THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

MONTSERRAT

MNIHCVAP2019/0010

BETWEEN:

STEPHEN MOLYNEAUX

Appellant

and

[1] HER MAJESTY'S PRISON
[2] SUPERINTENDENT OF PRISONS
[3] HEAD OF PRISON FUNCTION, EUSTACE ALLEN

Respondents

Before:

The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mde. Margaret Price-Findlay	Justice of Appeal [Ag.]
The Hon. Mr. Dexter Theodore, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Stephen Molyneaux, Appellant in Person
Ms. Renée Morgan for the Respondents ✓

2021: January 28;
June 30.

Civil appeal – Incentives and Earned Privileges Scheme ('IEPS') – Prison Act Cap. 10.04 – Prison Rules Cap. 10.04 – Whether the IEPS is ultra vires the Prison Rules – Whether there is a legal basis for the establishment of the IEPS – Section 21 of the Prison Act – Rule 6 of the Prison Rules – Whether appellant's confinement during specific period amounted to cellular confinement and was therefore unlawful – Whether appellant's confinement during specific period amounted to removal from association with other inmates and was contrary to Rule 26 of the Prison Rules – Whether learned judge erred in his finding that confinement in a cell in excess of twenty-two hours amounted to cellular confinement – Whether learned judge erred in his finding that 'basic level' under the IEPS was equivalent to cellular confinement under the Prison Rules – Appellate interference with trial judge's findings of fact

– Whether learned trial judge erred in refusing to order any declarations or make any award of damages to appellant

The appellant, Mr. Stephen Molyneaux, has been serving a life sentence at Her Majesty's Prison in Montserrat for murder, since 2002. While serving his sentence, the Incentives and Earned Privileges Scheme ('IEPS'), had been implemented at Her Majesty's Prison. The IEPS is a system of privileges aimed at incentivising prisoners to abide by the prison rules and engage in rehabilitation exercises such as education and substance misuse interventions. Under the IEPS, inmates are required to sign a statement referred to as a "compact", in which they agree to, among other things, abide by the **Prison Rules**. In return they enjoy privileges over and above what is outlined in the **Prison Act** and **Prison Rules**. Upon the recommendation of a prison advisor, the IEPS was revised in 2016 by the Superintendent of Her Majesty's Prison, with the approval of the Governor.

Prior to 2016, Mr. Molyneaux enjoyed several privileges including having access to several electronics and textbooks. Under the IEPS, a review was conducted of the inmates and Mr. Molyneaux's was assessed at the 'basic level'. He also had refused to sign the IEPS compact. In keeping with the revised IEPS, prison cells were searched and electronic devises kept by inmates were removed. Mr. Molyneaux's electronic devices, his textbooks and a piece of wood used for woodworking purposes, which were kept in his cell were also removed. This upset him and it was alleged that he assaulted a prison officer as a result. Charges of assault and indecent language were instituted against him by the Director of Public Prosecutions, however, were subsequently withdrawn.

From the date of the alleged assault on the prison officer, Mr. Molyneaux was transferred several times and kept in his cell in some instances for more than 20 hours daily for 15 months ("the Confinement Period"). Aggrieved, he instituted proceedings in which he sought several reliefs including declarations and damages for breach of the **Prison Act**, **Prison Rules**, and the **Constitution**. In his statement of case, he claimed among other things, that his confiscated items should be returned to him; that his confinement during the Confinement Period amounted to 'cellular confinement' and was therefore contrary to the **Prison Act** and **Prison Rules**; that the IEPS conflicted with rule 33 of the **Prison Rules**; and that his rights under sections 4 and 8 of the **Constitution** were breached during the Confinement Period. The respondent strenuously resisted these claims.

The learned trial judge having heard the evidence, found that: (i) Mr. Molyneaux's claims in relation to the return of items taken from him should be dealt with by the Prison Visiting Committee and he dismissed all other claims made by Mr. Molyneaux; (ii) the 'basic level' under the IEPS was tantamount to cellular confinement but it was lawful since the IEPS superseded the **Prison Rules**; and (iii) Mr. Molyneaux was not removed from association with other inmates contrary to Rule 26 of the **Prison Rules**.

Mr. Molyneaux being dissatisfied with the decision of the learned judge, appealed to this Court relying on eight grounds of appeal. However, at the hearing he did not pursue the grounds seeking constitutional relief. The respondents dissatisfied with the learned trial judge's finding that basic level was tantamount to cellular confinement, counter appealed. The main issues that arise for determination before this Court are: (i) whether the IEPS is ultra vires the **Prison Rules**; (ii) whether Mr. Molyneaux's confinement during the Confinement Period amounted to (a) cellular confinement and was therefore unlawful; and (b) removal from association with other inmates and was contrary to Rule 26 of the **Prison Rules**; (iii) whether the learned trial judge erred in refusing to order any declarations or make any award of damages to Mr. Molyneaux; and (iv) whether the learned judge erred in his finding that confinement in a cell in excess of twenty-two hours amounted to cellular confinement and that "basic level" under the IEPS, was equivalent to cellular confinement under the **Prison Rules**.

Held: allowing the appeal in part; allowing the counter appeal; and making the orders set out in paragraph 77 of this judgment, that:

1. The IEPS was legally implemented pursuant to section 21 of the **Prison Act** and rule 6 of the **Prison Rules**. The effect of section 21 of the **Prison Act** is that Parliament delegated, to the Governor-in-Council ('Executive Branch'), the power to make rules for the management of the prison. While pursuant to rule 6 of the **Prison Rules**, the Executive Branch granted to the Superintendent of Prisons, with the approval of the Governor, the power to establish a system of privileges for inmates of the prison. As such, when read conjointly, section 21 and rule 6 provide the legal basis for the establishment of the IEPS.

   Section 21 of the **Prison Act** Cap. 10.04, Revised Laws of Montserrat 2013 applied; Rule 6 of the **Prison Rules** Cap. 10.04, Revised Laws of Montserrat 2013 applied; **R (on the application of Potter and ors.) v Secretary of State for the Home Department** [2001] EWHC Admin 1041 applied; **R (on the application of Barrie Hewlett) v The Secretary of State for Justice** [2009] EWHC (Admin) 2979 applied.

2. In the exercise of the power under rule 6, the IEPS was created by the Superintendent of Prisons with the approval of the Governor. The provisions of the IEPS outline in detail, the privileges to be afforded to inmates at various levels. The creation of the IEPS did not however, amend any portion of the **Prison Rules** nor create a separate system of discipline. The IEPS simply provides additional support to the existing prison system as regulated by the **Prison Act** and **Prison Rules**. As such, for the most part, the IEPS is not contrary to the provisions of the **Prison Act** and **Prison Rules** and is therefore not ultra vires. However, insofar as the IEPS, as it stood at the time of the institution of these proceedings, permitted at the basic level, only 1 hour of recreation, it was inconsistent with rule 17 of the **Prison Rules**, which provides that a prisoner was to be afforded no less than 1 hour recreation

when he was not engaged in outdoor activities with other inmates. Therefore, in this limited form, this specific provision in the IEPS was ultra vires and therefore of no effect.

