Case No: CO/444/2001 &
CO/1104/2001

Neutral Citation Number: [2001] EWHC Admin 357
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(DIVISIONAL COURT)

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday17th May 2001

IN THE MATTER OF
APPLICATIONS FOR JUDICIAL REVIEW

B e f o r e :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
and
MR JUSTICE LIGHTMAN

	THE QUEEN **on the application of "P"**	**Claimant**
	- and -	
	THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
	&	
	THE QUEEN **on the application of "Q"**	**Claimant**
	-and-	
	THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- - - - - - - - - - - - - - - - - -

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- - - - - - - - - - - - - - - - - -

Mr Richard Gordon QC and Mr Ian Wise (instructed by Hickman & Rose, 144 Liverpool Road, London N1 1LA for "P")
Mr Richard Gordon QC and Mr Hugh Southey (instructed by Thanki Novy Taube,

The Mews, 1A Birkenhead Street, London WC1H 8NB for "Q")
Ms Eleanor Grey (instructed by The Treasury Solicitor, Queen's Chambers, 28 Broadway, London SW1H 9JS for the Secretary of State in "P" and "Q")

Judgment
As Approved by the Court

Lord Woolf CJ:

1. This is a judgment of the court. The judgment relates to two claims for judicial review. The claims question the lawfulness of the formulation and the application of the present policy of the Prison Service contained in Prison Service Order ("PSO") No 4801 issued on the 10th May 2000 ("the Policy") only to allow babies to remain with their mothers who are in prison until (in the present cases) they reach the age of 18 months. There are two other similar applications listed for mention after we have given judgment on the present applications. So as to protect the identity of children involved, the applications which are subject of this judgment are listed as "P" and "Q" while the other two applications are listed as "J" and "K".

2. Having identified the nature of the challenge in these applications, it will be immediately apparent that the issues raised are of an extremely sensitive nature. No one would suggest that it is desirable, if this can be avoided, for a mother to give birth to or have a child with her in prison. Unfortunately it is a feature of our criminal justice system in this country that the number of women in prison has rapidly risen over the last few years. The inevitable consequences is that there has been an increase in the decisions which have to be made as to what is to happen to very young children while their mothers are in prison.

3. One of the explanations for the increase in the female population of prisons is the part which women are playing in the illegal drug trade. When sentencing a woman who has or is about to have a baby, the courts should and do take into account, when determining the sentence, what the effect will be on other members of the family. But in cases involving unlawful activities in relation to drugs, the courts must also take into account that, if they are too lenient in the sentences which they impose, this will result in those who direct and control the illegal drug trade making even greater use than they do already of expectant mothers and mothers with young children in the hope that they will be dealt with leniently if detected. It is therefore no surprise that the present claimants are in prison for having committed offences involving drugs.

4. Until the lawfulness of the formulation of the Policy and its application has been determined, the factual merits of the individual applications do not require detailed consideration. The facts, however, demonstrate the very real human problems underlying the applications. We summarise the facts of both cases briefly as follows:

The Facts in the Case of P

5. P is a 32 year old Jamaican. She was sentenced to 8 years imprisonment on 28 June 1999 for an offence of unlawfully importing drugs into this country. She could be eligible for release on parole in 2003 and if she is not granted parole she should complete the custodial part of her sentence in 2005.

6. Her baby "PB" was born on 8 July 1999 so that she is now 20 months of age. P has three other children who are being looked after in Jamaica. P was arrested on arrival in this country on 3 March 1999. At the time of her arrest she was approximately five months pregnant. A recommendation for her deportation at the expiry of her sentence was made by the trial judge. She is herself HIV positive and although, at one time, it was thought that PB could be HIV positive, this complication fortunately does not now arise.

7. P is at HMP Styal. Initially it was proposed that PB should be transferred to the care of her father when she was 18 months old, but approximately eight months ago PB had an argument with the father, following which she decided that she would not allow PB to go to her father.

8. In November 2000, a social worker employed by Cheshire County Council visited P in prison to discuss arrangements for PB to be placed in foster care. A proposed foster mother was identified and she visited P and PB at Styal on 8 January 2001 and a number of subsequent occasions. The proposed foster mother lives in the Manchester area with her husband and their two children together with a foster child whose mother is also at HMP Styal.

