Trinity Term
[2015] UKSC 54
On appeal from: [2012] EWCA Civ 376

JUDGMENT

R (on the application of Bourgass and another) (Appellants) *v* Secretary of State for Justice (Respondent)

before

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

JUDGMENT GIVEN ON

29 July 2015

Heard on 16 and 17 February 2015

Appellants
Dinah Rose QC
Dan Squires
(Instructed by Birnberg Peirce and Partners)

Respondent
Sam Grodzinski QC
David Lowe
(Instructed by Government Legal Department)

Intervener (The Howard League for Penal Reform)
Edward Fitzgerald QC
Martha Spurrier
(Instructed by Clifford Chance LLP)

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

1. These appeals are concerned with the procedure followed when a prisoner is kept in solitary confinement, otherwise described as "segregation" or "removal from association". The principal question raised is whether decisions to keep the appellants in segregation for substantial periods were taken lawfully. Before the courts below, the arguments focused on the procedural requirements of article 6.1 of the European Convention on Human Rights ("the ECHR"). Before this court, the primary focus of the parties' printed cases was upon the requirements of procedural fairness at common law. During the course of the hearing, however, a different issue came to the forefront, namely whether the segregation was authorised as required by the applicable legislation. For the reasons I shall explain, I have concluded that it was not.

2. In the light of that conclusion, the question whether the requirements of procedural fairness were met does not affect the outcome of these appeals. Nevertheless, the nature of those requirements in this context is a question of general public importance, which has divided judicial opinion and was fully and carefully argued in these appeals. In the circumstances, it is appropriate that this court should deal with it.

3. It may be helpful to begin, however, by summarising the relevant factual background, considering first the history of events, and then the conditions of segregation.

The first appellant: the history of events

4. In 2010 the first appellant, Kamel Bourgass, was a prisoner in HMP Whitemoor, which is a high security prison. He was serving a life sentence for the murder of a police officer, concurrent sentences for the attempted murder of two other officers and the wounding of a third, and a 17 year sentence for being part of a terrorist conspiracy to commit public nuisance by the use of poisons and/or explosives.

5. On 10 March 2010 Bourgass was the victim of an assault by another prisoner named Sahebzadeh. Bourgass was then segregated under rule 45(1) of the Prison Rules 1999 (SI 1999/728) ("the Rules"), for reasons of good order and discipline. He was charged with an offence against discipline, it being alleged by a prison

officer that he had been fighting with Sahebzadeh. He appeared before a governor the following day, when he denied the charge and was remanded.

6. Bourgass's segregation was reviewed after 72 hours, on 13 March 2010, and thereafter at fortnightly intervals, on 23 March and 6 April 2010. The review was carried out by a Segregation Review Board ("SRB"). On each occasion, authority for continued segregation was given, purportedly in compliance with rule 45(2), by the senior prison officer who chaired the SRB (the officer on two of these occasions being Mr Colley, the "challenging prisoners manager"), on the ground that the investigation into the incident had not yet been completed. On 20 April 2010 Bourgass was found not guilty of the disciplinary charge. On 22 April 2010 he was removed from segregation. In a memorandum of the same date, he was notified by the head of security at the prison that intelligence suggested that he held extreme views, that he exerted a significant influence over other prisoners, and that "we suspect you of being linked to threats to other prisoners". In a letter dated 14 May 2010, the prison informed Bourgass's solicitors that he had been kept in segregation during that period as he was "influencing other prisoners in their activities".

7. On 23 April 2010 Sahebzadeh was seriously assaulted. Bourgass was not present. He was however segregated under rule 45(1) on the orders of Mr Colley, the reason given being that it was for the maintenance of good order and discipline pending an investigation into a serious assault. Authority for continued segregation was given on 26 April 2010 by another officer, the same reason being given. The assault was referred to the police for investigation. On 29 April 2010 Bourgass's solicitor, Mr Guedalla, wrote to the governor pointing out that his client had not been present at the time of the assault, and requesting an outline of the evidence relied on to justify his segregation. In a letter dated 30 April 2010, the "dynamic security governor", Mr Garvie, stated that "although not in the area of this assault we believe your client, along with others was behind this assault and as such his presence on normal location poses a threat to the good order and discipline of the Establishment".

8. On 4 May 2010 authority for Bourgass's continued segregation was given by Mr Colley on the ground that "you were involved in a serious assault". At about the same time Bourgass was referred for an assessment for transfer to the Close Supervision Centre ("CSC"), which houses prisoners considered too dangerous and challenging to be held in ordinary locations.

9. On 12 May 2010 Mr Guedalla wrote again asking for information about the evidence relied on. On 14 May 2010 the prison replied, stating that Bourgass was being held in segregation "due to his involvement in the planning of an assault on another prisoner [which] is currently being investigated by the police". Continued segregation was authorised on 18 May 2010 "pending an investigation into a serious

assault". In a letter of the same date, Mr Guedalla again requested an outline of the evidence relied on.

10. On or before 20 May 2010 the police indicated that they did not regard Bourgass as a suspect in connection with the assault on Sahebzadeh, and that he was no longer the subject of investigation by them. Mr Guedalla then wrote to the governor again, referring to the outcome of the police inquiries and requesting disclosure of the reasons for any further segregation, and of the evidence relied on to support it. The prison replied by letter dated 26 May 2010, stating that the investigation was still ongoing. In a letter to Mr Guedalla dated 28 May 2010, Mr Colley stated that Bourgass "is a prisoner we believe to hold extremist views and has an influence over other prisoners", that he was being referred to the CSC, and that he would remain segregated until the result of that referral was known.

11. On 1 June 2010 Bourgass's continued segregation was authorised by Mr Colley, the reason given being that "you are an unacceptable risk to other prisoners". Mr Colley authorised continued segregation again on 15 June 2010, the reason given being "pending CSC referral and investigation". He authorised continued segregation again on 29 June 2010, giving the reason "you are being investigated for a serious assault", and again on 13 July 2010, giving as his reason that "you were involved in a very serious assault". Continued segregation was again authorised on 27 July 2010 by another officer, on the ground that a final decision was awaited on the CSC referral.

12. In the meantime, Mr Guedalla had initiated judicial review proceedings, which were listed for a hearing on 4 November 2010. On 17 June 2010 the Secretary of State filed a response which said that Bourgass was not being segregated "simply because he may be responsible for the assault, but because, for numerous reasons, he is considered to pose an unacceptable risk on normal location". The additional reasons were based on intelligence that he had been involved, prior to the commencement of his segregation on 10 March 2010, in "intimidating other prisoners to change faith", and "forcing other prisoners to join in prayer sessions and to refrain from eating certain foods for religious reasons".

13. On 2 August 2010 the Secretary of State filed detailed grounds of defence, which disclosed that the basis upon which Bourgass was suspected of involvement in the assault on Sahebzadeh was principally that, during the morning prior to the assault, he had been seen on CCTV speaking to the perpetrator of the assault. It is difficult to understand why that information, and indeed the CCTV footage itself, had not been provided during the previous three months.

14. The Secretary of State also filed a witness statement of Mr Garvie, who stated that Bourgass had been transferred to Whitemoor in the first place because of his perceived influence over other prisoners at his previous prison and suspicion that he was bullying and intimidating other prisoners there. On his arrival at Whitemoor, he had been placed on the prison's anti-bullying regime but, according to Mr Garvie, had failed to engage with it and had continued his attempts to intimidate other prisoners. His initial segregation after the incident on 10 March 2010 had been a reaction to that incident, but it had been decided that he should remain in the segregation unit because it was believed that his attempts to influence other prisoners had caused Sahebzadeh to assault him out of frustration. There had been an escalation in violence within the prison that involved prisoners being pressurised into assaulting other prisoners for faith-related reasons. It was believed that Bourgass was involved in this. Following his removal from segregation on 23 April 2010, he had again been segregated because he was known to have met the perpetrator of the assault which took place that day, there was intelligence suggesting that he had been involved in the organisation of that assault as retaliation for the previous assault on himself, and there was intelligence suggesting that he had influence over other prisoners. These factors, combined with his history of violence and intimidation, led to the conclusion that he could no longer be managed on normal location. At the meeting of the SRB on 4 May 2010, it had been decided that he should be referred to the CSC. If the CSC referral were refused, Mr Garvie stated, Bourgass would have to be moved to another establishment.

15. Mr Garvie also disclosed that the prison authorities had decided that there was insufficient evidence to bring a disciplinary charge against Bourgass in relation to the assault on Sahebzadeh. They nevertheless considered, on the basis of his history, as well as their suspicion as to his involvement in the organisation of the assault on Sahebzadeh, that there would be a significant risk to the safety of other prisoners if he were returned to normal location.