Rule 17 of the **Prison Rules** Cap. 10.04, Revised Laws of Montserrat 2013 applied; **R (on the application of Barrie Hewlett) v The Secretary of State for Justice** [2009] EWHC (Admin) 2979 applied.

3. Cellular confinement is not defined in the **Prison Act** or in the **Prison Rules**. It is however defined in the **Mandela Rules** as confinement in a cell over a period of time for more than 22 hours per day and that the confinement must be without meaningful human contact. While, neither the **Prison Act** nor the **Prison Rules** define cellular confinement, on a careful reading of the **Prison Rules** and the **Code of Conduct for Prison Officers**, it shows that rules 21(10), 31(1), 33(1) and 34(1) and (3) of the **Prison Rules** and rules 14 and 43 of the **Code of Conduct for Prison Officers** when read conjointly, embrace the concept that confinement without meaningful human contact would amount to cellular confinement. These rules provide that cellular confinement could only be imposed on a prisoner where the prisoner is found guilty of an offence against discipline either by the Superintendent of Prisons or Senior Officer in charge for a limited period of no more than 3 days and by the Prison Visiting Committee for a period of 56 days.

UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules): resolution / adopted by the General Assembly, 8 January 2016, A/RES/70/175 applied; Rules 21(10), 31(1), 33(3) and 34 of the **Prison Rules** Cap. 10.04, Revised Laws of Montserrat 2013 applied; Rules 14 and 43 of the **Code of Conduct for Prison Officers**, Cap. 10.04, Revised Laws of Montserrat 2013 applied.

4. In the case at bar, Mr. Molyneaux, was not convicted of any offence against discipline and was therefore not sentenced by the Superintendent or the Prison Visiting Committee. However, he was confined in the juvenile cell, on three separate occasions for 30, 43 and 46 days respectively, without meaningful human contact. He was also not let out his cell except when offered 1 hour recreation. While in the juvenile cell, Mr. Molyneaux was not let out to have meals with other inmates, he was not permitted purposeful activity as permitted by rule 18, he had no access to reading materials, television and radio and his only association was with the prison officer who gave him meals and took him for 1 hour recreation. It follows, that these circumstances amounted to cellular confinement and his cellular confinement was unlawful since he was not convicted of any offence against discipline contrary to rule 30 and his cellular confinement was not imposed in accordance with rule 34 of the **Prison Rules**.

UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules): resolution / adopted

by the General Assembly, 8 January 2016, A/RES/70/175 applied; Rules 31(1), 33(3) and 34(1), and (3) of the **Prison Rules** Cap. 10.04, Revised Laws of Montserrat 2013 applied; **Shahid v Scottish Ministers** [2015] UKSC 58 applied; **Prison Officers Association v Iqbal** [2009] EWCA Civ 1312 considered.

5. The IEPS, unlike cellular confinement, is not a disciplinary measure, rather it is a scheme that allows inmates to enjoy certain privileges if they are of good behaviour. An inmate at the basic level enjoys all the privileges afforded under the **Prison Rules**, in addition to those privileges outlined in the IEPS for inmates at the basic level. An inmate in cellular confinement on the other hand is being punished and does not enjoy the normal privileges accorded to an inmate, until the expiration of his cellular confinement. Critically during this period, he does not enjoy meaningful human contact. Therefore, the learned judge erred when he found that the 'basic level' under the IEPS was the same as cellular confinement under the **Prison Rules**.

   Prison Rules Cap. 10.04, Revised Laws of Montserrat 2013 applied.

6. The **Prison Rules** recognise the importance of prisoners being able to associate with each other. Notwithstanding this, rule 26 of the **Prison Rules** permits the Superintendent of Prisons, with the approval of a member of the Prison Visiting Committee or Governor, to remove an inmate from association with other inmates in excess of twenty-four hours, for the maintenance of order and discipline in a prison. This removal from association means complete removal from all contact with other prisoners.

   Rule 26 of the **Prison Rules** Cap. 10.04, Revised Laws of Montserrat 2013 applied; **Syed v Secretary of State for Justice** [2019] EWCA Civ 367 applied.

7. In this case, the learned trial judge having heard the evidence before him, found that Mr. Molyneaux was not removed from association as contemplated by rule 26 of the **Prison Rules**. It is well settled that an appellate court would only be compelled to interfere with a trial judge's finding of fact where there is no evidential basis to support the findings of the trial judge. As such, where there was a sufficient evidential basis to support the finding that during Mr. Molyneaux's time spent in the cells other than the juvenile cell, he was able to associate with other inmates, the appellate court is not so compelled to interfere with the judge's findings. In this regard rule 26 of the **Prison Rules** was not breached. However, there was uncontroverted evidence that when Mr. Molyneaux was kept in the juvenile cell, he was not able to associate with other prisoners. In those circumstances, and with no approval having been given for Mr. Molyneaux to be removed from association, the Court is entitled to interfere with the trial judge's findings of fact and find that Mr. Molyneaux's removal during this period was contrary to rule 26 and thus unlawful.

Rules 17, 18, 19, 21 and 26 of the **Prison Rules** Cap. 10.04, Revised Laws of Montserrat 2013 applied; **R (on the application of Bourgass and another) v. Secretary of State for Justice** [2015] UKSC 54 applied; **Syed v Secretary of State for Justice** [2019] EWCA Civ 367 applied; **Ming Siu Hung v JF Ming Inc** 2021 UKPC 1 applied.

8. A prisoner does not have a cause of action in damages where there is a breach of the **Prison Rules**. A prisoner's recourse would be a remedy applicable to an administrative action. In the circumstances of this case, where the prison authorities misapprehended the effect of the IEPS and the **Prison Rules**, Mr. Molyneaux is entitled to declaratory orders and an award of costs both in the lower court and in this Court.

R v Deputy Governor of Parkhurst Prison and others, ex parte Hague [1991] 3 All ER 733 applied; **R (on the application of Bourgass and another) v. Secretary of State for Justice** [2015] UKSC 54 applied.

JUDGMENT

[1] **THOM JA**: Rehabilitation of prisoners is one of the key roles of modern Prison Administrations. One of the main methods used to enhance rehabilitation is the Incentives and Earned Privileges Scheme ("IEPS"). The IEPS is a system of privileges aimed at incentivising prisoners to abide by the prison rules and engage in rehabilitation exercises such as education and substance misuse interventions. The IEPS provides for inmates to be classified into three different levels, being: basic, standard and the highest level being, enhanced. The levels of inmates are reviewed and assessed intermittently by a Prison's Review Board and are determined by patterns of behaviour, personal progress and engagement with the prison regime. Privileges earned could therefore be lost after a review. Such schemes are in operation in prisons around the world. A revised IEPS was introduced into the Montserrat Prison System in 2016.

[2] This appeal concerns the relationship of the IEPS with the **Prison Act**[1] and the

[1] Cap. 10.04, Revised Laws of Montserrat 2013.

