Prisoners and the Right to Family Life

Matt Evans looks at how art.8 has been interpreted as regards prisoners and the maintenance of family life

Article 8 of the Convention Provides:
"Everyone has the right to respect for his private and family life, his home and his correspondence.
There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The right to family life is not one that is automatically lost by a prisoner on incarceration (see *R. v. SSHD ex parte and Q* [2001] 1 WLR 2002 para.78). Indeed, it has been recognized that while family life is inevitably restricted for an individual while incarcerated, it is of particular importance that prisoners are able to maintain family connections through visits and other communication.

Prison Policies and Regulations

Prison Rules 1999 (SI 1999/728) ("the Prison Rules"), made in the exercise of the power granted to the Home Secretary under s.47 of the Prison Act 1952, require "special attention ... be paid to the maintenance of such relationships between a prisoner and his family as are desirable in the best interests of both" (r.4). Prison Service Order (PSO) 4410 refers to r.4 and notes in its Statement of Purpose that, "visits are ... crucial to sustaining relationships with close relatives, partners and friends. They help prisoners maintain links with the community, and are associated with a reduced likelihood of reoffending."

PSO 4410 also notes that any refusal of a social visit "should be proportionate, taking account of Convention rights particularly art.8." Similarly, the Prison Service Index (PSI 20/2006) makes clear that any decision to allow only "closed visits" must be "proportionate" (para.4). Paragraph 3.6 of the PSO deals with the circumstances in which a visit should be stopped, and notes that stopping a visit is "a very serious measure" and should "not normally be necessary" except in certain circumstances. PSO 3610 deals with "Measures to Deal with Visitors and Prisoners who Smuggle Drugs through Visits." The PSO notes that a ban on visits should not be imposed, even if a visitor and prisoner have been found to have trafficked drugs, where that would cause disproportionate harm to family life protected by art.8 (para.9). Examples of where a ban might cause disproportionate harm would be where the visitor concerned, was the only family member who visited the prisoner. Whilst PSO and PSIs are non-statutory guidance, it has been held in *EC Gransden & Co Ltd and Another v. Secretary of State for the Environment and Another* (1985) 54 P&CR 86, [1987] JPL 365, CA and *R. v. Blaenau Gwent County Borough Council ex parte Wilson* [2004] ELR 152, that a breach of non-statutory guidance, without good reason, is unlawful.

Engagement of Article 8(1)

The importance of "family life" for prisoners was explained in *McCotter v. The United Kingdom* [1992] 20479/92 by the European Commission of Human Right as follows:

"In the context of prisoners or other persons who are detained the concept of "family life" must be given a wider scope than in other situations: Prisoners generally have limited means of contact with the outside community and of maintaining relationships with family members. "Family life" for prisoners is inevitably restricted to visits, correspondence and possibly other forms of communication such as telephone calls. The Commission recalls in this context that the European Prison Rules emphasize the need to encourage these links:

65. Every effort shall be made to ensure that the regimes of the institutions are designed and managed so as:

(c) to sustain and strengthen those links with relatives and the outside community that will promote the best interests of prisoners and their families ... ." The Commission has also stated the opinion that art.8 requires the State to assist prisoners as far as possible to create and sustain ties with people outside prison in order to facilitate prisoners' social rehabilitation ..."

A number of legal challenges have been pursued under art.8 around various aspects of prison life and policies so, *McCotter*, a prisoner's argument that his allocation to a prison a long distance from his family breached art.8 was rejected. Only in "exceptional circumstances" would an allocation or transfer decision potentially breach art.8. However the individual circumstances of the case, such as where the case concerned a young or especially vulnerable prisoner, could obviously heighten the risk of a breach of art.8 where a prisoner is placed a long way from family and support. The

right to respect for family life contained in art.8 must be considered with regard to the family as a whole, as there is only one family life: *Beoku-Betts v. Home Secretary* [2008] 3 WLR 166 at [1], [2], [3], [4], [20] and [43].

It has been held that preventing prisoners seeing their children engages art.8 (see, *ex parte P and Q*). The same is true of a ban on a prisoner seeing a woman with whom he had corresponded for two years (see *R. v. SSHD ex parte Wilkinson* [2002] EWHC 1212). In *R (P and Q) v. Home Secretary* [2001] 1 WLR 2002, concerning a decision around whether babies should be kept with their mothers in detention, the Court of Appeal reviewed the Strasbourg jurisprudence on prisoners' rights under the Convention. Lord Phillips of Worth Matravers MR delivered the judgment of the court, holding: [78] It is possible to draw some general conclusions from these authorities: (i) the right to respect for family life is not a right which a prisoner necessarily loses by reason of his/her incarceration; (ii) on the other hand, when a court considers whether the state's reasons for interfering with that right are relevant and sufficient, it is entitled to take into account (a) the reasonable requirements of prison organization and security and (b) the desirability of maintaining a uniform regime in prison which avoids any appearance of arbitrariness or discrimination; (iii) whatever the justification for a general rule, Convention law requires the court to consider the application of that rule to the particular case, and to determine whether in that case the interference is proportionate to the particular legitimate aim being pursued; (iv) the more serious the intervention in any given case (and interventions cannot come very much more serious than the act of separating a mother from a very young child), the more compelling must be the justification.