16. Continued segregation was authorised on 10 August 2010, the reason given being that "you are down as a threat to other prisoners and we are awaiting a referral to CSC". On 24 August 2010 continued segregation was again authorised, the reason given being that "your behaviour is deemed to be unsuitable for normal location and have been referred to CSC" (sic). It was said that he would remain in segregation until the outcome of the referral. On 7 September 2010 continued segregation was authorised by Mr Colley, who reverted to the reason, "pending an investigation into a serious assault".

17. On 15 September 2010 the CSC Management Committee decided not to accept Bourgass's referral to the CSC, in the light of a report by the Central Case Management Group, a body within the prison service but external to Whitemoor. Its report stated that the referral was primarily based on alleged violence towards prisoners, with reference to the assault on Sahebzadeh. The report concluded,

however, that the referral did not provide sufficient evidence to justify selection for the CSC. It noted that no internal investigation was being carried out into the assault on Sahebzadeh, and that the police did not consider Bourgass to have been involved. As to the allegations of intimidation, it stated that "there is very little that shows he is intimidating others".

18. On 21 September 2010 continued segregation was authorised, the reason given being that "you will be transferred to another establishment, as we feel you would be a disruptive influence on normal location at Whitemoor".

19. Mr Guedalla wrote to the Treasury Solicitor on 22 September pointing out that one reason which had sometimes been given for Bourgass's segregation, namely involvement in the assault on Sahebzadeh, had been rejected by the police after investigation, and that another, the need to await the outcome of the referral to the CSC, had been superseded. Bourgass had been held in segregation for a period of over seven months, apart from a 24 hour period on 22/23 April 2010. Mr Guedalla reminded the Treasury Solicitor of concerns that had been expressed by the senior forensic psychologist at Whitemoor about the potential effect of prolonged segregation on Bourgass's mental health.

20. On 5 October 2010 continued segregation was authorised, the reason given being that "we are trying to transfer you". On 3 November 2010, the day before the judicial review hearing, Bourgass was transferred to HMP Woodhill. He had been in segregation almost continuously since 10 March 2010. On arrival at Woodhill, he was removed from segregation and placed on normal location.

21. The application for judicial review was heard together with that of the second appellant by Irwin J, who dismissed both applications: [2011] EWHC 286 (Admin). Their appeals to the Court of Appeal were heard together with that of a third appellant named King. All three appeals were dismissed: [2012] EWCA Civ 376; [2012] 1 WLR 3602.

The conditions of the first appellant's segregation

22. During segregation, Bourgass was locked in his cell for 23 hours a day, and was denied association with other prisoners. He was allowed out of his cell for exercise, which he took alone in a caged area. He was unable to participate in activities which involved association with other prisoners, such as work, education and communal religious services. Prisoners in segregation could however have access to education courses in their cells. He was permitted visits, but not physical contact with visitors, until that restriction was lifted during July 2010. He saw a

member of the chaplaincy from time to time. He also saw members of staff of the segregation unit when they opened the door to his cell at mealtimes. He was permitted books and a radio, and also had the opportunity to have a television if he displayed consistently good behaviour and a good attitude.

The second appellant: the history of events

23. In 2010 the second appellant, Tanvir Hussain, was a prisoner in HMP Frankland, which is another high security prison. He was serving a life sentence, having been convicted of involvement in a terrorist conspiracy.

24. On 26 April 2010 Hussain was placed in segregation under rule 45 on the orders of the "residential governor" of the prison, Mr Greener, following an incident in which another prisoner, Aslan, was seriously injured. The reason given was to ensure the safety of others and to maintain good order. Disciplinary proceedings also began on the same date, in which it was alleged that Hussain had assaulted Aslan. He was provided with a report by a prison officer who said that he had seen Hussain assaulting Aslan and had heard him make an incriminating remark. The adjudicator decided to refer the matter to the police, and adjourned the adjudication.

25. On 27 April 2010 Hussain's continued segregation was authorised by an officer on the ground that "following an alleged recent assault on a fellow prisoner we need to assess your risk and future location". A further continuation was authorised on 5 May 2010 by Mr Greener, the reason given being "the risks you pose to others". A further continuation was authorised on 19 May 2010, "due to the serious nature of the incident you were involved in on J Wing and the risk you pose to others". Hussain's solicitor, Mr Guedalla, wrote to the governor the same day requesting an explanation of why it was necessary for Hussain to be kept in segregation, and for an outline of any evidence relied on. In response, the prison stated that segregation had been continued because of the risk Hussain potentially posed to other prisoners.

26. A further continuation was authorised on 2 June 2010, "to maintain good order and discipline after an assault on another prisoner". On 14 June 2010 Mr Greener wrote to Mr Guedalla stating that Hussain remained segregated "following his physical attack upon another prisoner". It was said that the savage nature of the attack raised obvious risk concerns relating to other prisoners.

27. Further continuations were authorised on 16 and 30 June and 14 July 2010, the reasons given being respectively "pending police investigation and security review", "due to ongoing investigation into an assault on another prisoner", and

"pending ongoing investigation into a serious assault on another prisoner". A further continuation was authorised by Mr Greener on 28 July 2010, on the ground that "it is believed you may pose a threat to others, and you may be at risk from other prisoners". The latter possibility had not previously been mentioned.

28. In the meantime, Mr Guedalla had initiated judicial review proceedings, which were listed for a hearing together with the proceedings brought by Bourgass. On 30 July 2010 the Secretary of State submitted detailed grounds of defence together with a witness statement of Mr Greener.

29. It was said, in Mr Greener's witness statement, that Hussain had initially been segregated because of the severity of the assault on Aslan, the fact that it appeared to have taken place as the result of a mundane disagreement over food, and the risk which Hussain therefore posed to other prisoners. Consideration had also been given to the risk of reprisals by Aslan or other prisoners. Intelligence information also linked Hussain with the "conditioning" of segregated prisoners who were susceptible to manipulation. Three such prisoners had informed segregation unit staff that they had changed their religion from Christianity to Islam, having been converted through their cell windows by another prisoner. Intelligence suggested that Hussain was preaching Islam through his cell window to others in a determined attempt to convert non-Muslim prisoners to his own interpretation of Islamic ideals. There was concern that his interpretation of the Quran was in line with his terrorist beliefs, and that the promulgation of his ideals had the potential to cause serious disruption both in the segregation unit and in the general prisoner population. Mr Greener did not consider that the risk posed by Hussain could be managed by means of closer supervision on normal location, transfer to another wing or transfer to another establishment. He therefore remained in the segregation unit while he was monitored with the aim of assessing whether he should be referred to the CSC.

30. In a witness statement filed in reply, Hussain gave a detailed response to the allegation of proselytising. He quoted the sentencing remarks of the judge at his trial, to the effect that there was no evidence that he was a religious fanatic, and that his involvement in the offence appeared to be entirely attributable to his loyalty to his co-defendant. In correspondence some months later, concerned with Hussain's security classification, the prison authorities stated that it was believed not to be Hussain who had converted the prisoners.

31. On 10 August 2010 the judicial review proceedings were listed for a hearing. The following day, it was recorded that Hussain was being considered for transfer to another establishment. A further continuation of segregation was authorised because "of an assault on another prisoner". A further continuation of segregation was authorised by Mr Greener on 25 August 2010, "pending transfer to another establishment; and due to risks you pose to others". Further continuations of

segregation were authorised on 8 and 22 September 2010, the reasons given being respectively that "due to the assault on another prisoner you are to remain segregated until transferred out of the establishment", and because "of the risk you pose to others on the wing". On or before 19 October 2010 Hussain was transferred to HMP Wakefield. He had been in solitary confinement since 26 April 2010.

32. Following the police investigation, Hussain was charged with an assault upon Aslan. On 3 February 2011 the Crown Prosecution Service informed Hussain's solicitors that the proceedings were being discontinued on the ground that there was insufficient evidence to provide a realistic prospect of conviction.

The conditions of the second appellant's segregation

33. The conditions in which Hussain was kept in segregation were broadly similar to those that applied to Bourgass. He was only able to make a telephone call once every three days, as there were fewer telephones available than on normal location. As there was no electricity in the cells in the segregation unit, he did not have a television. Hussain also claimed to have been denied exercise on some occasions.

34. The regime which was applied to Bourgass and Hussain is similar to that which applies to prisoners undergoing cellular confinement as a punishment for an offence against discipline. Such a punishment can however only be imposed following disciplinary proceedings conducted in accordance with the Rules. It can, in addition, only be imposed for a maximum of 21 days. That maximum reflects the well-known risks which solitary confinement poses to the mental health of those subjected to it for prolonged periods: a matter to which I turn next.