Prison Rules.[2]

Background

[3] The appellant, Mr. Stephen Molyneaux, has been serving a life sentence at Her Majesty's Prison in Montserrat for murder since 2002. Prior to 2016, Mr. Molyneaux enjoyed several privileges including having access to and use of computers, textbooks (including law textbooks), a MP3 player, an iPod and a portable PlayStation 2.

[4] In 2015, Mr. Keith Munns, a prison advisor from the United Kingdom, appointed by the Foreign and Commonwealth Office to provide consultancy services in relation to the prisons in British Overseas Territories, conducted a review of the prison system in Montserrat. One of his findings in his report was that the IEPS was not operating to the benefit of the prison or the prisoners. He recommended that the IEPS be revised.

[5] Acting on this recommendation, the Superintendent of Her Majesty's Prison made a revised IEPS in 2016 which was approved by the Governor. The aims of the IEPS are listed as follows: to encourage responsible behaviour by prisoners; to encourage effort and achievement in work and other constructive activity by prisoners; to encourage sentenced prisoners to engage in sentence planning and benefit from activities designed to reduce re-offending; and to create a more disciplined, better controlled and safer environment for prisoners and staff.

[6] Inmates are required to sign a statement referred to as a "compact", in which they agree to, among other things, abide by the **Prison Rules**, be cordial to prison staff and other inmates and use their time constructively. In return they enjoy privileges over and above what is outlined in the **Prison Act** and **Prison Rules**. Mr. Molyneaux refused to sign this IEPS compact.

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[2] Cap. 10.04, Revised Laws of Montserrat 2013 at p.11.

[7] With the introduction of the IEPS, a review was conducted of the inmates. In Mr. Molyneaux's review, he was assessed at basic level.

[8] In keeping with the recommendation of Mr. Munns, prison cells were searched and electronic devices kept by inmates were removed. Mr. Molyneaux's electronic devices, including a hard drive on which violent and indecent material was discovered, along with certain textbooks were taken from him. A few months later other electronic devices and a piece of wood (gifted to Mr. Molyneaux for woodworking purposes), which Mr. Molyneaux kept in his cell were also removed. Mr. Molyneaux became upset. It was alleged that he assaulted a prison officer as a result and charges of assault and indecent language were instituted against him by the Director of Public Prosecutions. Those charges were subsequently withdrawn a few months later.

[9] From the date of the alleged assault on the prison officer being 9th August 2016, until 23rd November 2017 (a period of fifteen months), Mr. Molyneaux was transferred several times and kept in his cell in some instances for more than 20 hours daily ("the Confinement Period").

[10] Mr. Molyneaux on 10th April 2018 instituted proceedings in which he sought several reliefs including declarations and damages for breach of the **Prison Act**, **Prison Rules**, and the **Constitution**.[3] In his statement of case, he claimed principally:

(a) Return of items that he was deprived of – his items being, his electronic devices such as his PlayStation 2 Portable ("PSP") device, iPod, and his textbooks contrary to rule 33 of the **Prison Rules**.

(b) That his confinement during the Confinement Period amounted to "cellular confinement" and was as a direct result of his alleged assault of the prison officer, and that he was being victimised, as charges were

[3] Cap 1.01 The Montserrat Constitution Order 1989.

withdrawn by the Director of Public Prosecutions and there was no adjudication hearing by the Superintendent or the Prison Visiting Committee. His confinement was therefore contrary to **the Prison Act** and **Prison Rules**.

(c) Damages for hypertension and arthritis caused by his confinement during the Confinement Period which was without meaningful human contact and amounted to "cellular confinement".

(d) That the IEPS conflicted with rule 33 of the **Prison Rules** as it allowed "cellular confinement" (in the form of "basic" status) way beyond the three days contemplated as punishment in rule 33(1)(e) or 56 days contemplated in rule 34(3)(d) of the **Prison Rules**.

(e) That he was being tortured and punished for not agreeing to sign the IEPS; and

(f) His rights under sections 4 and 8 of the **Constitution** were breached as during the Confinement Period he was unfairly placed near a noisy and unsanitary mentally ill inmate and was also not allowed to associate with other inmates.

[11] The respondents, in their defence, denied that Mr. Molyneaux was subjected to cellular confinement. The respondents contended that Mr. Molyneaux was kept in his cell for over 20 hours per day during the Confinement Period due to the need to maintain safety in the prison and that prior to Mr. Molyneaux's alleged assault of the prison officer, he had exhibited violent tendencies towards other inmates and prison staff. Further, by reason of his sentence he had no right to liberty apart from that afforded him by the **Prison Rules**, which allowed him 1 hour recreation and as an inmate at the 'basic level' under the IEPS, he was not entitled to be out of his cell, save and except for meals, shower and recreation for one hour daily.

[12] The respondents further contended that Mr. Molyneaux was offered 1 hour recreation, as was prescribed by rule 17 of the **Prison Rules**, however, in some instances, he did not make use of his time. Further, items taken away by the prison authorities were done due to restructuring under the IEPS and his classification as a 'basic' inmate and that there was no breach of the **Prison Act** and **Prison Rules** or the **Constitution** as alleged.

[13] The learned trial judge having heard the evidence, found that Mr. Molyneaux's claims in relation to the return of items taken from him should be dealt with by the Prison Visiting Committee and he dismissed all other claims made by Mr. Molyneaux. The learned judge, having accepted the evidence of Mr. Munns that confinement in a cell in excess of 22 hours a day without meaningful human contact amounts to cellular confinement, found that the 'basic level' under the IEPS was tantamount to cellular confinement. This he reasoned was lawful since he was of the view that, the IEPS superseded the **Prison Rules**. The learned judge found further that Mr. Molyneaux having failed to sign the IEPS compact, was automatically placed at the basic level and Mr. Molyneaux was therefore himself responsible for any discomfort and or harm he suffered as a result of his confinement. The learned judge also found that Mr. Molyneaux was not removed from association with other inmates contrary to rule 26 of the **Prison Rules**, since on the evidence he was able to interact with other prisoners.

The Appeal

[14] Mr. Molyneaux being dissatisfied with the decision of the learned judge, appealed to this Court. He outlined eight grounds in his notice of appeal. At the hearing, Mr. Molyneaux did not pursue the grounds seeking constitutional relief. The remaining grounds can be condensed into three main issues, being:

(i) Whether the IEPS is ultra vires the **Prison Rules**;

(ii) Whether Mr. Molyneaux's confinement during the "Confinement Period" amounted to (a) cellular confinement and was therefore

unlawful; and (b) removal from association with other inmates and was contrary to rule 26 of the **Prison Rules**; and

(iii) Whether the learned trial judge erred in refusing to order any declarations or make any award of damages to Mr. Molyneaux.

[15] The respondents dissatisfied, with the learned trial judge's finding, that the basic level was tantamount to cellular confinement, counter appealed. The issue arising on the counter appeal is whether the learned judge erred in his finding that confinement in a cell, in excess of 22 hours amounted to cellular confinement and that 'basic level' under the IEPS, was equivalent to cellular confinement under the **Prison Rules**.

