Neutral Citation Number: [2010] EWHC 3389 (QB)

Case No: HQ08X01539

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Swansea Guildhall Crown Court
St Helens Road, Swansea, SA1 4PE

Date: 21/12/2010

Before :

MR JUSTICE SWEENEY

- -

Between :

LESLIE MALCOLM	**Claimant**
- and -	
MINISTRY OF JUSTICE	**Defendant**

- -
- -

Miss P. Kaufmann (instructed by **Bhatt Murphy**) for the **Claimant**
Mr O. Sanders (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 3 & 4 November 2009

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MR JUSTICE SWEENEY

Mr Justice Sweeney :

Introduction

1. On 4 June 1996 the Claimant (now aged 46) was sentenced, for an offence of rape, to life imprisonment with a minimum term of 8 years. Whilst serving that sentence he has been held in a number of high security prisons. He has yet to be released.

2. On 26 April 2007 the Claimant was transferred from HMP Long Lartin (where he had been held in the Segregation Unit for around 12 months) to HMP Frankland. On arrival at HMP Frankland he refused to locate onto a Wing, and insisted on going to the Segregation Unit. He remained there for some 159 days until 2 October 2007, on which date he was transferred to HMP Whitemoor. On arrival there he chose to be placed on a normal location Wing.

3. The Defendant accepts that, for the purposes of section 17 of the Crown Proceedings Act 1947, it is responsible for HM Prison Service.

4. Paragraph 2(ii) of Prison Service Order ("PSO") 4275 requires that governors and directors "must ensure" that prisoners who are subject to a severely restricted regime (such as a Segregation Unit) are provided with the opportunity to spend a minimum of 1 hour in the open air each day.

5. It is common ground between the parties that, whilst he was held in the Segregation Unit at HMP Frankland, the Claimant was only provided with an average of around 30 minutes in the open air each day. Indeed, it is agreed that 11 days before he was transferred to HMP Whitemoor, the Acting Deputy Prisons and Probation Ombudsman upheld the Claimant's complaint that he was not being given enough time in the fresh air.

6. Against that broad background, the Claimant seeks damages, including aggravated and exemplary damages, for misfeasance in public office. The Claimant also seeks damages for a breach of the Defendant's duty under section 6 of the Human Rights Act 1998 ("the 1998 Act"), on the ground that the Defendant's servants or agents acted incompatibly with his rights under Article 8 of the European Convention on Human Rights ("the ECHR"). The Claimant asserts that he suffered material damage, namely loss of residual liberty, and other loss – namely significantly increased stress arising from lack of purposeful activity, access to sunlight and exercise, together with physical discomfort and a general feeling of unfitness, and also disrespect of his human right to respect for his private life.

7. The Defendant accepts, in relation to misfeasance in public office, that it is capable of being held vicariously liable for the acts and/or omissions of members of HMP Frankland staff. Otherwise, it disputes the legal issues in the case, which arise under

the following broad headings (the first four of which relate to misfeasance in public office, and the remainder to the 1998 Act):-

(i) Unlawful act or omission

(ii) Bad faith

(iii) Loss

(iv) Aggravated and exemplary damages

(v) Article 8(1) ECHR

(vi) Article 8(2) ECHR

(vii) Just satisfaction.

8. I propose first to deal with the factual issues (other than my findings in relation to bad faith), then to set out the broad legal framework, then to go on to examine the resultant legal issues (using the broad headings that I have already identified immediately above, and dealing with my findings of fact in relation to bad faith), and then to set out my conclusions.

The Evidence.

9. I heard evidence from the Claimant, and from six witnesses from HMP Frankland called on behalf of the Defendant. The six witnesses were, in order of rank, Robert Russell (Governor Grade E – Head of Residential from December 2008); Lee Drummond (Governor Grade F – in charge of the Segregation Unit from about the early summer of 2007); Lance Wilson (Manager C and D Wings); Colin Harris (Principal Officer in the Segregation Unit); John Brown (Senior Officer in the Segregation Unit); David Tempest (Senior Officer in the Segregation Unit). The statement of the Defendant's seventh witness David Wilkinson (Manager A and B Wings) was taken as read.

10. There is also a large quantity of contemporaneous documentation in evidence -dealing principally with events during the period that the Claimant was at HMP Frankland.

11. The Claimant gave evidence over a video link. He is plainly intelligent and articulate. However, having seen him give evidence and be cross-examined, as well as answering some questions that I posed, and notwithstanding his counsel’s

submissions to the contrary, I am sure that he was generally intent on ensuring that he gave answers which supported and/or did not undermine his case, rather than trying to tell the truth, the whole truth and nothing but the truth at all times. Accordingly, I did not find him to be a credible or reliable witness, unless supported by other evidence.

12. I reached these conclusions about the Claimant against the following broad background:-

(i) In paragraph 14 of the Defence, the Defendant asserted that the Claimant was located in the Segregation Unit at his own request. In its Opening Speech, circulated before trial, the Defendant attached significance to the Claimant's refusal to move from the Segregation Unit to a normal location.

(ii) During his evidence the Claimant asserted in terms, for the first time, that from the moment that he set foot in HMP Frankland to the moment that he left he wanted to go back to normal location via a phased return (in accordance with PSO 1700), albeit that he had gone straight to normal location on arrival at HMP Whitemoor, where (he said) the relevant Wing was smaller.

(iii) Whilst PSO 1700 had been relied upon by his then solicitors as the defence to a disciplinary charge that had been brought against him after his refusal to locate to normal location on arrival at HMP Frankland, in cross-examination the Claimant was forced to accept that:-

(a) Apart from a passing reference to the policy of gradual re-integration in paragraph 3 of his witness statement in these proceedings, he had otherwise failed in that statement to make any mention of any wish, throughout, to return to normal location via a phased return.

(b) He could give no explanation as to why that was so, beyond that he did not know why.

(c) Although, most of the time, he was an assertive complainer, he had made no representations or complaints, whilst at HMP Frankland, articulating his wish for a phased return to normal location – which he sought to explain, variously, by asserting that the onus was on the prison to arrange a phased transfer so that there was no need for him to mention it; that he did not think that it would bear fruit if he mentioned it; that mentioning a phased transfer would have made him look weak, so that he was too uncomfortable to mention it; and that he was confused and strained.

(d) He could see that it was "odd" that he had failed to mention his wish at a number of points in the contemporaneous documentation that he had completed.

(e) When, by way of example, he had stated in written representations to the Segregation Review Board on 16 July 2007 (well over two months after his arrival) "…I am not really interested in going on any wing at all but I will consider going on to either A Wing or C Wing if there is a clean cell available ..", he claimed that what he actually meant (echoing his evidence in chief) was that he did want to go onto a wing, but that he did not feel able to do it.

(iv) On another topic, in paragraphs 9 and 10 of his witness statement, the Claimant asserted that there was very little free space in his cell, and that with such a small amount of outside exercise he found that he became very stressed. However, during cross-examination:-

(a) The Claimant accepted at the outset that his cell measured approximately 12 feet long by 7 feet wide by 8 feet high, and that there was enough room to exercise. He claimed, however, that exercise in the cell was impractical, and asserted in clear terms that he did not, on occasion, exercise in his cell.

(b) The Claimant's attention was then drawn to his Daily Wing Record for 19 May 2007 where there is the following entry (timed at 17.35) "Became irate when unlocked for tea meal. Stated that he was exercising and did not want his tea until later. Was told this wasn't possible and took his tea but glared at staff whilst doing so". The Daily Occurrence Log for the same date shows that the Claimant was in the exercise yard for about half an hour from 09.55, and that the service of the tea meal did not begin until 15.45.

(c) In response, the Claimant asserted that the entry did not refer to exercise in his cell, but rather that he had been exercising in the yard, and was upset because he had to curtail that exercise for tea.

(v) I returned to this topic at the end of cross-examination. Despite the content of the contemporaneous entries on the 19 May documents, the Claimant told me that he recalled being brought in on one occasion to get his tea, and being annoyed. Then, quite contrary to his earlier evidence, he said that there was the odd occasion when he did do press-ups in his cell.

(vi) On a further topic, the extent to which the Claimant did, or did not, suffer any physical or mental health consequences from the limitation of his time

in the fresh air is a significant issue in the case. The Claimant asserted in graphic terms that there were physical and mental health effects upon him, but did not rely on any medical evidence. Indeed, he declined to disclose his contemporaneous medical records. In cross-examination the Claimant admitted that he did not raise his alleged health effects with medical staff at the prison. He claimed that he chose not to do so because he was embarrassed. This is to be contrasted, at the least of it, with his acceptance in cross-examination (see sub-paragraph (iii)(c) above), that, most of the time, he was an assertive complainer.

(vii) All these various attempts, whether to rely upon assertions or to seek to explain difficulties away, were obvious lies on oath about significant issues in the case. The equally obvious reason for them was the Claimant's wish to support his own case, and to avoid giving any evidence that undermined it, irrespective of the truth.

13. In contrast, I found that each of the witnesses called by the Defendant was credible. I have no doubt that each of them tried his best to give me an honest and accurate account. As I have already indicated, Mr Wilkinson's statement was taken as read. There was no dispute about it.

The Facts

14. In addition to the particular findings of fact to which I have already made reference in paragraphs 11-13 above, and having taken into account the parties submissions, I make the following findings on the basis of the evidence and on the balance of probabilities.

15. On 4 June 1996 the Claimant (who is now aged 46) was sentenced to life imprisonment, with a minimum term of 8 years, for an offence of rape. To date he has served that sentence in various prisons and has yet to be released.

16. PSO 4275 was issued in 1998, was in force at all material times in 2007, and still is. As indicated above, paragraph 2(ii) requires that governors and directors "must ensure" that prisoners who are subject to a severely restricted regime are provided with the opportunity to spend a minimum of one hour in the open air each day.

17. On 26 April 2007 the Claimant was transferred from HMP Long Lartin (where he had been housed in the Segregation Unit for about 12 months) to HMP Frankland.

18. Like HMP Long Lartin, HMP Frankland is a high security prison. It houses long term prisoners who are mostly in Categories A and B. At all material times in 2007 there were 6 Wings and a Segregation Unit at the prison.

19. Four of the Wings (A – D) were for vulnerable prisoners, such as those (like the Claimant) convicted of sex offences. Each of these Wings had a maximum capacity of 108 prisoners, each of whom had his own cell measuring approximately 12 foot long by 7 foot wide by 8 foot high (the same size as the cells in the other 2 Wings).

20. A Wing was for prisoners who had earned enhanced status for good behaviour. B and C Wings were for other vulnerable prisoners. D Wing was for those undergoing induction onto the vulnerable prisoner Wings.

21. There was a substantial outside exercise yard for the exclusive use, one Wing at a time, of the prisoners in A – D Wings. There were no problems with their exercise regime.

22. Such prisoners, if they wished, received a minimum of one hour in the open air each day – typically made up of 30 – 45 minutes in the exercise yard, and other movements around the prison.

23. Whilst exercise was segregated, there was a potential for prisoners in A – D Wings to come into contact with each other on activities such as education and use of the gym, or on healthcare visits.

24. On arrival at HMP Frankland on 26 April 2007 the Claimant refused, without giving any reason, to locate on to a Wing, and said that he would only go to the Segregation Unit. Therefore, as he knew that he would be, the Claimant was placed in the Segregation Unit under Rule 45, for good order or discipline.

25. Discipline proceedings were instituted against the Claimant for refusing the order to locate on to a Wing on arrival, but were dismissed after the Claimant's then solicitor drew attention to the fact that the order was in breach of PSO 1700, which required a Segregation Review Board to consider whether a phased return was required, before such an order could be issued.

26. The Claimant remained in the Segregation Unit until 2 October 2007 when he was transferred to HMP Whitemoor. Thus he was housed in the Segregation Unit at HMP Frankland for some 159 days in all.

