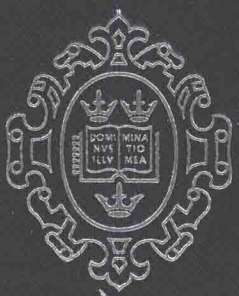
LIVINGSTONE, OWEN, AND MACDONALD ON PRISON LAW

FIFTH EDITION

EDITED BY
TIM OWEN QC
ALISON MACDONALD



OXFORD

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In memory of Stephen Livingstone

MEMORIAL NOTE
STEPHEN LIVINGSTONE 1961–2004

The first edition of *Prison Law* was published in 1993. The idea of writing a textbook which would seek to provide both an academic and practical guide to the rapidly expanding subject of prisoners' legal rights and the law of imprisonment came from Stephen Livingstone, then a young law lecturer at Queen's University in Belfast.

Convinced that the ideal combination for writing such a book would be an academic and a lawyer practising in the field of prisoners' rights, Stephen rang me up out of the blue one day in the summer of 1990 when I was involved in a six-month trial arising from a major disturbance at Risley Remand Centre and pitched his idea. He was a highly engaging and persuasive advocate and before we ever met in person, I had agreed to sign up to writing what would become the first edition of *Prison Law*.

Tragically, and at the desperately young age of 43, Stephen died suddenly in March 2004, and so the fourth edition of *Prison Law* was the first to be written without his inspiring wit and academic brilliance. By the time of his death Stephen had risen rapidly in the academic world. In 1998, he had returned to Queen's University after a spell as a reader in law at Nottingham University to take up the post of professor of human rights law. Later he became head of the law school at Queen's and director of the human rights centre. He was a prolific author of texts on human rights, the judiciary, and constitutional law, a marvellous teacher, and fiercely committed to practical action in support of human rights and civil liberties in Northern Ireland. As with the previous edition, this fifth edition of *Prison Law* is dedicated by Alison Macdonald and myself to the memory of Stephen Livingstone.

Tim Owen QC

PREFACE

In his 1993 Foreword to the first edition of *Prison Law*,[1] Stephen Sedley QC (as he then was) recalled the sense of impotence and isolation experienced by prisoners when informed by prison officials of an unpleasant truth—'I'm the law here'. As Sedley explained, such absolute power is the antithesis of the rule of law:

> yet for an age the courts were either afraid or unwilling to take responsibility for the protection of citizens behind bars from unlawful treatment. It was not said, of course that prisoners had no rights; only that the assurance of such rights as they had could safely be entrusted to their custodians. Behind this lay, I think, an assumption that in any context the custodian would be stolidly in the right and the prisoner a mendacious troublemaker so that nothing was to be gained by giving a prisoner a day in court.

There is of course no more 'legal' institution than a prison. The death penalty aside, there is no more significant intervention by the public into the private sphere than the act of imprisoning someone. Prisons are entirely the creation of law. When American radical George Jackson commented that 'the ultimate expression of law is not order, it's prison' he was, in one sense, plainly correct. Yet until the 1970s when the judiciary, at both the domestic and European level, abandoned the 'hands off' approach to legal claims by prisoners, the broader public debate about who should go to prison (and for how long) assumed that the State's coercive involvement ended with the decision to imprison. This was always untrue. The State never simply locked people up and threw away the key even in relation to the worst offenders. From the relatively mundane requirement to work, to take baths and submit to medical examination to the more extreme consequences of disciplinary punishment, administrative segregation (solitary confinement) and the process of release back into society, imprisonment was and remained a continuing experience of coercion.

Such extensive intervention was justified by a multitude of Rules, Standing Orders, and Prison Service Instructions, but despite the number and density of these layers of rules and often inaccessible regulations, prisons were in practice islands of lawless discretion in a society guided by the values of the rule of law. The paradox of prisons—highly rule-bound institutions where the rule of law is absent—is no longer a proper characterisation. How this came about over the past 35 years can

[1] *Prison Law: text and materials*, Stephen Livingstone and Tim Owen, OUP, 1993.

fairly be termed revolutionary in terms of the shift in attitude it reflects not just amongst lawyers and judges but amongst prison staff and wider society.