[16] In view of the issue raised on the counter appeal, I will deal first with issue (i). I will then deal with issue (ii)(a) and the counter appeal together since they deal with the issue of cellular confinement. This will be followed by issue (ii)(b) and then issue (iii).

Issue (i): Whether the IEPS is ultra vires the Prison Rules and the Prison Act

[17] At paragraphs 21 and 24 of the learned trial judge's judgment he made the pronouncement that the IEPS amounted to a re-writing of parts of the **Prison Rules** and that they "superseded" the **Prison Rules**. The learned judge stated:

> "[21] On analysis, mindful the IEPS is designed to improve conditions for prisoners consistent with the UN approved Mandela Rules, in my judgement the scheme amounted to re-writing parts of the Prison Rules, as permitted by the Governor in Council under s21 Prison Act, so that from August 2016 the Prison Rules were no longer to be in force insofar as they might conflict with the IEPS. It is not clear to me whether the correct procedure was adopted by Governor Carriere, but as it is for the claimant to prove his case, I find on balance he has not shown the procedure was flawed" (emphasis mine).
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> ...

> [24] Molyneaux has further complained that his ability to associate with other prisoners was improperly curtailed, but that is only if the Prison Rules applied, which I have found were superseded by the IEPS..."

[18] Mr. Molyneaux contends that the learned judge erred in so finding. He submits that the IEPS is ultra vires the **Prison Act** and **Prison Rules** for two reasons, being, firstly, it was beyond the power of the Governor to amend the **Prison Rules** and that the IEPS not being an act of the legislature, the IEPS does not have the effect of amending the **Prison Rules**. Secondly, the provisions of the IEPS are inconsistent with the **Prison Act** and **Prison Rules**.

[19] Learned counsel Ms. Morgan in response relied on section 21 of the **Prison Act** and rule 6 of the **Prison Rules** as the source of the power for the establishment of the IEPS. These provisions read as follows:

Section 21 of the **Prison Act**

> "21. (1) The Governor acting on the advice of Cabinet may make rules for the regulation and management of prisons, the conduct, discipline and duties of the officer employed therein, and the classification, treatment, employment, discipline and control of prisoners. (2) Rules made under this section shall make provision for ensuring that a person who is charged with any offence under the rules shall be given a proper opportunity of presenting his case."

Rule 6 of the **Prison Rules**

> "Privileges
> (1) For the encouragement of the good conduct, industry and rehabilitation of prisoners the superintendent shall subject to the approval of the Governor, establish a system of privileges for the prison, including schemes under which money earned by prisoners may be spent by them within the prison.
> (2) Prisoners who have been sentenced to imprisonment for a term of or exceeding three months shall be granted a discharge, financial aid at the rate of 50 cents per day, of the sentence served up to a maximum of $2000."

[20] I turn to Mr. Molyneaux's first contention that the Governor had no authority to make the IEPS and the IEPS could only be established by the Legislature.

[21] It is well settled that the Executive Branch of Government has no inherent power to enact legislation. Its power to make laws is derived from Acts of Parliament and in some instances the **Constitution**. An examination of the IEPS shows that the IEPS was made by the Superintendent of Prisons with the approval of the Governor.

[22] The effect of the provisions of section 21 of the **Prison Act** is that the power to make rules for the management of the prison was delegated by Parliament to the Governor-in-Council (Executive Branch).[4] In the exercise of the power delegated to it, the Executive Branch by rule 6, granted powers to the Superintendent of Prisons, with the approval of the Governor, to establish a system of privileges for inmates of the prison. When read conjointly, section 21 and rule 6 provide the legal basis for the establishment of the IEPS.

[23] The IEPS was introduced in the United Kingdom under similar legislative provisions being section 47 (1) of the UK Prison Act 1952 and rule 8 of the 1999 Prison Rules which read as follows:

UK Prison Act 1962

> "Section 47 (1) The Secretary of State may make rules for the regulation and management of prisons, young offender institutions or secure training centres, and for the classification, treatment, employment, discipline and control of persons required to be detailed therein.

1999 Prison Rules

> "Privileges
>
> Rule 8 There shall be established at every prison systems of privileges operated by the Secretary of State and appropriate to the class of prisoners there, which shall include arrangements under which money earned by prisoners in prison may be spent by them within the prison."

[24] The courts in the UK have recognised that the UK IEPS was established pursuant to the powers in section 47 (1) of the UK Prison Act 1952 and rule 8 (1) of the 1999 Prison Rules. This is seen in the case of **R (on the application of Potter and ors.)**

[4] Per The Montserrat Constitution Order 1989 the Governor-in-Council acts as the Cabinet in Montserrat.

v Secretary of State for the Home Department and another,[5] where the claimants who were found guilty of serious sexual offences sought judicial review of decisions refusing them enhanced status under the IEPS. In explaining the genesis of the scheme the learned judge stated at paragraph 4 of the judgment as follows: 'The National and local schemes have been laid down pursuant to the Prison Rules 1999, made in the exercise of the Secretary of State's statutory power, confirmed by section 47 (1) of the Prison Act 1952.'[6]

[25] Similarly in **R (on the application of Barrie Hewlett) v The Secretary of State for Justice**,[7] Mr. Hewitt who was serving a life sentence, sought judicial review of a decision of the Incentives and Earned Privileges (IEP) Board which firstly changed his status from enhanced to standard and secondly confirmed his status. The court stated, at page 2 of the judgment, that:

> "A National framework for IEP schemes was introduced by amendment to the Prison Rules by PSO 400O in October 2006. This updated and replaced earlier IEP frameworks. IEP schemes are introduced into each prison by virtue of Rule 8 of the Prison Rules 1999."[8]

[26] I therefore find that there is no merit in Mr. Molyneaux's contention that the IEPS could only be implemented by the Parliament. The IEPS was legally implemented pursuant to section 21 of the **Prison Act** and rule 6 of the **Prison Rules**.

[27] I will now consider Mr. Molyneaux's second argument that even if there was legal authority to implement a system of privileges, the provisions of the IEPS are contrary to the provision of the **Prison Act** and **Prison Rules** and are therefore ultra vires.

[28] In my view, there is also no merit in this submission. Rule 6 does not outline the details of how the systems of privileges should operate, instead, it gives the Superintendent of Prisons, with the approval of the Governor, the power to outline

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[5] [2001] EWHC Admin 1041.
[6] Ibid at p. 1.
[7] [2009] EWHC (Admin) 2979.
[8] Ibid at p.2.

the details of the system of privileges. The details of the system of privileges are outlined in the IEPS which was made by the Superintendent of Prisons with the approval of the Governor. The IEPS provides for privileges in several areas including access to computers, electrical devices, telephone calls, paid work outside of the prison and extended periods out of cell for association. The provisions of the IEPS compliment the **Prison Rules**. They provide inmates privileges over and above the privileges under the **Prison Rules**. However, there is one area in which the IEPS is inconsistent with the **Prison Rules**, that is as it relates to the recreation time at 'basic level'.