9. P has visited the foster parent's home and is concerned that her daughter will share a small room with a young boy. A separation had originally been proposed for the 8 January 2001 but was postponed at first until 8 February and subsequently to 15 February 2001.

10. P at present lives with PB in the mother and baby unit at the prison. This unit can accommodate 22 mothers with their babies in two blocks of 11 prisoners.

11. P was given a "separation plan" which consisted of no more than a list of dates when the foster mother would have PB. On two of the dates (15 and 18 January 2001) the foster mother did not attend because she was ill and her car had broken down and this is why the date of separation was delayed until 15 February 2001. P also was given a list of dates on which PB would regularly see her mother after the separation.

12. The manager of the mother and baby unit has filed an affidavit on behalf of the defendants indicating that he does not consider that the Baby Unit is suitable for children over 18 months. There is an issue as to whether this is the case. A consultant chartered psychologist who has prepared a report on behalf of P states, not surprisingly, the opinion that no matter how good the environment within the prison, it is likely that some essential aspects of normal development will be affected adversely. He is therefore not of the opinion "that PB can continue in the present circumstances if she is to develop her full potential". This is contrary to P's wishes which are that PB should remain with her for the period of her sentence. P does however accept that special arrangements will have to be made if PB is to remain with her to enable PB to carry on activities outside the prison. The consultant's view of the best solution would be that P should serve her sentence at an open prison, a setting that would allow both her and PB to remain together whilst PB attended community-based pre-school opportunities for further stimulation and personal social development.

The Facts in the Case of Q

13. Q gave birth to QB on 26 July 1999. On that date she was on bail in respect of offences relating to class B drugs. She was convicted on 31 March 2000 and sentenced to 5 years imprisonment. Her parole eligibility date is the 25 July 2002 and her non-parole release date is 24 May 2003. Q was separated from QB for a short period following her conviction but they were reunited at HMP Holloway. On 6 July 2000 Q was transferred to HMP Askham Grange, a small open prison in Yorkshire, where she has remained ever since. Askham Grange has substantial grounds to which the prisoners have free access. In addition Q and QB are able to leave the prison every weekend.

14. It had been clear that the Policy might result in the separation of Q and

QB. But a pilot project was being considered by the Prison Service to allow children to remain with their mother beyond the age of 18 months and Q hoped that if she was selected for the pilot project this would mean that she would not be separated from QB. But on 27 January 2001 Q was told that the pilot project would not proceed and that accordingly separation would take place. A letter written on behalf of the Prison Service dated 13 February 2001 indicated that when suitable carers for QB were found, an introduction programme would begin "with a view to separation sometime in April".

15. On 27 January 2001, Q applied to the Family Division of the High Court for an injunction and declaration but the proceedings were dismissed by Kirkwood J on 8 February 2001 on the grounds that judicial review was the appropriate form of proceedings.

16. A problem in finding foster carers for QB is her Anglo/Indian/West Indian heritage. Because of this a suggestion was made that Q should be transferred to a London prison where foster parents with this background would be more likely to be found.

17. In support of her present application, Q relies upon a statement by an independent social worker. She says that QB is a well adjusted toddler who would suffer significant harm were she to be separated from her mother. The social worker does accept that "there are real concerns about a child being brought up in prison". Her conclusion as to the best result from QB's point of view is that she should be offered 4 to 5 days a week day-care by York (the local) social services as a 'child in need'.

18. Having been unsuccessful in the application to the Family Division, Q made her present application. The single judge, Stanley Burnton J, referred the question of permission to make the application to this court. At the outset of the hearing we gave Q the necessary permission.

The Issues

19. In resolving the issues to which these applications give rise, we have been greatly assisted by the fact that Mr Richard Gordon QC was instructed on behalf of both claimants and that we have had the benefit of his skilful argument. We did not require Ms Grey, (for whose assistance we are also grateful) to advance orally all the submissions which she might have wished to advance in response to Mr Gordon's argument. It was

unnecessary to explore all the issues raised. It is in our judgment sufficient to concentrate on the three issues which are critical namely:

i) Was the Prison Service entitled to have a policy that required children to cease to reside with their mothers in prison when they become 18 months of age?

ii) If so, was the Policy adopted by the Prison Service to this effect lawful?

iii) If the Policy was lawful, was the Policy lawfully applied in the case of P and Q?