The initial battle was to establish judicial authority—jurisdiction—over the actions of the prison administration. The first victory was secured in *St Germain*[2] when, in the wake of the 1976 Hull prison riot and the grotesque disciplinary process that ensued, the Court of Appeal rejected the idea that judicial oversight of the actions of prison staff would rapidly render the prison unmanageable and held that the quasi-judicial, disciplinary powers of a Board of Visitors were subject to judicial review on ordinary public law principles. The judgment of Lord Justice Shaw asserted that 'the courts are in general the ultimate custodians of the rights and liberties of the subject whatever his status and however attenuated those rights and liberties may be as a result of some punitive or other process', thereby recognising prisoners as citizens behind bars with as much entitlement to court protection as any other individual. Although for a time, the courts were reluctant to extend this principle to the disciplinary powers of prison governors,[3] the decision in *Leech*[4] not only clearly established that governors exercising disciplinary powers were subject to judicial review, it also hinted that judicial supervision of governors' powers might extend beyond the formal disciplinary sphere. In rhetoric that echoed Shaw LJ in *St Germain,* Lord Bridge (a former Treasury Devil) observed that historically the development of the courts' jurisdiction had been impeded 'by the fear that unless an arbitrary boundary is drawn [courts] will be inundated by a flood of unmeritorious claims'. Disciplinary powers of governors were always exercised more frequently than those of Boards of Visitors. They were much more clearly seen by prison administrators as one of the governor's resources to maintain order in a prison, resources which included the power to segregate and transfer. Hence it was always likely to be more difficult to claim that opening their exercise to judicial review still left the 'administration' of a prison outside judicial scrutiny. But eventually any lingering doubts about the courts' willingness to extend jurisdiction to prison administration were removed by the House of Lords in *Hague*,[5] in which the use of Rule 43 administrative segregation and transfer of allegedly disruptive prisoners was acknowledged to be reviewable. *Hague* unequivocally brought the exercise of *all* discretionary powers in prisons within the ambit of judicial review and when combined with the court's earlier recognition of prisons owing a duty of care to prisoners to ensure they are not injured during the course of their imprisonment, it marked a clear victory for the views of Shaw LJ in *St Germain*; a clear declaration that the rule of law applies to prisons. It was established that prison authorities must act within their legal powers, that indeed their power to make decisions affecting prisoners' lives comes

[2] *R v Board of Visitors of Hull prison, ex parte St Germain* [1979] QB 425.
[3] *R v Deputy Governor Camphill Prison, ex p King* [1985] QB 375.
[4] *Leech v Deputy Governor, Parkhurst Prison* [1988] AC 533.
[5] [1992] 1 AC 58.

entirely from the law and that the courts stand ready to police breaches of those legal powers.

At more or less the same time, at the European level the Commission and the European Court of Human Rights cast off any idea that prisons might be beyond the scope of the Convention in the *Golder* case,[6] with the Court rejecting the notion that prisoners were subject to 'inherent limitations' on their rights by the fact of their imprisonment. Instead the Court indicated that the application of the qualifying clauses contained in many Convention Articles would have to take account of the fact that the applicant was imprisoned and that a particular regime obtained in prisons which justified some restrictions which would not be acceptable in the outside world. Such an approach subjected prison administrations to the obligation to protect prisoners' human rights and enabled prisoners freely to assert those rights.

Linked to, and indeed essential to winning the battle for jurisdiction, was a series of domestic cases concerning prisoners' access to legal advice and to courts themselves. The effect of the decisions in *Raymond v Honey*,[7] *ex parte Anderson*[8] and *Leech (No 2)*[9] was that prison authorities could not stop or censor correspondence sent directly to a court and in order to ensure effective access to the courts it was recognised that a prisoner must have unimpeded access to legal advice with respect to claims or potential claims. What distinguished this line of cases was that, like the *Golder* case, their fundamental premise was that prisoners retain all their civil rights, save for those that are taken away expressly or by necessary implication.