[29] Under the IEPS, at the basic level, an inmate is permitted 1 hour recreation. This is inconsistent with rule 17 which provides in effect that where a prisoner is not engaged in work in association with other prisoners pursuant to rule 18, then the prisoner it to be permitted no less than 1 hour recreation. In other words, the minimum time is 1 hour, while the IEPS provides the maximum time is 1 hour. In this limited form the IEPS, as it stood at the time of the institution of these proceedings, was inconsistent with the **Prison Rules** and was therefore ultra vires and of no effect. It is noteworthy that since November 2017 the IEPS has been revised to permit 7 hours of recreation at the basic level.

[30] I also find the following statement by the learned judge in paragraph 21 to be an error:

> "... in my judgement the scheme amounted to re-writing parts of the Prison Rules, as permitted by the Governor in Council under s21 of the Prison Act, so that from August 2016 the Prison Rules were no longer to be in effect in so far as they might conflict with the IEPS."

The IEPS being made by the Superintendent of Prisons, with the approval of the Governor cannot amend any portion of the **Prison Rules** and in fact it does not purport to do so. The IEPS also does not create a separate system of discipline.

As stated in **Barrie Hewlett**, at page 2 of the judgment:

> "[I]EP schemes are not designed or operated as secondary disciplinary systems. They are schemes that enable privileges to be earned by good behavior and behavior which fulfills the objective of IEP schemes generally. Misbehaviour, particularly when this amounts to breaches of prison rules should be dealt with by disciplinary proceedings."

In my view, the IEPS simply provides additional support to the existing prison system as regulated by the **Prison Act** and **Prison Rules**.

Issue (ii)

Cellular Confinement

[31] In the lower court, Mr. Molyneaux contended that he was placed in cellular confinement between the period 9th August 2016 to November 2017 contrary to the **Prison Act** and **Prison Rules**. He alleged that he was confined because of an incident with a prison officer in relation to which no disciplinary charges were laid against him and in circumstances where he was not convicted of any offence under the **Prison Act** or **Prison Rules**.

[32] The learned judge in his judgment found at paragraph 23 as follows:

> "23. Moreover, while I do find it is "cellular confinement" to be kept in a cell for more than 22 hours, as Keith Munns said, nevertheless the IEPS specifically anticipated cellular confinement will arise at basic status (until changed in November 2017) which is supposed to act as an incentive for prisoners cooperation and is the very reason on signing the compact a prisoner is elevated to standard status, with then 10.5 hours out of cell daily. The short point is that Molyneaux imposed basic status on himself, and therefore cellular confinement on himself by refusing to sign, so that culpability for his discomfort lies at his own feet not the superintendent."

[33] Mr. Molyneaux contends that the learned judge having found that being kept in a cell for more than 22 hours was cellular confinement, the learned judge erred in failing to find that his confinement was unlawful since it was contrary to rule 33 (1) (e) and rule 26 of the **Prison Rules**. He complains that he was not charged with any offence under the **Prison Rules**, nor was he subjected to any disciplinary proceedings in accordance with rule 34 of the **Prison Rules** before the Prison Visiting Committee.

[34] The respondents in their counter appeal complain that the learned judge erred in his finding that Mr. Molyneaux was held in cellular confinement since he was kept in his cell for more than 22 hours per day and the learned judge fell into further error in finding that 'basic status' is equivalent to cellular confinement.

[35] The chronology of the case as outlined in the court below and which is undisputed, shows that during August 2016 to 23rd November 2017, Mr. Molyneaux was housed in the following cells:

(a) Cell 18 of Block C from 9th August 2016 to 11th August 2016 (2 days);
(b) The juvenile cell in Block E from 11th August 2016 to 10th September 2016 (30 days);
(c) Cell 18 in Block C form 10th September 2016 to 12th April 2017 (214 days);
(d) The juvenile cell in Block E from 12th April 2017 to 25th May 2017 (43 days);
(e) Cell 24 in Block D from 25th May 2017 to 21st July 2017 (57 days);
(f) The juvenile cell in Block E from 21st July 2017 to 5th September 2017 (46 days);
(g) Cell 18 in Block C from 5th September 2017 to 26th October 2017 (51 days); and
(h) Cell 11 in Block B from 26th October 2017 to 23rd November 2017 (28 days).

[36] The learned judge found as a fact that Mr. Molyneaux was confined to his cell while in the juvenile cell for 22 hours or more. The above chronology shows that Mr. Molyneaux was held in the juvenile cell on three occasions for 30, 43, and 46 days respectively.

[37] Ms. Morgan for the respondents submits that pursuant to section 17(1) of the **Prison Rules**, a prisoner is to be allowed outside of his cell for 1 hour for recreation. She further submits that while neither the **Prison Act** nor the **Prison Rules** define the term 'cellular confinement', but guidance as to what constitutes 'cellular

confinement' can be found in rule 44 of the **Mandela Rules**[9] and article 3 of the **European Convention of Human Rights** ("ECHR").[10] Learned counsel also relied on the cases of **Shahid v Scottish Ministers**[11] and **Prison Officers Association v Iqbal**.[12] Ms. Morgan further submits that based on the above authorities, cellular confinement is not based solely on confinement for more than 22 hours per day without more, but the confinement must also be accompanied by a lack of meaningful human contact. Relying on **Shahid**, Ms. Morgan submits that the time spent in the juvenile cell did not amount to cellular confinement since Mr. Molyneaux was able to communicate with persons passing on the walkway and he was given 1 hour recreation pursuant to rule 17(1).

Discussion

[38] Cellular confinement is not defined in the **Prison Act** or in the **Prison Rules**. The term has been used interchangeably with the terms 'solitary confinement' and 'segregation'.

[39] The **Mandela Rules** outline what is internationally accepted as cellular confinement in rule 44 as follows:

> "For the purposes of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days."

[40] In the United Kingdom, the **Essex Paper 3 on the Initial Guidance on the Interpretation and Implementation of the Nelson Mandela Rules**[13]provides

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[9] UN General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) : resolution / adopted by the General Assembly*, 8 January 2016, A/RES/70/175.
[10] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.
[11] [2015] UKSC 58.
[12] [2009] EWCA Civ 1312.
[13] The Essex paper 3 on the "Initial guidance on the interpretation and implementation of the Nelson Mandela Rules" (Penal Reform International/Human Rights Centre, Essex University, February 2017).

guidance on the meaning of the term 'meaningful human contact'[14] and referred to it as:

> "The amount and quality of social interaction and psychological stimulation which human beings require for their mental health and well-being. Such interaction requires the human contact to be face to face and direct (without physical barriers) and more than fleeting or incidental, enabling, empathetic interpersonal communication contact must not be limited to those interactions determined by prison routines the cause of (criminal) investigations or medical necessity."

The above shows that there are two aspects to cellular confinement. There must be confinement in the cell over a period of time for more than 22 hours per day and the confinement must be without meaningful human contact.

[41] Although neither the **Prison Act** nor the **Prison Rules** define cellular confinement a careful reading of the **Prison Rules** show that it embraces the concept of confinement without meaningful human contact to be cellular confinement.