It is important to emphasise that whilst the welfare of children is very much involved in the proceedings, this court is determining a question, not as to the welfare of a child, but as to the legality of the Policy as formulated and applied by the Prison Service.

The Policy Arguments

20. The issues make it clear that the Policy is central to each of these applications.

The Policy reads as follows:

> "This new PSO on the management of mother and baby units including the application process has been produced to standardise the administration of mother and baby units in order to build on best practice and strengthen the Prison Service position in the light of legal challenge.
>
> There are 64 places in total spread between four prisons.
>
> **The units are not places of safety.**
>
> **Whilst recognising its overriding common law duty of care towards prisoners and their babies the prime duty of parental care for the child lies with the mother.**

Purpose

The purpose of providing mother and baby unit places is to allow the mother/baby relationship to develop whilst safeguarding the child's welfare. This does not preclude the mothers from participating in the full prison regime, including addressing their offending behaviour. Mothers must be encouraged to take up every opportunity for education and training the prison can provide.

Age-limit

The upper age limit for children to live with their mothers in prison is eighteen months. Arrangements will be made for babies to leave the units at an earlier age if it is considered to be in the best interests of the child.

1.2 Definition

1.2.1 A mother and baby unit is designated separate living accommodation within a female prison which enables mothers to have their babies with them whilst in prison. A mother and baby unit is a drug-free unit.

1.3.1 The Prison Service will provide places for babies to live with their mothers in prison to enable the mother and baby relationship to develop, whilst safeguarding and promoting the child's welfare. The best interests of the child are the primary consideration when assessing applications for places. Mothers retain their parental responsibility for their child(ren).

2.2 International Conventions

2.2.1 Two international Conventions provide very clear principles for the provision and management of services for mothers and their children in prison. *The United Nations Convention on the Rights of the Child* 1989: Article 3, para 1 and *The European Convention on Human Rights* 1950: Article 8. This Convention, to which the United Kingdom is a signatory, provides the principle of the child's best interests. Although the ECHR is not yet directly enforceable in domestic law, it is nevertheless the policy of the United Kingdom to comply with its international obligations; moreover it will become directly enforceable in English law when

the *Human Rights Act* 1998 comes fully into force on 2 October 2000.

2.3 Children Act 1989

2.3.1 *The Children Act* 1989 does not directly apply to the decision of the Prison Service under prison legislation. It has, however, been frequently referred to in discussion of the legal responsibilities of the Prison Service for, or proceedings relating to, babies living with their imprisoned mothers. Section 1 of the Act requires that, in deciding any question about the upbringing of a child: "the child's welfare shall be the (court's) paramount consideration". Section 3 (1) laid down the first legal definitions of parental responsibility.

2.3.2 There has been some confusion as to the application of Sections 1 and 3 of this Act to the decisions of the Prison Service concerning babies/ children of mothers required to be detained in its custody. However, that does not mean the 1989 Act has no relevance to such babies/children. First, where possible the underlying principle of giving primacy to the welfare and best interests of the child, drawn from the UN Convention above, should be followed. Secondly, it applies directly to the determination of certain questions relating to such children, such as who has parental responsibility.

2.3.3 Section 17 (1) of the Children Act provides the legislative base on which the provision of social work services to prisoners and their children is based.

7.1.1 Establishments must take reasonable steps to ensure that prisoners on Mother and Baby Units have access to the full range of regime opportunities available. It is important in providing services for the mother that the requirements for participation in Offending Behaviour Programmes and personal development is encouraged in the context of their own sentence plan.**"**

21. The maximum age referred to in the Policy is 18 months in the case of

Ashkam Grange and Styal but 9 months at Holloway and at New Hall near Wakefield.