Removing Politics from the Administration of the Life Sentence

In terms of its transforming, practical impact on the liberty of individuals, the most significant single example of judicial intervention in prison life is the review of procedures governing the release of life sentence prisoners (and children detained during Her Majesty's Pleasure). This was, once again, a strategic sequence of battles fought at home and in Strasbourg, with the English judiciary gradually extending Convention law principles at each end of the indeterminate sentence – the punitive and post-punitive phases. This brilliantly fought pincer movement was eventually to obliterate the underlying theoretical distinction between the mandatory life sentence for murder, the sentence of HMP detention, and the discretionary life sentence imposed for dangerous offenders convicted of serious sexual or violent offences falling short of murder.

[6] *Golder v UK*, (1975) 1EHRR 524.
[7] [1983] 1 AC 1.
[8] [1984] QB 778.
[9] [1994] QB 198.

The initial trigger was the decision of the ECtHR in *Weeks v UK*[10]. Robert Weeks had been sentenced to life imprisonment in December 1966 at the age of 17 when he pleaded guilty to a bungled armed robbery during which no one was injured.[11] He was released on licence for the first time in 1976 but recalled to prison the following year. Between 1977 and 1986 he was released and re-detained several times and spent a further six years in custody. In his application to Strasbourg he argued first that his recalls to prison from 1977 onwards and consequent detention were in breach of Article 5(1)(a) ECHR because there was no sufficient causal connection between the original conviction and sentence in 1966 and the later deprivations of liberty from 1977 to satisfy the requirements of Art 5(1). Secondly, he argued that on his recall to prison in 1977, or at reasonable intervals throughout his detention, he had not been able to take proceedings to challenge his imprisonment in a manner that complied with the requirements of Article 5(4).

Mr Weeks lost his Article 5(1) claim on the particular facts of his case but in analysing the true nature of a discretionary life sentence, the ECtHR held that if a decision not to release a discretionary lifer (or to re-detain him after release) was based on grounds which were inconsistent with the objectives of the original sentencing court, then the necessary causal link between the sentence and any period of continuing detention would be broken, with a breach of Article 5(1) established. As for the Article 5(4) claim, the ECtHR held that the stated purpose of social protection and rehabilitation which underlay the imposition of the discretionary life sentence and the grounds relied upon by the trial judge in Weeks' case were, by their very nature, susceptible to change with the passage of time. Accordingly, Mr Weeks was entitled to apply to a 'court' having jurisdiction to decide speedily whether or not his deprivation of liberty had become unlawful at the moment of his recall to prison and also at reasonable intervals during the course of his imprisonment. The Parole Board did not satisfy this requirement because to be a 'court' the body in question must not have merely advisory functions but must be competent to decide the lawfulness of detention and order release if the detention has become unlawful. Save in a recall case, the Board had no power to order release. Furthermore, the lack of any right of access to the reports and other material before the Parole Board meant that the prisoner affected was not able properly to participate in the decision making process.

Weeks did not lead to an immediate change in the procedures for reviewing the detention of discretionary lifers. That came about as a result of the next challenge brought

[10] (1988) 10 EHRR 293.