[42] In rule 33 (1) of the **Prison Rules**, cellular confinement is one of the punishments that may be imposed on a prisoner who is found guilty of one of the offences against discipline outlined in rule 30. Cellular confinement may be imposed either by the Superintendent of Prisons or Senior Officer in charge of the prison who conducted the hearing in relation to the charge and by virtue of section 21(10), the Superintendent of Prisons may defer the right of a prisoner to a visit until the expiration of his cellular confinement. Where an inquiry is held pursuant to rule 31(3) and the Superintendent of Prisons or the Senior Officer in charge of the prison decides that if the prisoner were found guilty the punishments provided under rule 33 would having regard to the nature and circumstances of the offence, be inadequate, the Superintendent, or the Senior Officer in charge of the prison, with the agreement of the Superintendent, may refer the charge to the Prison Visiting Committee who, pursuant to rule 34 may, on hearing of the charge, impose cellular

[14] The Essex paper 3 on the "Initial guidance on the interpretation and implementation of the Nelson Mandela Rules" (Penal Reform International/Human Rights Centre, Essex University, February 2017) at pages 88-89.

confinement for a period of no more than 56 days. Rules 31(3), 33(1) and 34 read as follows:

> "31(3) Every charge shall be inquired into, in the first instance, by the Superintendent or, in his absence, by the Senior Officer in charge of the Prison.
>
> ...
>
> 33 (1) If he finds a prisoner guilty of an offence against disciplines, the Superintendent or the Senior Officer in charge may, subject to rule 35, impose one or more of the following punishment-
>
> (a) a caution.
> (b) ...
> (c) ...
> (d) ...
> (e) cellular confinement for a period not exceeding three days.
>
> ...
>
> 34.(1) Where an inquiry held pursuant to rule 31(3) the Superintendent or the Senior Officer of the prison decides that, if the prisoner were found guilty, the punishments provided under rule 33 would, having regard to the nature and circumstances of the offence, be inadequate, the Superintendent or the Senior Officer of the prisons with the agreement of the Superintendent, may refer the charge to the Visiting Committee hereinafter referred to as the "Committee".
> (2) ...
>
> (3) The Committee shall inquire into the charge, and if it finds the prisoner guilty it may, subject to rule 4, impose one or more of the following punishments-
> (a)...
> (d) cellular confinement for a period not exceeding fifty-six days;"

[43] The conjoint effect of the above provisions is that cellular confinement could only be imposed on a prisoner where the prisoner is found guilty of an offence against discipline either by the Superintendent or Senior Officer in charge of the prison for a limited period of no more than 3 days and by the Prison Visiting Committee for a period up to 56 days. Further to this, rules 14 and 43 of the **Code of Conduct for**

Prison Officers,[15] provide the conduct expected of the Superintendent in relation to prisoners undergoing cellular confinement.

[44] It is common ground that Mr. Molyneaux was not convicted of any offence against discipline and was therefore not sentenced by the Superintendent or the Prison Visiting Committee to a period of cellular confinement. Indeed, it is not disputed that there was no hearing of any charges against discipline brought pursuant to rule 30 against Mr. Molyneaux. It is also not disputed that Mr. Molyneaux was confined in the juvenile cell on three separate occasions for 30, 43, and 46 days respectively. What is in contention is whether during the period in the juvenile cell Mr. Molyneaux had meaningful human contact.

[45] The learned judge did not make a specific finding on whether Mr. Molyneaux was denied human association during the period he spent in the juvenile cell. However, in considering Mr. Molyneaux's claim under rule 26, that he was unlawfully removed from association with other prisoners, the learned judge found at paragraph 24 as follows:

> "...I find on the facts, having myself been three times to the prison so I am familiar with the layout, Molyneaux was wholly not cut off from other inmates, though in his cell he was able to talk through the cell door, play games (depending on which cell he was in), interact regularly, so I do not find he was specifically removed from association as contemplated by rule 26."

[46] The above passage shows that some of the activities the learned judge relied on to make his finding depended on which cell Mr. Molyneaux was occupying. An examination of the record show that there was specific evidence before the learned judge on the issue as it relates to the time spent in the juvenile cell. There was evidence from Mr. Molyneaux and the Superintendent of Prisons, Mr. Bennett Kirwan. Mr. Molyneaux's evidence was that he was kept in his cell except when he was allowed 1 hour of recreation. He was not let out to have meals with other inmates. During the period he had one visit from the Premier of Montserrat, and a

[15] Code of Conduct for Prison Officers, Cap. 10.04, Revised Laws of Montserrat 2013 at p.35.

lawyer visited him. The evidence of the Superintendent is that the juvenile cell has a window and two doors. Through the window, which is at the back of the cell, Mr. Molyneaux could have seen a walkway that is used by the prison officers to go to the workshop or the kitchen. Mr. Molyneaux could speak to the officers when they use the walkway. The walkway is about 39 feet from the juvenile cell. Mr. Molyneaux could have also seen the workshop and the kitchen door from the window.

[47] What amounts to meaningful human contact has been considered in the authorities relied on by Ms. Morgan. In **Shahid v Scottish Ministers** the appellant remained in segregation for almost five years. Despite the fact that he was kept in segregation for this period, which the court found was exceptional by the standards of prisons in the UK, the Supreme Court found that the conditions in which he was held did not violate article 3 of the ECHR which is viewed as a safeguard against excessive solitary confinement. The court noted at paragraph 33 that:

> "...Although the regime prevented contact with the general prison population, it did not involve the appellant's total isolation from other prisoners or from other human contacts. He was confined to his cell for between 20 and 22 hours per day. He was permitted to associate with other prisoners at times when he was released from his cell. He generally had access to one hour exercise per day in the segregation unit yard. He often had access for about an hour at a time to a gym located in the segregation unit. He was entitled to receive visits and to use the prison telephones. He had daily access to showers and newspapers... After March 2008 all cells in which he was accommodated had electric power, and a television was provided. Prior to that date, he was provided with a battery powered television in his cell. ...On the other hand, no work or other occupation was provided or permitted in his cell, and education courses were not generally available..."

[48] When the evidence in this case is considered, particularly the evidence of the respondents which was accepted by the learned judge, I am of the view that Mr. Molyneaux did not have meaningful human contact during the period in the juvenile cell. Being able to speak through a window while behind bars to prison officers as they walk by to the workshop and the kitchen, cannot be considered to be meaningful human interaction as the **Essex Paper 3** outlined. The interaction was at best fleeting and not face to face since Mr. Molyneaux was behind a physical

barrier. They did not enable empathetic interpersonal communication. Mr. Molyneaux's only human association other than when the prison officer who gave him his meals and took him for recreation, was the lone visit from the Premier and a lawyer. Mr. Molyneaux was not permitted to have any form of purposeful activity as permitted by rule 18. He had no access to any educational material. His books including his law books were seized. He had no access to newspapers, television or a radio. Having regard to the circumstances in which Mr. Molyneaux was held in the juvenile cell, I find the circumstances amounted to cellular confinement and his cellular confinement was unlawful since he was not convicted of any offence against discipline contrary to rule 30 and cellular confinement imposed as the punishment by the Prison Visiting Committee pursuant to rule 34. Cellular confinement is only lawful when it is imposed in accordance with the **Prison Rules**.