22. Prior to the Policy being issued, the Prison Service had commissioned a review of the principles, policies and procedures for mothers and babies in prison. The report of the distinguished working group who examined the issues ("the Report") was published in June 1999 with a forward by the Director General of the Prison Service. He stated that the Report "is convincing in demonstrating that the overriding principle directing our work with mothers and babies must be the best interest of the child".

23. One of the issues considered by the Report was the stage at which a baby should be separated from her mother. As to this the conclusion of the Report was as follows:

> "There is still concern about the effect of a prolonged stay. Accepting the lack of empirical evidence on the optimum age of separation of child from mother, but based on the knowledge and experience of expert members, the group believed that *the upper age limit should remain 18 months whilst new research is commissioned.* In the meantime, managers of the units and professionals involved should concentrate on enabling mothers to make the best choice for their child in each individual case. The discretion to allow a child over 18 months to stay longer with his/her mother should be exercised only in the child's best interest and monitored carefully by the women's policy group. *The current difference in age limits among the existing units should be examined and reviewed in order to establish a clear rationale for any difference.* During site visits members of the working group were disturbed by the perceived assumption among staff and prisoners that all children allocated a place would stay to 18 months, if the mother's time in custody warrants it. For some children, separation at an earlier age may be in their best interest." . . . "In short, the principle should be that the purpose of the place should be clearly defined at the Admission Board and regularly reviewed to see that residence remains in the child's best interest. The emphasis should be on empowering the mother to make an informal choice. Where

> separation is inevitable, the responsibility of the Prison Service is to facilitate the alternative child care arrangement being put in place, in co-operation with the relevant external agencies." (emphasis added)

24. The Report was followed by the publication in December 1999 by the Prison Service of a document entitled *Response and Action Plan* ("the Response"). Within the Response was a Statement of Principles, which included as a main principle, that;

> "The purpose of a mother and baby unit in a prison is to enable the mother/baby relationship to develop whilst safeguarding and promoting the child's welfare."

25. The Response contained a statement of "Overreaching Principles". These included that "the best interests of the child is the primary consideration at every level of policy making as well as when considering individual situations. Prison Service policy will reflect the ECHR Article 8, save where it is necessary to restrict the prisoners rights for a legitimate reason, such as good order and discipline, or the safety of other prisoners or babies."; and that "care planning for the child is essential from before birth, if relevant, including the plan for the babies exit from the mother and baby unit."

26. In relation to the suggestion that the age limit should remain at 18 months while new research is commissioned, the Response referred to discussions which the Prison Service had had with others and emphasised the importance of considering the length of stay of each child as an individual, but added that the Prison Service accepted that the policy should be based on evidence and concluded that research should be commissioned.

27. Evidence served on behalf of the Prison Service indicates that the Prison Service "has continued to undertake extensive research". In addition, the Prison Service is conducting an international survey of facilities provided in other countries. Already the results indicate that there is a wide degree of variation in practice from one country to another.

Relevant Legislation

28. Mr Gordon's submissions have as their foundation the provisions of the

Children Act 1989 ("the Children Act") and in particular Article 8 of the ECHR and section 6 (1) of the Human Rights Act 1998 ("HRA") and the United Nations Convention on the Rights of the Child 1989 ("UNCRC").

29. As to the Children Act, the sections which are of particular importance are sections 1 and 17. These sections provide as follows:

> "**Section 1**
>
> 1. Welfare of the child
>
> (1) When a court determines any question with respect to –
>
> (a) the upbringing of a child; or
>
> (b) …
>
> the child's welfare shall be the court's paramount consideration.
>
> **Section 17**
>
> (1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part) –
>
> (a) to safeguard and promote the welfare of children within their area who are in need; and
>
> (b) so far as is consistent with that duty, to promote the upbringing of such children by their families,
>
> by providing a range and level of services appropriate to those children's needs."

30. Section 6 (1) of the HRA provides:

> "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

31. Article 8 of the ECHR provides:

> "(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."

32. The United Kingdom ratified the UNCRC on 16 December 1991. The relevant provisions of the UNCRC are as follows:

"**Article 3**

(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

(3) States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the

present Convention.

Article 9

(1) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

(2) In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

(3) States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

(4) Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 18

(1) States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility

> for the upbringing and development of the child. The best interests of the child will be their basic concern.
>
> (2) For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
>
> (3) States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible."

