulting impasse, the judge did not deem this to amount to an exceptional circumstance requiring an oral hearing. The prison authorities clearly did not consider it to be a case where they could exercise their discretion under *H* to permit a higher degree of risk if a prisoner needs training.

¹⁷⁴ Para 74.

¹⁷⁵ *R (Lynch) v Secretary of State for Justice* [2010] EWHC 3622 (Admin).

¹⁷⁶ [2008] EWHC 2590 (Admin).

¹⁷⁷ [2009] EWHC 1503 (Admin).

*R (Brownhill) v Minister of Justice*¹⁷⁸ concerned a vulnerable prisoner who was assessed as a ‘high priority’ to undertake the CALM course in order to achieve recategorisation to a lower security category. When this assessment was made, CALM was not available to vulnerable prisoners in the prison to which the claimant had been allocated and, at the time of the judgment, CALM was not available to any vulnerable prisoners elsewhere within the prison system. Despite the Minister of Justice accepting it ‘was unreasonable to expect this prisoner to transfer to normal location to undertake an offending behaviour course,’¹⁷⁹ the judge remained deferential to the prison authorities, stating:

‘Plainly there are difficulties with regard to the availability of the CALM course... the matter is by no means so stark as to justify this court’s intervention.’¹⁸⁰

The case of *R (Riley) v Governor of HM Prison Frankland*¹⁸¹ was an exceptional case and, although successful, does little to change one’s assessment of the judges’ position regarding the importance of courses, nor their general tendency to defer to the decision maker in such cases. Riley had suffered a stroke and suffered from dysphasia rendering him unsuitable in the risk reduction courses that it was deemed he should participate in. It was held that these circumstances necessitated an oral hearing with the judge stating:

‘This necessarily begs the question whether in reality the claimant continues to pose a serious risk or whether it is simply the case that he cannot demonstrate that this is not so by reason only of his disability.’¹⁸²

The judge held that an oral hearing was required to address this issue fairly. It should be noted that this case was successful merely on grounds of procedural fairness and that this was one successful argument amongst many that were made.¹⁸³

¹⁷⁸ [2008] EWHC 1394 (Admin).

¹⁷⁹ Para 9.

¹⁸⁰ Para 11.

¹⁸¹ [2009] EWHC 3598.

¹⁸² Para 19.

¹⁸³ See Chapter 3.3.

In the case of *R (Wells) v Parole Board*,¹⁸⁴ it was accepted that the Secretary of State had breached his public law duty by failing to provide rehabilitative courses for short term IPP prisoners. Indeed, Lord Hope said the Secretary of State had ‘failed deplorably.’¹⁸⁵ As such, the Parole Board was unable to satisfy itself that the claimants had sufficiently reduced the risk they posed and as a consequence could not direct the claimants’ release. Nonetheless, this was not held to impact on the lawfulness of the claimants’ detention. The importance of courses to the Parole Board was acknowledged by Lord Brown: If a prisoner is unable to undertake courses to demonstrate his or her safety for release, then any review by the Parole Board is rendered an ‘empty exercise.’¹⁸⁶ Indeed, Lord Brown asks:

‘What is the point of having a Parole Board review of the prisoner’s dangerousness once his tariff period expires unless the Board is going to be in a position then to assess his safety for release?’¹⁸⁷

Nevertheless it was held that, despite the breach of duty by the Secretary of State, the Parole Board was not in breach of Article 5(4) of the ECHR.¹⁸⁸ It was held that all Article 5(4) required was that the Parole Board should ‘speedily decide whether the prisoner continues to be lawfully detained.’¹⁸⁹ This is in spite of the fact that, if the prisoner has been unable to undertake any courses to demonstrate his or her reduction in risk, any review will be ‘an empty exercise.’ Although *Wells* is a case concerning the Parole Board and a prisoner’s release on licence, as opposed to a prisoner’s security categorisation, it is important in a categorisation context. As explained above, a failure to undertake courses can frustrate any attempt by a prisoner to achieve a lower security category. Even if such courses are unavailable due to a breach of duty by the Secretary of State, there is no

¹⁸⁴ [2009] UKHL 22.

¹⁸⁵ Para 3.

¹⁸⁶ Para 59.

¹⁸⁷ Para 59.

¹⁸⁸ Which states that: ‘Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.’

¹⁸⁹ Para 60.

remedy available to the prisoner. The courts have shied away from intervening and requiring courses to be made available for specific prisoners.¹⁹⁰ Following the decision of the House of Lords in *Wells*, it is inconceivable that prisoners would be able to insist that courses be made available to him or her so that they may achieve a lower security categorisation. The House of Lords ruled that, where courses were unavailable to a prisoner, even in breach of duty by the Secretary of State, there was no relief or remedy possible. Although security categorisation has an effect on a prisoner's prospects of release on licence, it is not always determinative. It is highly unlikely, therefore, that a prisoner will be able to argue that a categorisation decision was unlawful because he or she has not had the opportunity to demonstrate a reduction in risk, even in the most extreme circumstances.

The judges' approach to courses, given the chronic unavailability of these to prisoners, has the consequence that violent and sexual offenders may spend even more time in prison.¹⁹¹ This is because courses have been deemed necessary for a prisoner to demonstrate that he or she has reduced the risk they pose to the public. While the current situation is unsatisfactory, the judges' approach cannot be said to demonstrate any particular moral bias against sexual or violent offenders themselves. Any delay in a prisoner being released is as a consequence of the administrative aspect of punishment as opposed to any further judicial sanction. The judicial approach to courses does, however, underline the deferential approach adopted by judges towards the prison authorities regarding matters of risk and dangerousness.

Even if one accepts that the judicial approach to courses does not illustrate any particular bias against sexual or violent offenders, there is some evidence that judges do allow the

¹⁹⁰ See *R (Lynch) v Secretary of State for Justice* [2008] EWHC 2697 (Admin).

¹⁹¹ This is especially the case given the greatly increased number of IPP sentences awarded under the Criminal Justice Act 2003.

seriousness or gravity of the original offence to influence their judgment on what should be an objective assessment of law and risk reduction. This is achieved by taking into account judicial views of public confidence in the criminal justice system. In *R (Payne) v Secretary of State for the Home Department*,¹⁹² Moses J held that the basis of public confidence in the criminal justice system were legitimate grounds not to transfer a prisoner convicted of murder to open conditions six years before the prisoner was eligible for release on licence. He stated:

‘Public confidence in the criminal justice system demands that during the tariff period imprisonment should have, at least in part, the quality of punishment and deterrence.’¹⁹³

Moses J was clearly of the view that Payne had not yet been sufficiently punished for her crimes and stated that, even if she were completely suitable for open conditions, she should not be transferred early. He even went so far as to suggest that she would join a class of prisoner who had completed their rehabilitative work and were ‘marking time’¹⁹⁴ until they were closer to the expiry of their tariff before being considered for transfer to an open prison.