27. The Segregation Unit was built at a time when the prison was significantly smaller. The Unit contained 28 cells – each the same size as those in the remainder of the prison, and thus large enough for in-cell exercise.

28. The Segregation Unit had its own outside exercise yard, which was about the size of a standard tennis court. At some point in the past, the exercise yard was divided into

two by wire mesh, thus providing two caged areas of roughly equal size – each for the use of a single prisoner at a time.

29. In about the late 1980s, and before the full recognition of the value of risk assessments, the practice began of permitting prisoners in the Segregation Unit to take exercise in pairs in the two caged areas. However, this resulted in episodes of violence against both prisoners and prison officers, and was eventually stopped.

30. At around that time, consideration was given to further dividing the exercise yard into four caged areas, but that idea was rejected as it was decided that the resultant areas would be too small.

31. Principal Officer Harris was working in the Segregation Unit at the time of the various decisions referred to in paragraphs 29 & 30 above, and/or was aware of them and the reasoning behind them.

32. In 1998 Her Majesty's Chief Inspector of Prisons ("HMCIP") carried out an inspection at HMP Frankland, and found that prisoners in the Segregation Unit were exercising outside for only half an hour each day. HMCIP indicated that this period was too short, and recommended that prisoners in the Unit "must have a one hour exercise period".

33. In 2001, following an unannounced follow-up inspection, HMCIP reported that the objective of a one hour exercise period for those in the Segregation Unit had been achieved.

34. In August 2004, during a previous period of serving his sentence at HMP Frankland, the Claimant was housed in the Segregation Unit, and complained on two occasions that he had only been given 30 minutes exercise, whereas his basic entitlement was 60 minutes. In response, his attention was drawn to the then current Prisoners Information Book, and it was asserted that he was only entitled to between 30 and 60 minutes exercise per day.

35. During the 159 day period in 2007 that the Claimant was in the Segregation Unit under Rule 45, other prisoners were also housed there, under various different regimes. Two were placed in the Unit in order to carry out cleaning duties. Others were placed there in order to maintain good order and discipline (Rule 45); in their own interest (Rule 45); as punishment (Rule 51); or pending adjudication (Rule 53).

36. From mid June 2007 onwards, there were also one or two prisoners at a time from the Close Supervision Centre ("CSC") at HMP Woodhill. These were prisoners who were too dangerous and/or disruptive to be housed in Wings, and who were thus held on a particularly restrictive regime (Rule 46). They were held in the Segregation Unit at HMP Frankland by special arrangement with HMP Woodhill in order to provide some

respite for the CSC staff. These prisoners required a high level of Segregation Unit staff input. Under the terms of the special arrangement, and given the particularly restrictive conditions under which they were held, these prisoners were always (if they wished) given one hour of exercise (always alone) in the yard each day.

37. The Segregation Unit Induction Booklet indicated that – "All prisoners will receive time in the open air, daily, subject to operational allowances, the time determined by staff…".

38. A Daily Occurrence Log for the Segregation Unit was completed as each day progressed. It set out, amongst other things, details of the prisoners held, their applications and movements. A Daily Wing Record was also maintained for each prisoner. However, the Daily Occurrence Log was generally more accurate.

39. Each prisoner in the Segregation Unit was subject to formal 14 day review by the Segregation Review Board, which included the involvement of medical staff and psychologists.

40. During the 159 day period when the Claimant was in the Segregation Unit there were, on average, some 19 prisoners housed in the unit each day. Some 8 or 9 Prison Officers worked there during both the morning and afternoon shifts.

41. Given the nature of those who were housed in the Segregation Unit, a 'one in, one out' policy was necessarily in operation throughout the 159 days. This meant that only one prisoner at a time was allowed out of his cell, and required at least 2 Prison Officers to supervise each movement. At the top end of the security scale, some movements required supervision by a number of officers dressed in full protective equipment.

42. During the 159 days, the daily regime in the Segregation Unit was broadly as follows. From about 8.15am to 8.45am the prisoners were unlocked, one at a time, and provided with breakfast. At that stage, if they wished to, they could make application, variously, for outside exercise, a shower, a razor, a cell clean out, use of the library, healthcare, an evening phone call, or a visit. Lunch was provided, again one prisoner at a time, from about 11.45am to 12.15pm. The prisoners would all then remain locked in their cells until about 1.30 to 1.45pm, whilst the staff had their lunch. The prisoners would all then be locked up again at about 3.30pm – 3.45pm, being let out thereafter, again one at a time, only for their evening meal and to make telephone calls.

43. Once all the applications for the day had been made at breakfast time, officers then gave consideration as to the amount of time that could be allotted to each prisoner who wished to take exercise in the yard. In accordance with the regime, the broad time periods available for such exercise were from about 8.45am to 11.45 am and from about 1.30pm – 1.45pm to 3.30pm – 3.45pm. In theory this gave a time period

of a little over 5 hours for time in the fresh air, and thus (given the use of the two caged areas each occupied by only one prisoner at a time) the theoretical possibility that if there were up to 10 applicants, each of them could have an hour in the fresh air. However in allotting exercise periods, consideration had to be given to the time limitations imposed by the necessary 'one in, one out' policy, the practicalities of staff involvement in all the other movements and activities taking place during the particular day, and the imperative for CSC prisoners to be given a full hour of exercise alone. In addition, the regime under which an applicant for exercise was being held also had to be considered. For example, and for obvious reasons, a prisoner in the Segregation Unit for his own protection could not be placed in one of the caged areas whilst a prisoner who was in the unit for reasons of good order and discipline was in the adjacent caged area. Equally, the process necessarily had to remain subject to any other operational needs, and therefore be dynamic, as the day progressed. Thus, if there were more than about 6 or 7 applicants on a particular day (as was typically the case, up to as many as 14-17 applicants) then (in view of the space available and the various operational requirements outlined above) at least some of the applicants could not be allocated a full hour of exercise, though all were given at least around half an hour.

44. No precise written records were kept of the amount of time allotted to each applicant for exercise each day, or of the amount of time that each actually spent in the exercise yard. However, the time that each was taken out to the exercise yard was recorded on the Daily Occurrence Log, and thus it is possible to work out, approximately, how long the great majority of those exercising spent in the yard each day.

45. If the weather was inclement, applicants for exercise were provided with a coat and the choice of whether they wished to exercise or not.

46. Excluding the days of the Claimant's arrival and departure, when exercise in the open air would not have been practicable, there were thus 157 days on which he could have applied for and been given exercise. On 4 of those days (29 April, 1 May, 9 September and 22 September) he either failed to submit an application or, having applied, then declined. As to the remaining 153 days, the great majority of which involved high occupancy of the Unit, the Claimant was generally given around 30 minutes exercise in the open air each day, and regularly longer, but not a full hour.

47. The Claimant was not alone in failing to receive a full hour's exercise during those 153 days – on a few of which only a relatively small number of prisoners applied for exercise. For example, on 28 August 2007 there were only 6 applicants for exercise out of 13 prisoners then housed on the Unit, yet two received only a maximum of 45 minutes exercise, and the Claimant and another received a maximum of 50 minutes exercise.

48. Thus during the time that the Claimant was in the Segregation Unit, the Unit did not fully comply with paragraph 2(ii) of PSO 4275.

49. The Claimant was, however, the only prisoner who made complaints about this failure. In particular, he made the following formal written complaints:-

(i) On 21 May 2007 he complained that, since arrival on the Segregation Unit he had only been receiving 30 minutes of exercise in the fresh air per day, and that the day before he had received only 25 minutes. He indicated that he would like to get 60 minutes, as he was entitled to. The following day, Senior Officer Tempest responded to the effect that, due to operational reasons, it was not possible to provide the Claimant with an hour's exercise, that the situation was looked at daily, and that the amount of time for exercise depended on how many prisoners applied.

(ii) On 23 May the Claimant appealed against Senior Officer Tempest's response. He pointed out that if two prisoners were placed in each of the caged areas at a time, then all would be able to get their entitlement of one hour of exercise. He asserted that that was what happened at HMP Whitemoor, Long Lartin, Wakefield and Full Sutton – all without problems. In the alternative, he suggested that the exercise yard could be divided into four instead of two. He suggested that being locked up for 23½ hours per day was wholly unreasonable. Later that day, Principal Officer Harris replied that – "This is not an option that is going to be considered at this time". [It will be recalled that Principal Officer Harris was aware that the Claimant's first suggestion had been tried in the past but had been found to be too dangerous for both prisoners and staff, and that the Claimant's second suggestion had also been considered and rejected thereafter – see paragraphs 29-31 above].

(iii) On 31 May the Claimant appealed against Principal Officer Harris' response. He questioned why nothing was being done to ensure that inmates in the Segregation Unit got one hour of exercise in the open air, and why he was being refused his entitlement. On 18 June Governor Drummond, who considered but rejected dividing the exercise yard into four, responded that – "Your exercise period runs in line with the Unit regime, as explained previously. If you require more exercise a move to normal location may be beneficial".

(iv) On 23 July the Claimant sought to appeal Governor Drummond's response. Again, he pointed out his entitlement to receive one hour of exercise in the fresh air each day. He asserted that, as a result of not receiving his full entitlement, he was suffering a profound detrimental effect on his physical and psychological well being, and that he felt that he was being treated worse than a dog, without humanity or respect. He asked that arrangements for an hour's exercise should made as a matter of urgency. On 7 August Principal Officer Harris responded that:- "Due to the pressure of numbers in the Segregation Unit at times, it is not possible to give the full entitlement of exercise time comparable to persons on normal location and only in these circumstances is the time reduced."

(v) The Claimant wrote to the Prisons and Probation Ombudsman for England and Wales on 28 May, 17 July and 10 August outlining the details of his complaint. On 21 September, after an investigation which showed that prisoners were regularly receiving more than 30 minutes exercise but not the full hour, the Acting Deputy Ombudsman wrote to the Claimant upholding his complaint and stating, amongst other things, that:-

> "I have considered your complaint carefully. There is no dispute that Frankland is not complying with the mandatory requirements in PSO 4275 that persons held in segregation units have the opportunity to spend at least an hour in the open air each day. It is clear that staff there are aware of this requirement, but are unable to comply with it due to the high level of occupancy, the restrictions on the number of persons who can be out in the exercise yard at any one time, and the fact that certain persons cannot be allowed to exercise with others. I understand the difficulties faced by staff in trying to allow persons in the segregation unit a full hours' exercise each day. I accept that, from time to time, this may not prove possible. However, it should be the exception rather than the norm. In this respect I am upholding your complaint. I am therefore copying this letter to the Governor of Frankland so that he may note my concerns, and consider what steps can be taken to ensure that prisoners in the segregation unit have the opportunity to spend at least one hour in the open air even in times of high occupancy."

50. Although the Claimant's then solicitor raised PSO 1700 (dealing with phased transfers from Segregation to a normal location Wing) in response to the disciplinary charge brought against the Claimant shortly after his arrival at HMP Frankland, the Claimant did not himself at any stage want to move from the Segregation Unit to normal location by way of a phased transfer. He neither expressed, nor had, any such desire at any time, and this was not a factor in his detention within the Segregation Unit, nor in his refusal to move to normal location.

51. As to a move from the Segregation Unit to normal location by way of a direct transfer:-

(i) The Claimant refused such a move on arrival at HMP Frankland, and thereafter.

(ii) In truth, and for his own reasons the Claimant never wanted (at any stage) to leave the Segregation Unit - because he knew that if he remained within it he would eventually be transferred to another prison. He also knew that,

if he did transfer to one of the vulnerable prisoner Wings there would be no problem with achieving an hour in the fresh air each day.

(ii) On 23 May he declined the offer of advice and assistance aimed at helping him to consider and agree to such a move.