33. The UNCRC is not part of our domestic law. Nonetheless, Mr Gordon submits the obligations under the UNCRC are relevant because (a) they can inform our decision; and (b) they are taken into account by the European Court of Human Rights when applying Article 8 and therefore in accordance with section 2(1) of the HRA have a place in the interpretation of Convention rights in the courts in this jurisdiction. He also relies on the fact that (as appears from the evidence before us) in devising the Policy the Prison Service has itself taken into account the UNCRC. We accept these submissions.

The Legality of the Policy

34. Mr Gordon's first core proposition is that the Policy is made without any lawful authority. Whether there is any substance in this proposition depends in the first instance on the domestic legislation relating to prisons. The Prison Act 1952 (the "1952 Act") gives the Secretary of State wide managerial powers in relation to prisons and prisoners: see Sections 1, 2, 4 and 12. Section 47 of the 1952 Act contains a wide discretionary power to make Rules, which in accordance with Section 52 are to be made by Statutory Instrument. Pursuant to these provisions, the Secretary of State has made the Prison Rules 1999. Rule 4 (1) is concerned with the importance of maintaining family relations. It states:

> "Special attention shall be paid to the maintenance of such relationships between a prisoner and his family as are desirable in the best interests of both."

Rule 12 (2) stipulates that:

> "The Secretary of State may, subject to any conditions he thinks fit, permit a woman prisoner to have her baby with her in prison, and everything necessary for the baby's maintenance and care may be provided there."

35. We regard this statutory framework (which reflects the requirements both of Article 8 of the ECHR and the UNCRC) as implicitly authorising the Secretary of State or the Prison Service to adopt the Policy.

36. Mr Gordon contends that this is not the position. He submits that the Policy in providing for the separation of mother and child by a specific date contravenes section 1 and 17 of the Children Act and the fundamental rights which are engaged by Article 8 of the ECHR and that in these circumstances the Policy requires more direct statutory authority than is provided by the statutory framework to which we have just referred. He prays in aid the case of R v The Lord Chancellor, ex parte Witham [1998] QB 575, 581 ("Witham"). Witham was dealing with a very different situation from that which is being considered here. It was concerned with the removal by a statutory instrument of the exemption from the payment of court fees of litigants in person in receipt of income support which had the effect of preventing poor litigants in person from obtaining access to the courts. The court held that this interfered with access to the courts which is a constitutional right at common law and which could only be abrogated by a specific statutory provision in primary legislation or by subordinate legislation whose vires in primary legislation specifically conferred the power to abrogate the right. In that context Laws J stated:

> "In the unwritten legal order of the British state, at a time when the common law continues to accord a legislative supremacy to Parliament, the notion of a constitutional right can in my judgment inhere only in this proposition, that the right in question cannot be abrogated by the state save by specific provision in an Act of Parliament, or by regulations whose vires in main legislation specifically confers the power to abrogate. General words will not suffice. And any such rights will be creatures of the common law, since their existence would not be the consequence of the democratic political process but would be logically prior to it. I shall explain in due course what I mean by a requirement of specific provision, a concept more elusive than it seems."

37. In our judgment where the Children Act has direct application e.g. in cases where the issue is the care and welfare of children, their best interests are the primary consideration in the choice between available alternatives. But the provisions of the Children Act have no direct application to the Secretary of State or the Prison Service in the present context. Article 8 confers the right, not to family life, but for its respect and the qualifications to Article 8(1) contained in Article 8(2) are in play by reason of the legality (recognised by Article 5) of the prisoners' imprisonment. Neither the Secretary of State nor the Prison Service has assumed parental responsibility for the children of prisoners under section 3 of the Children Act: that responsibility remains vested in the prisoners. The duties under section 17 of the Children Act do not attach to the Secretary of State or the Prison Service: they attach to the local authorities. The statutory role of the Secretary of State and the Prison Service is subject to the provisions of the Prison Act. Prisoners are sent to prison as a punishment, a deterrence and for rehabilitation. The impairment of the right of family life is a consequence of the deprivation of liberty which prison involves: see R v. Secretary of State for the Home Department ex parte Mellor [2001] EWCA Civ 472. Rehabilitation involves prisoners, while in prison, having to address their offending conduct and having to take advantage of such opportunities as the prison provides for education and training. (This is reflected in Paragraph 7.1.1 of the Policy). Promoting the welfare of prisoners' children is constrained by these considerations and the need for the efficient running of, and the maintenance of good order and discipline within prisons. Prisons restrict options for promoting the welfare of prisoners' children. Despite this, the Secretary of State accepts that in adopting and applying the Policy, he does and should take into account the importance of the welfare of children of prisoners.