[11] The facts of Mr Weeks' original conviction case are startling in light of subsequent events. He had entered a pet shop in Gosport with a starting pistol loaded with blanks, pointed it at the owner and told her to hand over the till. He stole 35p which were found on the shop floor after Weeks had left. Later he phoned the police and said he would give himself up. He was apprehended by two police officers and when he took out his starting pistol it went off. Two blanks were discharged causing no injury. It emerged that Weeks had committed the offence to pay back his mother the sum of £3 after she told him that he would have to find accommodation elsewhere.

before the Strasbourg Court in *Thynne, Wilson and Gunnell v UK*.[12] Whereas Mr Weeks' case was unusual in that the original offence which led to the life sentence was not particularly serious, the three applicants in *Thynne* had all been convicted of very grave offences of rape and buggery. In response to the submission that their continuing detention was also in breach of Article 5(4), the UK sought to argue that *Weeks* had been decided on its own facts and that its reasoning could not apply to all discretionary lifers, especially those were punishment was a significant aspect of the original life sentence. In short, it was submitted that it was impossible to disentangle the punitive and security components in the vast majority of discretionary life sentences. The courts rejected this argument and pointed out that the discretionary life sentence had a clear lineage and purpose, namely a measure to address the problem of sentencing mentally unstable and dangerous offenders. All three applicants in *Thynne* had been detained beyond their punishment or tariff dates and they were in the same position as Mr Weeks. The factors of mental instability and dangerousness which justified the imposition of the discretionary life sentence were susceptible to change over time and new issues of lawfulness could thus arise in the course of their indeterminate detention which demanded periodic review. The significance of *Thynne* was clear. The process of reviewing the detention of discretionary lifers once they had completed the tariff portion of their life sentence and on any recall to prison had to be changed in order to comply with the ECHR. The Criminal Justice Act 1991 sought to achieve that change though the Government was firm (and reasonably so) in its view that a clear distinction had been drawn by the ECtHR between discretionary and mandatory lifers so that murderers could not benefit from the rulings in *Weeks* and *Thynne*. It was to take another decade and a series of carefully planned cases litigated before the domestic courts and the ECtHR before this distinction was to be consigned to history as irrational, unprincipled, and ultimately ahistorical.

Thus, the decision in *Hussain*[13] concerning the administration of the sentence of detention during Her Majesty's Pleasure continued the trend of injecting greater judicial control over the release of indeterminate sentence prisoners. And eventually in *Stafford*[14] the ECtHR finally recognised that the differences between the discretionary and mandatory regimes were not so great as to justify a different approach to the role of politicians in decision-making and the scope of the judicial supervision. The *Stafford* ruling was significantly influenced by a series of domestic court decisions which enhanced the procedural fairness rights of life sentence prisoners. Decisions such as *Doody*[15], *Pierson*,[16] and *Venables and Thompson*[17] narrowed the scope of the Home Secretary's discretion in relation to the release of mandatory

[12] (1991) 13 EHRR 666.
[13] *Hussain v UK* (1996) 22 EHRR1.
[14] (2002) 35 EHRR 32.
[15] [1994] 1 AC 531.
[16] [1998] AC 539.
[17] [1998] AC 407.

lifers by indicating that he would be constrained by strict procedural obligations in tariff setting and that the courts would be prepared to exercise control over the substantive exercise of that discretion. Once the domestic courts had explained that the exercise of tariff fixing was a conventional sentencing exercise (rather than some unique, mystical non-judicial process) it was strongly arguable that the setting of a mandatory lifer's tariff should attract Article 6 safeguards, i.e. that it should be done by judges in open court and not by the Home Secretary as part of a Red Box exercise. But until *Stafford* finally removed the obstacle of the *Wynne* decision, the domestic courts had stopped short of applying the full logic of their reasoning. With the decision in *Anderson*[18] (and with the Human Rights Act 1998 now in force) the House of Lords finally endorsed the view that the Home Secretary could play no role in the sentencing decision by fixing the tariff of mandatory life sentence prisoners. After the Grand Chamber (and rightly anticipating what this would mean at the domestic law level in the wake of the enactment of the HRA 1998), an apparently incandescent Home Secretary Blunkett issued dark warning that, should *Stafford* lead to the removal of all his powers to control the time that convicted murderers would spend in prison, he would somehow seek to derogate from the Convention on this issue. In the event of course, and no doubt heavily influenced by statements in *Anderson*, upholding the legality of the whole life tariff, wiser counsels prevailed. Shortly after the ruling in *Anderson*, the Home Office issued a statement confirming that new legislation would be drafted to establish a clear set of principles within which judges alone would fix tariffs in the future. The necessary amending legislation was eventually enacted in the Criminal Justice Act 2003. The process of judicialisation was complete.