(iii) From 23 May to 11 July the Claimant continued to oppose such a move despite, for example, Governor Drummond's reminder on 18 June that a move to normal location might be beneficial (see paragraph 49(iii) above).

(iv) On 11 July the Claimant made a formal request to move onto a Wing, other than D Wing – saying that he had had problems with people on that Wing. However, contrary to his subsequent protestations, and to his evidence, this was not a genuine request. As the Claimant knew, D Wing was the induction wing for vulnerable prisoners, and he could not be housed in A Wing because he had not earned enhanced status. Whilst the prison authorities made genuine efforts to house the Claimant in B – D Wings, he turned down subsequent offers of accommodation for no good reason. Hence his written representations to the Segregation Review Board on 16 July stated, amongst other things – "…I am not really interested in going onto any wing at all, but I will consider going onto either A Wing or C Wing if there is a 'clean' cell available. If this is not possible for whatever reason I will just stay here where I am until somebody eventually moves me to another jail. As my position is unlikely to change I see no need for me to attend future R 45 boards just to repeat myself…"

52. As to other events during the Claimant's 159 days at HMP Frankland:

(i) The Claimant was able to exercise in his cell, when he wished to, and did so.

(ii) From around 18 July 2007 onwards (following the Claimant's written representations to the Segregation Review Board on 16 July) the prison authorities took steps to find the Claimant a place at another prison.

(iii) Contrary to his complaints at the time, and to his evidence, the Claimant suffered no adverse effect on his health, physical or mental, as alleged or at all, as a result of the lack of a full hour in the fresh air each day. Nor, for the avoidance of doubt, did he suffer any anxiety, stress or distress as a result of it either.

(iv) In September a store room in the Segregation Unit, which was somewhat larger than a cell, was converted into a Cardio Suite for additional exercise by the inmates of the Unit indoors - one at a time.

53. On 2 October 2007 (11 days after the Acting Deputy Ombudsman had upheld the Claimant's complaint) the Claimant was transferred to HMP Whitemoor where he immediately chose to be placed on a normal location Wing.

54. On 27 September 2009 the Claimant wrote to the Chairman of the Independent Monitoring Board at HMP Frankland, by way of a complaint, seeking information as to whether, in accordance with the Acting Deputy Ombudsman's recommendation in 2007, prisoners in the Segregation Unit now had access to one hour of exercise in the open air each day. On 7 October 2009 the Chairman replied to the effect that all CSC prisoners received one hour of exercise; that all other prisoners received a minimum of half an hour, and one hour if the number of prisoners held would allow it to be accommodated; and that the full hour was not available as recommended due to number and time pressures.

55. The evidence before me confirmed the accuracy of the Chairman's reply. Thus in 2009 there was still a failure to fully comply with paragraph 2(ii) of PSO 4275 at HMP Frankland.

56. As to the <u>very</u> limited material before me about other prisons:-

    (i) At HMP Wakefield the only prisoners who exercised alone were CSC prisoners and those in the Segregation Unit who had been risk assessed as presenting a risk of hostage taking. All other prisoners in the Segregation Unit exercised with others, up to a maximum of four at a time.

    (ii) At HMP Full Sutton it was standard practice to allow persons to have a daily allowance of exercise in times of high population in the Segregation Unit, although a risk assessment was done before a decision was made as to whether certain prisoners could share a yard.

    (iii) At HMP Long Lartin shared exercise in the Segregation Unit was allowed for approximately 2 years or so until it was withdrawn, following a violent incident, in April 2008.

    (iv) At HMP Whitemoor prisoners were exercised more than one at a time, subject to risk assessments.

57. This information is too limited for me to draw any sensible conclusions as to whether the arrangements at these other prisons were comparable to those at HMP Frankland, or could necessarily have been implemented there, or to suggest that the arrangements at HMP Frankland were unreasonable or unjustified.

58. I propose to set out my findings as to the states of mind of the staff and the Claimant when dealing with bad faith – see paragraph 117-118 below.

The Broad Legal Framework

(i) Prisoners' Rights

59. Sections 12(1) & 13 (1) of the Prison Act 1952 ("the 1952 Act") provide that:

> "12(1) A prisoner, whether sentenced to imprisonment or committed to prison on remand or pending trial or otherwise, may be lawfully confined in any prison…..
>
> 13(1) Every prisoner shall be deemed to be in the legal custody of the governor of the prison."

60. Section 47(1) of the1952 Act provides that:

> "The Secretary of State may make rules for the regulation and management of prisons... and for the classification, treatment, employment, discipline and control of persons required to be detained therein."

61. In *Raymond v Honey [1983] 1 AC 1* the House of Lords confirmed the basic principle that, under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights that are not taken away expressly or by necessary implication. The House concluded that section 47 of the 1952 Act is concerned with the regulation and management of prisons, and that neither it, nor any rule made under it, could authorise hindrance or interference with the basic right (in that particular case) of unimpeded access to the courts.

62. In the conjoined appeals of *R v Deputy Governor of Parkhurst Prison and others, Ex parte Hague* and *Weldon v Home Office [1992] AC 58* (cases concerned, respectively, with the judicial review of a decision to transfer a prisoner and to segregate him, and a prisoner alleging false imprisonment by prison officers) the House of Lords decided, inter alia, that the 1952 Act was designed to deal with the administration of prisons and the management and control of prisoners, but that nothing in the Act suggested that Parliament intended to confer on prisoners a right of action sounding in damages for breach of its provisions; that the Prison Rules 1964 were regulatory in character and provided a framework within which the prison regime operated, but that the Rules were not intended to protect persons against loss injury and damage, nor to give them a right of action (as later confirmed in *Watkins v Secretary of State for Home Department [2006] 2 AC 395*); that sections 12(1) and 13(1) of the 1952 Act provided lawful authority for the restraint of prisoners within the defined bounds of the prison by the prison governor; and that while a prisoner was subject to the Act and Rules, and his whole life was regulated by the regime, he had no residual liberty and thus no

action could lie against the Secretary of State or a prison governor for unlawfully depriving him of such liberty – see, for example, the speech of Lord Bridge at pp 162G – 163H, and at p.164D as to the potential applicability, nevertheless, of the tort of misfeasance. However, the speeches of Lord Bridge (at p.164), Lord Ackner (at p.166) and Lord Jauncey (at p.178) illustrated how a prisoner could nevertheless suffer an unlawful deprivation of liberty as against someone not acting under the Governor's authority, and thus not protected by ss. 12 & 13 of the 1952 Act.

63. In *R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532* (a case concerned with the searching of prison cells) Lord Bingham, at paragraph 5, summarised the law in relation to prisoners rights, as follows:

> "Any custodial order inevitably curtails the enjoyment, by the person confined, of rights enjoyed by other citizens. He cannot move freely and choose his associates as they are entitled to do. It is indeed an important objective of such an order to curtail such rights, whether to punish him or to protect other members of the public or both. But the order does not wholly deprive the person confined of all rights enjoyed by other citizens. Some rights, perhaps in an attenuated or qualified form, survive the making of the order. And it may well be that the importance of such surviving rights is enhanced by the loss of or partial loss of other rights. Among the rights which, in part at least, survive are three important rights, closely related but free standing, each of them calling for appropriate legal protection: the right of access to a court; the right of access to legal advice; and the right to communicate confidentially with a legal adviser under the seal of legal professional privilege. Such rights may be curtailed only by clear and expressed words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment."

64. In *Prison Officers Association v Iqbal [2009] EWCA Civ 1312* the Court was concerned with the issue of whether an action in false imprisonment lay against prison officers who took unlawful strike action, if that action resulted in a prisoner, who would otherwise have been permitted by the prison governor to leave his cell for the purpose of working, exercise and healthcare, being confined to his cell. The Court agreed that the prisoner had no right, as against the governor, to be let out of his cell. In the result, the court ruled by a majority (Lord Neuberger MR and Smith LJ) that the POA was not liable, in the circumstances postulated, for false imprisonment, upon the basis that there was no positive act, that there was no bad faith (see paragraph 38), and that when consideration was given to the 'realities of prison life' there were practical reasons for concluding that there was no false imprisonment.

65. At paragraphs 40-42 of the judgment Lord Neuberger MR said:

> "The rights of prisoners should certainly be acknowledged: indeed according and respecting rights are one of the hallmarks

of a civilised society. Further, it can fairly be said that every moment out of his cell is valuable to a prisoner. However, I think that the court should be reluctant to reach a conclusion whose implications could lead to many small private law damages claims arising from what may often be little more than poor time-keeping by prison officers, and whose outcome may often turn on issues such as whether an officer in an undermanned prison could better have organised his working day to ensure that a prisoner was let out of his cell at precisely the time stipulated by the governor.

It better accords both with principle and with practicality to limit claims by prisoners who are left locked in their cells by the inaction of prison officers to cases where the relevant prison officers are guilty of misfeasance in public office, a tort specifically mentioned by Lord Bridge in *Hague [1992] 1 AC 58, 164D*. That tort was described by Lord Steyn in *Three Rivers District Council v The Governor and Company of the Bank of England (No 3) [2000] UKHL 33, [2003] 2 AC 1, 191E,* where he said it had two forms:

"First, there is the case of targeted malice by a public officer, i.e. conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and the act will probably injure the [claimant]. It involves bad faith in as much as the public officer does not have an honest belief that his act is lawful".

In that connection, in *Karagozlu v Commissioner of the Police of the Metropolis [2007] 1 WLR 1881, para 50,* this court, after referring to its earlier decision in *Toumia The Times 1 April 1999, para 55,* concluded that "There was no reason why [a prison officer] should not be liable for misfeasance" if he "deliberately and dishonestly refuses to carry out his duties such that the governor decides not to give a direct order to unlock the cells… perhaps in order to avoid turmoil in the prison". It therefore seems to me that the tort of misfeasance in public office plays an important part in this field. On the one hand, it ensures that a prisoner who remains in his cell due to the unjustified inaction of a prison officer is not without a remedy in an appropriate case; on the other hand, it ensures a degree of practicality in that a prison officer is only liable in such a case if his action is "deliberate and dishonest"."

66. At paragraph 68 of the judgment Smith LJ said:

> "I do not think that a prisoner has a *right* to be released from his cell at any particular time, even though he is usually released at particular times under the normal regime. The prisoner certainly has a right to be released from his cell as against the governor. I can see no reason why he should be able to claim that he has such a right as against any particular prison officer or even as against the prison officer who would normally unlock his door on any particular morning. Nor do I think that a prison officer owes to each prisoner personally a duty to follow the normal regime. A prison officer is under a contractual duty to the employer to attend for work. He has a duty to the employer to carry out his usual duties which would include unlocking the prisoners from their cells. A refusal to comply with those duties will be a breach of contract and a disciplinary offence. However, I do not consider that it necessarily follows that a prison officer is under a duty *to prisoners* to unlock them in accordance with the normal regime."

67. The general principles applied by the European Court of Human Rights ("ECtHR") in relation to prisoners rights are set out at paragraphs 69-70 of its judgment in *Hirst v United Kingdom (2006) 42 E.H.R.R. 41* (a case concerned with prisoner disenfranchisement), as follows:

> "In this case, the Court would begin by underlining that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Art. 5 of the Convention. For example, prisoners may not be ill-treated, subjected to inhuman or degrading punishment or conditions contrary to Art. 3 of the Convention; they continue to enjoy the right to respect for family life, the right to freedom of expression, the right to practise their religion, the right of effective access to a lawyer or to court for the purposes of Art. 6, the right to respect for correspondence and the right to marry. Any restrictions on these other rights require to be justified, although such justification may be well found in the considerations of security, in particular the prevention of crime and disorder, which inevitably flow from the circumstances of imprisonment (see, for example, *Silver,* where broad restrictions on the right of prisoners to correspond fell foul of Art. 8 but stopping of specific letters, containing threats or other objectionable references were justifiable in the interests of the prevention of disorder or crime).
>
> There is, therefore, no question that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction. Nor is there any place under the Convention system, where tolerance and broadmindedness are

> the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion."

