C/2000/2627
Neutral Citation Number: [2001] EWCA Civ 378
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
(LAWS LJ & RAFFERTY J)

Royal Courts of Justice
The Strand
London

Thursday 8 March 2001

B e f o r e:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
(The Lord Woolf of Barnes)

LORD JUSTICE MAY

and

LORD JUSTICE DYSON

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

B E T W E E N:

JOHN HIRST — Appellant

and

SECRETARY OF STATE FOR
THE HOME DEPARTMENT — Respondent

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

(Computer Aided Transcription by
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MR EDWARD FITZGERALD QC and MISS FLO KRAUSE (instructed by Messrs Hickman & Rose, London N1 1LA) appeared on behalf of THE APPELLANT
MISS ALISON FOSTER (instructed by the Treasury Solicitor) appeared on

behalf of THE RESPONDENT

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J U D G M E N TThursday 8 March 2001

1. THE LORD CHIEF JUSTICE: This is an appeal from the refusal by the Divisional Court of an application for judicial review of the decision to reclassify John Hirst, a post-tariff discretionary life sentence prisoner, from a Category C to a Category B prisoner and transfer him from Her Majesty's Prison Stocken (a Category C prison) to Her Majesty's Prison Nottingham (a Category B prison). The Divisional Court having dismissed the application, the present appeal is brought with the leave of the single judge.

2. The appeal raises the question as to what steps fairness requires the prison service to take before recategorising a prisoner who has served the tariff part of a discretionary life sentence.

3. It is only necessary to set out the facts leading to this appeal in outline because it is acknowledged by Mr Fitzgerald QC, on behalf of the appellant, that at this distance of time it would not be practicable for the recategorisation which has taken place to be quashed.

4. This litigation therefore is concerned with the principles which lie behind the process to which the appellant was subject. The facts can be shortly set out as follows. In 1980 Mr Hirst was convicted of the manslaughter of his landlady with an axe on the grounds of diminished responsibility due to a serious personality disorder. No hospital order was made. Mr Hirst was given a discretionary life sentence with a 15 year tariff period. He was initially allocated to Her Majesty's Prison Wakefield. He subsequently made various moves through the prison system. Mr Hirst's tariff expired on 25 June 1994.

5. A person who is sentenced to a discretionary sentence of life imprisonment is entitled to know the period of his sentence which relates to punishment and deterrence because it is only after that period that he will be considered for release on licence. Whether he is so released depends upon whether the Parole Board considers that he still poses a risk to the public. If the Parole Board concludes that he is no longer a risk to the public, they direct his release pursuant to sections 28(5) and (6) of the Crime (Sentences) Act 1997. That is a different situation from that which previously existed where the Parole Board would recommend the prisoner's release to the Home Secretary who could accept that recommendation if he wished to do so. The change followed the decision in the European Court of Human Rights in Thynne, Wilson and Gunnell v United Kingdom (1990) 13 EHRR 6566.Mr Hirst was transferred from a Category B prison (Her Majesty's Prison Nottingham) to a Category C (Her Majesty's Prison Stocken) in October 1995. On 6 June 1998 the Discretionary Lifer Panel of the Parole Board, following a hearing and having read various reports, recommended that Mr Hirst be transferred to open conditions. The Panel said that the risk that Mr Hirst might pose could be safely managed in those conditions and that his progress might be advanced thereby. The Panel did not deal with the question of Mr Hirst's release.

6. On 31 July 1998 Mr Hirst was abusive and assaulted a female guard who prohibited him from smoking in a cell van whilst he was being escorted to court. On 7 October 1998 the Secretary of State for the Home Office notified Mr Hirst that he would not be following the

Panel's recommendation to transfer him to open conditions. The Secretary of State noted that Mr Hirst still needed to make considerable progress in addressing certain personality problems. He also noted the 31 July incident involving the female guard. That incident was a matter of particular concern given the nature of the offence for which Mr Hirst was sentenced: the victim was both female and to an extent in a position of authority.

7. In addition, Mr Hirst tested positive to cannabis once in January and again in March 1999. During the months of March, April and May of that year he received a number of reprimands and warnings relating to his behaviour which largely involved his aggression and refusal to co-operate with female staff members.

8. An internal Lifer Review Board meeting was held on 18 March. On 22 March, Mr Hirst was placed on basic regime because of his poor hygiene. That decision was later set aside following a successful appeal.