This relentless sequence of cases before the domestic and Strasbourg courts represents the most significant example of judicial intervention affecting the rights of convicted prisoners. Within a fifteen year period, what was previously a highly discretionary, secretive, and frequently arbitrary system of sentencing and release decision-making within the penal system was subjected to strict, principled regulation. This regulation emphasised the value of a fair process, free from political interference, with the speeches of Lord Steyn and Lord Hope in *Pierson* strongly articulating the view that the control of all aspects of sentencing was properly the domain of a Judge and not a politician.

Making Prisons Fairer

The decision in *Hague* that there was no area of prison administration free from judicial scrutiny coincided with the resurgence of judicial review as a means of holding government to account. The more muscular approach which the courts

[18] [2002] 3 WLR 1800.

began to adopt to government decision-making had no better testing ground than in its application to the coercive regulation of the life of the prisoner. The courts had to grapple with decisions whose implications for the prisoner were hugely significant. Before they began to scrutinise how the Home Secretary decided the time lifers should serve as punishment or whether they should be released, such decisions were taken with no regard to the enormity of the impact on the interests of the prisoner who would simply be told after the event what had been decided, or in the case of lifers whose tariff was fixed at 20 years or more, not even the precise term. Such cases provided the courts with an opportunity to look at the concept of fairness as an aspect of administrative decision making more generally, and to move away once and for all from an unprincipled dichotomy between judicial decision-making where fairness lay at the heart of the process and administrative decision-making where the law had trodden far more cautiously. Lord Mustill's short encapsulation of the principle of fairness in *Doody*[19] remains to this day the first resort of the courts and lawyers in any analysis of the fairness of any decision-making process.

Over the years the courts have injected procedural safeguards into many decision-making processes and prisoners have won valuable opportunities to seek to influence decisions having very significant impact upon their lives.

Even in the most sensitive areas of prison regulation, the courts have not accepted the executive's plea to be left to get on with the job, untrammelled by the need to take into account the interests of the prisoner. Fundamental to the successful operation of any prison is that security, order, and discipline are maintained. Such decisions are entirely evaluative involving the assessment of uncertain risks and intelligence of differing degrees of reliability. Among such decisions are those to allocate prisoners to a particular security category in order that they can be held in conditions appropriate to the level of risk they are assessed to pose. At the top are Category A prisoners so classified because they are considered to be highly dangerous and for whom escape must be made impossible. Such a categorisation affects day to day life within the prison for the obvious reason that such prisoners residual liberty is all the more closely circumscribed by reason of their perceived dangerousness.

But for indeterminate sentence prisoners, the consequence of such a categorisation is far graver still. Save in the tiny class of political prisoners, so long as a prisoner remains Category A they have almost no prospect of release regardless of how far they are beyond the punitive term of their sentence. Parole Board reviews are largely worthless exercises. The Parole Board simply will not release a prisoner whom the Prison Service has assessed as remaining highly dangerous. Even if the Parole Board itself considers the prisoner has changed, until there has been an

[19] [1994] 1 AC 531.

opportunity for testing in conditions of lesser security more closely resembling life outside, it will not be in a position to satisfy itself that the extent of change means it is safe to release. Decisions to maintain the category A status of prisoners can therefore be decisive of the prisoner's prospects of release for many years. This is particularly so in the case of prisoners who deny their offences, some of whom, history shows, are undoubtedly innocent. Until their convictions are quashed by the courts the Prison Service must proceed on the basis that such prisoners are properly convicted and it will look to see evidence of a reduction in risk. Because of their denial they are considered unsuitable for the offending behaviour courses available to prisoners. Such courses are seen by the Prison Service to provide vital evidence whether the risk of the offender has reduced. For those prisoners who deny their offences this evidence of risk reduction is missing. While recognising that latitude must be allowed when taking decisions on risk, the courts have nonetheless demanded that those decisions are taken fairly with due regard to the grave impact on prisoners. Thus, all post-tariff discretionary lifers must have an opportunity to make informed representations before the decision is taken which requires the gist of the reports before the decision maker to be disclosed[20] and in a smaller category of cases, generally where the prisoner is trapped at an impasse arising from his denial, may even require an opportunity to have an oral hearing before the Category A Committee.[21]