68. In *Dickson v United Kingdom (2008) E.H.R.R. 41* (a case concerned with a prisoner's wish to play a role in artificial insemination) the ECtHR repeated the principles identified in *Hirst* (above), and continued at paragraph 70:

> "There is, therefore, no question that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction…"

(ii) Time in the open air

69. Rule 21(1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners (as adopted/approved in 1955, 1957 and 1977) provides that:

> "Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits."

70. The relevant domestic rules in this case, made under s.47 of the 1952 Act, are the Prison Rules 1999 SI 728/1999 (as amended). Rule 30 provides that:-

> "If the weather permits and subject to the need to maintain good order and discipline, a prisoner shall be given the opportunity to spend time in the open air at least once every day, for such period as may be reasonable in the circumstances."

71. Rule 45 deals with the removal of prisoners from association with others. It provides that:-

> "(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, and in exercising that discretion the governor must fully consider any recommendation that the prisoner resumes association on medical grounds made by a registered medical practitioner or registered nurse such as is mentioned in rule 20(3).
>
> (4) This rule shall not apply to a prisoner the subject of a direction under rule 46."

72. PSO 0001 was issued in September 2005, it updated the previous version of PSO 0001 which it replaced. Section 1 deals with the Prison Service Instruction system, and provides that:-

> "1.1 This section describes the system by which the Prison Service issues directions, advice and information. These are:-
>
> - Prison Service Orders (PSO) – these are long-term directions.
> - Prison Service Instructions (PSI) – these are short-term directions with a definite expiry date…
>
> 1.3 PSIs and PSOs are issued under the authority of the Prison Service Management Board (Public Sector) and the Office for Contracted Prisons (Contracted Establishments). They set out the framework within which the whole Prison Service fulfils its obligations as a public authority."

73. As indicated above, PSO 4275 was issued in 1998. At that time, the Prison Rules 1964 were in force, and Rule 27A, which was in the same terms as the present Rule 30, governed time in the open air. PSO 4275 continues in force and thus now regulates the application of Rule 30. It provides, inter alia that:

> "**TIME IN THE OPEN AIR**
>
> **Purpose and scope of the order**
>
> 1. The Order provides prison service staff with guidance on the application of Prison Rule 27A "Time in the Open Air" which gives all prisoners an entitlement to the opportunity to spend time in the open air each day, weather and control conditions permitting.
>
> **Mandatory requirements**
>
> 2. Governors and directors <u>must ensure</u> (my emphasis) that:
>
> (i) If the weather permits and subject to the need to maintain good order and discipline, a prisoner shall be given the opportunity to spend time in the open air at least once every

> day, for such period as may be reasonable in the circumstances;
>
> (ii) prisoners subjected to a severely restricted regime (e.g. those held in the segregation unit as a punishment or under Rule 43 in the interests of good order or discipline) are provided with the opportunity to spend a minimum of one hour in the open air each day. This requirement will also apply to unconvicted prisoners who exercise their right to participate in work or other activities.
>
> In approving arrangements for their establishment or for particular groups of prisoners, governors and directors must bear in mind that they may be called upon to justify their judgment of what is reasonable in the circumstances (paragraph 3-5 refers)…
>
> **Arranging time in the open air**
>
> 4. The time allowed each day for access to the open air need not be a single period. Particularly where it is practicable to provide for an hour or more, it may be preferable to allow for more than one period.
>
> 5. In assessing opportunities available for time in the open air, it is reasonable to include time that prisoners spend outside moving between buildings, e.g. walking to and from workshops, but time spent on internal movements to and from an outside area should not be included…
>
> **Cancellation/curtailment**
>
> 10. A scheduled period for time in the open air should be cancelled or curtailed only when weather conditions make it unreasonable to allow prisoners to be outside or, exceptionally, for security or control reasons. Any cancellation or curtailment should be duly authorised and recorded, with a clear explanation of the reason.
>
> 11. When a scheduled period in the open air is cancelled or curtailed, prisoners should be able to spend the time in association with others (unless subject to segregation), with access to recreational or PE facilities wherever possible, and subject to the need to maintain good order and discipline…."

74. In January 2006, against the background, inter alia, of the ECHR, decisions of the ECtHR, the United Nations Standard Minimum Rules, and standards developed by the European Committee for the Prevention of Torture and Inhuman or Degrading treatment (including the view that one hour of outdoor exercise everyday was a fundamental safeguard for prisoners), the Committee of Ministers of the Council of

Europe recommended that governments of member states be guided in their legislation, policies and practice by the European Prison Rules, as appended to the recommendation. The Rules included the following:

> "4. Prison conditions that infringe prisoners' human rights are not justified by lack of resources…
>
> 27.1 Every prisoner shall be provided with the opportunity of at least one hour of exercise every day in the open air, if the weather permits."

(iii) Misfeasance

75. As to the ingredients of the tort of misfeasance in public office, the leading case is, of course, *Three Rivers DC v Bank of England (No 3) [2003]2 AC 1* see in particular, the judgment of Lord Steyn at pp 191-195. I have also been referred, in this context, to *Marsh v Clare [2003] EWCA Civ 284*, *Watkins v Secretary of State for Home Department* (above)*, Karagozlu v Commissioner of Police of the Metropolis [2006] EWCA Civ 1691, Hussain v Chief Constable of West Mercia Constabulary [2008] EWCA Civ 1205, Prison Officers Association v Iqbal* (above) and *Muuse v Secretary of State for Home Department [2009] EWHC 1886 (QB).*

76. To state the obvious, misfeasance in public office is a tort of considerable gravity. It requires targeted malice or bad faith on the part of one or more public officials. In the circumstances of this case it requires proof that:-

    1. The person whose conduct is in question was a public official at the material time.

    2. His conduct (including any deliberate and conscious omission, but not mere inadvertence or oversight) was an exercise of his power in that capacity.

    3. (a) He intended to injure the Claimant by the conduct complained of, having no honest belief that his conduct was lawful (targeted malice); **or**

       (b) His conduct was:-

       (i) In the knowledge of, or with reckless indifference to, the illegality of his actions; and

       (ii) In the knowledge of, or with reckless indifference to, the probability of causing injury to the Claimant.

4. The Claimant suffered material damage in consequence.

77. In *Muuse v Secretary of State for the Home Department* (above) the Claimant had been unlawfully detained for a significant period as a result of an outrageous exercise of arbitrary executive power by officials in the Immigration Directorate. In nevertheless allowing the Secretary of State's appeal against a finding of misfeasance, the Court of Appeal made clear, inter alia, that reckless indifference to illegality must be subjective not objective; and that neither the fact that the officials were too incompetent to exercise the powers entrusted to them, nor that they were grossly negligent in the discharge of their duties (a defence expressed in other contexts as "I did not act in bad faith or dishonestly, but I was very foolish") could be equated with reckless indifference to illegality.

78. *Watkins v Secretary of State for the Home Department* (above) was concerned with proceedings against the Home Office, a prison governor and several prison officers. The misfeasance alleged was the opening of legal correspondence in breach of the Prison Rules. In allowing the Secretary of State's appeal the House decided that the material damage that a claimant must prove that he suffered, if he is to succeed, is financial loss, or physical or mental injury – with the latter including recognised psychiatric illness, but <u>not</u> distress, injured feelings, indignation or annoyance. The House pointed out that other legal remedies were potentially available to a prisoner who had suffered a legal wrong without suffering material damage; that prison officers who acted in breach of the Prison Rules were amenable to judicial review and susceptible to disciplinary proceedings; that a Claimant might also have a remedy under the 1998 Act; and that it was to be inferred that Parliament intended that infringements of the core human and constitutional rights protected by the Act would be remedied under it, and not by development of parallel remedies.

79. *Karagozlu v Commissioner of Police of the Metropolis* (above) was decided after the *Watkins* case. The Claimant, who was serving a sentence of imprisonment as a Category D prisoner in an open prison, was transferred to a closed Category B prison. He alleged that the transfer was the result of the supply of false information by a police officer under the control of the Commissioner, and thus commenced an action for misfeasance. The action was struck out. The Court of Appeal allowed his appeal, deciding that as the claim alleged damage special to the Claimant and a significant loss of residual liberty occurred by his transfer from open to closed prison, that amounted to a form of material damage sufficient to found the cause of action – see, in particular, paragraphs 24-45 of the judgment as to the general principles involved, and paragraphs 46-51 as to their application to a serving prisoner. In paragraph 52 of the judgment the Court set out aspects of the particulars of claim, and at paragraph 53 stated:-

> "It appears to us that those particulars do allege relevant damage. They allege damage special to the Claimant and they allege a significant loss of the liberty which he would have enjoyed if he had remained a Category D prisoner at HMP Ford. He would have been much less confined both while at Ford and on day release than he was after his transfer to HMP

> Winchester. That damage is, in our opinion, a form of the special or material damage to which the House of Lords referred to in the *Watkins* case."

80. Further, as to loss of residual liberty, I have already referred to *Prison Officers Association v Iqbal*, and in particular to the judgment of Lord Neuburger MR, at paragraphs 64-66 above (and see also paragraph 82 below).

(iv) Damages

81. The broad principles applicable to the award of ordinary (basic), aggravated and exemplary damages were helpfully set out by the Court of Appeal (in the context of directions to juries in cases of false imprisonment and malicious prosecution) in *Thompson v Commissioner of Police of the Metropolis [1998] QB 498.*

82. In *Prison Officers Association v Iqbal* (above) the Court concluded that, if the Claimant prisoner had succeeded in his action for false imprisonment, involving a loss of residual liberty for six hours, the appropriate award of damages would have been £120. The basis for this conclusion was explained by Lord Neuburger MR at paragraph 49 of the judgment:

> "In summary, the claimant suffered real loss in not being able to enjoy his customary limited freedom for some six hours, but this was at a time when he was lawfully being confined within the Prison in the cell where he had been for seven months, he was deprived only of limited freedom of movement within the prison, and this deprivation did not cause him much distress. In my judgment, an award of nominal damages is unjustifiable as the claimant suffered real loss, a relatively modest award of £120, which represents £20 an hour, would have been a fair sum to award him by way of damages, particularly bearing in mind that the Judge clearly would have thought it right to adopt a relatively low figure within what might be described as the permissible band."

83. As to aggravated damages, Lord Woolf MR made clear in *Thompson* (above) that although there could be a penal element in the award of aggravated damages, they were primarily awarded to compensate the claimant for injury to his proper pride and dignity, and the consequences of his being humiliated, or where those responsible had acted in a high handed, insulting or malicious manner.