9. On 8 May 1999, Governor Berlyn, Head of Residence at Her Majesty's Prison Stocken wrote a letter to the Life Management Unit of the prison service. By that letter he identified a number of incidents concerning Mr Hirst and suggested that he should be transferred to Category B. Mr Hirst was not made aware of that letter until March 2000. On 2 June 1999, the Head of the Lifer Management Unit decided to recategorise Mr Hirst to Category B and transfer him to a Category B prison. On 3 June 1999, there was an incident in which Mr Hirst was found guilty of refusing to return to his cell. He refused to obey the order because he believed it was unlawful.

10. On 14 June 1999, Mr Hirst was advised that he had been recategorised to Category B and would be transferred the following day to Her Majesty's Prison Nottingham. He was also advised orally of some of the reasons for the decision. He contacted his solicitor who communicated with the prison service and sought to have the decision to move Mr Hirst postponed. That was not accepted. On 15 June 1999, Mr Hirst was duly transferred to Nottingham Prison. He was not given an opportunity to make formal representations in respect of the decision to change his categorisation, nor was he given an opportunity to make representations about his move.

11. On 16 June 1999, Mr Hirst issued a complaint form in relation to his recategorisation and transfer. He asked for full reasons and disclosure, and also asked that the decision be quashed.

12. On 25 June 1999, Mr Hirst's solicitor requested reasons for his recategorisation. Written reasons for the recategorisation and transfer were provided by the Treasury Solicitor by letter dated 8 July 1999. The reasons centred upon the deterioration in his ability to deal with others in authority, particularly females. Subsequently Mr Hirst made an application to the High Court for permission to apply for judicial review in respect of the decision to which reference has been made. It was that application which came before the Divisional Court. The fact that he was at the time the decisions were taken a discretionary life sentence prisoner who had served the tariff part of his sentence was always central to his contentions.

13. The decision of the Divisional Court recognised the consequences of the expiry of the tariff portion of his sentence. However, the Divisional Court pointed out that recategorisation only takes place as a result of an incident or incidents that made recategorisation desirable; that in

the view of the prison authorities he remained potentially dangerous; and the court considered that it should be very slow to impose strict procedural standards upon the internal workings of the prison system in so sensitive a context as dealing with a prisoner of that category.

14. The Divisional Court referred to R v Secretary of State for the Home Department, ex parte Duggan [1994] 3 All ER 277, which deals with a prisoner in Category A, and noted that in that case it was said that prisoners in Categories B, C and D were in a different position. On the basis of the material which was placed before them, the court rejected the contention that the appellant was entitled to be informed of the prospective decision to recategorise him ahead of it being made and then given the proposed reasons in full. The court considered that the imposition of such a duty on the Home Secretary could have "unforeseen adverse consequences". However, the court considered that Mr Hirst should have been provided with full reasons for the transfer before 8 July 1999 which, as they pointed out, was over three weeks after the decision to recategorise him had been taken.

15. It is not in issue before this court that the principles of fairness have a role to play with regard to the process of recategorisation of a prisoner in Mr Hirst's position. That is not surprising since Mr Hirst had served the tariff period of his sentence. The principal issue on the appeal is confined to the question as to whether Mr Hirst is entitled as a matter of fairness to be informed of the reasons for a proposed decision to recategorise him and have an opportunity to make representations as to that recategorisation before it has taken place.

16. There was no clear evidence before the Divisional Court, and there is no clear evidence before this court, as to whether the placing of a prisoner in Category B has an adverse effect upon his release. However, it is clear that in the normal course of events a prisoner sentenced to a life sentence will progress through the course of his sentence from one category to another. Chapter 4 of the second Lifer Manual says:

> "4. SERVING THE LIFE SENTENCE
>
> 4.1 The structure of a life sentence
>
> A typical male lifer will generally go through the following stages of the sentence prior to release on licence:
>
> * Local prison
>
> * Life Main Centre
>
> * Category B training or dispersal prison
>
> * Category C prison
>
> * Category D (open) prison
>
> * Resettlement facility (eg pre-release
>
> employment scheme (PRES))
>
> While no two life sentences will be identical, exceptions to this general

pattern will be rare. A gazetteer of establishments holding lifers is at Appendix 4."

17. Although there is no clear evidence before this court as to the effect of a person being recategorised as a Category B prisoner, it is right to say that more evidence is available before this court than was available to the Divisional Court. In particular we were given the numbers of prisoners who had been released on licence from Category B and from the other categories. The material which we were given indicates that the majority of those released on licence from a life sentence are released from Category D, in accordance with the manual to which I have referred. However, over the years from 1992 to 1999 a total of 22 prisoners were released from Category B out of a total of 229 prisoners who were released on licence, and from 1,386 prisoners whose cases were considered. However, with regard to the figure of 22, Mr Fitzgerald argues, with considerable justification, that the majority, if not all of the prisoners who were released from Category B, were prisoners who had been returned to prison, having previously been on licence, and therefore they were not prisoners who were being released on licence for the first time. If and insofar as that contention is correct, then different considerations would apply to them.