38. Contrary to the position in Witham, we are concerned here with a policy which enables a mother to have her child with her for a limited period and which to this extent is intended to be not adverse to but supportive of a child's welfare and family rights. Although it is controversial as to whether the objective will be achieved, the Policy is designed to further the interests of children and to reflect the quoted provisions of the Children Act and Article 8. In these circumstances there is here, contrary to Mr Gordon's submission, no lack of sufficient statutory underpinning.

39. Mr Gordon argues that because of the terms in which the Policy is formulated, it precludes consideration of the individual case and runs counter to the provision in the Prison Rules for consideration of individual cases on their merits. This argument is misconceived. Placing to one side the merits of the Policy, it is obvious that a policy is required. The Policy

ensures that mothers who are in prison and have very young children are treated in the same way. The 18 month cut off period is essential for those who have to make the preparations for the removal of a child to know when the separation, however painful, should take place. It likewise informs the Prison Service of the age of the children for whom it should provide facilities. For reasons which we consider later, the Policy does not preclude in its application the consideration, whether in any particular case, the Policy should be modified or not apply.

40. It is also submitted by Mr Gordon that the Policy is founded on a premise for which there is no objective justification. This contention ignores the contents of the Report on which the Policy is based. For the time being, on the basis of the Report, the Prison Service accepts that it may be in the interests of the mother and child that they should part before 18 months have expired, but does not consider that in normal circumstances it will ever be appropriate for the child to remain longer with the mother than 18 months.

41. Whether the Policy is right in adopting this approach is controversial. There is evidence that the separation should take place earlier. Separation will then take place when the bond with the mother is less strong. But the Policy is based on the approach of the working party. This continues to be the subject of research and review and while this is the position, the Secretary of State cannot be criticised for adopting the Policy.

The Application of the Policy

42. Mr Gordon submits that the Prison Service, having encouraged the mother to defer the date of separation until 18 months has elapsed, cannot avoid the consequences that any severance thereafter of mother and child may be particularly damaging to the child and therefore may need to be avoided. In our judgment the Prison Service enables the mother to defer separation for this period: it does not encourage the mother to do this. The Policy leaves the choice to the mother, though we accept that she will naturally want to keep her child with her as long as possible. The mother, who continues to have parental responsibility for her child, at all times knows the limits which the Policy places on the period during which the child will remain with her. The mother is not required to allow the child to remain for that period if this is not in the child's best interest. It is common ground that there is a need for an assessment of the child's needs before separation takes place. That assessment by the social services can take time, as the present cases make clear, and the Policy therefore provides

time for this to happen.

43. Mr Gordon also submits that Article 8 and the Children Act both require an individual assessment of the needs of both mother and child as to whether, when and on what terms separation should occur. It is argued that unless there is such an assessment, the actions of the Prison Service would not be in accordance with the law.

44. That there should be an individual assessment is not in dispute. The issue is whether the assessment should take place against the background of the Policy or whether it should be at large. Here it seems to us critical to start, as Ms Grey contends we should, with the fact that both of the claimants are lawfully in prison and subject to the constraints which such imprisonment imposes. The available options are limited by such constraints. It is for the Prison Service, under the powers contained in the Prison Act, to determine the conditions in which a sentence is served. The thrust of the evidence of the claimants is directed at proposing the putting in place of arrangements which will protect the child from the harmful consequences of being in a prison environment. But at least in the first instance, it is for the Prison Service to decide what in the light of the available options they are prepared to do and what they are not prepared to do. They must have an area of discretion as to the facilities and support they are prepared to provide for the mother. Like any other government body, the Prison Service's resources are certainly not unlimited.