84. The classic formulation as to the conditions for an award of exemplary damages is that given by Lord Devlin in *Rookes v Barnard [1964] 1 AC 1129* at p.1226, namely that the conduct proved must be "oppressive, arbitrary or unconstitutional action by servants of the government". At p.1228 Lord Devlin continued:

> "In a case in which exemplary damages are appropriate, a jury should be directed that if, and only if, the sum that they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum"

85. In *AB v South West Water [1993] QB 507* Sir Thomas Bingham MR, having pointed out that Lord Devlin's phrase at p. 1226 in *Rookes v Barnard* ought not to be subject to minute textual analysis, indicated (at p.529) that there was no doubt as to what Lord Devlin was talking about:

> "It was gross misuse of power, involving tortious conduct by agents of the government"

86. In the *Thompson case* (above), Lord Woolf MR formulated the relevant directions as follows:

> "(12) Finally the jury should be told in a case where exemplary damages are claimed and the judge considers that there is evidence to support such a claim, that though it is not normally possible to award damages with the object of punishing the defendant, exceptionally this is possible where there has been conduct, including oppressive or arbitrary behaviour, by police officers which deserves the exceptional remedy of exemplary damages. It should be explained to the jury: (a) that if the jury are awarding aggravating damages these damages will have already provided compensation for the injury suffered by the plaintiff as a result of the oppressive and insulting behaviour of the police officer and, inevitably, a measure of punishment from the defendant's point of view; (b) that exemplary damages should be awarded if, but only if, they consider that the compensation awarded by way of basic and aggravated damages is in the circumstances an inadequate punishment for the defendants; (c) that an award of exemplary damages is in effect a windfall for the plaintiff and, where damages will be payable out of police funds, the sum awarded may not be available to be expended by the police in a way which would benefit the public (this guidance would not be appropriate if the claim were to be met by insurers); (d) that the sum awarded by way of exemplary damages should be sufficient to mark the jury's disapproval of the oppressive or arbitrary behaviour but should be no more than is required for this purpose".

87. That exemplary damages may be awarded in a case of misfeasance, if the public official's behaviour amounted to oppressive, arbitrary or unconstitutional action was

confirmed in *Kuddus v Chief Constable of Leicestershire Constabulary [2002] 2 AC 122* in which Lord Hutton, having quoted Lord Devlin's words at p.1228 in *Rookes v Barnard* (above) said, at paragraph 91:

> "I think that the use of the adjective 'outrageous' shows that the conduct which falls within Lord Devlin's first category as being oppressive or arbitrary or unconstitutional is conduct of such a nature that it calls for exemplary damages to mark disapproval, to deter and to vindicate the strength of the law, and I further think that not every abuse of power which constitutes the tort of misfeasance will come within the first category. If the point had arisen for decision I am very doubtful if I would have held that the conduct of the police constable in the present case calls for exemplary damages"

88. In *Muuse v Secretary of State for the Home Department* (above) the Court of Appeal concluded that the guidance given by Sir Thomas Bingham MR (above) and Lord Hutton (above) as to the application of Lord Devlin's words in *Rookes v Barnard* was sufficient, and that there was no need for this to be qualified by further looking for malice, fraud, insolence, cruelty or similar conduct. The test is thus whether the relevant conduct is outrageous such as to call for an award of exemplary damages by way of punishment, to deter and to vindicate the strength of the law. In *Muuse* exemplary damages were thus awarded for the outrageous exercise of arbitrary power that lay behind the admitted unlawful imprisonment.

(v) Article 8

89. Section 2 of the 1998 Act requires that, when determining a question that has arisen in connection with a Convention Right, the court must take into account, inter alia, judgments of the European Court of Human Rights. Subject to the exceptions in section 6(2), section 6(1) makes it unlawful for a public authority to act in a way which is incompatible with a Convention Right.

90. Article 8 of the ECHR provides that:-

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

91. In *Raninen v Finland (1998) 26 E.H.R.R. 563* the ECtHR considered a possible breach of Article 8 in a case in which the Claimant had been unlawfully detained and handcuffed without justification. At paragraphs 63-64 of its judgment the Court stated:

> "According to the Court's case law, the notion of 'private life' is a broad one and is not susceptible to exhaustive definition; it may, depending on the circumstances, cover the moral and physical integrity of the person. The Court further recognises that these aspects of the concept extends to situations of deprivation of liberty. Moreover, it does not exclude the possibility that there might be circumstances in which Article 8 could be regarded as affording a protection in relation to conditions during detention which do not attain the level of severity required by Article 3.
>
> In the case under consideration, as quoted above, the applicant based his complaint under Article 8 on the same facts as that under Article 3, which the Court has considered and found not to have been established in essential aspects. In particular, it had not been shown that the handcuffing had affected the applicant physically or mentally or had been aimed at humiliating him. In these circumstances, the Court does not consider that there are sufficient elements enabling it to find that the treatment complained of entails such adverse effects on his physical or moral integrity as to constitute an interference with the Applicant's right to respect for private life as guaranteed by Article 8 of the Convention."

92. At paragraph 105 of its judgment in *DG v Ireland [2002] ECHR 39474/98*, which was followed in *Nowicka v Poland [2003] 1 FLR 417*, the ECtHR dealt with the scope of Article 8 in the context of a penal institution, as follows:

> "It is true that the notion of private life may, depending on the circumstances, cover the moral and physical integrity of the person which in turn may extend to situations covering deprivations of liberty. There may therefore be circumstances in which Art. 8 could be regarded as affording protection in respect of conditions of detention which do not attain the level of severity required by Art. 3 (the above-cited *Raninen v Finland [1997] ECHR 20972/97 at para 63*). However, normal restrictions and limitations consequent on prison life and discipline during lawful detention are not matters which would constitute a violation of Art. 8 either because they are considered not to constitute an interference with the detainee's private and family life (*X v UK, No. 9054/80, Commission decision of 8 October 1982, Decisions and Reports (DR) 30, p.113* and the above-cited judgment, at para 64) or because any such interference would be justified (*Wakefield v UK No. 15817/89, DR 66, p.251*)."

93. In *R (Munjaz) v Mersey Care NHS Trust [2006] 2 AC 148* the House of Lords was concerned with judicial review proceedings in relation to the Code, issued under section 118(1) of the Mental Health Act 1983, containing 'guidance' for hospitals and medical staff on the use of seclusion for detained psychiatric patients in high security hospitals. The House concluded, by a majority, that the Code did not have the binding force of legislation and was guidance rather than instruction, but that it was not mere advice and should not be departed from without cogent reasons; that the policy, properly applied, did not permit a patient to be deprived of any residual liberty to which he was properly entitled within Article 5(2); and that seclusion could not be said to involve an interference with a person's right to respect for his home and his correspondence within Article 8(1) if it was properly used as the only means of protecting others from violence or intimidation and for no longer than necessary and was, in any event, justified under Article 8 (2), having its base in statute.

94. In *R (Wood) v Commissioner of Police of the Metropolis [2009] HRLR 25* Laws LJ reviewed the broad area of interests protected under Article 8 in light of the case law (including *Pretty v United Kingdom 35 E.H.R.R. 1* quoted in *Anufrijeva v Southwark LBC [2004] QB 1124),* and concluded that the concept that underpins them is that of personal autonomy. At paragraphs 21 & 22 of the judgment he stated that:

> "The notion of the personal autonomy of every individual marches with the presumption of liberty enjoyed in a free polity: a presumption which consists in the principle that every interference with the freedom of the individual stands in need of objective justification. Applied to the myriad instances recognised in the Article 8 jurisprudence, this presumption means that, subject to the qualifications I shall shortly describe, an individual's personal autonomy makes him – should make him – master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image, of which the cases speak; and also of the "zone of interaction" (*Von Hannover* paragraph 50) between himself and others. He is the presumed owner of these aspects of his own self; his control of them can only be loosened, abrogated if the State shows an objective justification for doing so.
>
> This cluster of values, summarised as the personal autonomy of every individual and taking concrete form as a presumption against interference with the individual's liberty, is a defining characteristic of a free society. We therefore need to preserve it even in little cases. At the same time it is important that this core right protected by Article 8, however protean, should not be read so widely that its claims become unreal and unreasonable. For this purpose I think that there are three safeguards, or qualifications. First, the alleged threat or assault to the individual's personal autonomy must (if Article 8 is to be engaged) attain "a certain level of seriousness". Secondly, the touchstone for Article 8(1)'s engagement is whether the claimant enjoys on the facts a "reasonable expectation of privacy" (in any of the senses of privacy accepted in the cases).

> Absent such an expectation, there is no interference with personal autonomy. Thirdly, the breadth of Article 8(1) may in many instances be greatly curtailed by the scope of the justifications available to the state pursuant to Article 8(2)".

(vi) Damages for breach of Article 8

95. Section 8 of the 1998 Act provides that:-

> "(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.
>
> (2) But damages may be awarded only by a court which has power to award damages, or to order payment of compensation, in civil proceedings.
>
> (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including –
>
> (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
>
> (b) the consequences of any decision (or that of any other court) in respect of that act,
>
> the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.
>
> (4) In determining –
>
> (a) whether to award damages, or
>
> (b) the amount of an award,
>
> the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention ….
>
> (6) In this section –
>
> 'court' includes a tribunal;
>
> 'damages' means for an unlawful act of a public authority;
>
> 'unlawful' means unlawful under section 6(1)."

96. Article 41 of the ECHR provides that:

> "*Just satisfaction*; if the court finds that there has been a violation of the Convention or the protocols thereto, and if the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

97. In *Anufrijeva v Southwark LBC* (above), in the context of alleged breaches of Article 8, the Court of Appeal concluded that the approach to awarding damages in this jurisdiction should be no less liberal than those applied by the ECtHR, or one of the purposes of the 1998 Act will be defeated and claimants will still be put to the expense of having to go to Strasbourg to obtain just satisfaction. In giving the judgment of the Court Lord Woolf CJ observed, inter alia:

> "10….Article 3 of the Convention provides protection against inhuman and degrading treatment. What is the nature of the right to respect for private and family life, the home and correspondence afforded by Article 8? In essence it is the right to live one's personal life without unjustified interference; the right to one's personal integrity. In *Bensaid v United Kingdom (2001) 33 E.H.R.R. 205* the claimant contended that his Article 8 rights would be infringed if he were expelled from this country because of the likely effect that this would have on his mental health. The European Court of Human Rights had this to say, at p 219, para 46, about Article 8;
>
> 'Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8. However the court's case law does not exclude that treatment which does not reach the severity of Article 3 treatment may none the less breach Article 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity'.
>
> 11. In *Pretty v United Kingdom (2002) 35 E.H.R.R. 1* the issue was whether Article 8 required that the claimant should be permitted to enlist the aid of her husband to commit suicide when immobilised in the final stages of motor neurone disease. The Court of Human Rights made the following comment about the ambit of Article 8, at pp 35-36, para 61:
>
> 'As the court has had previous occasion to remark, the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can sometimes embrace aspects of an individual's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within this personal sphere protected by Article 8. Article 8 also protects a right to personal development and the right to establish and develop relationships with other human beings and the outside world. Though no previous case has

established as such any right to self-determination as being contained in Article 8 of the Convention, the court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees'.

52…. The remedy of damages generally plays a less prominent role in actions based on breaches of the article of the Convention than in actions based on breaches of private law obligations where, more often than not, the only remedy claimed is damages.

53…Where an infringement of an individual's human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any importance. This is reflected in the fact that, when it is necessary to resort to the court to uphold and protect human rights, the remedies that are most frequently sought are the orders which are the descendants of the historic prerogative orders or declaratory judgments. The orders enable the court to order a public body to refrain from or to take action, or to quash an offending administrative decision of a public body. Declaratory judgments usually resolve disputes as to what is the correct answer in law to a dispute. This means that it is often procedurally convenient for actions concerning human rights to be heard on an application for judicial review in the Administrative Court. That court does not normally concern itself with issues of disputed fact or with issues as to damages. However, it is well placed to take action expeditiously when this is appropriate.

65….Where there is no pecuniary loss involved, the question whether the other remedies that have been granted to a successful complainant are sufficient to vindicate the right that has been infringed, taking into account the complainant's own responsibility for what has occurred, should be decided without a close examination of the authorities or an extensive and prolonged examination of the facts. In many cases the seriousness of the maladministration and whether there is a need for damages should be capable of being ascertained by an examination of the correspondence and the witness statements.