The importance of taking public confidence in the criminal justice system into account was confirmed by PSI 45/2004 and is now set out in Paragraph 14 of PSI 03/2009. Subsequent case law¹⁹⁵ and PSI 03/2009 itself make it clear that only the damage that a prisoner absconding from prison would cause to public confidence is a relevant consideration when deciding on matters of public confidence. Punitive matters should not be taken into account when deciding categorisation cases and *Payne* must surely now be viewed as an exception to the general approach taken by the judges.

¹⁹² [2004] EWHC 581 (Admin).

¹⁹³ Para 16.

¹⁹⁴ Para 31.

¹⁹⁵ *R (Bryant) v Secretary of State for the Home Department* [2005] EWHC 1663 (Admin); and *R (Smith and Mullally) v Governor of HMP Lindholme* [2010] EWHC 1356 (Admin).

Judges' reluctance to support challenges brought by violent or sexual offenders stems from a disinclination to engage in the internal management of the prison system rather than any conscious discrimination against the 'worst' offenders. In the context of categorisation decisions, the significantly lower success rate is due to the requirement of courses to demonstrate a prisoner's reduction in risk and judges refusing to rule that certain courses must be made available to particular prisoners. In essence, judges are showing deference in what is essentially a matter of resource allocation. The courts have constitutional competence to decide the matter, but the courts instead defer to the prison authorities on the basis that they have better institutional competence to decide how best to allocate limited resources.¹⁹⁶

¹⁹⁶ The following chapter contains further discussion of this issue. See also J Jowell (2003b) for a fuller explanation of these terms and an excellent analysis of the debate.

CHAPTER FOUR

Evaluating judicial tendencies in categorisation decisions.

4.1. Judges are deferential to the prison authorities in categorisation decisions.

There is a perception among commentators on prison law that judges are unwilling to uphold prisoners' interests in security categorisation decisions. This is illustrated by comments such as: 'categorisation decisions are notoriously difficult to challenge',¹ 'the courts have proved reluctant to grant applications for judicial review in this area'² and 'this judicial reluctance has extended to powers to classify prisoners.'³ The first theme supports this perception and Griffith's thesis in *The Politics of the Judiciary*, that judges tend to side with the executive instead of upholding individual rights.

This perception may not seem at first glance to be so strongly supported. After all, 26 of the 57 cases included in the survey were successful - a success rate of 46 per cent in security categorisation cases over the ten year period examined in this thesis. In 2009, out of a total of 495 applications for judicial review, 192 applications were allowed,⁴ a success rate of 39 per cent. However, the vast majority of security categorisation cases in the survey were funded by legal aid and, as was explained in the third chapter, prisoners are subject to very stringent requirements if they are to be eligible for legal aid funding. One of the main requirements is that the case must be more likely to succeed than not.⁵ As a consequence it would be expected that the success rates for categorisation cases would be high as cases which are unlikely to be successful should not be able to be brought in the first place.

¹ H Arnott and S Creighton, 'Recent Development in Prison Law' bulletin.

² S Livingstone (1995), p173.

³ J Griffith (1997), p172.

⁴ Ministry of Justice (2010), p173.

⁵ Legal Services Commission Volume 3: Funding Code 5.7.2 available.

http://www.legalservices.gov.uk/docs/civil_contracting/Funding_code_criteria_Jul07.pdf accessed 15/06/10.

Writing on the topic of prisoners' rights generally, Dirk van Zyl Smit stated:

'While extreme deference to the executive is rare in matters where liberty is directly involved... the position is very different where prisoners seek judicial review of the administrative decisions of the prison authorities that affect substantive conditions of imprisonment. Although such decisions are subject to judicial review too, in this area the courts have continued to defer markedly to the judgement of prison authorities.'⁶

Does the judicial tendency to side with the prison authorities over prisoners in categorisation decisions equate to the sort of deference that van Zyl Smit is referring to in the above passage? Deference does not refer exclusively to the doctrine of judicial deference in judicial review, but also refers to a general reluctance to review the activities of the Prison Service. Writing primarily on the subject of medical negligence, Lord Woolf was of the opinion that the courts had been excessively deferential to the medical profession.⁷ This thesis argues that the courts have shown a high level of deference to the prison authorities in three ways. Firstly, the courts have limited any examination of categorisation decisions to judicial review. Secondly, the courts have found that no convention rights are engaged by the categorisation process, hence limiting any substantive review of the decision to irrationality.⁸ Thirdly, the courts, when applying the test of irrationality, use a light touch standard of review instead of applying anxious scrutiny to the decision.⁹

A central plank of the argument that the courts afford the prison authorities a high level of deference in categorisation decisions is the manner in which the courts have limited challenges against categorisation decisions to challenges by way of judicial review.

⁶ D van Zyl Smit (2007), p574.

⁷ Lord Woolf (2001).

⁸ See, for example, *R (Manjit Sunder) v Secretary of State for the Home Department* [2001] EWCA Civ 1157.

⁹ T Poole (2010).

Although *R v Deputy Governor of Parkhurst Prison, ex parte Hague*¹⁰ had the effect that all operational and managerial decisions affecting prisoners were amenable to judicial review, the court ruled that a prisoner could not sue the Prison Service for false imprisonment whilst lawfully incarcerated.¹¹ This was decided on the basis that a prisoner has no residual freedom of movement and is lawfully detained. On the subject of being placed in segregation, Lord Bridge stated:

‘The prisoner is at all times lawfully restrained within closely defined bounds and if he is kept in a segregated cell at a time when, if the rules had not been misapplied, he would be in the company of other prisoners in the workshop, at the dinner table or elsewhere, this is not the deprivation of his liberty of movement, which is the essence of the tort of false imprisonment, it is the substitution of one form of restraint for another.’¹²

It follows that a prisoner cannot sue the prison governor for being held in greater conditions of security as a result of being wrongly categorised. A prisoner who has lawfully been committed to prison by a court has no residual liberty of movement and so has suffered no wrong if he or she is over-categorised. Nor can a prisoner sue for false imprisonment because he or she has served longer in prison as a result of being wrongly categorised. This is because the prisoner is still lawfully detained in spite of any delay on his or her release on the basis of his or her categorisation. As a consequence, possible challenges are limited to judicial review.

A degree of deference to the authorities is evident in judicial review cases. Judicial review is not an appeal: it is primarily concerned with the legality of a decision and whether the correct procedure has been followed when arriving at a decision.¹³ The merits of the decision itself will only be overturned if the decision is deemed to be irrational or, if

¹⁰ [1992] 1 AC 58.

¹¹ This position was confirmed in *Iqbal v Prison Officers Association* [2009] EWCA Civ 1312 where a prisoner, who would otherwise have been able to leave his cell, was confined to his cell as a result of prison officers taking unlawful strike action. It was held that a prisoner has no right, as against the governor, to be let out of his cell.

¹² At p164.

¹³ See Feldman (2009), chapter 14.

fundamental rights are affected by the decision, the interference with a prisoner's fundamental rights is deemed to be disproportionate to the legitimate aim being pursued.