The effects of segregation

35. In about 2003 the Secretary of State issued Prison Service Order 1700 ("the PSO"), a non-statutory document concerned with segregation. It acknowledges that the number of self-inflicted deaths in segregated settings is disproportionate. It continues at p 29:

> "Research into the mental health of prisoners held in solitary confinement indicates that for most prisoners there is a negative effect on their mental wellbeing and that in some cases the effects can be serious. A study by Grassian & Friedman (1986) stated that, 'Whilst a term in solitary confinement would be difficult for a well adjusted person, it can be almost unbearable for the poorly adjusted personality

> types often found in a prison.' The study reported that the prisoners became hypersensitive to noises and smells and that many suffered from several types of perceptual distortions (eg hearing voices, hallucinations and paranoia)."

36. According to a report published in June 2015 by the Prisons and Probation Ombudsman for England and Wales, 28 prisoners took their own lives while being held in segregation units in England and Wales between January 2007 and March 2014.

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

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

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

39. Similar conclusions were reached by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in its 21st General Report of 10 November 2011. It referred to evidence that solitary confinement "can have an extremely damaging effect on the mental, somatic and social health of those concerned", which "increases the longer the measure lasts and

the more indeterminate it is" (para 53). It considered the maximum period for which solitary confinement should be imposed as a punishment to be 14 days (para 56(b)).

40. The risks of segregation are recognised by the Secretary of State. On his behalf, it is said that segregation is used as a last resort where other means of addressing risk are considered insufficient. The alternatives include transfer to another wing, to another establishment, to a CSC, or to a Dangerous and Severe Personality Disorder Unit; or closer supervision on normal location, which might include constant CCTV observation, and resort to powers to use physical force so far as necessary; or the use of an incentives and earned privileges scheme.

Was the segregation duly authorised?

41. I turn next to the question whether the appellants' continued segregation was duly authorised.

Rule 45

42. The legal basis for segregation is rule 45 of the Rules. It provides, so far as material:

> "(1) Where it appears desirable, for the maintenance of good order or discipline or in his own interests, that a prisoner should not associate with other prisoners, either generally or for particular purposes, the governor may arrange for the prisoner's removal from association accordingly.
>
> (2) A prisoner shall not be removed under this rule for a period of more than 72 hours without the authority of the Secretary of State and authority given under this paragraph shall be for a period not exceeding 14 days but it may be renewed from time to time for a like period.
>
> (3) The governor may arrange at his discretion for a prisoner removed under this rule to resume association with other prisoners at any time ..."

43. It is clear from rule 45(1) and (3) that removal from association is something which is arranged, and may be ended, by "the governor": an expression with a

specific meaning, as I shall explain. It is equally clear from rule 45(2) that removal from association is not to last for a period exceeding 72 hours without the authority of the Secretary of State. The appellants complain that their segregation was ordered without that authority.

PSO 1700

44. As explained earlier, in about 2007 the Secretary of State issued a non-statutory document concerned with segregation, known as PSO 1700. The PSO provides for the establishment of SRBs, chaired by "a competent operational manager". Counsel for the Secretary of State informed the court that an operational manager is an officer performing a senior role within a prison, such as the head of security or the head of the segregation unit. Such officers are accorded the title "governor", although not in fact the governor of the prison or the duty governor for the time being (these expressions will be explained later). The PSO adds that "a person who is acting up/temporarily promoted to competent operational manager is able to give authority for the continuation of segregation".

45. The PSO states that the initial SRB must be held within 72 hours of a prisoner being placed in segregation, and that subsequent SRBs should be held at least every 14 days. Those intervals correspond to those required by rule 45(2). The initial SRB should comprise at least a chairman and a healthcare representative, and subsequent SRBs may also include other members of prison staff, such as the chaplain, and the prisoner for at least part of the Board. It is said to be desirable that a member of the independent monitoring board for the prison ("the IMB"), appointed by the Secretary of State under section 6 of the Prisons Act 1952 as amended ("the 1952 Act"), should also attend.

46. In relation to procedure, the PSO states that, once a decision has been reached by the SRB, it is good practice for the chairman to ask the IMB member to comment on it and to indicate whether he or she is likely to raise an objection to it. The chairman "will then make a final decision on the matter". In that regard, the PSO states:

> "The Review Board decides, after considering all of the factors detailed in section 2 [the part of the PSO headed 'What the Review Board should consider'], whether or not to authorise segregation to continue for a certain period of time (up to the maximum of 14 days). The operational manager chairing the Board has the final authority as to whether to authorise continuation of segregation under rule 45 (YOI rule 49) and must sign the relevant part of the form Segregation Review Board - Governor's Continued Authority for Segregation."

It is common ground that the PSO thus purports to confer on a member of the staff of the prison, namely the operational manager chairing the SRB, the power to authorise the continued segregation of a prisoner after the initial 72 hours ordered by the governor.

47. The first question raised by the appellants is whether authority under rule 45(2) can lawfully be given by an operational manager, as envisaged by the PSO, and as occurred in relation to both appellants, given that rule 45(2) requires authority to be given by the Secretary of State. It is argued on behalf of the Secretary of State that rule 45(2) permits governors and other senior prison officers to take such decisions, when authorised to do so by the Secretary of State, and that such authority has been lawfully granted by the PSO. The Secretary of State's argument is not that a blanket authorisation has been granted by the Secretary of State ab ante. The argument, rather, is that the decision of the governor or the operational manager *is* the decision of the Secretary of State, by virtue of the operation of the *Carltona* principle. Alternatively, it is argued that the words "the Secretary of State", in rule 45(2), should as a matter of construction be interpreted as including prison governors and other senior prison officers.

The Carltona principle

48. In *Carltona Ltd v Comrs of Works* [1943] 2 All ER 560, the Court of Appeal rejected a challenge made to a decision taken by a senior civil servant on the ground that the statutory power was conferred on the minister rather than his officials. Lord Greene MR said at p 563:

> "In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in

> Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them."

49. The *Carltona* principle, as it has become known, is not one of agency as understood in private law. Nor is it strictly one of delegation, since a delegate would normally be understood as someone who exercises the powers delegated to him in his own name. Rather, the principle is that a decision made on behalf of a minister by one of his officials is constitutionally the decision of the minister himself. As Jenkins J stated in *Lewisham Borough Council v Roberts* [1949] 2 KB 608, 629, when rejecting an argument that the principle was one of delegation:

> "I think this contention is based on a misconception of the relationship between a minister and the officials in his department. A minister must perforce, from the necessity of the case, act through his departmental officials, and where as in the Defence Regulations now under consideration functions are expressed to be committed to a minister, those functions must, as a matter of necessary implication, be exercisable by the minister either personally or through his departmental officials; and acts done in exercise of those functions are equally acts of the minister whether they are done by him personally, or through his departmental officials, as in practice, except in matters of the very first importance, they almost invariably would be done. No question of agency or delegation ... seems to me to arise at all."

50. An official in a government department is in a different constitutional position from the holder of a statutory office. The official is a servant of the Crown in a department of state established under the prerogative powers of the Crown, for which the political head of the department is constitutionally responsible. The holder of a statutory office, on the other hand, is an independent office-holder exercising powers vested in him personally by virtue of his office. He is himself constitutionally responsible for the manner in which he discharges his office. The *Carltona* principle cannot therefore apply to him when he is acting in that capacity.

51. It is possible that a departmental official may also be assigned specific statutory duties. In that situation, it was accepted in *R v Secretary of State for the Home Department, Ex p Oladehinde* [1991] 1 AC 254 that the official remained able to exercise the powers of the Secretary of State in accordance with the *Carltona* principle.

52. It is also possible that the performance of statutory ministerial functions by officials, or by particular officials, may be inconsistent with the intention of Parliament as evinced by the relevant provisions. In such circumstances, the operation of the *Carltona* principle will be impliedly excluded or limited: *Oladehinde* at p 303. Furthermore, the authorisation of officials to perform particular ministerial functions must in any event be consistent with common law requirements of rationality and fairness: see, for example, *Oladehinde* at pp 281-282 per Lord Donaldson of Lymington MR (in the Court of Appeal), and at pp 300 and 303 per Lord Griffiths.

The legislative framework

53. In considering rule 45(2), it is necessary to note at the outset that the court was provided with only minimal information about the administrative relationships between prisons (both those staffed by civil servants and those that are contracted out to private operators, to which rule 45(2) also applies), Her Majesty's Prison Service, the National Offender Management Service and the Ministry of Justice, and with no information about the governance arrangements or the arrangements in relation to accountability to Parliament.