45. Mr Gordon alternatively submits that the Policy is unlawful because it interferes with the assessment which is the responsibility of the local authority under Section 17. Again we disagree. The local authority's duty to undertake an assessment is undiminished by the Policy. What the Policy does is to provide an option which is available to meet those needs.

46. As to Mr Gordon's reliance upon Article 14 of the ECHR prohibiting discrimination, while the position of a mother who is a prisoner will differ from that of a mother who is not a prisoner, this is not a form of discrimination which contravenes Article 14. The different position arises out of the fact of imprisonment which is recognised by Article 5:it is both justified and proportionate.

47. As to the relevant articles of UNCRC, it is the Prison Service's contention that they have taken into account the policy reflected in the articles and in our judgment there is no reason to doubt that this is so as stated in the Policy. If the claimants are not in a position to succeed under ECHR

Article 8, they are not able to succeed under the UNCRC.

48. Mr Gordon also contends that there is a procedural failure on which he is entitled to rely under ECHR Article 6 and Article 9 (1) of UNCRC. We do not accept that this is the position. In relation to the issues as to the legality of the formulation and application of the Policy, the claimants' rights to a decision of a court are fully protected by the process of judicial review. This is confirmed by the decision of the House of Lords in R v. Secretary of State for the Environment Transport and the Regions ex parte Holding and Barnes plc (Times 10 May 2001). The conduct of the local authority is likewise at all times open to challenge if it fails to comply with its obligations under the Children Act.

49. In his reply, Mr Gordon identified what he described as the critical question. He submitted that, even on the basis that the Prison Service was entitled to have the Policy, the law still requires the question of the needs of the children to be assessed at large and not against the requirement of the Policy. Otherwise, a decision could not be made as to whether to change the Policy in the case of the present claimants.

50. The starting point for Mr Gordon's argument is the speech of Lord Reid in the British Oxygen case (British Oxygen Company Limited v Minister of Technology [1971] A.C.610). At p625 Lord Reid made his much quoted statement having referred to a statement of Banks LJ in R v The Port of London Authority ex party Kynoch Limited [1919] 1KB 176. To properly understand what Lord Reid had in mind, it is desirable to refer not only to what he said, but to what Banks LJ said in the Kynoch case which reads as follows:

> "There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case. I think counsel for the applicants would admit that, if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a

> wide distinction to be drawn between these two classes."

The passage in Lord Reid's speech reads as follows:

> "I see nothing wrong with that. But the circumstances in which discretions are exercised vary enormously and that passage cannot be applied literally in every case. The general rule is that anyone who has to exercise a statutory discretion must not "shut his ears to an application" (to adapt from Bankes LJ on p.183). I do not think there is any great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say – of course I do not mean to say that there need to be an oral hearing. In the present case the respondent's officers have carefully considered all that the appellants have had to say and I have no doubt that they will continue to do so."

51. The important words in that passage which must be noted are that the authority must always be willing to "listen to anyone with something *new to say*". Policies must not be over rigid and they must not be unreasonable. Here, although the claimants would wish for a change in the Policy in their cases, there is nothing unusual or exceptional about PB and QB. They are normal babies. There is no suggestion that the claimants had any case to put forward which would undermine the explanation for the Prison Service adopting 18 months as the cut-off point until the results of the further research are available or justify an exception to it.

52. We accept that the Prison Service responded to their claims to have the children allowed to remain with them in terms which were more categoric than they should have been. But, as Ms Grey submitted, this was because what was being sought was not a limited exception or modification in its

application, but a total change to the Policy without any foundation being put forward for such a change. If what was required was an exception because of the particular situation which the claimants and their children found themselves in, then Ms Grey accepts the Prison Service, as a matter of law, would be required to be flexible. This was not expressly stated in the Policy. It was however implicit and in fact the Prison Service do not apply the policy rigidly or arbitrarily. This is confirmed by the facts of both these cases where extra time was given to enable arrangements to be made for the children to be placed with foster parents. We do not consider that there is anything unreasonable or improper in the approach of the Prison Service to the application of the Policy. We do, however, accept that it is desirable that the Prison Service makes clear that if there are unusual or exceptional circumstances it will be prepared to consider making an exception or modification in the application of the Policy to take these into account.