It should be noted that this limitation is self-imposed by the judges. They have consistently refused to accept any civil actions in a categorisation context, and this follows the judges' general reluctance to overrule low level decision making within the prison system.¹⁴ This refusal, limiting challenges to judicial review, means that the judges can continue with their hands-off approach only being prepared to overturn the substantive categorisation decision if it is shown to be irrational.

As *Hague* excludes the possibility of a prisoner possessing any residual liberty, it also rules out one argument for applying a proportionality standard of review for categorisation decisions. The decision in *R (Daly) v Secretary of State for the Home Department*¹⁵ has had the effect that any intervention affecting an ECHR right has to be proportionate to the legitimate aim being pursued.¹⁶ This does not equate to a full consideration of the merits of the decision. However, it is a substantially higher level of scrutiny and review than the weak test of irrationality. By consistently ruling that a prisoner has no residual freedom of movement, the courts have excluded Article 5, the right to liberty and security of the person, from the categorisation context. Indeed, in *R v Secretary of State for the Home Department, ex parte Manjit Sunder*,¹⁷ Tuckey LJ explicitly stated that, in the context of security categorisation, 'Article 5 is not engaged because the applicant's continued detention is under the original sentence of life imprisonment.'¹⁸ The ruling in *Manjit Sunder* was made in spite of repeated judicial acknowledgement that categorisation

¹⁴ See S Livingstone (1995), pp173-175.

¹⁵ [2001] 2 AC 532.

¹⁶ The actual outcome of *Daly* was decided the common law principle of legality, as set out in *R v Home Secretary, ex parte Leech (No2)* [1994] QB 198 and *R v Home Secretary ex parte Simms* [2000] 2 AC 115. The principle of legality is still applicable to cases decided under the Human Rights Act. Indeed, Lord Bingham asserted that he would have decided the case the same way if he had applied Article 8 ECHR.

¹⁷ [2001] EWCA Civ 1157.

¹⁸ Para 6.

directly affects a prisoner's prospect of release.¹⁹ It is difficult to reconcile the exclusion of Article 5 from the area of security categorisation with the judicial acknowledgement that categorisation has a direct impact on a prisoner's release date.

As a consequence, categorisation decisions must surely engage Article 5, and the standard of substantive review for post-tariff prisoners and Category A prisoners then should be the standard of proportionality as laid down in *Daly*. The current judicial stance that Article 5 is not engaged in the context of categorisation has been branded illogical.²⁰ Indeed, it is submitted that the judges' approach in keeping Article 5, and hence higher standards of review, out of the categorisation context is little more than judicial deference by the back door. That is to say, instead of accepting proportionality as the standard of review applicable and then deferring to the decision maker, the judges have gone to great lengths to ensure that Article 5 is not engaged and then applying a light touch review standard when examining the reasonableness of the decision.²¹

The limiting of the ways in which a prisoner may challenge his or her categorisation may seem at odds with the increasing justiciability of prison matters. The case of *Hague* itself demonstrates that the two positions do not have to be mutually exclusive. *Hague* limited the possible challenges a prisoner may bring against the prison authorities but opened up all managerial and operational decisions to judicial review. This approach is not limited to security categorisation. Writing in the context of judicial deference regarding prerogative powers, Poole calls this the 'two-step': He remarks:

'This two-step will be familiar to those who are conversant with the cases... the courts have moved away from a previous stance whereby these matters were taken to be non-justiciable to a more subtle position in which review is open, even invited, but the exercise of that review is light touch in the extreme.'²²

¹⁹ See theme 2.

²⁰ S Livingstone et al (2008), para 4.28.

²¹ *R v Ministry of Defence, ex parte Smith* [1996] QB 517.

²² T Poole (2010), p103.

In effect, the courts have maintained the same position - that they will not intervene in such matters. Now, however, there is an appearance of justiciability. This is clearly the case in the context of security categorisation. Since *R v Board of Visitors of Hull Prison, ex parte St Germain*,²³ the authoritarian and arbitrary world of the prison has been opened up to judicial scrutiny. Nevertheless, the courts have limited the ways that a prisoner may bring a challenge so that they can apply the lightest possible scrutiny of decisions. Hague was transferred and segregated under Rule 43²⁴ so the prison authorities could punish him without having to bring disciplinary charges which might have embarrassed members of the prison service. There is no reason why an unscrupulous member of the Prison Service could not use categorisation in a similar manner to circumvent safeguards that are in place for disciplinary matters. As long as the correct procedure has been followed, any review of the decision itself or the reasoning for the decision will be limited to reviewing whether the decision was irrational. This state of affairs was upheld in *R (Bourgass and Hussain) v Secretary of State for Justice*,²⁵ here the information relating to the prisoner's segregation had been withheld from him for security reasons. While admitting that this made it 'difficult for Mr Bourgass to challenge the intelligence' leading to his segregation, Irwin J found the decision to be procedurally sound. Furthermore, the availability of judicial review to challenge the decision meant that the requirements of Article 6 ECHR had been met.

The manner in which the justiciability of categorisation decisions have been approached has had the effect that judicial review, and the substantive standard of unreasonableness, is in effect the only standard that can be applied. In itself, this could amount to the judges adopting a hands-off approach to categorisation decisions. Nevertheless, the judges in this

²³ [1979] QB 425.

²⁴ Under the Prison Rules 1999, the provisions formally contained in Rule 43 are now found in Rule 45.

²⁵ [2011] EWHC 286 (Admin).

survey of cases have gone further and have explicitly adopted a deferential approach to the decision maker in categorisation cases. Silber J in *R (M) v Secretary of State for Justice*, for example, stated:

‘If I had any doubt about my conclusion that the decision to retain the claimant in closed conditions was not *Wednesbury* unreasonable I would have accorded some deference to the Secretary of State even though this was a case calling for intense scrutiny.’²⁶

Despite the considerable changes to the legal landscape since the last edition of *The Politics of the Judiciary*²⁷ was published fifteen years ago, it would seem that judicial attitudes towards prisoners and the prison authorities are little changed: the prison authorities know best and the courts remain reluctant to interfere in the internal management of prisons despite the considerable impact that categorisation decisions can have on a prisoner.

4.2. The degree of judicial deference in categorisation decisions is unnecessary and unjustified.

The mere existence of deference, despite the strong criticisms of the doctrine by T.R.S. Allan,²⁸ is not necessarily problematic. Indeed Kavanagh has endeavoured to demonstrate ‘that one can share Professor Allan’s belief that the courts can (and should) provide a valuable mechanism for protecting rights and the rule of law, whilst nonetheless admitting and articulating the limits of the judicial role which underlie the doctrine of deference.’²⁹ When contemplating the appropriate degree of deference that should be shown, judges need to ask a number of questions including: ‘do we [the courts] have enough expertise, competence and/or legitimacy to interfere with this decision.’³⁰ It is suggested here that the

²⁶ [2009] EWHC 768.

²⁷ J Griffith (1997).

²⁸ See T Allan (2006).

²⁹ A Kavanagh (2010), p249.