The parole process is another area with enormous significance for prisoners and where, until the courts intervened, the entire process was hidden from view. In *ex parte Wilson*[22] discretionary life sentence prisoners were held entitled to have access to the reports written about them in advance of the review. Having strongly objected at the time, the Prison Service soon decided to roll out the system of open reporting to all parole processes, no doubt recognising the beneficial effects fair decision-making has on the effective operation of an administrative system.

The flexibility of the principles of fairness mean that the court can require greater protection for some groups. Judges have been particularly assiduous where prisoners are especially vulnerable. For example, children who are segregated must, save in exceptional circumstances, be afforded an opportunity to make representations in advance of a decision to segregate them,[23] whereas for adult prisoners the decision in *Hague* still governs and no such entitlement arises.

The area of greatest procedural upheaval has come within the prison disciplinary system, the very site of the first battle for jurisdiction in the case of *St Germain.*

[20] *R v Home Secretary, ex parte Duggan* [1994] 3 All ER 277.

[21] *R (Williams) v Home Secretary* [2002] 1 WLR 2264; *R (McAvoy and McLuckie) v Home Secretary* [2010] EWHC 2013 (Admin); *R (Downs) v Home Secretary* [2011] EWCA (Civ) 1422

[22] *R v Parole Board, ex parte Wilson*, Court of Appeal, 30 January 1992.

[23] Children must be given an opportunity to make informed representations before a decision is taken: *R (SP) v Secretary of State for the Home Department* [2004] EWCA Civ 1750. For adults the decision in *Hague* still stands.

In 1992 the disciplinary functions of the Board of Visitors[24] were abolished[25] and the jurisdiction to hear disciplinary offences was conferred exclusively on the prison governor. The intention was that the more serious offences would be referred to the police for criminal prosecution. However, governors retained the power to impose a further period of detention of up to 42 days for each finding of guilt. Eventually, after a challenge had failed in the domestic courts,[26] the ECtHR held in *Ezeh and Connors* that the determination of a charge which was liable to lead to an award of additional days amounted to the determination of a criminal charge under Article 6 and was therefore required to be heard by an independent and impartial tribunal. This led to an amendment to the Prison Rules to introduce independent adjudicators who now have exclusive power to award additional days, as well as the provision of legal aid to prisoners to enable them to secure legal representation at such hearings.

By requiring prisons to act fairly, sometimes in the face of strong objection from the Prison Service, the courts have brought untold benefits, not just to prisoners who with the support of lawyers have often been able to secure favourable outcomes through their participation in decision-making processes, but for the prison estate more generally. Like anybody else prisoners are more accepting of unfavourable outcomes if they feel they have at least been treated fairly.

Developing Constitutional Law

The judicial authority established over the prison estate by the decision of the House of Lords in *Raymond v Honey* was a moment of far wider constitutional significance. The House of Lords endorsed the holding of the Divisional Court in *St Germain* that a prisoner retains all civil rights that are not taken away expressly or by necessary implication.[27] In so doing it identified in our unwritten constitution a substantive constraint on the freedom of parliament and the executive in favour of civil liberties while at the same time preserving parliamentary sovereignty to override fundamental rights should it squarely confront what it is doing. *Raymond v Honey* was a particular application of the constitutional principle of legality,[28] a principle of statutory construction long embedded in the common law, and according to which Parliament is presumed to intend its enactments to conform with the rule of law and thus with fundamental principles embedded in the entire system of laws including the common law.[29]

[24] Now the Independent Monitoring Board.