[83] ... Compulsory separation is, on the face of it, a serious interference by the state in the children's right to respect for that family life. The European court has said time and again that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, and domestic measures hindering such enjoyment amount to an interference with the right protected by art.8."

In that case, the rigid policy of children having to leave mother and baby units in prison by the age of 18 months or earlier was found to be unlawful in the case of a prisoner serving a short sentence. The policy could not be prescriptive and had to have a degree of flexibility. However, it would also be wrong to consider that there is a right for the baby to remain with the mother until the age of 18 months. Where women are serving longer sentences, separation much earlier than that may be considered in the best interests of the child. So a challenge by a woman serving a sentence of five years arguing that separation at nine months would be unlawful failed in *CF v. Secretary of State for the Home Department* [2004] EWHC 111 (Fam).

Article 8 was held not to be engaged in respect of a challenge to the cost of phone calls from prison. Article 8 did not guarantee a prisoner's right to make phone calls "particularly where the facilities for contact by way of correspondence are available and adequate". The possibility of challenge, in a case where a prisoner's sole means of contact with his family is by phone (for instance in case of a prisoner with literacy problems), would still seem to be a possibility. However, the imposition of certain licence conditions may engage art.8. Guidance on the setting of licence conditions and the need to take into account art.8 considerations can be found in Probation Circular 28/2003, ch.13 of PSO 4700 and most recently PSI 2011/34. However in *R (Carman) v. Secretary of State for the Home Department* the court made clear that it would only be in "exceptional cases" that it would feel able to interfere with licence conditions, and indeed that not all licence conditions would engage art.8. This leads us to consider the limitations of art.8 rights.

Deemed Necessary or Justified?

The first issue is to consider the proportionality of any interference. In order for the interference with a prisoner's family life to be justified it must be in accordance with the law, and "necessary" in pursuing of the one of the aims listed in art.8(2) (*R (X) v. Home Secretary* [2005] EWHC 1616 (Admin) at [27])

The interference must meet a "pressing social need" (*Sunday Times v. United Kingdom* (1980) 2 EHRR 245 para.59). There must also be a relationship of "proportionality" between the "pressing social need" and the means used to pursue it. For interference to be proportionate the measures designed to meet the "need" must be rationally connected to it and no more than necessary to accomplish their objectives (*R. v. SSHD ex parte Daly* [2001] 2 AC 532 para.27). There must be no way in which the legitimate objective could be pursued that would interfere to a lesser extent with the claimant's rights (see, *R. v. SSHD ex parte Samaroo* [2001] EWCA Civ 1139 para.19).

So in assessing proportionality, the relationship, number of other visitors a prisoner might have, and the availability of other forms of contact/communication, would clearly be considered when looking at an interference with particular social contacts or communications. In performing that same assessment around contact with a child, then obviously consideration of what is in the best interests of the child, would be of crucial importance: *Kajari v. Finland* (Application no. 65040/01), judgment October 23,2007.

The particular issue of restrictions around phone calls from prison was raised in *R (Taylor) v. Governor of HM Prison Risley*. In that case the High Court held that the need to control a drugs problem within the prison justified a policy whereby prisoners were only entitled to have up to 20 numbers to call and that such numbers had to be authorized by the prison governor. Such interference with the prisoners' family and private life was justified by reference to the need to control drugs in prison, although it was stressed that a blanket policy would not be allowed in every prison.