³⁰ A Kavanagh (2010), p250.

courts have answered this question incorrectly and have adopted an overly deferential approach. Indeed, the criticism contained in this thesis is not that judges are deferential *per se*, rather that they are overly deferential to the prison authorities in their approach to security categorisation cases.

The doctrine of judicial deference has been justified on two grounds: the courts lack democratic legitimacy - therefore they lack the constitutional competence to decide on certain issues - and secondly, the judiciary lacks the training and expertise to adequately weigh the issues at hand - therefore it lacks the institutional competence to decide on certain issues.³¹

Although Jowell argues persuasively that the courts should not defer on the grounds of constitutional competence, he nevertheless accepts that there may be occasions when it may be proper to defer to the executive on the basis of institutional competence.³² The reasons why the courts may lack institutional competence include a lack of expertise, a lack of investigative techniques and the limitations of the adversarial process.³³ The deferential stance of the courts regarding categorisation decisions was underlined in *R v Secretary of State for the Home Department, ex parte McAvoy*³⁴ when, in the context of the reviewability of a categorisation decision, the Court of Appeal stated:

‘It is undesirable - if not impossible - for this court to examine operational reasons for a decision made under that section; and to examine security reasons for decisions made under that section could, in my view, be dangerous and contrary to the policy of that particular statutory provision, which is to confer an absolute discretion, within the law, on the Secretary of State to make such executive decisions as he thinks fit for operational and security reasons.’³⁵

³¹ R Edwards (2002), p859.

³² J Jowell (2003b). Jowell’s position is now the generally accepted position in public law. See Craig (2008), Chapter 18.

³³ P Craig (2008), para 18-048.

³⁴ [1984] 1 WLR 1408 (QB).

³⁵ p1417.

This overtly deferential approach adopted by the Court of Appeal in 1984 should not determine the appropriate manner in which the courts review categorisation decisions today, particularly in a Human Rights Act era. Furthermore, it is suggested that none of the reasons for applying the doctrine of judicial deference mentioned above is applicable in the case of categorisation decisions.

The Court has at its disposal all of the evidence and information used in the original categorisation decision so any lack of investigative techniques should not pose a problem. As was noted earlier, Category A prisoners have the right to make representations before any categorisation decision is made, while there is provision for prisoners to be granted an oral hearing in certain circumstances. Furthermore, following *Chahal v UK*,³⁶ a special advocate may be appointed if revealing intelligence relating to the risk that a prisoner may pose would threaten national security. This means that a fair hearing regarding a prisoner's categorisation can be held without revealing sensitive information to the prisoner. It would seem, therefore, that any review of a categorisation decision can be executed perfectly well within an adversarial system.

It is difficult to understand why judges do not believe themselves to have the necessary expertise to decide on matters of security categorisation. Categorisation is concerned with issues of risk and dangerousness, the same issues that judges deal with on a frequent basis when passing sentence. Indeed, one of the justifications of imprisonment is based on the utilitarian ground of incapacitation as a method of crime reduction.³⁷ Furthermore, considerations of risk in sentencing have been greatly increased by the Criminal Justice Act 2003, section 225 of which grants a sentencing judge the power to order indeterminate detention if the judge deems the offender to be dangerous. In a similar way, issues of risk

³⁶ (1996) 23 EHRR.

³⁷ S Easton and C Piper (2008), para 4.2.4.

and dangerousness will be at the forefront of a judge's mind when deciding whether to grant bail to a person who is accused of a criminal offence. Although serious criminal matters are normally dealt with by the Crown Court, it is judges of the Queen's Bench Division of the High Court³⁸ who preside over the most important and serious criminal cases.³⁹ Indeed, Class 1 offences⁴⁰ are generally heard by a High Court judge and may only be heard by a lower judge if the presiding judge releases the case for trial by such a judge.⁴¹ Similarly Class 2⁴² offences are tried by a High Court judge unless the case is released by the presiding or resident judge to be heard by a lower judge.⁴³ These are the types of cases where issues of risk and dangerousness are especially important considerations during sentencing.

There seems little substance, then, to claims that judges do not have the necessary expertise to decide on the level of risk a prisoner poses and the security necessary to minimise that risk. To the contrary, the judiciary seem especially qualified to make such judgements. A further argument that may be advanced, although not a particularly principled one, is a floodgates argument. That is to say that the courts would be inundated with cases concerning prisoner categorisation. Circumstances when the greatest scrutiny of

³⁸ This is the division which has responsibility for judicial review hearings and hence the division which deals with issues of security categorisation. For the purposes of brevity and to avoid repetition, future references to High Court judges refer to High Court judges of the Queen's Bench Division.

³⁹ <http://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/high-court> and <http://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/crown-court>.

⁴⁰ These offences are misprision of treason and treason felony; murder; genocide; torture hostage-taking and offences under the War Crimes Act 1991; an offence under the Official Secrets Acts; manslaughter; infanticide; child destruction; abortion; sedition; an offence under section 1 of the Geneva Conventions Act 1957; mutiny; piracy; soliciting, incitement, attempt or conspiracy to commit any of the above offences. See *The Consolidated Criminal Practice Direction*, pt III.21.1.

⁴¹ S Bailey, J Ching and N Taylor (2007), para 2-055.

⁴² These are rape; sexual intercourse with a girl under 13; incest with a girl under 13; assault by penetration; causing a person to engage in sexual activity by penetration, where penetration is involved; rape of a child under 13; assault of a child under 13 by penetration; causing or inciting a child under 13 to engage in sexual activity where penetration is involved; sexual activity with a person with a mental disorder, where penetration is involved; inducement to procure sexual activity with a mentally disordered person where penetration is involved; Paying for sexual services of a child where child is under 13 and penetration is involved; Committing an offence with intent to commit a sexual offence, where the offence is kidnapping or false imprisonment; Soliciting, incitement, attempt or conspiracy to commit any of the above offences. See *The Consolidated Criminal Practice Direction*, pt III.21.1.

⁴³ S Bailey, J Ching and N Taylor (2007), para 2-055.

categorisation decisions would be appropriate would only arise in relation to Category A post-tariff prisoners, and, as we have seen, such prisoners constitute a very small proportion of all prisoners. The courts have already imposed higher standards of procedural fairness in situations where they are of the opinion that categorisation has a direct impact on a prisoner's prospect of release. It was considered that the small numbers of prisoners who are Category A post-tariff prisoners would not impose any substantial burden on the prison authorities, and that the consequences of an adverse categorisation decision outweighed the slightly increased administrative inconvenience. If this is the case for HM Prison Service, then surely the same argument is applicable to the courts.

4.3. The implications of the judges' deferential approach to categorisation decisions.

Thus far it has been argued that the judges do afford the prison authorities too much deference in security categorisation decisions and that this approach is not necessary or justified. A high degree of judicial deference to the prison authorities is not limited to the categorisation context and is evident more generally throughout prison law cases.⁴⁴ Van Zyl Smit believes this judicial deference could amount to a deliberate policy, designed to reflect what is perceived to be Parliament's policy not to recognise prisoners' rights.⁴⁵ In truth, any such policy, if such a policy exists, only manifests itself by the silence of Parliament in failing to acknowledge prisoners' rights. But this does not justify the courts' inactions. This approach by the courts is surely erroneous. If Parliament is silent on an issue of fundamental rights, then the courts are free to come to any conclusion they wish.