[25] This followed two examinations by government appointed Committees, the Prior Committee and the Woolf Committee.

[26] *R (Greenfield) v SSHD* [2003] 1 WLR 836.

[27] Per Lord Wilberforce at [1983] 1 AC 1, p. 10G-H.

[28] Per Lord Steyn in *R v Home Secretary, ex parte Pierson* [1998] AC 539.

[29] For a detailed exposition of the principle of legality see the speech of Lord Steyn in *R v Home Secretary, ex parte Pierson* [1998] AC 539.

In *Raymond v Honey* the House of Lords embedded fundamental common law rights as deeply as is possible in an unwritten constitution where Parliament remains the supreme legislative authority.[30] It left a number of questions unanswered, such as what are civil or common law rights and what is the basis for determining whether an enactment takes a right away by necessary implication. As noted, in *Raymond v Honey, ex parte Anderson* and *Leech (No 2)*, the rights in issue were access to the courts, the right recognised to be an inseparable part of that right, namely unimpeded access to legal advice, and the right to preserve legal professional privilege. The upshot was that when construed according to the principle of legality, the general rule-making power to regulate and manage prisons contained in s 47 of the Prison Act 1952 was quite insufficient to authorise hindrance or interference with such basic rights. Rules and Prison Service Orders which unlawfully interfered with those rights were struck down.

It is hardly surprising that as our courts grappled with the application of the principle of legality in cases concerning fundamental rights, Strasbourg was reaching similar decisions in cases such as *Golder, Boyle and Rice, McComb* and *Campbell.* Nor that the jurisprudence in Strasbourg should have had an influence on the path the common law took. That influence was greatest in the case of *Leech (No 2).* Here, Lord Justice Steyn (a commercial lawyer with a good understanding of the unpleasant consequences of uncontrolled State authority) grappled head on with the issue of how to determine whether interference with a fundamental right was authorised by necessary implication. With strong echoes of Strasbourg's jurisprudence on the Convention's qualified rights, he held that a prison Rule which interfered with fundamental rights could be upheld only if 'a self evident and pressing need' had been established and the measure constituted 'the minimum interference necessary' to achieve the statutory objectives.

The *Leech (No 2)* approach was endorsed by the House of Lords in *Simms and O'Brien* where two convicted murderers who protested their innocence had sought to interest investigative journalists in their cases in the hope that this would produce evidence and enable them to have their cases referred back to the Court of Appeal. But when the journalists applied to meet with them in prison to discuss their cases they were confronted by a Prison Service Order which only permitted a social visit, amounting in effect to a blanket ban on meeting journalists. Witness statements lodged by the journalists explained that without an opportunity to assess the prisoner in person they were in no position to decide whether to investigate the potential miscarriage. The House of Lords accepted this and, recognising the vital role that the media plays in bringing such miscarriages to light, held that

[30] Lord Hoffman observed that through the principle of legality the courts 'apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document': *R v Home Secretary ex parte Simms and O'Brien* [2000] 2 AC 115.

the PSO unlawfully interfered with prisoners' common law right to freedom of expression. Their Lordships rejected the Secretary of State's claim that the rule was necessary to prevent disruption of discipline and order and in so doing gave further refinement to the *Leech* principle. The judgment recognises that different value falls to be attached to the exercise of freedom of expression. Where, as here, the purpose was to expose a potential miscarriage of justice, the weight to be accorded to the right was great and much more would be required by way of justification before, as a matter of necessary implication, it could be held to have been lawfully curtailed. Their Lordships would have taken a very different approach to the strength of the need to maintain good order and discipline as a justification for preventing face-to-face interviews so that prisoners could simply air their views on matters of current interest. After serving 11 years of a life sentence Michael O'Brien succeeded in having his conviction for murder overturned.[31]

The principle of legality also played an important role in the path leading to judicialisation of the life sentence. It was invoked in *ex parte Pierson* to prevent the Home Secretary increasing the tariff he had earlier fixed to mark the punitive period of the sentence on the ground that he had no power to once the punishment had been fixed and communicated. The principle of legality constrained him, in what was essentially a sentencing exercise, to act according to sentencing principles embedded in the common law.