53. We have also to deal with Mr Gordon's point that it is irrational that the Policy makes no distinction between closed and open prisons. When the Report was prepared, those who were responsible for the Report were well aware that the 18 months cut-off point applied to both the prisons with which we are concerned. They do not suggest that there is anything wrong in maintaining the same cut-off point for both prison establishments. The scope for greater flexibility clearly exists in an open prison environment than a closed prison environment. The difference between the two establishments is one of degree and the fact remains that both environments are likely to have harmful consequences for children. It must be within the Prison Service's discretion to decide whether the difference between the two establishments justifies different treatment.

54. Standing back and looking at Mr Gordon's argument as a whole, what he is really contending is that the Policy should in effect be reduced to no more than the most general of guidelines, indeed guidelines to be departed from whenever they do not produce the ideal result for a particular child. The Prison Service does not have to deal with a vast number of mothers with very young children but the number of children involved is sufficient to make such an approach very difficult, if not impossible to operate in practice. What Mr Gordon is contending for is a result which is wholly impractical. It is not a merely a question of administrative inconvenience. What is required is a policy and the application of a policy which is, and which can be seen by prisoners as a whole to be, clear, consistent and practical.

55. In our judgment it is not without significance that there is no case in our

domestic law or in the jurisprudence of the ECHR which requires such a result as is contended for by the claimants. There are cases at the level of the Commission which Ms Grey relies upon which are supportive of her contentions and one case of the Commission's (Togher v. UK application no. 00028555/95) on which Mr Gordon relies. The latter case did no more than decide that a claim in different circumstances (where the claimant was a mother on remand) was admissible.

56. At the forefront of Mr Gordon's argument were his contentions that the Prison Service was irresponsible in creating the bonds between the children and the mother and then separating them. This approach provides the wrong starting point for the consideration of the issues which we have considered. The correct starting point is that the claimants have been sentenced to imprisonment. The Prison Service is responsible for the conditions in which that sentence is served. Here the Prison Service have exercised their discretion in favour of the prisoners to allow them to have their babies with them. The Prison Service having allowed the mother to have her baby with her, it is for the mother to decide whether she wishes to take advantage of this opportunity. The permission which has been given is a limited one: the period is limited to the date when the child is 18 months old. While Mr Gordon criticises the age of 18 months, he has not identified, in the case of either of the claimants, the period which should be substituted. The longer the period, the more difficult will be the separation for both mother and baby.

57. In exercising its discretion to permit mother and child to be together, the Prison Service have rightly attached importance to the welfare of the baby. Mr Gordon considers the welfare of the baby should be the paramount consideration though he accepts that it does not "trump" all other concerns. He accept that a prison sentence brings with it its own constraints on the extent to which the family life can be enjoyed and also accepts any child is going to be affected by the imposition of a prison sentence on the mother even though the detrimental effect which it will have on a child is in no sense the fault of that child. Furthermore, he acknowledges that, on a practical level, the Prison Service has to take into account other considerations as well. He is correct to make these concessions. But we would go further. While the Prison Service should, in exercising any discretion of the sort under consideration here, have fully in mind the importance of family ties and welfare considerations, it is not required to allow them to dominate its decision. They are no more than important considerations to be taken into account and, where necessary, balanced against the other considerations (operational and otherwise), which are relevant to their decision. When the expert reports relied upon

by the claimants are examined, it becomes apparent that the authors, not unnaturally, are suggesting what, in an ideal situation, should happen in the interests of the babies and the mothers with which we are concerned and how this could be achieved. But this is not what is required of the Prison Service since otherwise it would be impossible for the Prison Service to pursue the goals which imprisonment is designed to achieve or to operate effectively. What is required of the Prison Service is to adopt a reasonable balance between the various considerations involved. As it appears to us this is what they have sought to do. Their conclusion is not flawed and in those circumstances the courts should not intervene. It is not for the courts to run the prisons.

The claims should be dismissed.

******