18. Although it appears to me that it cannot be said that a prisoner would not be released on licence for the first time from Category B in any circumstances, it would be highly unusual if this were to be done. Indeed, it would be unusual if it were to be done from Category C. It follows therefore that the recategorisation of a prisoner from Category C to Category B significantly affects the prospects of his being released on licence. The reason is obvious. It is of the greatest assistance to the Parole Board, in assessing the risk that a prisoner poses to the public, to have information as to how that prisoner has performed under the less confined circumstances of an open prison. Without the help of seeing how the prisoner reacts to an open prison, it is difficult for the Parole Board accurately to assess the degree of risk.

19. Mr Fitzgerald submits that in practical terms the decision to remove his client from Category C and place him in Category B is likely to result in his release being postponed for at least two years. That is confirmed by the fact that the Parole Board had recommended that he should be transferred from Category C to Category D. If that recommendation had been acceded to by the Secretary of State, it would have enabled the Parole Board to assess Mr Hirst's progress in a Category D establishment, and that assessment would influence their decision as to the date of his release. In these circumstances the argument on behalf of Mr Hirst is that the decision to recategorise him in a retrograde manner had a serious effect upon him. The obligations of fairness in those circumstances should involve considerable safeguards of his position. He has, as Mr Fitzgerald submitted, a special status, having been detained well beyond his tariff period. Furthermore, it was argued upon his behalf that there were no security or emergency factors which justified the postponement of his opportunity to make submissions regarding the Home Secretary's decision to recategorise and transfer him.

20. On behalf of the Home Office, a statement was placed before the court by a Mr Ian Truffet, who is a member of the Life Management Unit at Her Majesty's Prison Service Headquarters. In that statement he says that he is responsible for the operation within the service of the Lifer Management Unit. He deals with the general practice in these terms:

> "It is the general practice (to which the facts of this case are an exception) not to inform a prisoner of where and why he is being moved before he is moved. Times of transit from one prison to another present a significantly elevated risk of escape. Thus the risk of contact being made with those either within or outside the prison who might assist in an escape is ever present, but can be minimised if there is no opportunity to plan. Experience has also shown that there are real opportunities for disruption where a move is announced in advance. A prison transfer instruction is sent from Headquarters in a case such as this and then transport arranged .... and the move is effective.
>
> As a matter of administration, it would be almost impossible to operate retrogressive transfers if time for legal advice, representations, argument and further considerations were to be factored in to the procedure before a move was made. There would necessarily be delays which would be outside the control of the prison or Headquarters and such delays could be very damaging indeed to security and the prison environment as a whole. Operational difficulties which I would see being caused by the delay could include continued misbehaviour of the type which led to the decision to transfer, or avoidance of, or delay to, offending behaviour work to reduce risk. There is also the risk of serious and urgent threats to security and discipline within the prison.
>
> My long experience of these situations leads me to believe that there is, generally, a real risk of problems where there is delay in implementing a retrogressive transfer. Further, it is not necessarily possible to distinguish beforehand which situations will produce disruption or difficulty so an 'emergency' policy in parallel with a 'non-emergency' policy would be unlikely to be workable.
>
> I respectfully suggest there is nothing intrinsic to the fact that representations are made after transfer that imputes a lack of fairness or objectivity. Institutional entrenchment may be a perception, but I suggest it is an unjustified perception. There are good operational reasons why the full process of protesting a decision must wait until a later stage."

21. Miss Foster on behalf of the Home Office recognises that fairness requires the prisoner to be told of the reasons for his recategorisation. However, basing herself upon the passages of Mr Truffet's statement to which I have just referred, she submits that fairness does not require this to take place prior to recategorisation. She urges that, in considering what fairness requires, it is not the task of any court to consider whether a better system than that in fact employed by the Home Office could be devised. The limit of this court's jurisdiction is to consider whether fairness requires more than the system in operation at the relevant time. In support of her contentions she refers to the decision, in a different context, in Lloyd v McMahon [1987] 1 AC 625 and to the speech of Lord Bridge in that case at pages 702-703. She also refers to the speech of Lord Mustill in R v Secretary of State, ex parte Doody [1990] AC 531, where at page 560 he said:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited

> authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

22. Miss Foster refers in particular to the fifth principle identified by Lord Mustill: the opportunity to make representations with a "view to producing a favourable result; or after it is taken with a view to procuring its modification; or both". She submits that the Home Office practice falls squarely within the second alternative that Lord Mustill had in mind in the passage of his speech which I have just cited. In relation to the Canadian cases upon which Mr Fitzgerald relied, namely Jamieson v Commissioner of Corrections [1986] 2 FTR 146, Demaria v Regional Classification Board [1987] 1 FC 74, and Kelly v Canada [1987] 12 FTR 296, Miss Foster urges that they are no more than an illustration of what the position is in Canada, which may be more favourable to the prisoner than the system in this jurisdiction; that this is merely a Canadian application of similar principles to those which we apply; and that those decisions should not be regarded as being authorities which have to be followed within this jurisdiction. She argues that there is a spectrum of situations in which fairness has to be applied in practice and cites: R v Home Secretary, ex parte Hickey (No 2) [1995] 1 WLR 734, R v Home Secretary, ex parte Allen (unreported 10.02.2000), and R v Home Secretary, ex parte Mehmet (unreported 09.02.1999). She urges that within that spectrum the decision of the Home Office, which is under consideration here, falls well within the requirement of fairness.

23. Mr Fitzgerald accepts that there are a range of situations, but he submits that, having regard to his position, as a matter of principle Mr Hirst is entitled to be engaged in the recategorisation decision. He draws attention to R v Secretary of State for the Home Department, ex parte Duggan [1994] 3 All ER 277. Although Lord Justice Rose distinguished a Category A prisoner from prisoners falling within different categories, Mr Fitzgerald submits that for someone in Mr Hirst's position, the adverse consequences of being moved to Category B are just as great and therefore this court should adopt a similar approach to that which Lord Justice Rose adopted in ex parte Duggan. He relies upon the decision in R v Hickey (No 2), while recognising that it falls within a different factual

background from the present because of the approach of Lord Justice Simon Brown to the consequences of a decision having previously been reached before a person affected has an opportunity to advance reasons why a different course should be taken. At page 744 Lord Justice Simon Brown said:

> "I remain unpersuaded by either of these arguments. Rather, there seem to me compelling reasons why, whatever the practical difficulties to be resolved (and to these I shall return), petitioners should, before the Secretary of State's decision, be given a specific opportunity to make effective representations upon whatever material has been revealed by his inquiries. Inquiries will presumably only be made if the petition itself raises one or more points of sufficient substance to cast doubt on the safety of the conviction. If the inquiries appear to resolve those points against the petitioner, elementary fairness surely requires that he should then have the opportunity to address these fresh obstacles in his path before an adverse decision is taken against him. Once it is conceded that section 17 determinations are reviewable (and it is), principle dictates that, absent powerful countervailing considerations, advance disclosure is required. It is required in the interests both of fairness and informed decision-making. Without it an adverse decision may not be right; and even if it is, it will certainly not be fair.
>
> It is no sufficient answer to say that the process of review is continuous. An adverse decision is not a negligible event. In a high-profile case it is likely to have attracted wide publicity. Clearly it represents the culmination of a specific and often intensive investigatory process. Strive as the Secretary of State may to avoid becoming defensive and entrenched in his view, it is difficult to suppose that he can remain as open-minded as if no clear decision had been taken. It is difficult to suppose too that with competing claims on his resources further representations could generate the same momentum towards a fresh decision as representation made in the course of a single determinative process."

24. Mr Fitzgerald submits that it is a very different situation trying to influence a decision, from trying to change a decision which already been made.

25. I have found the question of what should be the outcome of this appeal by no means easy to determine. I accept the importance of the prison service being able to make decisions which are operationally important without having to go through the technical requirements of providing opportunities for making representations. However, the rules of fairness and natural justice are flexible and not static; they are capable of developing not only in relation to the expectations of contemporary society, but also to meet proper operational requirements. The ability of the prison service to meet both their operational needs and the needs for prisoners to be treated fairly can usually be achieved within the panoply of the requirements of fairness. On the whole, the courts will require considerable persuasion that administrative convenience justifies a departure from the principles of fairness which would otherwise be appropriate in a particular situation. However, the arguments which are advanced by the Home Office in this case, as I understand them, are not only ones of administrative convenience. They refer to operational difficulties and operational problems

which could undermine the security and discipline within the prison system.