Finally the issue of public opinion, as a determinant or consideration, has been considered in several art.8 cases. In *R (Adelana) v. Governor of HMP Downview* [2008] All ER (D) 275 (Oct), Robert Jay QC, sitting as a Deputy Judge of the High Court, considered the issue of public opinion in the context of temporary release under r.9(5) of the Prison Rules (and PSO 6300) which deals with various types of temporary release (including childcare resettlement leave). He held at [22] that:

"Whereas it is true that temporary release [under PSO 6300] needs to respect family life under art.8 of the Convention, a sub-rule which states, as does sub-rule (5), that [release on temporary licence] should not be granted if, having regard to the matters set forth in sub-paras. (a) and (b), the

Secretary of State is of the opinion that such release would be likely to undermine public confidence in the administration of justice, does not violate art.8. Rule 9(5) is sufficiently flexible in its terms to permit, subject to any further policy, consideration to be given to individual cases." In a previous case around artificial insemination (AI) the Court of Appeal had rejected an application by a prisoner seeking access to AI facilities whilst in prison. In approving the government policy restricting access to AI save for 'exceptional circumstances, the court cited amongst its reasons the need to maintain public confidence in the penal system. However, in *Dickson v. UK* (2008) 46 EHRR 41, another case on AI in the prison context, the Grand Chamber found (at [75]) as follows: Then, as the Chamber, reiterates that there is no place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic forfeiture of rights by prisoners based purely on what might offend public opinion: *Hirst v. UK* (2006) 42 EHRR 41, [70]. However, the court could accept, as did the Chamber, that the maintaining of public confidence in the penal system has a role to play in the development of penal policy. The Government also appeared to maintain that the restriction, of itself, contributed to the overall punitive objective of imprisonment. However, and while accepting that punishment remains one of the aims of imprisonment, the court would also underline the evolution in European penal policy towards the increasing relative importance of the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence [internal reference omitted]."The Grand Chamber went on to hold that the policy placed an inordinately "high exceptionality" burden on applicants requesting access to AI facilities and failed the proportionality test. The Prison Service, despite the European Court's judgment, has yet to amend its policy on access to AI facilities to reflect it. *Adelana* was decided on October 28, 2008. While the court in *Adelana* considered the judgment of the Grand Chamber in *Dickson* in deciding other points, Robert Jay QC appears not to have considered *Dickson* in reaching his conclusions on public confidence. It would therefore seem that arguments around public opinion should not justify an interference with art.8 rights.

Procedural Requirements

The ECtHR recognized in *McMichael v. UK* (1995) 20 EHRR 205 that there are procedural protections implicit in art.8. The ECtHR held that "whilst art.8 provides no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by art.8" (para.87). The ECtHR quoted the following passage from *W v. UK* (1987) 10 EHRR 313 para.64 in relation to procedures for placing children for adoption: "[W]hat . . . has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as 'necessary' within the meaning of art.8."

The procedural safeguards of art.8 have also been applied outside of child-care proceedings. In *Z v. Finland* (1997) 25 EHRR 371 the ECtHR applied *W v. UK* to an interference with art.8 rights in relation to a decision to disclose medical records from one public authority to another (see, especially para.101). It held that the applicant was entitled to procedural fairness and in particular to make representations prior to the disclosure of the records. So within prisoner rights cases, procedural requirements would suggest that in order for representations about an intended interference with art.8 rights to be meaningful, the individual concerned must be given sufficient information about the reason for his proposed treatment and the case he has to meet (see, comments of Lord Phillips in *R (P and Q)* para.106).

Margin of Appreciation

The variety of exceptions to the right set out para.2 of the provision, have left plenty of room for executive manoeuvre and therefore judicial deference. A case in point can be seen around the issue of conjugal visits which are not permitted in the UK, although they are allowed in certain European countries. Several prisoners have attempted to challenge the ban on conjugal visits under art.8. However, the Commission has found that it is within the UK's margin of appreciation to apply a blanket ban on conjugal visits.

Conclusions

As the UK took over chairmanship of the Council of Europe in November, tensions within the coalition government around the Human Rights Act and its interpretation have again recently come to the fore. However, contrary to what its various critics tend to argue, human rights legislation and the case law around art.8, do not suggest Judges and courts being indignant about the idea of rules and polices; rather it is often the unyielding and over-prescriptive nature of the application of the policy in question that is objected to. As a rule, and as shown by the art.8 case law, Judges like inflexible policies which permit no exceptions for individual cases even less than they like striking down executive policies. So the courts have been tempted (as they did in *R (P and Q)*) to escape the dilemma of having to choose between expediency and utility on the one hand (suggesting the inflexible application of general policies) and human rights on the other (suggesting that every case be treated as a single matter to be viewed entirely on its own terms) by accepting that in principle, a policy is necessary, whilst at the same time stressing the need for flexibility on the part of the decision maker. So in the case of the mother and baby separated the human right in these cases is not that there is a right to keep one's baby in prison, rather that the prisoner should have the opportunity of arguing that they are within the exceptional category of mothers who should be allowed this "privilege". This is part of the balancing exercise required by art.8.2 and the notion of due process. from what is often a deliberate and politically motivated misrepresentation of what rights people actually enjoy.

About the author

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