54. Counsel for the Secretary of State relied upon the decisions in *R v Secretary of State for Social Security, Ex p Sherwin* (1996) 32 BMLR 1 and *Castle v Director of Public Prosecutions* [2014] EWHC 587 (Admin); [2014] 1 WLR 4279, implicitly inviting the court to assume that there was no relevant difference between the relationship of the agency officials with which those cases were concerned and the Secretary of State, on the one hand, and the relationship of prison governors and other prison staff and the Secretary of State for Justice, on the other hand. That cannot however be assumed. The decisions in *Ex p Sherwin* and *Castle* were based upon evidence concerning the relationship between officials of the Benefits Agency and the Highways Agency, respectively, and the relevant departments of government. No equivalent evidence is before this court.

55. Furthermore, unlike those cases, the relationship between prison governors and other officers, on the one hand, and the Secretary of State on the other hand, is the subject of specific legislation: something which, in itself, points towards a different relationship from that between a departmental official and a minister, since it is not readily reconciled with the idea that prison governors and officers, and the Secretary of State, are constitutionally indistinguishable.

56. Section 3 of the 1952 Act empowers the Secretary of State to "appoint such officers and employ such other persons as he may ... determine". Under section 4(1), the Secretary of State "shall have the general superintendence of prisons and shall

make the contracts and do the other acts necessary for the maintenance of prisons and the maintenance of prisoners". Section 4(2) and (3) provide:

> "(2) Officers of the Secretary of State duly authorised in that behalf shall visit all prisons and examine the state of buildings, the conduct of officers, the treatment 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.
>
> (3) The Secretary of State and his officers may exercise all powers and jurisdiction exercisable at common law, by Act of Parliament, or by charter by visiting justices of a prison."

57. Section 7 provides:

> "(1) Every prison shall have a governor, a chaplain and such other officers as may be necessary.
>
> …
>
> (3) A prison which in the opinion of the Secretary of State is large enough to require it may have a deputy governor ..."

The implication is that a prison has only one "governor" within the meaning of the 1952 Act.

58. Section 8 confers on every prison officer the powers, authority, protection and privileges of a constable. Section 13 provides:

> "Every prisoner shall be deemed to be in the legal custody of the governor of the prison."

Other sections confer powers or impose duties specifically upon the governor or prison officers. Examples include sections 16A and 16B, which empower the governor to authorise the testing of prisoners for drugs and alcohol, and empower prison officers to carry out such testing in accordance with the authorisation. Provisions such as these can be contrasted with other provisions conferring powers

or imposing duties upon the Secretary of State, generally of wider scope, or of a supervisory nature. There are also provisions which confer separate and overlapping powers on the governor and on the Secretary of State, such as sections 40A to 40E.

59. Apart from a small number of powers for which specific provision is made, such as those I have mentioned, the 1952 Act gives no content to the powers of governors or other prison officers. By section 47(1), however, Parliament has enabled the Secretary of State to make rules conferring a wide range of powers:

> "The Secretary of State may make rules for the regulation and management of prisons, remand centres, young offender institutions or secure training centres and for the classification, treatment, employment, discipline and control of persons required to be detained therein."

It was under section 47(1) that the Rules were made.

60. Several features of the Rules are relevant to the present question. First, a number of the Rules expressly confer powers upon the Secretary of State. Numerous powers are also conferred or imposed expressly on governors, a term which is defined by rule 2 as including "an officer for the time being in charge of a prison". A "governor", within the meaning of the Rules, can therefore include an officer who is acting as "duty governor", as well as the "governing governor" of the prison.

61. Secondly, some rules deal separately with the powers and duties of the Secretary of State, on the one hand, and the governor, on the other. For example, rule 35(3) empowers the governor to allow a prisoner an additional letter or visit, and rule 35(7) separately empowers the Secretary of State to allow additional letters and visits in relation to any prisoner. Rule 45 also falls into this category, as I have explained.

62. Thirdly, numerous rules require the governor or prison officers to act in accordance with directions or guidance given by the Secretary of State. For example, rule 55(4) requires the governor, in imposing a punishment, to take into account any guidelines issued by the Secretary of State. It would scarcely be necessary to impose explicit requirements of this kind if the governor and prison officers were, for these purposes, in the position of departmental officials. It would then go without saying that they were bound to carry out the instructions of their minister.

63. Fourthly, several other rules require the governor to act in a specified manner towards the Secretary of State. For example, rule 22(2) requires the governor to

notify the Secretary of State of the death of a prisoner. Rules of this kind would again be unnecessary if the governor were in the position of a departmental official. Legislation is scarcely necessary to require departmental officials to provide their minister with the information he desires.

64. In the light of the foregoing, it is apparent that the arrangements governing the relationship between the Secretary of State and prison governors, established by the 1952 Act and the Rules, bear no resemblance to those governing the relationship between a minister and his departmental officials. Prison governors, whether the governor appointed under the 1952 Act or the wider class of "governors" referred to in the Rules, are the holders of an independent statutory office. The governor, not the Secretary of State, has custody of the prisoners held in the prison in question. He and his officers, unlike the Secretary of State, have the powers of constables. He and his officers exercise the powers over prisoners which are conferred on them by rules made by the Secretary of State, under the power conferred on him by section 47(1). The Secretary of State's officers in turn ensure that those rules are complied with, in accordance with section 4(2). Under the Rules, the powers of governors and of the Secretary of State are distinctly demarcated. Some powers are exercised by governors independently. In relation to others, they are expressly required by law to act in accordance with, or have regard to, directions given by the Secretary of State: a requirement which demonstrates their constitutional separation from the Secretary of State and his departmental officials.

The case law

65. There are two decisions of the House of Lords in which the relationship between prison governors and the Secretary of State has been considered. In the first, *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533, the question was whether a disciplinary decision by a governor was amenable to judicial review. In the course of considering that question, their Lordships made a number of observations which are pertinent to the present issue.

66. Lord Bridge of Harwich, in a speech with which the other members of the House agreed, stated at p 561:

> "The governor of a prison holds an office created by the Act of 1952 and exercises certain powers under rules 47 to 55 of the Rules of 1964 [the disciplinary provisions then in force] which are conferred upon him and him alone."

Lord Bridge went on to address the reasoning in an earlier decision of the Court of Appeal, which had distinguished between prison governors and boards of visitors on the basis that governors were servants or agents of the Secretary of State:

> "A prison governor may in general terms be aptly described as the servant of the Secretary of State, but he is not acting as such when adjudicating upon a charge of a disciplinary offence. He is then exercising the independent power conferred on him by the rules. The Secretary of State has no authority to direct the governor, any more than the board of visitors, as to how to adjudicate on a particular charge or what punishment should be awarded. If a Home Office official sought to stand behind the governor at a disciplinary hearing and tell him what to do, the governor would properly send him packing." (p 563)

67. It follows from Lord Bridge's observations that the Secretary of State, having no authority to direct the governor in the exercise of his disciplinary powers, could have no constitutional responsibility for the governor's exercise of those powers (as distinct from his own supervisory functions), and that the rationale underpinning the *Carltona* principle would therefore be absent.

68. Lord Oliver of Aylmerton, whose speech was also concurred in by the other members of the House, reiterated that "the office of a governor of a prison is the creation of statute" (p 569). He went on to observe:

> "The starting point of the inquiry appears to me to be that the prison governor is not a mere servant or alter ego of the Secretary of State but a statutory officer performing statutory duties. Many of those duties are of a purely administrative nature and involve no adjudicatory function at all." (p 578)

69. Applying Lord Oliver's dictum, plainly the *Carltona* principle can have no application in so far as the governor is performing those duties. Lord Bridge focused particularly on the governor's exercise of disciplinary functions, but, as Lord Oliver recognised, the same principle applies to the exercise of administrative functions. As I explained earlier, the important question is whether the function in question is one which is performed by the governor as the holder of an independent statutory office, as distinct from being a function of the Secretary of State which might be performed by any Crown servant authorised by him.

70. It is also necessary to note the decision of the Court of Appeal in *R v Deputy Governor of Parkhurst Prison, Ex p Hague* [1992] AC 58. The case concerned rule 43 of the Prison Rules 1964 as amended, which was the predecessor of rule 45 of the Rules in issue in the present appeals. Under rule 43(1), as under the later rule 45(1), the initial power to segregate was given to "the governor". The case arose from the fact that the governor of one prison had purported to authorise the segregation of a prisoner on his arrival at another prison to which he was being transferred, as required by an instruction issued by the Home Office. The prisoner's continued segregation at his new prison, after the initial period of segregation expired, was then automatically authorised by the regional director of prisons on behalf of the Secretary of State, in accordance with the same instruction. Both authorisations were held to be ultra vires. The governor of one prison had no power to order the segregation of a prisoner held in another prison: the decision could only be taken by the governor of the prison where the prisoner was currently held. Nor could the Secretary of State lawfully authorise segregation as a matter of routine, without a genuine exercise of his discretion both as to whether it should be given and, if so, for how long.