This judicial deference to the prison authorities has implications, both for prisoners and more widely. These wider implications have even led to questioning whether human rights

⁴⁴ See D Van Zyl Smit (2007), p580.

⁴⁵ D Van Zyl Smit (2007), p580.

standards that were previously accepted as being absolute may not be so. Foster, writing on the judicial regulation of prison conditions, comments that the level of judicial deference shown by both domestic and European courts to the prison authorities regarding Article 3 ECHR⁴⁶ cases has led to a questioning of whether Article 3 does have absolute status.⁴⁷

The most obvious consequence of the judges' deferential approach regarding categorisation challenges is that since some prisoners who may have been wrongly categorised and are unable to effectively challenge their categorisation, they serve longer terms in prison than they would otherwise have had to and with greater restrictions on their liberty than is necessary or justified. It also leaves the categorisation process open to abuse. For example, it may in practice be difficult to prevent categorisation being used as an unofficial disciplinary sanction.⁴⁸

The courts' deferential approach also impacts on prisoners' perceptions of how fairly they have been treated. This is especially important as a low perception of fairness has been linked to discipline and disorder within the prison system.⁴⁹ Since the Woolf Report⁵⁰ was published, prison life and decision making have become more open and fair. This is certainly the case in the context of categorisation where the courts have been instrumental in introducing greater standards of procedural fairness.⁵¹ The categorisation process is now far more transparent, with far greater scope for challenging decisions. Nevertheless, as was noted in Chapter 3, the grounds upon which a categorisation decision may be challenged are limited primarily to the procedural aspects of the decision. Current judicial attitudes to

⁴⁶ Article 3 of the European Convention on Human Rights provides that no one shall be subject to torture or inhuman and degrading treatment and punishment. This article is supposedly absolute and admits no exceptions: *Chahal v UK* (1997) 23 EHRR 413.

⁴⁷ S Foster (2009).

⁴⁸ Such a situation may be analogous to the improper use of Rule 43 as an unofficial disciplinary sanction in *R v Deputy Governor of Parkhurst Prison, ex parte Hague*.

⁴⁹ Home Office (1991); A Liebling (2004), p442-6.

⁵⁰ Home Office (1991).

⁵¹ See Theme 2.

categorisation may not, therefore, satisfy what prisoners perceive to be fair treatment by the prison authorities.

At this point, a brief comparison with the judicial effect on prison discipline may help to highlight the impact that the procedural safeguards that have been introduced by the courts have had on security categorisation. A combination of changes to the Prison Rules and changes required by judicial review and ECtHR judgements have produced far greater standards of procedural fairness in disciplinary proceedings. The effect that these standards have had is mixed to say the least. As Livingstone *et al* state in their chapter on prison discipline:⁵²

‘The development of greater procedural guarantees for disciplinary proceedings heard in prison does not seem to have had much effect on the scale of disciplinary punishment.’⁵³

It is the decision of *Ezeh and Connors v UK*⁵⁴ that has had the greatest impact in field of prison discipline in recent years.⁵⁵ This decision removed prison governors’ powers to award additional days as a punishment for disciplinary infractions. Using the criteria laid down in *Engel v the Netherlands*,⁵⁶ which distinguishes whether an offence should be classified as disciplinary or criminal, the Court held that the awarding of additional days constituted a deprivation of liberty that is characteristic of the punishment for a criminal offence. Consequently, a disciplinary hearing which results in additional days being awarded would have to comply with the requirements of Article 6 ECHR. This approach

⁵² S Livingstone et al (2008), Chapter 9 see especially paras 9.77 - 9.79.

⁵³ Ibid, para 9.77.

⁵⁴ (2003) 39 EHRR1.

⁵⁵ Following this decision the Prison Rules, the Young Offender Institution Rules and PSO 2000 (*The Prison Discipline Manual*) were amended.

⁵⁶ (1976) 1 EHRR 647. In this case the ECtHR laid out three factors that govern whether, in the context of military adjudications, would determine whether a charge was disciplinary or criminal in nature. The three factors are: the domestic classification of the offence as criminal or disciplinary, the whether the offence would ordinarily appear in a criminal code, and the nature and severity of the penalty that could be applied. These criteria were adopted to determine whether a charge was disciplinary or criminal in the prison adjudication context by the ECtHR in *Campbell and Fell v UK* (1985) 7 EHRR 165.

has been confirmed in *Black v UK*⁵⁷ and *Young v UK*.⁵⁸ *Ezeh and Connors v UK*, is highly unlikely to apply to indeterminate sentence prisoners as they have no right to be released at the end of their tariff.⁵⁹ This is because indeterminate sentence prisoners are not susceptible to the imposition of additional days as punishment.⁶⁰ In *Tangney v Governor of Elmley Prison*, the claimant argued that, although additional days could not be imposed, the consequence of being found guilty of assault could impact on his eventual date of release and therefore Article 6 should be engaged. This argument was rejected by the Court of Appeal on the basis that Tangney's parole decision would be made by the Parole Board and not the prison governor. Furthermore, any decision by the Parole Board not to release the claimant would be on the basis of the risk the prisoner posed to the public and not as a punishment for this offence.⁶¹ Although the Court did not rule out the possibility of an indeterminate sentence prisoner being able to claim that Article 6 should be invoked by a disciplinary hearing, it was held to be 'difficult to envisage circumstances in which criterion three [of the *Engel* criteria] would be met in the case of a lifer.'⁶²

The procedural safeguards introduced as a consequence of the decision of *Ezeh and Connors*⁶³ have led to a 'striking'⁶⁴ reduction in the use of additional days as a punishment.⁶⁵ This has resulted in *Livingstone et al* noting:

'What the dramatic reduction [in the use of additional days as a punishment] also underscores is the impact that procedural guarantees... can have on the life and liberty of prisoners.'⁶⁶

⁵⁷ (2007) 45 EHRR 25.

⁵⁸ (2007) 45 EHRR 29.

⁵⁹ See *Tangney v Governor of Elmley Prison* [2005] EWCA Civ 1009.

⁶⁰ In this case the punishment imposed was that of seven days cellular confinement for each of the offences committed.

⁶¹ This is a similar stance to the judicial approaches in categorisation decisions. The courts are less willing to intervene the more consequential and less direct the impact of an action on the deprivation of a prisoner's liberty.

⁶² Para 25.

⁶³ (2003) 39 EHRR 1.

⁶⁴ S *Livingstone et al* (2008).

⁶⁵ The use of additional days as a punishment dropped from a rate of 124 awards of additional days per 100 prisoners in 1995 to 16 additional days per 100 prisoners in 2005. See S *Livingstone et al* (2008), para 9.77.

