



29 July 2015

PRESS SUMMARY

R (on the application of Bourgass and another) (Appellants) v Secretary of State for Justice (Respondent) [2015] UKSC 54
On appeal from [2012] EWCA Civ 376

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Sumption, Lord Reed and Lord Hodge

BACKGROUND TO THE APPEALS

The question raised in these appeals is whether decisions to keep the appellant prisoners in solitary confinement (also known as segregation) for substantial periods were taken lawfully. The decisions were made under the Prison Act 1952, rule 45 of the Prison Rules 1999 and “PSO 1700”, a non-statutory document issued by the Secretary of State. Rule 45, paragraph (1) enables the governor of the prison to arrange for the prisoner to be segregated. Paragraph (2) provides that the prisoner shall not be segregated under the rule for 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.”

In 2010 the first appellant, Kamel Bourgass, was serving a life sentence in HMP Whitemoor. On 23 April 2010 a prisoner who had previously assaulted Bourgass was himself assaulted. Bourgass was not present. He was segregated under rule 45(1) on the orders of the “challenging prisoners’ manager”, Mr Colley. The reason given was investigation into a serious assault. He remained in segregation for seven months. His continued segregation after 72 hours was purportedly authorised under rule 45(2), in accordance with PSO 1700, by various prison officers chairing the prison’s “Segregation Review Board” (“SRB”), including Mr Colley. Authority for his segregation was accompanied by the same reason on a number of occasions, i.e. investigation of the assault. In May 2010 the police indicated that they did not regard Bourgass as a suspect in connection with the assault. After that another reason given for continued segregation was that the prison was referring Bourgass to the Close Supervision Centre (“CSC”). Bourgass’s representatives initiated judicial review proceedings. In his response of June 2010 the Secretary of State said that Bourgass was segregated not only because of the assault but because “he is considered to pose an unacceptable risk on normal location”. It was alleged that he had been “intimidating other prisoners to change faith”. On 2 August 2010 the Secretary of State filed detailed grounds of defence to the judicial review claim, disclosing that on the morning prior to the assault, Bourgass had been seen on CCTV speaking to the perpetrator. This had not been disclosed previously. The Secretary of State also filed a witness statement repeating the suspicions about the assault and intimidation. In September 2010 the CSC decided not to accept Bourgass, stating that there was insufficient evidence to support the allegations. Segregation continued to be authorised until Bourgass was transferred to HMP Woodhill in November 2010.

The second appellant, Tanvir Hussain, was serving a life sentence in HMP Frankland. On 26 April 2010 he was placed in segregation under rule 45(1) on the orders of the “residential governor” Mr Greener, following an incident in which another prisoner was seriously injured. He remained in segregation for six months. His continued segregation after 72 hours was purportedly authorised under rule 45(2), in accordance with PSO 1700, by various prison officers chairing the SRB, including Mr Greener. The reasons given were the assault, police and prison investigations into it, and, later, the risk of reprisals from other prisoners. Judicial review proceedings were initiated. On 30 July 2010 the Secretary of State submitted detailed grounds of defence and a witness statement of Mr Greener, stating that Hussain was

initially segregated because of the assault and the risk he posed to others. Another reason was intelligence linking Hussain with converting other prisoners in segregation to his interpretation of Islam (an allegation which the prison subsequently withdrew). In October 2010 Hussain was transferred to HMP Wakefield.

The applications for judicial review focused on issues of procedural fairness. They were dismissed by the High Court. Appeals to the Court of Appeal were dismissed.

JUDGMENT

The Supreme Court unanimously allows the appeals and grants a declaration in each case that the appellant's segregation beyond the initial period of 72 hours was not authorised, so was unlawful. Lord Reed gives a judgment with which Lord Neuberger, Lady Hale, Lord Sumption and Lord Hodge agree.

REASONS FOR THE JUDGMENT

There are two issues: whether the segregation was lawfully authorised, and whether the procedure followed met the requirements of fairness under the common law and, if applicable, article 6(1) of the European Convention on Human Rights.

On the first issue, the decisions taken under rule 45(2) were not taken by the Secretary of State, but by the senior prison officer or "operational manager" chairing the SRB, in accordance with PSO 1700. The argument was that the decision of the operational manager was the decision of the Secretary of the State, by virtue of the *Carltona* principle. [44-46, 58, 60, 72] Under the *Carltona* principle, a decision of a departmental official is constitutionally the decision of the minister himself. [48-49] However, the relationship between governors and other prison officers on the one hand, and the Secretary of State on the other, is the subject of specific legislation: this is not readily reconciled with the idea that prison governors and other officers are constitutionally indistinguishable from the Secretary of State. [55] Prison governors are the holders of an independent statutory office. In both the 1952 Act and the Rules there are provisions imposing duties specifically on the governor or prison officers and provisions that confer separate powers on the Secretary of State. It is clear that the relationship between the governor, or his officers, and the Secretary of State bears no resemblance to the relationship between a minister and his officials. [58-60, 64] Neither can perform the functions properly belonging to the other. Rule 45(2) is intended to provide a safeguard for the prisoner against excessively prolonged segregation by the local prison management. It can only operate as a safeguard if it ensures that segregation does not continue for a prolonged period without being considered by officials who are independent of the prison. It follows that the *Carltona* principle cannot apply to rule 45(2) so as to enable a governor to take the decision on the Secretary of State's behalf. [88-89]

That is sufficient to allow the appeals, but it is also appropriate to consider the second issue, procedural fairness: first, the prisoner's right to make representations and second, the scope of judicial review of decisions under rule 45(2), and its compatibility with article 6(1) ECHR. [91] Common law fairness requires that a prisoner should normally have a reasonable opportunity to make representations before a decision is taken to authorise continued segregation. 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. In the present cases, more could and should have been said. [98, 100] As to whether the decisions to authorise continued segregation fall within article 6(1), so that the prisoner is entitled to a hearing before an independent and impartial tribunal, this depends on whether the decision involves the determination of a civil right recognised by English law. [117] A prisoner does not possess any private law right to association, or any precisely defined entitlement as a matter of public law. Article 6(1) therefore does not apply. In any event judicial review could meet the requirements of article 6(1) in this context. [122-126]

References in square brackets are to paragraphs in the judgment

NOTE This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: <http://supremecourt.uk/decided-cases/index.shtml>