66. In determining whether damages should be awarded, in the absence of any clear guidance from Strasbourg, principles clearly laid down by the HRA may give the greatest assistance. The critical message is that the remedy has to be 'just and appropriate' and 'necessary' to afford 'just satisfaction'. The approach is an equitable one. The 'equitable basis' has been cited by the Court of Human Rights both as a reason for awarding damages and as a basis upon which to calculate them. There have been cases where the seriousness or the manner of the violation has meant that as a matter of fairness, the Court of

Human Rights has awarded compensation consisting of 'moral damages'. The Law Commission stated in its report (Law Com No 266 (Cm 4853)), para 4.96, that the Court of Human Rights took account of 'a range of factors including the character and conduct of the parties, to an extent which is hitherto unknown in English law'.

67. The scale and manner of violation can therefore be taken into account….

79. The reality is that a claim for damages under the HRA in respect of maladministration, whether brought as a free-standing claim or ancillary to a claim for other substantive relief, if pursued in court by adversarial proceedings, is likely to cost substantially more to try than the amount of any damages that are likely to be awarded. Furthermore, as we have made plain, there will often be no certainty that an entitlement to damages will be established at all.

80. What can be done to avoid a repetition of this situation in future proceedings? Based on the experience available at present we suggest as follows in relation to proceedings which include a claim for damages for maladministration under the HRA:

i) The courts should look critically at any attempt to recover damages under the HRA for maladministration by any procedure other than judicial review in the Administrative Court.

ii) A claim for damages alone cannot be brought by judicial review (Part 54. 3(2)) but in this case the proceedings should still be brought in the Administrative Court by an ordinary claim.

iii) Before giving permission to apply for judicial review, the Administrative Court judge should require the claimant to explain why it would not be more appropriate to use any available internal complaint procedure or proceed by making a claim to the PCA or LGO at least in the first instance. The complaint procedures of the PCA and the LGO are designed to deal economically (the claimant pays no costs and does not require a lawyer) and expeditiously with claims for compensation for maladministration. (From inquiries the court has made it is apparent that the time scale of resolving complaints compares favourably with that of litigation.)

iv) If there is a legitimate claim for other relief, permission should if appropriate be limited to that relief and consideration given to deferring permission for the damages claim, adjourning or staying that claim until use has been

made of ADR, whether by a reference to a mediator or an ombudsman or otherwise, or remitting that claim to a district judge or master if it cannot be dismissed summarily on grounds that in any event an award of damages is not required to achieve just satisfaction.

v) It is hoped that with the assistance of this judgment, in future claims that have to be determined by the courts can be determined by the appropriate level of judge in a summary manner by the judge reading the relevant evidence. The citing of more than three authorities should be justified and the hearing should be limited to half a day except in exceptional circumstances.

vi) There are no doubt other ways in which the proportionate resolution of this type of claim for damages can be achieved. We encourage their use and do not intend to be prescriptive. What we want to avoid is any repetition of what has happened in the court below in relation to each of these appeals and before us, when we have been deluged with extensive written and oral arguments and citation from numerous lever arch files crammed to overflowing with authorities. The exercise that has taken place may be justifiable on one occasion but it will difficult to justify again."

98. In *R (Greenfield) v Secretary of State for the Home Department [2005] 1 WLR 673* (in the context of a judicial review of the violation of a prisoner's Article 6 rights in discipline proceedings) the House of Lords considered the principles to be applied in deciding, pursuant to section 8 of the 1998 Act, whether an award of damages was necessary to afford just satisfaction for violation of Article 6, and if so how much. The principles are, nevertheless, relevant in the context of Article 8. The House approved paragraphs 52-53 of the judgment in *Anufrijeva* (cited above) and concluded that the British Courts had to look to the jurisprudence of the ECtHR for guidance; that the focus of the Convention is the protection of human rights rather than the award of compensation, and that that was reflected in the approach of the ECtHR, which was to treat the finding of violation as, in itself, providing just satisfaction to the injured party, and not to speculate what the outcome of the particular proceedings would have been if the violation had not occurred; that the ECtHR would award monetary compensation only when it was satisfied that the loss or damage complained of was actually caused by the violation (although it had, on occasion, been willing in appropriate cases to make an award if of the opinion that the applicant had been deprived of a real chance of a better outcome); that awards were not precisely calculated but were such as were judged by the court to be fair and equitable in the particular case; and that although judges in England and Wales were not inflexibly bound by awards of the European Court, they should not aim to be significantly more or less generous than that court might be expected to be if it was willing to make an award at all.

99. The ECtHR does not, as a matter of practice, make awards of aggravated or exemplary damages – see e.g. *Wainwright v United Kingdom (2007) 44 E.H.R.R. 40* at paragraph 60.

100. I have been referred to a number of cases dealing with awards of damages by the ECtHR for unlawful detention in breach of Article 5 – namely *Conka v Belgium (2002) 34 E.H.R.R. 54; Assanidze v Georgia (2004) 39 E.H.R.R. 32; Vasileva v Denmark (2005) 40 E.H.R.R. 27;* and *Lloyd & others v United Kingdom (6 July 2005).* The awards ranged from 500 Euros for 13½ hours, to 5,000 Euros for 2-3 days, 9,000 Euros for 28-36 days, and 150,000 Euros for more than 3 years.

Unlawful Act or Omission.

101. On the Claimant's behalf, Miss Kaufmann argues that the acts and omissions that resulted in the multiple failures to provide the Claimant with one hour in the fresh air, whilst he was in the Segregation Unit, were unlawful.

102. Her argument is to the effect that:-

(i) The duty to implement PSO 4275 is a public law duty, requiring to be judged by public law principles – see Lord Hobhouse in the *Three Rivers* case (above) at p. 230 b-f, when he said, inter alia:

> "…..the relevant act (or omission, in the sense described) must be unlawful. This may arise from a straightforward breach of the relevant statutory provisions, or from acting in excess of the powers granted, or for an improper purpose. Here again the test is the same or similar to that used in judicial review…."

(ii) PSO 0001 (see paragraph 72 above) makes clear that PSOs are long-term directions to which all members of staff and prisoners must have access.

(iii) PSO 4275 (see paragraph 73 above) enunciates the policy that the Secretary of State has adopted to structure the operation of the discretion given by Rule 30 (see paragraph 70 above) as to time in the open air.

(iv) Prisoners need to know of the terms of any current policy because they have a legitimate expectation that those terms will be applied – see *In re Findlay [1985] 1 AC at p. 388E/F*.

(v) Where a repository of public law power adopts a policy either himself, or for those exercising power on his behalf, public law principles of consistency, legitimate expectation, abuse of discretion and fairness, require

that the policy is applied in practice, save where there is good reason not to do so – see *R v SSHD ex parte Urmaza (Admin Court July 1996* – in particular at p.10(a)), and *R (Lowe) v Governor of Liverpool Prison [2008] EWHC 2167* (in particular at paragraphs 32-38, which include the relevant quotation from *ex parte Urmaza*), *Craig on Administrative Law 5th Ed at p. 534,* and *Wade and Forsyth 10th Ed at pp. 315-317*.

(vi) The *Lowe* case was concerned with the security re-categorisation of a prisoner. Under paragraph 7 of the Prison Rules 1999 prisoners were to be classified in accordance with directions given by the Secretary of State, who had issued PSO 0900 to set out the relevant policy to be applied. HH Judge Michael Kay QC held that the principles of consistency and legitimate expectation applied to the policy set out in the PSO.

(vii) The clear and unambiguous meaning of paragraph 2(ii) of PSO 4275 is that staff, acting on behalf of the Governor, must ensure that inmates in segregation units, if they seek it, have one hour in the open air each day, and that that is not subject to the need to maintain good order or discipline, nor to what is reasonable.

(viii) The relevant acts and omissions were thus unlawful because, without good reason and contrary to the Claimant's legitimate expectation, they contravened the clear and unambiguous policy of the Secretary of State, as expressed in paragraph 2(ii) of PSO 4275, with which the Governor and staff of the prison were bound to comply.

(ix) Other prisons have found solutions which ensure compliance.

(x) Neither of the two most senior officers in post at the material time, (Governor Drummond and Principal Officer Harris) took any, or any sufficient, steps to investigate the potential solutions, or to bring the attention of senior management to the need to investigate whether it was possible to make alterations to ensure compliance. In particular:

(a) Although Harris was working in the Segregation Unit at the time that two prisoners per caged area in the exercise yard was tried and later rejected on safety grounds, as well as working there when division of the overall caged area into four was also considered and rejected, he should have recognised that advances in risk assessment techniques required reconsideration of the former solution, and that the latter solution required reconsideration in any event.

(b) Although Drummond had considered division of the overall caged area into four, and concluded that the resultant areas would be too small, he had not costed the undertaking, nor had he asked the prisoners their

view, nor had he put forward a "business case" for any further resources or other change.

(xi) It was therefore impossible for the Secretary of State to contend that there was good reason at HMP Frankland not to comply with paragraph 2(ii) of PSO 4275.

103. On behalf of the Secretary of State, Mr Sanders argues, in summary, that:-

(i) The Claimant's contention as to legitimate expectation, which is not referred to in the Particulars of Claim, but which was referred to in the Opening Speech on his behalf, is misconceived.

(ii) However expressed, the argument amounts to an attempt to give legal force to a non-legal policy document, when the requirements in question have been intentionally excluded from any binding legal instrument, and when the consequence of the unlawfulness in question is said to be personal, primary tort liability on the part of individual public servants.

(iii) It is important to note that the Claimant cannot, and does not, allege that any unlawfulness arose by virtue of a failure to comply with Rule 30 of the Prison Rules (see paragraph 70 above) which required that the Claimant be given "the opportunity to spend time in the open air at least once every day, for such period as may be reasonable in the circumstances", which was the applicable legal requirement and which was fulfilled in the Claimant's case. Nor does the Claimant argue that the exercise regime at HMP Frankland and/or the failure to reform it was unlawful or ultra vires (in the sense of outwith the powers of the Secretary of State or the Governor), or irrational in the *Wednesbury* sense. Neither is it contended that the individual officers acted unlawfully by bringing the Claimant in from the exercise yard after half an hour, or by failing to leave him in the open air for longer.

(iv) Legitimate expectation provides no basis for a conclusion that individual members of staff acted unlawfully, given that:-

(a) The words of Lord Hobhouse in the *Three Rivers* case simply mean that the test for whether there has been a "breach of the relevant statutory provisions", an "excess of the powers granted", or an "improper purpose" is "the same as or similar to judicial review" – it does not mean that every instance of public law unlawfulness which might justify an order for relief in the Administrative Court may necessarily constitute an ingredient of misfeasance.

(b) What is required in misfeasance is an abuse by a public officer of the powers invested in him – i.e. an act which he had no power to do or an omission which he was duty bound to supply. In public law terms, legitimate expectations are created or frustrated by organisations in a corporate sense, not the individual members of staff who work within them. Alleged breaches are therefore analytically incapable of operating as ingredients of misfeasance in claims against such staff.

(c) The doctrine of legitimate expectation rests on the principle that it may be unfair to allow a public authority to resile from expectations that it has created by its past practices or representations. In this case, however, the policy document allegedly giving rise to the relevant expectation was promulgated by HM Prison Service Headquarters acting on behalf of the Secretary of State not the staff at HMP Frankland.

(d) Paragraph 2(ii) of PSO 4275 is only addressed to Governors and Directors, but the logic of the Claimant's argument is that any member of staff who furthers or participates in its breach is necessarily acting unlawfully. At most, the Claimant could only seek to criticise the staff for failing to request further resources or to put forward a "business case", he could not contend that they could or should have reformed the regime – that was beyond their powers.

(e) In fact, the Claimant did not have any legitimate expectation that paragraph 2(ii) of PSO 4275 would be fully complied with – given his previous experience at HMP Frankland.