71. In a judgment with which Nicholls LJ and Sir Nicolas Browne-Wilkinson V-C agreed, Taylor LJ addressed an argument that the Secretary of State possessed a residual power to initiate segregation under rule 43. He observed at p 107:

> "Whether or not the Secretary of State retains an overall power to segregate a prisoner, he cannot, in my judgment, exercise it under rule 43 because that rule gives powers specifically to the governor. Rule 43(2) provides for authority to be given to the governor to segregate for more than 24 hours by either a visitor or the Secretary of State. But that authority is merely clothing for the governor. The decision 'under this rule' is still his. I do not accept, therefore, that the Secretary of State can act under rule 43 to initiate segregation."

Taylor LJ went on to explain the fact that the Secretary of State's authority was required as a safeguard provided to protect the prisoner's rights (p 110).

72. These passages are doubly relevant to the present case. First, the implication is that segregation is at all times dependent on the governor's being of the view that it appears desirable for the maintenance of good order and discipline, as required by rule 43(1) of the 1964 Rules and rule 45(1) of the current Rules. "The governor", for these purposes, means the governing governor or the duty governor, to adopt the expressions used by counsel for the Secretary of State. It does not mean any prison officer meeting the description of a "competent operational manager". Secondly, the governor's functions under rule 43 are distinct from those of the Secretary of State, and neither can perform the functions properly belonging to the other. In particular,

since segregation beyond the initial period requires the authorisation of the Secretary of State, as a safeguard for the prisoner, in addition to the governor's being of the view that continued removal from association is desirable, it follows that such authorisation cannot be given by the governor (let alone by a more junior member of his staff).

73. The second decision of the House of Lords is that in *Somerville v Scottish Ministers* [2007] UKHL 44; [2007] 1 WLR 2734. One of the issues in the case was whether the act of the governor of a Scottish prison, in ordering the segregation of a prisoner, was to be regarded as the act of the Scottish Ministers by virtue of the *Carltona* principle. Under rule 80(1) of the Prisons and Young Offenders Institutions (Scotland) Rules 1994 (SI 1994/1931), the governor could order that a prisoner should be removed from association with other prisoners. Rule 80(5) provided that a prisoner who had been removed from association by virtue of an order made by the governor should not be subject to such removal for a period in excess of 72 hours from the time of the order except where the Scottish Ministers had granted written authority on the application of the governor. As Lord Rodger of Earlsferry observed at para 135, the terms of these rules would therefore suggest that, while the basis for the initial segregation of 72 hours would be the governor's order, the basis for any segregation for a period of longer than that would be constituted by the governor's order plus the written authority granted by the Scottish Ministers. That is consistent with the view expressed by Taylor LJ in *Hague.*

74. Lord Rodger accepted the Scottish Ministers' argument that, when making an order under rule 80(1), the governor was exercising a specific power which the rules conferred on governors and which could not be exercised by the ministers themselves. In that regard he applied the reasoning of Lord Oliver in *Leech,* on the basis that it was equally applicable to the governor's role under rule 80 as to his disciplinary functions. He added, at para 140:

> "Whoever is acting as governor for the purposes of rule 80 at the relevant time is exercising a distinct function, or distinct functions, which cannot be carried out by the Scottish Ministers. ... Under rule 80 of the Scottish Prison Rules, the Scottish Ministers have their own distinct functions. The division between the role of the governor and the role of the Ministers is indeed essential if the protections for prisoners contained in the rule are to be effective. It follows that the familiar principle in *Carltona Ltd v Comrs of Works* [1943] 2 All ER 560 has no application to what the governor does under rule 80."

75. The approach adopted in *Somerville* is consistent with that adopted in *Leech,* and as I have explained with that of the Court of Appeal in *Hague.* The implication of the decisions is that the powers that are confided to the governor by rule 45(1) or

its Scottish equivalent are conferred on him in his own right, and not in the performance of functions of the Secretary of State. They are therefore not within the ambit of the *Carltona* principle. Equally, the Secretary of State's function under rule 45(2), or its Scottish equivalent, is distinct from the function of the governor, and exists as a safeguard to protect the prisoner.

76. Counsel for the Secretary of State relied upon a number of other cases. The first was the case of *R v Governor of Brixton Prison, Ex p Walsh* [1985] AC 154, which was cited in *Leech* but not referred to in the speeches. The issue in that case was whether the Secretary of State, or the governor of a prison holding remand prisoners, was under a duty to produce them at court in accordance with the terms of their remand. Counsel relied upon a passage in Lord Fraser of Tullybelton's narration of the background circumstances, in which he stated at p 165 that the power conferred on the Home Secretary by section 29(1) of the Criminal Justice Act 1961, to direct that a detained person should be taken to a place where his attendance was desirable in the interests of justice, had been delegated to the governors of prisons for certain purposes. The matter was not argued or discussed. The use of the term "delegated" suggests that it was not the *Carltona* principle that Lord Fraser had in mind. In the circumstances, I find this case of no assistance.

77. Reliance was also placed on *R v Secretary of State for the Home Department, Ex p Hickling* [1986] 1 FLR 543. The case concerned the provision, now contained in rule 12(2) of the Rules, enabling the Secretary of State to permit a woman prisoner to have her baby with her in prison, subject to any conditions he thinks fit. The Secretary of State had issued a general instruction laying down criteria for admission to a mother and baby unit, together with the procedures to be followed, and stating that the final decision in a particular case should rest with the governor. The instruction also stated that the governor should arrange for the removal of the baby if he considered that the mother's behaviour was such as to threaten the serious disruption of the unit or the safety of the baby or other babies in the unit. The Court of Appeal held that the instructions laid down the conditions on which the Secretary of State permitted women prisoners to have their babies with them in prison, as contemplated by the relevant rule. Eveleigh LJ stated that it was not a case of the Secretary of State delegating his authority, but of his laying down conditions which must be fulfilled. Since those conditions addressed matters which the governor was best placed to judge, it was right to allow the governor to decide if they were not being complied with. It is apparent, therefore, that this case was not an application of the *Carltona* principle.

The Carltona principle, statutory construction and rule 45

78. Returning to rule 45 in the light of the foregoing discussion, it is virtually identical to the rule considered in *Hague*. Paragraph (1) enables the governor to

"arrange" for the prisoner's removal from association. Paragraph (2) provides that a prisoner shall not be removed under the rule for a period of more than 72 hours "without the authority of the Secretary of State", and that "authority given under this paragraph shall be for a period not exceeding 14 days". Authority is therefore given under rule 45(2) by the Secretary of State to the governor, the governor having already formed the view that continued segregation is desirable. That provision cannot sensibly be construed either as enabling the governor to give authority to himself, or as enabling authority to be given to him by a subordinate officer.

79. Rule 45 is also similar to the Scottish rule considered in the case of *Somerville.* The only distinction between the Scottish rule and rule 45 which might conceivably be material is that the former expressly states that decisions to authorise removal beyond the initial period are made following an application by the governor. Although that is not expressly stated in rule 45(2), it must be implicit that the Secretary of State's authority follows upon an initiative taken by the governor, as Taylor LJ considered in *Hague.* The minor difference in wording between the Scottish and English rules does not therefore warrant a different approach to the division of roles as between the governor and the Secretary of State from that held to exist, in the Scottish context, in *Somerville,* and in the English context, under the 1964 Rules, in *Hague.*

80. The apparent rationale of rule 45(2) is clear. The governor can order segregation at his own hand for a maximum of 72 hours, but any longer period requires the authorisation of the Secretary of State – in practice, senior officials from outside the prison – in order to protect the prisoner against the risk of segregation for an unduly protracted period. Counsel for the Secretary of State argued, however, that rule 45(2) had no such rationale. His argument was based primarily on a detailed analysis of the history of rule 45 and of two other rules, rule 48 and rule 49.

81. As originally made, rule 45(2) prohibited the removal of a prisoner under rule 45(1) for more than three days "without the authority of a member of the board of visitors or of the Secretary of State". Rule 45(2) in its present form was substituted by the Prison (Amendment) (No 2) Rules 2005 (SI 2005/3437) ("the 2005 amendments"). The material change was the removal of the reference to a member of the board of visitors.

82. Rule 48(1) permits the governor to order the temporary confinement of a prisoner in a special cell, but rule 48(2) prohibits the prisoner's confinement there for longer than 24 hours without a direction in writing. In its original form, rule 48(2) required the direction to be given by "a member of a board of visitors or by an officer of the Secretary of State (not being an officer of a prison)". That rule was amended by the 2005 amendments so as to require the direction to be given by "an officer of the Secretary of State".