Prisoners had claimed that the use of additional days as punishment was far too frequent and often unmerited. Livingstone *et al* suggest that the drop in the awards of additional days may imply that indeed this was the case and that the increased procedural safeguards have led to the vast reduction in the use of additional days.

It is clear that, while the procedural safeguards that have been introduced have had a positive impact, progress has been limited. The scope of the decision of *Ezeh and Connors* has been limited to circumstances where the liberty of the prisoner is directly at stake.⁶⁷ This created a ‘two tier system’ in which cases which engaged Article 6 were required to meet the requirements of a fair and impartial trial.⁶⁸ The case of *R (King) v Secretary of State for Justice*⁶⁹ has extended the remit of Article 6 to all disciplinary proceedings where prisoners’ civil rights, such as freedom of association and the right to private and family life, are at issue.⁷⁰ This application of Article 6 is a ‘soft’ application: all that is required to satisfy the Article 6 requirements is that the governor reaches an impartial conclusion and that the High Court has jurisdiction to review the impartiality of the governor and the fairness of the disciplinary hearing. Consequently, Foster is surely correct in his prediction that the decision in *King* ‘should not impact greatly on the existing two-tiered disciplinary process.’⁷¹ It is likely that even if categorisation decisions are held to engage Article 6, any such application of Article 6 would be soft, and thus be satisfied by the supervisory jurisdiction offered by judicial review. As such the impact of Article 6 on categorisation would probably be similarly limited.

⁶⁶ S Livingstone et al (2008), para 9.77.

⁶⁷ This is similar to the judicial approaches to prisoner security categorisation as illustrated by Theme 2.

⁶⁸ S Foster (2010) and S Foster (2011).

⁶⁹ [2010] EWHC 2522 (Admin).

⁷⁰ This position was confirmed in *R (Bourgass and Hussain) v Secretary of State for Justice* [2011] EWHC 286 (Admin).

⁷¹ S Foster (2010).

In the categorisation context, the safeguards that have been introduced and enforced by the courts, notably the gisting system, have curbed some of the worst excesses of the system. Some of the issues that persist within the prison discipline system illustrate similar problems that may also exist in the context of categorisation. Livingstone *et al* note that, even with additional safeguards, there is little reason why prisoners should not believe that too many ‘wrongful disciplinary punishments’⁷² are handed out by governors. Indeed, Livingstone *et al* believe that this perception has not changed since the 1980s, before the introduction of many of the procedural safeguards. Given that the changes introduced into the categorisation process are also procedural, if prisoners’ perceptions of the fairness and correctness of disciplinary measures have not improved, then there is reason to think that the same may be true of categorisation.

4.4. The limiting effect of judicial deference in categorisation decisions on the development of prisoners’ rights.

It was noted in Chapter 1 that there is very little statutory provision regarding prisoners’ rights. Indeed, as Lazarus states, ‘England is without a statutory code of prisoners’ rights and an overarching systematic conception of prison administration.’⁷³ Instead, it has been left to the judges to fill this void and in that sense judicial attitudes towards prisoners are especially important. This is especially so since the coming into force of the Human Rights Act, under which judges ‘have a legislative duty to determine the extent of Convention rights protections within the custodial sphere.’⁷⁴

As has been noted, the judiciary have focused on procedural matters in the categorisation cases and have tended not to engage with the merits of the categorisation decision itself.

⁷² Para 9.77.

⁷³ L Lazarus (2004), p128.

⁷⁴ L Lazarus (2006), p739.

While the vastly improved standards of procedural fairness are to be lauded, the judiciary's hands-off approach has done little to enhance understanding of the rights that a prisoner possesses. While it is accepted that the courts should acknowledge the shortcomings of their institutional capacity and therefore afford some deference to the prison authorities, they should be wary of granting too much discretion to the prison authorities in matters of security categorisation. It is submitted that judges have granted too much discretion to the prison authorities and have been too reluctant to engage with the merits of the actual categorisation decisions.⁷⁵ This means that prisoners find themselves with very little protection and very little possibility of obtaining redress. More importantly, any development of a judge led code or conception of prisoners' rights is inhibited.

The importance of the application of this principle of fairness to categorisation decisions should not be underestimated as it marks the introduction of the principle into low level decision making and the ordinary workings of prison life. Although the importance of fairness had already been accepted in the parole process and disciplinary hearings, these do not impact on a prisoner's daily life in the same way as categorisation. Unlike categorisation, neither process forms part of the low level decision making that the courts have shown such a reluctance to engage in.⁷⁶ It is these low level decisions that have a profound impact on a prisoner's daily life and it is by actively examining these decisions that judges can articulate what a prisoner can legitimately expect and which rights and freedoms are necessarily limited by the fact of a prisoner's imprisonment. As the courts have a deliberate policy of not recognising any overarching scheme of prisoners' rights,⁷⁷ it is only by engaging in low level decision making that any conception of a scheme of prisoners' rights could be developed. When examining the totality of a decision taken by

⁷⁵ As opposed to the procedure followed.

⁷⁶ S Livingstone (1995).

⁷⁷ See D Van Zyl Smit (2007).

the prison authorities, both the way the decision was made and the merits of the decision itself, judges would indicate what considerations are relevant and irrelevant and how to balance the needs of security and control with the rights and liberties of prisoners. Through such decisions the judiciary could construct a code of prisoners' rights from the bottom up.⁷⁸ This would require that the courts not only rule on procedure but be willing to review the merits of the decision itself.

Categorisation is an area where many of the primary interests in prison law intersect. Principally, it is where matters of security and liberty meet. Categorisation determines the greatest level of freedom that a prisoner can have without compromising security. However, these are not the only considerations. There are often other factors that need to be taken into account including how much of the sentence the prisoner has left to serve, the rehabilitative needs of the prisoner, matters of resource allocation on the part of the prison authorities and questions of public confidence.⁷⁹ Given these considerations, categorisation could be a useful battlefield in which the judges could begin to develop a judicial code of prisoners' rights. The many competing interests in categorisation decisions mean that, by engaging fully in categorisation decisions, the judges could start to lay the foundations upon which a code of prisoners' rights could be built in a more systematic and principled manner.

In recent years, the law regarding categorisation has changed significantly for the better. Improving standards of procedural fairness has been vital in increasing prisoners'

⁷⁸ It is unclear whether judicial reluctance to engage in the merits of categorisation decisions forms part of a concerted effort not to enlarge the scope of prisoners' rights from the bottom up or if judicial reluctance to engage in categorisation cases is an inevitable consequence of the limitations of prisoners' rights.