(f) Any judicial review based on the same alleged breach of legitimate expectation could only have been brought against the Secretary of State for failing to enforce PSO 4275 or, alternatively, against the Governing Governor of the prison for failing to implement it. It could not have been brought against the Segregation Unit staff who inherited the relevant regime, and who did not have the authority or the resources to reform it in any event. But it cannot be argued that those individuals themselves acted unlawfully simply by working in the Segregation Unit.

(g) Any such judicial review would, at best, have resulted in the matter being remitted to the authorities for reconsideration of the regime itself, or of PSO 4275.

(h) The uncertainties attaching to the doctrine of legitimate expectation, particularly in its substantive guise, means that it is not sufficiently certain or foreseeable to justify converting a policy statement into, in effect, law and to then justify holding public officials personally and

primarily liable in tort for instances of non compliance – it being important to recognise that the alleged wrong is committed by a member of staff.

(v) Litigation regarding non-compliance with daily prison routines and regime timetables should be discouraged, and the scope for a misfeasance claim in cases of "loss of residual liberty" represent a "safety net" for redressing the most extreme cases of bad faith and abuse of power and should, as demonstrated by *Prison Officers Association v Iqbal* (above), be confined to exceptional cases of blatant wrongdoing. In particular, given that there was no liability for misfeasance in *Iqbal* (which involved an alleged loss of residual liberty consequent on unlawful strike action), it cannot be sensibly be argued that the opposite should be the conclusion in this case where, at worst, Prison Officers frustrated a public law legitimate expectation without sufficiently good reason – the more so when paragraph 68 of Smith LJ's judgment (see paragraph 66 above) is taken into account.

(vi) In any event, there were valid public interest grounds for departing from PSO 4275 in this case, and for frustrating any legitimate expectation that might have existed – namely sound operational and security reasons for the restricted regime at times of high occupancy.

104. In the end, I reject Miss Kaufmann's contentions, and am persuaded, for the reasons advanced in argument by Mr Sanders, that the acts and omissions sought to be relied upon were not unlawful such as to found misfeasance against members of staff at HMP Frankland.

105. In the particular circumstances of this case that conclusion is, in itself, fatal to the misfeasance claim. However, in case it is later decided that I am wrong in that conclusion, and in deference to the evidence and argument as to the other three issues in connection with misfeasance, I propose still to deal with each of them – albeit only shortly in relation to the last two.

Bad Faith

106. The Particulars of Claim assert, in broad terms, both targeted malice and wider bad faith. In the end, however, the Claimant did not pursue the allegation of targeted malice at trial. Mr Sanders argues that, in the light of observations such as those at paragraph 57 of the judgment in *Marsh v Clare* (above) to the effect that such allegations should not be made by a responsible pleader unless he or she has grounds for believing that they can be made good, the original inclusion of targeted malice should be deprecated – albeit that there was no application to strike out, and a Defence was entered. In this regard I accept Miss Kaufmann's argument that she acted responsibly, albeit that it transpired (once disclosure had been completed) that there was no foundation whatsoever in the targeted malice allegation, and thus it was abandoned.

107. Applying the criteria identified in paragraph 76 (3)(b) above Miss Kaufmann argues that this is a clear case of conscious disregard, or reckless indifference, as to the lawfulness of the of the acts or omissions complained of, and as to any injury that the claimant.

108. Taking Governor Drummond and Principal Officer Harris as her examples, she submits that, in the light of their evidence, I must find that both:-

(i) Understood that the PSO imposed a mandatory requirement that prisoners in the Segregation Unit were to be given the opportunity to take one hour's exercise in the open air every day;

(ii) Realised that the terms of the PSO might lay down a legal requirement with respect to the provision of exercise in the Segregation Unit;

(iii) Knew that the consequence of not complying with the terms of the PSO was that the Claimant would remain in his cell for the period which the Unit's regime fell short of the one hour required in the PSO when otherwise he would be exercising in the open air in the exercise yard (i.e. that on such occasions the Claimant would lose his residual liberty);

(iv) Did not take any steps whatsoever, despite these realisations or the knowledge of resulting injury to the Claimant or anyone else in the Segregation Unit, to ensure compliance with the PSO, to investigate ways in which compliance might be achieved, or to mitigate the effects on the Claimant.

(v) Continued to take no action even in the face of Mr Malcolm's repeated complaints in the course of which he raised directly the illegality of what was occurring.

109. In consequence, Miss Kaufmann submits that both Governor Drummond and Principal Officer Harris were consciously indifferent to their legal responsibilities because both understood that PSO 4275 might set out legal requirements, and was in mandatory terms, yet did nothing to secure the provision of one hour. In addition, she submits, their conscious indifference was all the greater because they ignored the Claimant's repeated assertions of illegality.

110. Miss Kaufmann cites, as further examples of conscious indifference on the part of Governor Drummond and Principal Officer Harris the fact that:-

(i) Principal Officer Harris, in particular, failed to suggest a phased return by the Claimant to the vulnerable prisoner Wings, under PSO 1700.

(ii) There were failures to fully comply with PSO 4275 even on days when there was low occupancy of the Segregation Unit and few applicants for time in the open air – citing examples, in particular, on 23 & 27 August 2007 and 1 & 2 September 2007.

111. In the result, Miss Kaufmann submits that it is clear that Governor Drummond and Principal Officer Harris did not care whether the Claimant received his mandatory requirement or not.

112. Finally, Miss Kaufmann contends that the evidence supports the further conclusion that that other members of staff, including those more senior to Messrs Drummond and Harris, shared an equal disregard of the rights of those in the Segregation Unit in relation to PSO 4275 – particularly as, she submits, nothing significant was done after the Claimant's complaints in both 2004 and 2007, or even after the Acting Deputy Ombudsman's finding in September 2007, and nor were the Claimant's complaints dealt with appropriately either.

113. In stark contrast, Mr Sanders submits that the evidence demonstrated that all the relevant staff at HMP Frankland honestly, genuinely and reasonably believed that there were sound operational and security reasons for the restricted time for exercise in the open air. He submits that, at absolute worst, any unlawful conduct was an honest genuine and reasonable mistake, rather than the product of any wilful disregard of, or reckless indifference to, illegality.

114. Mr Sanders points out that none of the witnesses had the managerial or budgetary authority to reform the regime on the Segregation Unit, and that the Claimant has not sought to identify and to challenge anyone who did. Thus, he submits, there is no evidence (for example) that the Governing Governor did not honestly, genuinely and reasonably believe that the Segregation Unit was lawfully run.

115. Mr Sanders further submits that Governors Russell and Drummond each acted honestly and in good faith at all times, and in the genuine belief that 60 minutes exercise in the open air each day could not be delivered, and that the exercise regime was adequate and was not having any adverse effects on the Claimant, or on any other prisoner in the Segregation Unit (none of whom complained).

116. Finally, Mr Sanders submits that the evidence demonstrated that all the relevant members of staff cared about the well-being of the prisoners in the Segregation Unit (hence, for example, the introduction of the cardio suite), and that the Claimant had failed to prove that any member of staff had acted in the knowledge of, or with reckless indifference to, the probability of causing injury to the Claimant.

117. I therefore turn to my findings of fact in relation to bad faith. Whilst the reality is that the Claimant has failed on the unlawful act issue, I have necessarily reached these findings of fact upon the premise (favourable to the Claimant) that he has succeeded. I

make the findings set out immediately below upon the basis of the evidence and the balance of probabilities.

118. At all material times whilst the Claimant was in the Segregation Unit in 2007 the relevant staff at HMP Frankland tried their honest, but not always competent, best to comply with paragraph 2(ii) of PSO 4275 in challenging operational circumstances and with very limited space available to them - albeit that they failed to fully comply with it then and thereafter, and although the Unit had managed to achieve full compliance in at least 2001 (after earlier intervention by HMCIP). The relevant staff honestly believed that there were sound operational and security reasons for their inability to provide every applicant with one hour in the fresh air, and that they were acting lawfully. In providing the Claimant, each day that he took exercise, with less than an hour in the fresh air the staff were not acting in the knowledge of, or with reckless indifference to, any illegality in their actions, nor in the knowledge of, or with reckless indifference to, any probability of causing injury (including loss of residual liberty) to the Claimant. Rather, the relevant staff cared about the welfare of the Claimant and the other prisoners in the Segregation Unit. As was known to at least some, the Claimant's suggestions as to how the system for time in the fresh air could be improved had been considered in the past and rejected in good faith – albeit that they were not fully re-considered.

119. For the sake of completeness, I should add (having considered the matter) that the premise of the Claimant's success on the unlawful act issue does not cause me to alter any of my other findings of fact set out in paragraphs 11-57 above.

120. In considering the subjective state, at the material time, of the minds of the witnesses called by the Secretary of State, I was greatly assisted by the opportunity to observe and to assess them during cross-examination and re-examination, and (in each case) to take the whole of their evidence into account.

121. Equally, I have reminded myself that, in accordance with the *Muuse* case (see paragraph 77 above), honest incompetence cannot be equated with reckless indifference.

122. It follows that I reject the submissions made on behalf of the Claimant in relation to bad faith. He has failed to prove it on the balance of probabilities by some margin. Accordingly, on this issue too, the claim for misfeasance fails.

Loss

123. Given my conclusions on both unlawful act and bad faith, and as indicated above, I propose to deal with this topic briefly, not least as my findings of fact (and in particular those at paragraph 52(iii) above) mean that, loss of residual liberty is the only material damage for which the Claimant can, in fact, seek to argue.

124. Miss Kaufmann submits that on each of the 153 days that the Claimant chose to spend time in the open air he lost around thirty minutes of residual liberty by being returned to his cell prematurely. She relies, in particular, on the relevant passages in *R v Deputy Governor of Parkhurst Prison and others, Ex parte Hague, Karagozulu v Commissioner of Police for the Metropolis,* and *Prison Officers Association v Iqbal* to which I have made reference at paragraphs 62, 64-66, 79 & 82 above.

125. As to *Prison Officers Association v Iqbal* (in which, had the claim of six hours' false imprisonment succeeded, the Court of Appeal would have awarded £120 in compensation) Miss Kaufmann submits that the proposed award in that case would not be fair or adequate in this case because:-

(i) The Claimant was held in the Segregation Unit, and his time in the fresh air was the only substantial period of time that he was allowed out.

(ii) There is compelling evidence that the Claimant suffered distress.

(iii) The unlawful refusal to provide the mandated time went on for months, and in the face of repeated complaints.

(iv) A thirty minute period should attract a greater hourly rate than, say, a three hour period (citing the *Thompson* case at p.515E – see paragraph 81 above); and, in any event, there should be no reducing scale, given that each day the Claimant suffered a fresh loss of his residual liberty.

126. In the result, Miss Kaufmann submits that there should be a basic award in the region of £37 per half hour of loss of residual liberty.

127. Mr Sanders submits that the effect on the Claimant of having around thirty minutes, as opposed to 60 minutes, in the fresh air each day was not sufficiently significant to amount to a loss of residual liberty. He submits that the comparison is not between daily life in one kind of unit and another, rather it is between 23 hours in the Segregation Unit, and 23 hours and thirty minutes in the Segregation Unit. He points out that in *Karagozlu v Commissioner of Police of the Metropolis* (see paragraph 79 above) the significant loss of liberty referred to by the court was a change from detention in open conditions to detention in closed conditions, involving loss of privileges, loss of free association and loss of day release, and submits that the position in the instant case is very different. True loss, he suggests, requires more than *an impact on*, or *some restriction of*, a prisoner but rather a qualitative change in his treatment akin to "a prison within a prison" – as to which he cites paragraphs 42-43 of Lord Steyn's speech in *R (Munjaz) v Mersey Care NHS Trust* (see paragraph 92 above).

128. In the alternative, as to quantum, Mr Sanders submits, inter alia, that:-

(i) In the *Iqbal* case, Mr Iqbal's loss of residual liberty was greater than that of the Claimant in this case, and yet the Court of Appeal described Mr Iqbal's loss as "pretty limited".