83. Rule 49(1) permits the governor to order that a prisoner be placed under restraint, but rule 49(4) provides that a prisoner must not be kept under restraint for longer than 24 hours without a direction in writing. In its original form, rule 49(4) required the direction to be given by "a member of the board of visitors or by an officer of the Secretary of State (not being an officer of a prison)". That part of the rule was not amended by the 2005 amendments. It was however amended by the Prison (Amendment) Rules 2008 (SI 2008/597) ("the 2008 amendments"), so as to require the direction to be given by "a member of the independent monitoring board or by an officer of the Secretary of State (not being an officer of a prison)". It was amended again by the Prison and Young Offender Institution (Amendment) Rules (SI 2009/3082) ("the 2009 amendments"), so as to remove the reference to a member of the independent monitoring board.

84. In counsel's submission, the original terms of rules 48(2) and 49(4), which referred to "an officer of the Secretary of State (not being an officer of a prison)", were designed to make it clear that the direction had to be given by an official external to the prison. Their effect was to draw a distinction between the functions of the governor under rules 48(1) and 49(1), and the functions which could not be performed by the governor, under rules 48(2) and 49(4). There had been no similar words in rule 45(2). The implication, it was argued, was that the function under rule 45(2) could be performed by any officer of the Secretary of State, whether within the prison or not, and including the governor in particular.

85. The 2005 amendments, it was submitted, made the position even clearer. The words "(not being an officer of a prison)" had been removed from rule 48(2) but not from rule 49(4). The implication was that the function under rule 48(2) could now be performed by any officer of the Secretary of State, including an officer of the prison. Rule 48(2) was therefore placed in the same position as rule 45(2). No analogous amendment had been made to rule 45(2), because none was necessary: its terms had never prevented the function under that rule from being performed by an officer of the prison. The latter rule could not have been intended to be construed in the same way as rule 49(4), since it was expressed in different terms.

86. I am not persuaded by this argument. In the first place, it proves too much. As I have explained, the Rules accord a variety of powers to the Secretary of State. Some of those powers are clearly not intended to be exercised by a governor or other prison officer. For example, rule 46(1) empowers the Secretary of State to direct a prisoner's removal from association and his placement in a CSC. There is no express provision that the Secretary of State's powers cannot be exercised by an officer of the prison. On counsel's argument, it follows from the absence of those words that the Secretary of State's powers under rule 46 could be exercised by a governor. In view however of the contrast between the power given by rule 45(1) to a governor to order removal from association in the ordinary case, and the power given by rule 46(1) to the Secretary of State in the special case where removal is to result in

placement in a CSC, quite possibly in another prison, it is plain that the power under rule 46(1) is not intended to be exercisable by a governor. The presence of the language found in rule 49(4) (which appears to be unique to that provision), or its absence (as in the numerous other rules which address separately the functions of the governor and of the Secretary of State), cannot therefore be the touchstone.

87. The premise of counsel's argument, that whenever the Rules intend to restrict the delegation or devolution of the Secretary of State's powers to an officer external to the prison they say so expressly, is not made out. Reliance on the differently-worded provisions of rules 48 and 49 cannot therefore determine the meaning of rule 45(2).

88. As in the cases of *Hague* and *Somerville,* it can in my opinion be inferred that rule 45(2) is intended to provide a safeguard for the prisoner: a safeguard which can only be meaningful if the function created by rule 45(2) is performed by an official from outside the prison. It makes sense that the governor should be able to act at his own hand initially, since decisions to remove a prisoner from association with other prisoners may need to be taken urgently. It also makes sense that the governor should be able, under rule 45(3), to arrange for the prisoner's resumption of association with other prisoners at any time, and, in particular, in response to any medical recommendation. Rule 45(2) however ensures that segregation does not continue for a prolonged period without the matter being considered not only by the governor but also by officials independent of the management of the prison. If, as counsel submitted, rule 45(2) was not intended to provide a safeguard, then the requirement to obtain the authority of the Secretary of State, before segregation can lawfully continue for more than 72 hours, would lack any rationale.

89. It follows that it is implicit in rule 45(2) that the decision of the Secretary of State cannot be taken on his behalf by the governor, or by some other officer of the prison in question. The *Carltona* principle cannot therefore apply to rule 45(2) so as to enable a governor or other prison officer to exercise the powers of the Secretary of State. It equally follows that the alternative argument advanced on behalf of the Secretary of State, that the expression "the Secretary of State", in rule 45(2), implicitly includes the governor and other officers of the prison, must also be rejected. Quite apart from the implausibility of the argument in the light of other provisions of the Rules, as I have explained, it would in any event defeat the purpose of rule 45(2).

90. Any purported performance of the Secretary of State's function under rule 45(2) by a governor or other prison officer cannot therefore be treated as constituting performance by the Secretary of State. The Secretary of State's purported delegation of his function under rule 45(2) to the chairman of the SRB, in terms of the PSO, was therefore unlawful. It follows that the decisions to continue the segregation of

the two appellants were taken without lawful authority, and that their segregation beyond the initial 72 hours was therefore unlawful.

Procedural fairness

91. That is sufficient to determine these appeals. It is however appropriate also to deal with the questions of procedural fairness which divided opinion in the courts below and also occupied much of the hearing before this court. They concern two issues: first, the prisoner's right to make representations and, for that purpose, to be provided with information about the basis on which authorisation for his continued segregation is sought; and secondly, the scope of judicial review of decisions taken under rule 45(2), and its compatibility with the requirements of article 6.1 of the ECHR, if that provision is applicable.

92. It is important to be clear at the outset as to the nature of the decision-making in question. Decisions under rule 45(2) do not involve the determination of a charge against the prisoner or the imposition of a punishment, either in form or in substance. As counsel for the Secretary of State emphasised, segregation decisions are not based on a determination of fact as to whether a particular event has occurred, but involve a judgment as to the risk posed to the good order and discipline of the prison, and whether the particular situation could be equally or better addressed by other measures, such as transfer to another wing, closer supervision on normal location or transfer to another establishment. Allegations may be made against a prisoner, but the subject-matter of the Secretary of State's decision is not whether the prisoner behaved as alleged: these are not disciplinary proceedings.

Representations and the provision of information

93. It is common ground that initial segregation generally has to be decided upon in circumstances of urgency. It is not argued that such decisions, which cannot last for more than 72 hours, must be preceded by any form of hearing. It is also common ground that decisions by the Secretary of State to grant authority for continued segregation are in a different position. On behalf of the appellants, it is submitted that fairness requires that the prisoner be provided with sufficient information about the reasons for seeking authority, and the evidence relied on, to enable him to make effective representations. It is accepted that the evidence may be redacted or summarised where necessary to protect essential interests. On behalf of the Secretary of State, it is accepted that fairness requires that prisoners should usually be given a meaningful opportunity to make representations in relation to such decisions, and entails that they should be provided with relevant information for that purpose. It is submitted that the duty to provide information is limited by countervailing considerations, such as those relating to security and the need to

protect sources of information. It is therefore submitted that it is sufficient that the prisoner should be provided with the gist of the reasons for seeking authorisation, and the opportunity to make representations. The Secretary of State also submits that, on the facts of the appellants' cases, that is what they were given.

94. In relation to these matters, neither party seeks to support the decision of the Court of Appeal, which considered itself bound by its earlier decision in *Hague* to hold that the common law gave a prisoner no right to be provided with adequate disclosure or reasons to enable him to challenge his continued segregation. The Court of Appeal had previously declined to follow that aspect of its decision in *Hague* in relation to the segregation of child offenders (see *R (SP) v Secretary of State for the Home Department* [2004] EWCA Civ 1750), but considered itself bound by it as far as adult offenders were concerned.

95. In *Hague*, it was conceded, as in the present appeals, that there was no right to be heard before the initial decision to segregate was made, given the urgency with which such decisions normally have to be made. It was however argued that fairness required that the prisoner be given the right to be heard before continued segregation was ordered. That argument was rejected by the Court of Appeal, primarily, it appears, because of the absence from the then rule 43 of any express procedural requirements, whereas such requirements could be found in the rules governing disciplinary proceedings. The Court of Appeal also considered that there were public policy grounds for not giving reasons to the prisoner, since such disclosure could reveal sensitive information and put security, or informants, at risk. The court supported its decision by reference, in particular, to its earlier decision in *Payne v Lord Harris of Greenwich* [1981] 1 WLR 754.

96. The law relating to procedural fairness has not stood still since then. In *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531 the House of Lords overruled *Payne v Lord Harris of Greenwich* and, in the speech of Lord Mustill, set out the approach to be followed when considering questions of procedural fairness generally, and more particularly the procedural rights of prisoners in relation to decisions which may affect them adversely. The House also rejected the argument that the existence of express statutory rights to a fair hearing in relation to some kinds of decisions affecting prisoners entailed the absence of any such right in relation to all other such decisions.