⁷⁹ As was noted in the previous chapter, in matters of public confidence, decision makers exercise considerable discretion. It is possible for this to include punitive considerations if a particularly vilified offender were to progress to conditions of low security while still having a substantial amount of time left to serve.

perceptions of fairness and in granting the categorisation process legitimacy.⁸⁰ While these improved standards are to be welcomed, the opportunity for redress if a prisoner is incorrectly categorised remain limited and flawed. Without merit review of decisions by an independent body capable of binding the prison authorities, it is doubtful that full legitimacy may ever be achieved in the eyes of prisoners. As the courts have accepted that the liberty of a prisoner is directly in question, then it is contradictory, to say the least, to exclude Article 5 from categorisation law and process. While it is conceivable that the piecemeal development of the law regarding categorisation may lead to some discrepancies and anomalies, a contradiction of this sort must surely be the result of there not being an overarching conception of prisoners' rights. Instead, the judges are pulled between two 'parallel discourses' of pragmatism and parliamentary sovereignty on one hand and individual rights on the other.⁸¹ This has resulted in judges 'vacillating'⁸² between the two discourses. The contradictory approach of the judges regarding Article 5 in categorisation decisions is a demonstration of this vacillation.

As far as categorisation is concerned, the balance of these contradictory discourses should in this author's view, fall on the side of individual rights and Article 5 should be invoked by categorisation decisions. As has been noted above, categorisation can directly affect a prisoner's prospects of release. In addition, categorisation can severely impact on the regime and the amount of freedom of movement that a prisoner may experience while serving his or her sentence. The concept of a prisoner's residual freedom of movement was rejected by the House of Lords in *R v Deputy Governor of Parkhurst Prison, ex parte Hague*.⁸³ The House of Lords ruled that any such claim would be bound to fail for two reasons. First, they stated that the Prison Act 1952 section 12 allows for a prisoner to be

⁸⁰ See Home Office (1991), R Sparks et al (1996), A Liebling (2004) S Livingstone et al (2008).

⁸¹ L Lazarus (2004), p191.

⁸² L Lazarus (2004), p191.

⁸³ [1992] 1 AC 58.

held in any prison - and this was interpreted to mean any part of a prison - therefore any further detention would be lawful. Secondly, they ruled that a prisoner has no residual liberty that is capable of amounting to a right that can be protected by private law remedies against the prison authorities. In coming to this conclusion, Lord Jauncey stated:

‘He is lawfully committed to a prison and while there is subject to the Prison Act 1952 and the Prison Rules 1964. His whole life is regulated by the regime. He has no freedom to do what he wants, when he wants. His liberty to do anything is governed by the prison regime.’⁸⁴

Hague was, however, suing the Prison Service for false imprisonment; this is not the scenario which is envisaged here. Instead, it is argued that a prisoner’s residual liberty is directly affected by categorisation and, as a consequence, Article 5 should be invoked in all categorisation decisions. A careful reading of *Hague* and other residual liberty cases⁸⁵ reveals that prisoners do have residual liberty vis-à-vis other prisoners and prison officers acting without the authority of the governor, but not against officers acting with the governor’s authority or the governor himself. This is indicated by the proposition in *Hague* that a prisoner may be falsely imprisoned by other prisoners.⁸⁶ Furthermore it was held in *Toumia v Evans*⁸⁷ that a prisoner may be falsely imprisoned by prison officers acting without the authority of the governor.

If a prisoner has no residual liberty, then there is no liberty that can be limited and consequently no tort of false imprisonment can be committed. This is clearly not the case as a prisoner may sue for false imprisonment as is indicated in *Hague*, *Toumia v Evans* and *Iqbal v Prison Officers Association*.⁸⁸

⁸⁴ *Ex parte Hague*, p176.

⁸⁵ For example; *Toumia v Evans* [1999] All ER (D) 262 and *Iqbal v Prison Officers Association* [2009] EWCA Civ 1312.

⁸⁶ Lord Bridge used the example of a prisoner being locked in a shed.

⁸⁷ [1999] All ER (D) 262.

⁸⁸ [2009] EWCA Civ 1312.

In *Iqbal*, the claimant sued the Prison Officers Association (POA) for false imprisonment. As a consequence of unlawful strike action by the POA, the claimant was not unlocked from his cell. Although the claimant was unsuccessful in his claim, this was because the prison officers were found not to have been the direct cause of the claimant's detention, not because a claim for false imprisonment was unavailable.

Remarking, in *obiter*, on the question of damages that would have been appropriate had the claimant been successful, Lord Neuberger MR stated:

'The claimant suffered real damage in being confined to a small cell throughout the day, rather than having the relative freedom of "A" wing, while carrying out cleaning work, for three hours, getting some exercise for half an hour, working out for an hour or so, and telephoning his mother. That would have been a genuine and significant loss of freedom, albeit within the confines of the prison.'⁸⁹

Support for the proposition that a prisoner has residual liberty can even be found in *Hague*:

'While a prisoner has no residual liberty vis-à-vis the governor... he does have such measure of liberty as is permitted to him by the prison regime.'⁹⁰

In addition, the loss of liberty resulting from a change in categorisation has been accepted as sufficient damage to found a claim in misfeasance in *Karagozlu v Commissioner of Police of the Metropolis*.⁹¹ The Court of Appeal said:

'Suppose a prisoner is put in solitary confinement by a prison officer acting in such a way that he is guilty of misfeasance. We can see no reason in principle why he should not say that he has been deprived of... the residue or balance of his liberty.'⁹²

The question whether a prisoner has residual liberty must surely be answered in the affirmative and, despite statements to the contrary, a prisoner's residual liberty should amount to an Article 5 right and so should even be enforceable against a prison governor. Consequently, the correct defence to any claim of false imprisonment by a prisoner against a prison governor is that the prison governor has the protection and authority of section

⁸⁹ Para 45.

⁹⁰ Per Lord Jauncey, p178.

⁹¹ [2006] EWCA Civ 1691.

⁹² Para 52.

12(1) of the Prison Act 1952⁹³ and therefore the prisoner is not unlawfully restrained. It is in this light that comments such as ‘[a prisoner] has no liberty capable of deprivation so as to constitute the tort of false imprisonment’⁹⁴ must be read and understood. A prison governor may, however, be vicariously liable any misfeasance committed by his or her officers, provided those officers were not engaged in an unlawful frolic of their own.⁹⁵

The exclusion of Article 5 from the categorisation context seems illogical when one considers the case of *Blackstock v UK*⁹⁶. In *Blackstock v UK* the ECtHR held that a delay of 22 months between categorisation hearings led to a breach of Article 5(4) ECHR.⁹⁷ The court stated:

‘Given the acknowledged importance of the move to C conditions as part of the applicant’s progress towards open conditions and planned release and the absence of any indication of any specific programme of work over this period, as opposed to a general testing of the applicant’s capabilities in a less restrictive regime, the Court is not persuaded that the procedure adopted by the authorities, which led to an overall delay of 22 months, paid due regard to the need for expedition.’⁹⁸

The crucial defect in the process was the 22 month interval between reviews of the prisoner’s categorisation; this infringed the requirements of speed contained in Article 5(4) ECHR. As a consequence of this breach, the Court awarded €1,460 for non-pecuniary damage. This was not awarded as compensation for the impact that this delay may have had on the prisoner’s conditions of imprisonment nor any impact that the delay may have had on the prisoner’s eventual date of release. Indeed it was stated that:

‘The Court does not find that any loss of liberty may be regarded as flowing from the finding of a breach of Art.5(4) , which in this case is limited to the delay in

⁹³ This provides that: ‘A prisoner, whether sentenced to imprisonment or committed to prison on remand or pending trial or otherwise, may be lawfully confined in any prison.’