Whether Cellular Confinement Equivalent to Basis Status Under IEPS

[49] The respondents in their counter appeal contends that the learned judge at paragraph 23 of the judgment, referred to above, wrongly equated the 'basic level' under the IEPS with cellular confinement under the **Prison Rules**.

[50] In order to determine this issue, it is necessary to examine what are the conditions to which an inmate is subjected when at 'basic level' under the IEPS in comparison with cellular confinement under the **Prison Rules**.

[51] The IEPS, unlike cellular confinement, is not a disciplinary measure, rather it is a scheme that allows for inmates to enjoy certain privileges if they are of good behaviour. Indeed, the IEPS instrument contains the following statement under the heading "Double Jeopardy":

> "The disciplinary system and IEP scheme are two separate systems. Privileges levels are determined by patterns of behaviour. The adjudication helps maintain order and discipline within a prison by awarding punishments for specific incidents. The loss of a particular privilege following an adjudication, or at the Superintendent's discretion will not automatically result in the loss of their current IEP status. However, there will be occasions (as listed above) when behavior results in both disciplinary proceedings for a specified act and a review of privilege level because the prisoner's behavior falls below expected standard."

The privileges available to an inmate at basic level as outlined in the IEPS are - one visit per two weeks for thirty minutes; access to radio with headphones; one book or magazine, inmate permitted to be out of cell for meals, shower and one hour exercise.

[52] The **Prison Rules** provide for an inmate who is not in cellular confinement to enjoy the following privileges – association with other prisoners engaged in outdoor work for not more than 10 hours; paid work done at rates approved by the Superintendent; where the inmate is not engaged in outdoor work; he is given exercise for not less than one hour each day; participate in educational facilities at the prison; borrow books from the library; send and receive a letter once per week; receive visitor once every two weeks; and have access to books, newspapers, writing material. An inmate at the basic level enjoys all these privileges in addition to the privileges outlined in the IEPS for inmates at basic level. The additional privilege an inmate at the basic level would receive would be access to a radio with headphones.

[53] An inmate in cellular confinement on the other hand is being punished, he does not enjoy the normal privileges accorded to an inmate such as paid work, and his visits from family and friends may be deferred by the Superintendent (rule 21(10)) until expiration of his cellular confinement, nor does he get the additional benefit of a prisoner at basic level of having a radio with headphone. Critically, during the period, he does not enjoy meaningful human contact or association.

[54] In view of the above comparison, I agree with the respondents that the learned judge erred when he found that the basic level under the IEPS was the same as cellular confinement under the **Prison Rules**. As stated earlier, the IEPS did not amend any of the provisions of the **Prison Rules**. After the establishment of the IEPS, inmates continued to enjoy all privileges under the **Prison Rules** in addition to any other additional privileges under the IEPS. The learned judge seemed to have based his finding solely on the time permitted out for recreation. It must however be

noted that, as stated earlier, the time permitted for recreation under rule 17(1) is not a maximum of one hour, but rather no less than one hour, or a minimum of one hour.

Rule 26 – Removal from Association

[55] While imprisonment essentially necessitates confinement, the **Prison Rules** recognise the importance of prisoners being able to associate with each other and the **Prison Rules** do provide for inmates to be productively engaged in association with each other and for rehabilitation and educational development. These are addressed in rules 17, 18, and 19. They read as follows:

> "17. (1) A prisoner not engaged in outdoor work shall be given exercise in the open air for not less than one hair each day if health permits. Provided that exercise consisting of physical training may be given instead of in the open air.
> (2) The period of exercise referred to in sub- Rule (1) may be reduced in special circumstances by the Superintendent.
> (3) The medical officer shall decide upon the fitness of every prisoner for exercise and physical training, and may excuse a prisoner from, or modify, any activity or medical grounds.
>
> 18. (1) A convicted prisoner shall be required to do useful work approved by the Superintendent for not more than ten hours a day, and arrangements shall be made to allow prisoners to work, where possible, outside the cells and in association with one another.
>
> ...
>
> (5) Prisoners may be paid for their work at a rate approved by the Superintendent, either generally or in relation to particular cases, and in such case a Pay Record Book shall be in respect of all such payments."

[56] Rule 19 also provides for educational development, as it mandates the arrangement of daytime and evening educational classes for prisoners, who wish to improve their education. It further provides that a library be available to the prisoners and requires that every prisoner be allowed to have library books. In rule 21 provision is made for the prisoners to receive visitors once every two weeks and by subsection (8) the Superintendent of Prisons has a discretion to permit an additional visit.

[57] In rule 26, provision is made for prisoners to be prevented from associating in certain circumstances. Rule 26 reads as follows:

"26. (1) Where it appears desirable, for the maintenance of good order and discipline or in his own interests that a prisoner should not associate with other prisoners either generally or for particular purposes, the Superintendent may arrange for a prisoner's removal from association accordingly.
(2). A prisoner shall not be removed under this rule for a period of more than twenty-four hours without the authority of a member of the Committee or the Governor.
(3). The Superintendent may arrange at his discretion for such a prisoner to resume association with other prisoners, and shall do so if in any case the medical officer so advises on medical grounds."

[58] Rule 26 permits the Superintendent of Prisons to remove an inmate from association with other inmates for the maintenance of order and discipline in a prison. This discretion given to the Superintendent of Prisons although wide, is not unlimited. The Superintendent of Prisons must get the approval of a member of the Prison Visiting Committee or the Governor where he determines that an inmate should be removed from association in excess of twenty-four hours.

[59] The UK Supreme Court in **R (on the application of Bourgass and another) v Secretary of State for Justice**[16] considered the effect of section 45 of the UK Rules which is in similar terms to Rule 26. At paragraph 122 the Court stated as follows:

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

[16] [2015] UKSC 54.

[60] Mr. Molyneaux contends that he was removed from association with other prisoners for more than 24 hours and his removal was not authorised by a member of the Prison Visiting Committee or the Governor.

[61] It is not disputed that neither a member of the Prison Visiting Committee nor the Governor authorised that Mr. Molyneaux be removed from association with other prisoners at any time during the Confinement Period.

[62] The respondents contend in response that, Mr. Molyneaux was not removed from association with other inmates during the Confinement Period. They submit that due to persistent misconduct by Mr. Molyneaux as borne out in the evidence of the respondents which was accepted by the learned judge, Mr. Molyneaux was transferred from time to time to various cells and had to be kept apart from some prisoners. Nevertheless, the evidence shows that during the period he was able to interact with other prisoners from his cell playing games and at times from the hallway, he was able to watch television.

[63] The issue which arises is whether Mr. Molyneaux was removed from association within the meaning of rule 26 of the **Prison Rules**.

[64] The construction to be placed on 'removal from association' in rule 45 was recently considered by the English Court of Appeal in the case of **Syed v Secretary of State for Justice**.[17] The court was of the view that the words should be given their ordinary meaning. Removal from association means complete removal from all contact with other prisoners. It does not mean a reduction or limitation of association.