97. More recently, in *R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115 this court considered the rationale of procedural fairness at common law, and emphasised both the instrumental value of enabling persons to participate in decision-making when they may be able to contribute relevant information or to test other information before the decision-maker, and the ethical value of allowing persons to participate in decision-making which concerns them and is liable to have

a significant effect on their rights or interests, where they may have something to say which is relevant to the decision to be taken. The court also referred to research indicating the significance of unfair procedures in prisons, in particular, in affecting prisoners' attitudes and their prospects of rehabilitation.

98. Whatever the position may have been in the past, the approach described in *Doody* and *Osborn* requires that a prisoner should normally have a reasonable opportunity to make representations before a decision is taken by the Secretary of State under rule 45(2). That follows from the seriousness of the consequences for the prisoner of a decision authorising his segregation for a further 14 days; the fact that authority is sought on the basis of information concerning him, and in particular concerning his conduct or the conduct of others towards him; the fact that he may be able to answer allegations made, or to provide relevant information; and, in those circumstances, from the common law's insistence that administrative power should be exercised in a manner which is fair.

99. A contrary conclusion cannot be drawn from the absence from rule 45 of procedural provisions similar to those contained in the rules governing adjudication proceedings. It would be extraordinary if, where there was sufficient evidence to warrant disciplinary proceedings, the prisoner were entitled to a fair process at the end of which he might be segregated as a punishment for up to 21 days, yet where there was insufficient evidence, he could be segregated for a much longer period, without procedural protection. The Court of Appeal's decision to the contrary in *Hague* cannot be sustained.

100. A prisoner's right to make representations is largely valueless unless he knows the substance of the case being advanced in sufficient detail to enable him to respond. He must therefore normally be informed of the substance of the matters on the basis of which the authority of the Secretary of State is sought. That will not normally require the disclosure of the primary evidence on which the governor's concerns are based: as I have explained, the Secretary of State is not determining what may or may not have happened, but is taking an operational decision concerning the management of risk. It is however important to understand that what is required is genuine and meaningful disclosure of the reasons why authorisation is sought. The reasons for continued segregation which were provided by the prison staff involved in the present cases gave, at best, only the most general idea of the nature of their concerns, and of why those concerns were held. More could and should have been said - and was said, in the witness statements filed in these proceedings - without endangering the legitimate interests which the prison authorities were concerned to protect. The imposition of prolonged periods of solitary confinement on the basis of what are, in substance, secret and unchallengeable allegations is, or should be, unacceptable.

101. More specifically, in Bourgass's case, although some of the reasons given to him explained that his segregation was based on the assault on Sahebzadeh, the prison failed to provide any information as to why he was considered to have been involved in an assault which took place in his absence, despite being repeatedly asked to do so. The statement that he was to remain in segregation "pending an investigation into a serious assault" became particularly egregious when repeated after all investigations had ceased. Stating that segregation was "pending CSC referral", or that "we are trying to transfer you", provided no explanation related to rule 45. Stating that "you are an unacceptable risk to other prisoners", that "you are known as a threat to other prisoners", that "your behaviour is deemed to be unsuitable for normal location", or that "you would be a disruptive influence on normal location", told him nothing about the basis on which he was considered to present such a risk or threat or disruptive influence, or about the behaviour which was deemed unsuitable.

102. Similar criticisms apply in Hussain's case. He had been provided with information as to the basis on which he was believed to have assaulted another prisoner. It was not explained why, several months later, his suspected responsibility for that assault was still considered to require his segregation, not as a punishment, but for the maintenance of good order and discipline. It was only in the present proceedings that further allegations against him were disclosed, namely that he was suspected of having attempted to convert other segregated prisoners to Islam. Once that was disclosed, he was able to provide a response.

103. It has to be recognised, however, that authority under rule 45(2) will often be sought on the basis of information which cannot be disclosed in full without placing at significant risk the safety of others or jeopardising prison security. Considerations of that kind were relevant in both of the present cases. There may also be cases where other overriding interests may be placed at risk. In such circumstances, fairness does not require the disclosure of information which could compromise the safety of an informant, the integrity of prison security or other overriding interests. It will be sufficient to inform the prisoner in more or less general terms of the gist of the reasons for seeking the authority of the Secretary of State.

Judicial review and article 6.1

104. On behalf of the appellants, it is submitted that decisions to authorise the continued segregation of a prisoner fall within the scope of article 6.1, with the consequence that the prisoner is entitled to a hearing before an independent and impartial tribunal. On behalf of the Secretary of State, on the other hand, it is submitted that article 6.1 has no application to decisions to keep a prisoner in segregation.

105. The question is relevant to the scope of judicial review, since rule 45(2) requires authorisation to be given by the Secretary of State, who is not, of course, an independent and impartial tribunal. Where article 6.1 applies, and the initial decision-maker is not an independent and impartial tribunal, then its decision must be "subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of article 6.1" (*Tsfayo v United Kingdom* (2006) 48 EHRR 457, para 42). The only subsequent control exercised by a judicial body over the decisions of the Secretary of State is by way of judicial review. In its *Tsfayo* judgment, as in a number of others, the European Court held that judicial review did not meet the requirements of article 6.1 in that case, because the central issue was one of fact, and the High Court "did not have jurisdiction to rehear the evidence or substitute its own views as to the applicant's credibility" (para 48). If some decisions under rule 45(2) are centrally concerned with disputed questions of fact, then there is accordingly a question whether the availability of judicial review is sufficient to secure compliance with article 6.1.

106. There have been a number of cases in which the European Court of Human Rights has considered the application of article 6.1 in relation to court proceedings in which prisoners challenged restrictions on their activities. In this context, as in others, it has asked, first, whether there was a genuine and serious dispute over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, and secondly, whether the right in question was a civil one.

107. In relation to the first question, most of the relevant cases have concerned restrictions on activities, such as visits, correspondence and telephone calls, in respect of which prisoners were explicitly recognised as possessing rights under the relevant legal systems. The earliest case appears to be *Ganci v Italy* (2003) 41 EHRR 272, where the applicant's complaint concerned the failure of an Italian court to give a decision on his appeals against executive acts restricting his rights to visits and telephone calls: rights which were recognised under Italian law.

108. The case of *Gülmez v Turkey* (Application No 16330/02) given 20 May 2008, concerned prison disciplinary proceedings, and subsequent proceedings on appeal, which had resulted in a restriction on the applicant's right to receive visits: a right recognised in Turkish law. In that case, the Second Section gave an affirmative answer to the first question (whether there was a dispute over a right recognised under domestic law) simply on the basis that "the applicant had a right to challenge the disciplinary sanctions before the domestic courts". That reasoning was criticised by a minority of the court.

109. The case of *Enea v Italy* (2009) 51 EHRR 103 was similar on its facts to *Ganci*, but was decided by a Grand Chamber. The court held, as in *Ganci*, that since the Italian court had failed to reach a decision on the applicant's appeal against

restrictions imposed on rights recognised under Italian law, it followed that the first question should be answered in the affirmative. In relation to the second question, some of the restrictions alleged by the applicant, such as rights restricting contact with his family and those affecting his pecuniary rights, fell within the sphere of personal rights and were therefore civil in character.

110. The first case in which the court considered the imposition of segregation appears to have been *Stegarescu v Portugal* (Application No 46194/06) given 6 April 2010. Having recorded the Government's submission that the applicants had failed to identify any rights under domestic law which had been restricted, the Second Section noted that article 6.1 had been held in cases such as *Ganci* and *Gülmez* to be engaged in relation to other restrictive measures imposed on prisoners. It then cited the passage in the *Enea* judgment dealing with the second question: a passage which proceeded on the basis that the existence of a dispute over a right recognised under domestic law had been established, and addressed the question whether the right was of a civil character. The Second Section noted that the placement of the applicants in segregation led to the restriction of visits, the restriction of exercise, and the impossibility, for one of the applicants, of continuing his studies and sitting exams. It concluded that "in the eyes of the court these are restrictions on 'individual civil rights'", and that article 6.1 was applicable. It did not refer to domestic law in support of its conclusion.

111. The same approach has been adopted by the Second Section in more recent cases, such as *Nusret Kaya v Turkey* (Application Nos 43750/06, 43752/06, 32054/08, 37753/08 and 60915/08) given 22 April 2014, a case concerned with restrictions on prisoners' telephone calls.

112. The Second Section adopted a similar approach in *Boulois v Luxembourg* (Application No 37575/04) given 14 December 2010, a case concerned with release on licence. There was a vigorous dissent by a minority of the court. The decision of the majority in that case was relied on by Elias LJ, along with *Stegarescu*, in reaching the conclusion, contrary to the majority of the Court of Appeal, that article 6.1 applied in the present cases.