⁹⁴ *Ex parte Hague*, p177.

⁹⁵ See *Racz v Home Office* [1994] 2 AC 45.

⁹⁶ (2006) 42 EHRR 2.

⁹⁷ ‘Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.’

⁹⁸ (2006) 42 EHRR 2, para 48.

between reviews. However, the applicant must have suffered feelings of frustration, uncertainty and anxiety flowing from the delays in review which cannot be compensated solely by the finding of violation.⁹⁹

By accepting that Article 5(4) had been breached in the circumstances, without any loss of liberty being suffered as a consequence, the logical inference is that Article 5(4) is not merely concerned with whether a person is legally detained, but how the prisoner is detained. This logical inference could be extended to the Article 5(1) ECHR.¹⁰⁰ This would have the effect that the circumstances of detention¹⁰¹ would have to comply with procedures prescribed by law as opposed to the mere fact of detention.

Categorisation directly affects the regime that a prisoner experiences. Category D prisoners have far greater freedom of movement than Exceptional Risk Category A prisoners. They receive little staff supervision and the regime deliberately grants them greater freedom over their actions and movements. Category D prisons are designed as preparatory for release and, as such, have much greater liberty than higher category prisoners.¹⁰² They can even apply to undertake unsupervised voluntary work in the community for up to five days a week. It follows that the suggestion that categorisation cannot affect prisoners' residual liberty is a legal fiction. The recognition of this legal fiction would mean that Article 5 would be invoked by all categorisation decisions, even those where a prisoner's prospect of release is not directly affected. This would be a highly desirable development and would mean that judges could employ a proportionality standard of judicial review when a prisoner challenges his or her categorisation, as opposed to merely deciding whether the categorisation decision was irrational. This would

⁹⁹ Para 56.

¹⁰⁰ 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.'

¹⁰¹ I.e. how a prisoner is detained. This includes the security categorisation of the prisoner.

¹⁰² Although the extremes of Category A and Category D have been used to illustrate this point, the proposition that lower category prisoners have greater residual liberty is applicable across the categorisation spectrum.

constitute a major step towards the advancement of prisoners' rights as proportionality would ensure the minimum interference with prisoners' rights required by the circumstances. In addition the 'transparency of reasoning to which proportionality ought to give rise'¹⁰³ would require that judges examine the rationale for the prison authorities' actions and whether these actions are justified.

Discussing the impact of categorisation on a prisoner's liberty, Lazarus notes:

'[a] prisoner's personal experience of his day-to-day incarceration is materially affected by categorization and transfer decisions. This [is] simply not an issue of legal relevance.'¹⁰⁴

The adoption of Article 5 in the categorisation context would mean that the effect of categorisation on a prisoner's residual liberty would become an issue of legal relevance, albeit just one more factor to be considered in the court's balancing act. Although this may not have a major impact, it may help to change the emphasis in categorisation decisions. Instead of approaching the issue of a prisoner's categorisation by asking what issues justify the prisoner being placed in a lower security category, the focus might be on the issues that justify the prisoner being placed in a higher security category. Of course, the outcome of these different enquiries will often be the same, but this change of emphasis may have a particular impact in the 'catch-22' cases. In the context of prisons, security is obviously vital, but such a change in emphasis may help to ensure that the prison authorities are not overly defensive when categorising prisoners. It may even embolden the courts to support prisoners in categorisation cases.

4.5. Conclusion.

This examination of the cases relating to security categorisation that have been decided in the last ten years has revealed certain judicial tendencies, the principal of which is a

¹⁰³ L Lazarus (2006), p742.

¹⁰⁴ L Lazarus (2004), p245.

tendency to support the prison authorities against prisoners in categorisation decisions. It has been suggested the courts have been overly deferential to the prison authorities. While a degree of deference towards the decision maker is an inevitable consequence of judicial review, the courts have proactively limited the available challenges to exclude any substantive review of the merits of categorisation decisions. The advances in standards of procedural fairness that have been introduced by the courts over the ten year period covered by this study have improved the situation dramatically and are to be lauded. Nevertheless, the scope of many of these standards is limited to a small proportion of prisoners and, until the standard of substantive review is raised to a standard of proportionality, these advances are little more than window dressing, giving the appearance of justiciability regarding categorisation decisions. It has been argued that the refusal to admit Article 5 ECHR into the categorisation context demonstrates confused logic and that this refusal is wrong in fact and in law. Judges have explicitly accepted that categorisation directly affects prisoners' prospects of release and have imposed additional procedural safeguards in these circumstances. It seems incongruous, therefore, to exclude Article 5 from these cases.

The cases arguing for the concept of prisoners' residual liberty have been primarily brought in the context of false imprisonment and the author submits that this has led to a misunderstanding by the House of Lords. It is clear that a prisoner does enjoy a degree of residual liberty. This does not mean, however, that a prisoner would be able to successfully sue for false imprisonment. In the categorisation context, there is no complete restriction on a prisoners' residual freedom of movement as a result of a categorisation decision.¹⁰⁵ Furthermore, the defence to any claim of false imprisonment against the Prison Service lies in section 12(1) of the Prison Act. Just because a prisoner is unable to sue the Prison

¹⁰⁵ See *Bird v Jones* (1845) 7 QB 742.

Service in tort does not mean that the prisoner does not possess residual liberty amounting to an Article 5 right that could be protected in a public law context. This would mean that Article 5 would be invoked in all categorisation decisions. Lazarus reinforces the impact that a change in judicial attitudes and the embrace of proportionality in prisoners' rights cases may have when she states:

'The future of prisoners' rights under the HRA 1998 is ... inextricably linked with the future of judicial deference. If this doctrine successfully sustains ... a view of submission then the impact of the 1998 on prisoners' administrative status will be negligible. However, if this doctrine is reconciled with a culture of justification, in which prison officials and the Home Secretary are pressed to demonstrate the necessity and proportionality of the measures in question, then the future is more optimistic for prisoners' administrative rights.'¹⁰⁶

The refusal to admit Article 5 into the categorisation context severely limits any substantive review of a categorisation decision. This reduces the accountability of the prison authorities in categorisation decisions and could impact negatively on prisoner's perceptions of fairness. In addition, such an approach reduces any review of the merits of categorisation decisions to a minimum and inhibits any construction of a conception of prisoners' rights from the bottom up.

Judicial reluctance to engage in the merits of categorisation decisions has meant that decision makers are less answerable to the courts. The effect that categorisation can have on an individual prisoner is immense and must not be underestimated. It was recognised by the Woolf Report that prisoners are particularly vulnerable to unlawful action¹⁰⁷ it is essential therefore that they are fully protected by the courts. The courts, by demonstrating the degree of deference that they do to the prison authorities in categorisation decisions, leave prisoners in this vulnerable state.

¹⁰⁶ L Lazarus (2004), p244.

¹⁰⁷ Home Office (1991), para 14.293.

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