In 2000 the House of Lords determined *Daly*[32] another case concerning the interference with a prisoner's right to privileged communications with a lawyer. Invoking the principle of legality, a policy was struck down insofar as it permitted prison officers when conducting cell searches to look through prisoners' legal correspondence without the prisoner being present. While a legitimate need to check the correspondence was recognised to ensure that it was genuine or not being used to hide contraband, the policy offended the requirement that the interference be the minimum necessary to achieve that legitimate objective.

Much attention was focused by their Lordships in *Daly* on the Human Rights Act (then on the point of entering into force), a recognition that in the future it was to the Act rather than the principle of legality that the courts would most frequently be looking where fundamental rights were at stake. That has indeed proved to be the case but it is worth noting that despite the detailed protection the HRA gives to human rights, cases have continued to arise where the principle of legality has been invoked to protect the citizen against executive invasion of civil rights. At a time when the HRA is under threat such cases serve as a reminder of the continuing importance of this constitutional principle as a means of safeguarding fundamental rights.

[31] <http://www.theguardian.com/society/2008/sep/10/miscarriagesofjustice>.
[32] [2001] 2 AC 532.

Conclusions

This fifth edition of *Prison Law* is published in the wake of the changes to public funding for prison law cases which were enthusiastically introduced by the Lord Chancellor and Secretary of State for Justice, Chris Grayling MP, as part of his ideological commitment to destroying the right of access to our courts by prisoners (save in relation to a narrow band of cases where such denial would be incompatible with the requirements of the Convention). And so at the dawning of Mr Grayling's new legal order, what are we to make of this conspectus of prison law as it has developed over the last three decades? Obviously and most notably none of it could have happened in Mr Grayling's world. While it is plainly positive to record that a good deal of injustice has already been rectified by the courts over the past few decades, there will be plenty more in the future—whether at the hands of deliberately abusive prison officials or, less insidiously but no less dangerously, because officials under pressure cut corners, or governments take a more punitive approach to prisoners.

The tiny window of access to the courts that Mr Grayling is leaving to prisoners where their liberty is directly at stake will do nothing to prevent such injustice. In the longer term there is bound to be a marked deterioration in the administration of prisons. In the short term, it is indeterminate sentence prisoners who will feel the greatest impact. They will find themselves spending longer in prison than their true level of dangerousness requires, at great cost to the public purse. Without access to legal aid to pay for independent expert reports and the skilled legal representation of lawyers, Category A prisoners who find themselves in an impasse will remain there indefinitely, the onset of old age and infirmity alone their key to progression; for the same reasons those who have made real progress will be held back before being transferred to open conditions; and those on the point of release, although entitled to legal representation at the hearing will frequently stay where they are because the Probation Service has failed to put together a satisfactory release plan and legal aid is no longer available for their lawyers to do so on their behalf. The coalition government did not take account of these or any of the other added costs because the reforms are ideologically driven and took place within a consultation formulated to cut the costs of the legal aid budget.

The text of this fifth edition of *Prison Law* seeks to reflect the state of the law on 1 October 2014. We gratefully acknowledge the expert assistance of our outstanding team of contributing authors who have subjected the previous edition to a rigorous process of updating and revision to take account of relevant decisions at domestic and international level. Individuals who assisted in the writing of earlier editions have maintained their support and we are especially grateful to Simon Creighton (of Bhatt Murphy, solicitors), Sally Middleton (of Birnberg Peirce, solicitors), Phillippa Kaufmann QC, Edward Fitzgerald QC and Hugh Southey QC. We have been greatly assisted by our patient and careful publisher,