113. The case of *Boulois* was however referred to the Grand Chamber, which reiterated that for article 6.1 in its civil limb to be applicable, there must be a dispute over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law: (2012) 55 EHRR 941. The Grand Chamber added (para 91):

> "The court may not create by way of interpretation of article 6(1) a substantive right which has no legal basis in the state concerned. The starting-point must be the provisions of the relevant domestic law and

> their interpretation by the domestic courts. This court would need strong reasons to differ from the conclusions reached by the superior national courts by finding, contrary to their view, that there was arguably a right recognised by domestic law."

114. The Grand Chamber also explained that *Enea* had concerned a restriction on the existing scope of rights (para 98). It emphasised the significance in that case of the judgment of the Italian Constitutional Court, recognising that domestic rights were involved. It concluded that prison leave was a privilege which might be granted, in relation to which the prison authorities were intended to enjoy a certain discretion. It followed that prisoners had no right to obtain it, even if they met the required criteria (para 99).

115. There was a dissenting opinion by Judge Tulkens, who had presided over the Second Section in *Gülmez* and *Stegarescu* and had sat in the Section in *Boulois*, and Judge Yudkivska. They argued that the term "right" in article 6.1 was an autonomous concept which should not be dependent on the classification adopted in domestic law, and that the reasoning in *Stegarescu* should be applied. That was clearly a minority view.

116. It is notable that in the case of *Stegarescu* it was not the imposition of segregation itself which was considered to engage article 6.1, but consequential restrictions on visits, exercise and access to educational facilities. The same is true of the case of *Marin Kostov v Bulgaria* (Application No 13801/07) given 24 July 2012. That case was concerned with court proceedings in Bulgaria in which the applicant appealed against the imposition of solitary confinement as a punishment for offences against prison discipline. While in solitary confinement, his ordinary rights in relation to such matters as visits, telephone calls and parcels were suspended. The Fourth Section followed the orthodox approach to the scope of article 6.1, noting that the applicant's solitary confinement entailed restrictions of a set of prisoners' rights explicitly recognised by Bulgarian law.

117. While the case law of the European Court does not speak entirely in unison on this issue, the prevailing and most authoritative view is therefore that the applicability of article 6.1 in this context depends, in the first place, on whether there is a dispute over a right recognised in domestic law.

118. There are certain circumstances in which prolonged segregation may result in an arguable violation of a prisoner's rights under English law which may then be the subject of a dispute: where, for example, the prisoner seeks damages for negligence resulting in injury to his mental or physical health, or seeks a remedy for a violation of his Convention rights under the Human Rights Act 1998. In

circumstances such as these, where it is necessary to determine a dispute over a right recognised by English law, there is also a remedy before a court possessing jurisdiction to determine all aspects of the case, as required by article 6.1.

119. Whether the authorisation of continued segregation involves the determination of any right recognised by English law is a different question. Counsel for the appellant founded on a line of authority concerned with prisoners' access to the courts, to legal advice and to confidential correspondence with their solicitor. In that context, Lord Wilberforce said in *Raymond v Honey* [1983] 1 AC 1, 10 that "a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication". One right which plainly is not retained, as Lord Bingham of Cornhill noted in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532, para 5, is the right of a person to "move freely and choose his associates".

120. The argument that the right to associate (and therefore the right to move freely for that purpose) survives imprisonment, in an attenuated form, was considered in *Hague* as part of a submission that a prisoner segregated in breach of the Prison Rules had a cause of action for false imprisonment, or alternatively for breach of statutory duty. The submission was rejected. The concept of a "residual liberty" retained by the prisoner was also rejected. Lord Bridge stated:

> "The concept of the 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." (p 163)

Lord Jauncey also rejected the idea of a residual liberty, and added that, absent a deliberate abuse of power, in which event there would be a cause of action for misfeasance in public office, it followed that the prisoner's only judicial recourse for segregation in breach of the Prison Rules was to the public law remedies applicable to administrative action (p 173). The other members of the House agreed.

121. Article 6.1 is not, of course, confined to disputes arising under private law. Equally, not all administrative decisions fall within article 6.1. The availability of a remedy in public law to determine whether a public body has acted lawfully does

not, therefore, imply that persons with standing to seek such a remedy are the possessors of a "right" for the purposes of article 6.1. As Lady Hale explained in *R (A) v Croydon London Borough Council (Secretary of State for the Home Department intervening)* [2009] UKSC 8; [2009] 1 WLR 2557, para 36 et seq, article 6(1) has been applied to cases where the determination of a public law question is also decisive of the existence of private law rights. It has also been applied to cases concerning rights in public law which are regarded as closely resembling rights in private law, such as rights to state benefits. In *Ali v Birmingham City Council (Secretary of State for Communities and Local Government intervening)* [2010] UKSC 8; [2010] 2 AC 39, the critical feature of cases in the latter category was identified as being that the benefits in question were the subject of precise definition and could therefore amount to an individual right of which the applicant could consider herself the holder. Those were distinguished from benefits which were, in their essence, dependent on the exercise of judgment by the relevant authority. That is consistent with the approach adopted by the Grand Chamber in *Boulois.*

122. As was explained in *Hague,* a prisoner has no private law right to enjoy the company of other prisoners. Some degree of association is, of course, a normal feature of imprisonment; and rule 45 is based on that premise. Nevertheless, a prisoner does not possess any precisely defined entitlement to association as a matter of public law. The amount of time which he is permitted to spend outside his cell, and the degree of association which he is in consequence permitted to have with other prisoners, will depend on an assessment by the prison authorities of a variety of factors, such as the number and characteristics of the prisoners held in the prison, the number of staff on duty, security concerns, disturbances in the prison, and other contingencies such as industrial action by prison officers. The extent of association may therefore vary from one prison to another and from one day to the next. It is thus dependent upon the exercise of judgment by those responsible for the administration of the prison. That conclusion is not inconsistent with that exercise of judgment being subject to review on public law grounds. There is however no analogy with the circumstances in which article 6.1 has been applied to disputes arising in public law.

123. I should add that although I am not persuaded that a decision to authorise continued segregation falls within the ambit of article 6.1, it appears to me that judicial review would in any event meet the requirements of that provision in this context. When the European Court stated in *Tsfayo* that article 6.1 requires that an administrative decision falling within its scope should be "subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of article 6.1", the words "full jurisdiction" do not necessarily mean jurisdiction to re-examine the merits of the case, but "jurisdiction to deal with the case as the nature of the decision requires" (*R (Alconbury Developments Ltd) v Secretary of State for*

the Environment, Transport and the Regions [2001] UKHL 23; [2003] 2 AC 295, para 87, per Lord Hoffmann).

124. It is true that judicial review proceedings do not usually involve the determination of questions of fact, and therefore do not usually involve issues of credibility. But, as I have explained, decisions taken by the Secretary of State under rule 45(2) are unlikely to turn on the determination of disputed questions of fact. There may be underlying issues of fact which are contentious, as there were in the present cases, but, if rule 45 is being applied correctly, its application will not normally require the Secretary of State to resolve those issues one way or the other.

125. The critical question is whether the prisoner's continued segregation is justified having regard to all the relevant circumstances. Those will include the reasonableness of any apprehension that his continued association with other prisoners might lead to a breakdown in good order and discipline within the prison; the suitability of available alternatives; the potential consequences to the prisoner if authorisation is granted; and the potential consequences to others if it is not. The answer to the question requires the exercise of judgment, having regard to information and advice from a variety of sources, including the governor, health care professionals and the prisoner himself.

126. In proceedings for judicial review, the court has full jurisdiction to review evaluative judgments of that kind, considering their reasonableness in the light of the material before the decision-maker, whether the appropriate test has been applied, whether all relevant factors have been taken into account, and whether sufficient opportunity has been given to the prisoner to make representations. This court has explained that the test of unreasonableness has to be applied with sensitivity to the context, including the nature of any interests engaged and the gravity of any adverse effects on those interests: see, for example, *Pham v Secretary of State for the Home Department (Open Society Justice Initiative intervening)* [2015] UKSC 19; [2015] 1 WLR 1591. The potential consequences of prolonged segregation are so serious that a court will require a cogent justification before it is satisfied that the decision to authorise its continuation is reasonable. It should also be noted that although judicial review does not usually require the resolution of disputes of fact, or cross-examination, that is not because they lie beyond the scope of the procedure. Judicial review is a sufficiently flexible form of procedure to enable the court to deal with the situation before it as required: see, for example, *R (Wilkinson) v Broadmoor Special Hospital Authority* [2001] EWCA Civ 1545; [2002] 1 WLR 419.

Conclusion

127. For these reasons I would allow the appeals, and grant a declaration in each case that the appellant's segregation beyond the initial period of 72 hours was not authorised by the Secretary of State and was accordingly unlawful.