(ii) Unlike Mr Iqbal, the Claimant was not the subject of any unexpected restriction – he had been in the Segregation Unit before, and he insisted on staying there in 2007.

(iii) Unlike Mr Iqbal (who was not able to leave his cell at all on the material occasion), this claim is essentially quantitative not qualitative – especially as the Claimant complains about getting 30 minutes in double the space, as opposed to 60 minutes in half the space.

(iv) The *Thompson* case (paragraph 81 above) is "of no real assistance" - per Lord Neuburger MR in the *Iqbal* case (above) at paragraph 48.

(v) I should, in addition, factor in the Claimant's decision not to request or to take exercise on 4 of the 153 days; the provision to him of more than 30 minutes in the open air on other days; the need to taper any award; and the fact that the Claimant (wholly) exaggerated the distress and upset that he supposedly suffered.

(vi) In the result, I should make only a nominal award of damages at most, or in the alternative that even an *Iqbal* type award should be less than £10 per day, or in the further alternative (at very most) well under £1,500.

129. I do not find it at all easy to indicate what my findings would have been in relation to these submissions if I had found in the Claimant's favour on the preceding issues of unlawful act and bad faith, given that I have not, and that (as part of that) I have found against the Claimant on a number of significant factual issues – including, for example, the fact that the Claimant chose to remain in the Segregation Unit, and his complete lack of distress (as against Miss Kaufmann's reliance on the existence of distress in support of her quantum argument) or other adverse physical, mental or emotional consequence.

130. That said, I incline to the view that if I had found in the Claimant's favour on unlawful act and bad faith, and on the facts as to his wishes whilst in the Segregation Unit and as to his assertions about the effects on him, then (given the fact that he was in the Segregation Unit, the value of time in the fresh air to those on a restricted regime, and the period of time over which the loss of time in the fresh air occurred) I might have concluded that there was a material loss of residual liberty. I further incline to the view that, if I had, I would have rejected Mr Sanders' argument for only a nominal award, and also Miss Kaufmann's argument for an award of £37 per hour. Instead, factoring in the various matters argued for that were otherwise consistent with my findings of fact, and applying a taper, I would probably have taken an overall

broad figure of 72 hours and an overall broad hourly rate of £10-15, making a total (at most) of £1,080.

Aggravated and Exemplary Damages

131. Whilst I have done my best to indicate the award of basic damages that I would probably have made if I had found in the Claimant's favour on unlawful act and bad faith, I can give no such indication in respect of aggravated and exemplary damages. As to aggravated damages, and recalling the principles set out in paragraph 83 above, I have found that, in any event, the Claimant did not suffer injury to his proper pride and dignity, and was not humiliated. I do not feel able to reach any meaningful hypothetical finding (wholly contrary to my findings of fact) as to whether the relevant members of staff acted in a high handed, insulting or malicious manner, or to try to calculate hypothetical aggravated damages in consequence.

132. Likewise, bearing in mind the principles as to exemplary damages (see paragraphs 84-87 above), I do not feel able to reach any meaningful hypothetical finding (again wholly contrary to my actual findings of fact) as to the conduct of the staff, or then to try to decide whether such hypothetical conduct was outrageous such as to call for an award of exemplary damages by way of punishment, to deter and to vindicate the law.

Article 8(1) ECHR

133. Miss Kaufmann relying, in particular, on the principles identified in *Raninen v Finland, Pretty v United Kingdom* and *R (Wood) v Commissioner of Police for the Metropolis* (see paragraphs 90, 93 & 96 above), the background to the European Prison Rules (see paragraph 74 above), and *Wainwright v United Kingdom* (a case to do with strip searching, decided in 2006 – see Application No.12350/04), submits that (whatever my conclusion as to misfeasance) there was a plain breach of the Claimant's Article 8 rights. She submits that one hour in the fresh air each day is of obvious importance to someone held under the restrictive regime of a Segregation Unit, and she relies upon the Claimant's evidence as to the physical and mental impact that only thirty minutes in the fresh air had on him as being amply sufficient to engage the Article.

134. Mr Sanders argues, inter alia, that one way to express the issue is whether (applying the words of Laws LJ in the *Wood* case above) any impact on the Claimant's Article 8(1) right to respect for his private or family life attained the necessary "level of seriousness" to amount to a potential breach. He submits that Article 8 obliges public authorities to "respect" the private and family lives of individuals, and points out that the Claimant's personal autonomy was respected in the sense that his (unjustified) refusal to locate to a normal vulnerable prisoner wing was respected.

135. Mr Sanders submits that it is impossible to derive from Article 8 a rule that prisoners in segregation should be given time in the open air each day, or to deduce why any

such rule should dictate 60 minutes as opposed to 30,40 or 70 minutes. He argues that in attempting to make Article 8 bear this weight, the Claimant is seeking to incorporate and make binding general policy goals and standards that have been intentionally excluded from any binding provision of national and international law.

136. As I have found above, the Claimant did spend around thirty minutes, and regularly longer, in the fresh air on each of the 153 days that he took exercise. Equally, I have found that the Claimant suffered no detrimental effects at all to his health or wellbeing. Equally, I have found that he chose from the outset, and for his own reasons, to get himself moved to another prison by staying in the Segregation Unit – rather than moving to a vulnerable prisoner Wing, where (as he knew) he would immediately have been able to have more time in the fresh air. Despite the unreasonable nature of his actions, the Claimant's autonomy was respected. It also seems to me that there is some force in Mr Sanders' argument as to the difficulty in deriving from Article 8 a rule that prisoners in segregation should be given 30 minutes as opposed to 60 minutes in the fresh air each day. At all events, I conclude that, on the particular facts that I have found, not least that he was the author of his own misfortune, any impact on the Claimant's Article 8 right to respect for his private life did not attain the necessary "level of seriousness" to amount to an interference and thus to a potential breach of Article 8. This finding is, of course, decisive of the overall Article 8 issue. However, I propose to go on to briefly consider the other issues.

Article 8(2) ECHR

137. Miss Kaufmann submits that the Secretary of State has offered no meaningful justification for any interference. She argues that the terms of paragraph 2(ii) of PSO 4275 establish the benchmark for what respect for this aspect of the private life of segregated prisoners requires, and that the provision of anything less is therefore presumptively unjustified unless it represents a lawful departure from the policy. This requires that the interference is in accordance with domestic law, which Miss Kaufmann submits that it is not – given what she submits is the unreasonable failure of the staff at HMP Frankland to take reasonable and appropriate measures to attempt to comply with the PSO. Miss Kaufmann submits that the Secretary of State has wholly failed to establish that the failure was proportionate.

138. Mr Sanders emphasises that there can be no dispute that the operational reasons and the security reasons for the restricted regime at times of high occupancy are, in principle, capable of meeting the legitimate aims of "public safety". "the prevention of crime or disorder", "the protection of health or morals" and/or "the protection of the rights and freedoms of others" as referred to in Article 8(2); and that any assessment of the justification for, and proportionality of, the relevant restrictions must have regard to the nature and degree of any inherent interference with the Claimant's Article 8 rights (i.e. that the strength of the justification must correspond to, and be commensurate with the (minimal) impact on the Claimant).

139. Mr Sanders submits that the court should also respect the operational and security judgments of the prison authorities and accord an appropriate margin of appreciation, or discretionary area of judgment. He invites regard to the fact that:-

(i) The Claimant was given a reasonable amount of time in the open air each day.

(ii) The Claimant, knowing what the regime on the Segregation Unit was, nevertheless refused numerous offers of a transfer to normal location.

(iii) No other prisoner complained.

(iv) There was no adverse effect on the Claimant's health or well being, and paragraph 3 of PSO 4275 provides that 30 minutes in the open air each day is generally adequate from a healthcare perspective.

(v) In so far as he made any, the prison staff tried to meet the Claimant's request to move to a Wing (albeit that he had no intention of actually moving), and thus his personal autonomy was respected.

(vi) There was no safe and practical alternative to the regime – i.e. closing down the Segregation Unit and the prison, constructing a new Segregation Unit or exercise yards, moving the Claimant to a Wing against his wishes, exercising two prisoners together when this was assessed as unsafe (without carrying out impractical risk assessment procedures which would divert staff resources from other essential tasks), or confining the exercise area even more, or giving the Claimant longer to exercise at the expense of other Segregation Unit prisoners.

140. Given my factual conclusions, I do not find it easy to proceed on the necessarily hypothetical premise that, contrary to my earlier conclusion, the interference with the Claimant's Article 8 rights reached the necessary "level of seriousness" to amount to a potential breach. Nevertheless broadly accepting the arguments advanced by Mr Sanders, I incline to the view that there was proportionate justification for such interference as there was, which met the various legitimate aims referred to in paragraph 138 above.

Just Satisfaction

141. Consideration of this final issue must necessarily be on the premise that both my earlier conclusions in relation to Article 8 were wrong.

142. Against the background of the broad legal framework identified in paragraphs 95-100 above, Miss Kaufmann submits that in the light of the Claimant's evidence as to not only his loss of residual liberty, but also as to his distress, anxiety, and deterioration in

physical and mental well being, together with the repeated failures over 153 days, and the fact that (despite the Acting Deputy Ombudsman's finding) the failure to fully comply with paragraph 2(ii) of PSO 4275 was still continuing in 2009, this is a case in which the Acting Deputy Ombudsman's finding is not sufficient to amount to just satisfaction, and nor is any mere judgment in the Claimant's favour sufficient to amount to just satisfaction. Miss Kaufmann submits that, taking account of the ECtHR's approach to the cases cited under both Article 5 and Article 8, there should be an award of damages in the sum of not less than £10,000.

143. Mr Sanders submits that, applying the authorities, this is plainly not a case for the award of damages. He argues that the Acting Deputy Ombudsman vindicated the Claimant's position by upholding his complaint, and very shortly thereafter the Claimant was moved to another establishment where he went on normal location. The Claimant was therefore afforded just satisfaction, and a swift and effective remedy in September/October 2007. Mr Sanders further submits that even the subsequent seeking of a judgment in his favour by the Claimant has been disproportionate, let alone the award of any damages.

144. Bearing in mind that I have rejected the Claimants' assertions as to distress etc as being untrue, as well as making other significant findings of fact against him, and given paragraphs 79 & 80 of the judgment in the *Anufrijeva* case (see paragraph 97 above) I have no doubt that this is not a case for an award of damages. I agree with Mr Sanders that, in the particular circumstances of this case, the Claimant was awarded just satisfaction by the finding of the Acting Deputy Ombudsman, and by being moved to another establishment. If I was wrong about that, then I would have concluded that a judgment in his favour would have afforded the Claimant just satisfaction instead.

Conclusion

145. The Claimant is quite right in his assertion that over a long period of time (including the 159 days that he was in the Segregation Unit in 2007) HMP Frankland has failed fully to comply with paragraph 2(ii) of PSO 4275. Whilst right about that basic assertion, the Claimant has however tried, in significant part, to lie his way to monetary success in claims for misfeasance in public office and for breach of the Defendant's duty under section 6 of the 1998 Act. In light of the facts as I have found them to be, and for the reasons that I have set out above, his particular claims have failed.

146. That should not however be taken as an unqualified endorsement of the failure to fully comply with the PSO. This judgment is not intended to provide any indication of the future outcome of, for example, any appropriate judicial review proceedings by another, let alone of any other complaint to the Ombudsman, or on inspection by HMCIP.

147. Finally, I must apologise to the parties for the length of time that it has taken to complete this judgment since the provision of written closing and other submissions, including receipt in January of the Defendant's submissions in relation to the *Iqbal* case, and my attention being drawn to the *Muuse* case at the end of April.