26. On consideration, it seems to me that the problems in this case have arisen because of a confusion between the need to recategorise a prisoner and the need to move him for operational reasons. There was no reason, in my judgment, why it was necessary to recategorise Mr Hirst before he was moved to a different prison, if operational requirements in fact required that move. Mr Fitzgerald submitted, with some force, that the operational requirements were in this case fanciful. I make no finding as to that. However, if they had substance, the operational difficulties could have been met in his case, and would be met in other cases, if the prisoner was moved pending a decision to recategorise taking place. It seems to me basic that a decision which is as important as the present decision to Mr Hirst should not be taken without giving him the opportunity to make representations and to have the matter properly considered as a consequence of his so doing. I think that there is some substance, but would not overvalue it, in the problem referred to by Lord Justice Simon Brown which arise in reconsidering a decision. However, regardless of that difficulty, it seems to me that a decision of this nature as a matter of fairness should not be taken until Mr Hirst had been fully involved. He should have been given a reasonable period to make representations before the decision was taken. He should have been given that opportunity after he had been told the grounds upon which it was appropriate to recategorise him. If in the meantime it was necessary to move him to more secure conditions, that could be done. If that course had been taken, and if that course were to be taken with regard to other prisoners in a similar position in the future, it seems to me that the operational considerations mentioned by Mr Truffet could be fully met.

27. It is perhaps of some significance that even a prisoner who is sentenced to a determinate prison sentence is entitled to be involved under present prison service practice in the original process of categorisation. That obviously, as it seems to me, makes good sense. If it makes good sense in relation to the original categorisation, then in relation to a prisoner in Mr Hirst's position the same must be true of a retrograde recategorisation. I therefore regard this as a case where it would be appropriate for this court to give declaratory relief to Mr Hirst, indicating the proper course which should have been adopted in his case and similar cases in the future. I am, however, prepared to give the Home Office the opportunity to address this court further as to the terms of that declaratory relief, having given the Home Office an indication of the terms of the declaration that the court proposes.

28. LORD JUSTICE MAY: I agree that this appeal should be allowed to the extent that the Lord Chief Justice has described and for the reasons which he has given.

29. I would wish to emphasise, as my Lord has, that this case relates, and relates only, to prisoners serving sentences of discretionary life imprisonment who have served the tariff part of their sentence in full. These prisoners are in a special position because, as has to my mind been demonstrated, a regression from Category C to Category B will very probably have a material effect on the prisoner's eventual release date. This is not to say that questions of fairness will not arise with decisions for recategorisation of prisoners serving determinate sentences; only that their circumstances are materially different in the way that I have stated. For prisoners in Mr Hirst's position, I consider that it is not appropriate for this court to prescribe to the prison authorities precise details as to how a proper balance should be achieved between fairness to the individual prisoner and operational necessity. Speaking generally, however, I agree that the post-tariff discretionary life prisoner should be given a

proper opportunity to respond to a proposal for recategorisation from Category C to Category B before any decision to that effect is made, but that this should not prevent a prisoner being moved to a different establishment in a case where it is necessary to do so for operational reasons before any decision about recategorisation is made. There may be various ways in which this can be achieved in detail. It could be achieved, if necessary, by disconnecting the prisoner's categorisation from the category attributed to the establishment. In some, perhaps many, instances a move before recategorisation may not be necessary. But it is in my view obvious, notwithstanding Mr Fitzgerald's submission to the contrary, that there may be circumstances in which an urgent move from one establishment to another may be operationally necessary. It is not, I think, necessary to decide whether such circumstances arose in Mr Hirst's case.

30. LORD JUSTICE DYSON: I also agree. I would merely add this. It would clearly be wrong for this court to attempt to specify the circumstances in which a transfer of a prisoner should be made to a higher category prison for operational reasons before a decision is made to recategorise him or her. But, in my judgment, it would not be right for the prison service to transfer before recategorisation in every case. There will be cases where, having regard to the particular circumstances of the prisoner concerned, operational reasons will not require a transfer before the decision to recategorise is made. Indeed, there may be many such cases. In my view a blanket approach to this issue would be quite wrong.

ORDER: (Not part of judgment)

Appeal allowed with costs to be assessed in accordance with Community Legal Service (Costs) Regulations 2000.

The court made the following declarations:

(1)A prisoner who has served the tariff period of a discretionary life sentence is entitled to be told prior to his category being changed retrogressively, the reasons for the proposed change and given a reasonable opportunity to make representations as to the change.

(2)The fact that a decision to change the category of a prisoner has not been made does not prevent a prisoner being moved for operational reasons.

(3)The above declarations do not apply to recategorisations of prisoners which have taken place before this judgment.