[65] The learned judge's finding on this issue is found at paragraph 24. It reads as follows:

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[17] [2019] EWCA Civ 367.

"Molyneaux has further complained that his ability to associate with other prisoners was improperly curtailed, but that is only if the Prison Rules applied, which I have found were superseded by the IEPS. And if I am wrong about that superseding for want of proper procedure, then I find on the facts, having myself been three times to the prison so I am familiar with its layout, Molyneaux was wholly not cut off from other inmates through in his cell he was able to talk through the cell door play games (depending on which cell he was in) and interact regularly, so that I do not find he specifically removed from association as contemplated by Prison Rules 26."

[66] It is a well settled principle that an appellate court would be slow to interfere with findings of fact made by a trial judge. This was recently reiterated by the Privy Council in the case of **Ming Siu Hung v JF Ming Inc**[18] where the Board reaffirmed the following statement of Lewison LJ in **Fage UK Ltd v Chobani UK Ltd**[19] on the rationale for appellate restraint:

"114. Appellate courts have been repeatedly warned by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are **Biogen Inc v Medeva plc** [977] RPC 1; **Piglowska v Piglawski** [1999] 1WLR 1360; **Datec Electronics Holdings Ltd v United Parcels Service Ltd** 2007 UKItL 23; 2007 1 WLR 1325; **In re B (A child) (Care Proceedings Threshold Criteria)** 2013 UKSC 33: (2013) 1WLR 1911 and most recently and comprehensively **McGraddie v McGarddie** (2013) UKSC 58; [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include:

i) The expertise of a trial judge is in determine what facts are relevant to the legal issues to be decided, and what these facts are if they are disputed.

ii) The trial is not a dress rehearsal. It is the first and last night of the show.

iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellant court and will seldom lead to a different outcome in an individual case.

iv) In making his decision the trial judge will have regard to the whole of the sea of evidence presented to him, whereas on appellate court will only be island hopping.

v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

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[18] 2021 UKPC 1.

[19] [2014] EWCA Civ 5.

vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

[67] An appellate court would be compelled to interfere with a trial judge's finding of fact where there is no evidential basis to support the findings of the trial judge.

[68] As indicated earlier, Mr. Molyneaux was kept in several cells during the Confinement Period. The evidence shows that while Mr. Molyneaux was kept in cells other than in the juvenile cell, Mr. Molyneaux was able to interact with other inmates in the playing of games such as cards and dominos. He enjoyed television time in the hall with other prisoners. Television time was often between two -two and one-half hours. In my view in those circumstances, Mr. Molyneaux was not removed from association with other prisoners during those times within the meaning of rule 26. I agree that there was a sufficient evidential basis for the learned judge to find that Mr. Molyneaux was not removed from association pursuant to rule 26 and as such, the appellate court is not so compelled to interfere. However, when Mr. Molyneaux was in the juvenile cell, he was not able to associate with other prisoners. Further, he was not to be permitted to engage in purposeful activity with other prisoners as required by rules 17, 18 and 19 of the **Prison Rules**. Prior to his confinement, Mr. Molyneaux was actively engaged in making wooden craft at the Prison, even teaching other prisoners the art of doing so. This is borne out in the evidence of Senior Officer Oswald West and Superintendent Kirwan whose evidence was that he was confined to his cell, save for the 1 hour allotted for his recreation, left only to speak to officers using the nearby walkway. The learned judge in his finding at paragraph 24 did indicated that association depended on which cell Mr. Molyneaux was kept. No approval having been given for Mr. Molyneaux to be removed from association, his removal from association with other prisoners while in the juvenile cell, was contrary to rule 26 and therefore unlawful.

Issue (iii)

Whether The Learned Judge erred in not granting any declarations or awarding damages to Mr. Molyneaux.

[69] Mr. Molyneaux contends that the learned judge having found that confinement in a cell in excess of 22 hours per day amounted to cellular confinement, the learned judge erred in failing to make the declarations sought and to award him damages, he having suffered from hypertension and arthritis as a result of his cellular confinement. Mr. Molyneaux also submitted that his sentence should be reduced. He relied on paragraphs 76 and 77 of the Privy Council's decision in **Thomas and Haniff Hilaire v Ciprani Baptiste**[20] which state:

> "76. The result of the decision of the Court of Appeal is that in law and in fact a condemned man has no effective remedy for a complete or virtually complete denial of his rights to take exercise for one hour daily. The relevant provision in the Prison Rules is plainly motivated by a desire to protect health and welfare standards of condemned men. It was not included in the rules so that the prison authorities could decide whether to obey the rules or not as they preferred. That is exactly what they have done: the approach has been "We are the law here." The time has come to make clear that the law extends even to condemned men. It needs to be demonstrated that unlawful behavior by prison authorities towards condemned men in countries maintaining the death sentence will not be tolerated. Thomas had legal rights under the Prison Rules. By denying Thomas the opportunity to exercise these rights, the prison authorities have subjected Thomas to cruel and unusual treatment. Given that Thomas was subjected to such inhuman treatment over a prolonged period the only effective redness is now to quash the sentence of death. In my judgment the trial judge was right to quash the sentence of death and the Court of Appeal erred in reversing his decision.
>
> 77. In this case Kangaloo J has not made the necessary findings of fact. A possible course is to permit the matter for findings of fact. I do not, however, think this is necessary. The evidence was that all death row prisoners are treated in the same way. The judge did not reject Hilaire's evidence. Indeed, he reminded the authorities that the Prison Rules are there to be obeyed. And it will be recollected that in the case of Thomas, Jamadar J had rejected the evidence of the Acting Commissioner of Police. One can safely assume that during more than three years on death row Hilaire was also deprived of his rights under the Prison Rules in the same way as Thomas."

[70] The above paragraphs are part of the dissenting judgment of Lord Steyn where he was of the view that the conditions under which the appellants were kept amounted to "cruel and unusual treatment" and the appropriate remedy was to quash the sentences of death and substitute a life sentence. However, the majority were of

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[20] [1999] UKPC 13.

the opinion that the appeals should be dismissed but a stay of execution granted until the appellants' petitions before the Inter-American Commission on Human Rights and any ruling of the Commission had been considered by the Authorities.

[71] It is well documented by several expert reports that solitary confinement may cause serious psychological and sometimes physiological ill effects. Research suggests that between one third and as many as 90% of prisons experience adverse symptoms in solitary confinement. Symptoms range from insomnia and confusion to hallucinations and psychosis. Also, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment as Punishment in the General Report of 10th November 2011, emphasised the extremely damaging effect segregation had on the mental health of those concerned.

[72] The learned judge found that Mr. Molyneaux did not suffer from hypertension or arthritis as alleged by Mr. Molyneaux. This finding was based on a certificate of Dr. Lewis. There was no contradictory evidence before the learned judge. There is therefore no basis to interfere with the findings of the learned judge.

[73] The issue of what relief should be granted to a prisoner when there is a breach of the **Prison Rules** was considered by the House of Lords in **R v Deputy Governor of Parkhurst Prison and others, ex parte Hague**[21] and the UK Supreme Court in **Bourgass v Secretary of State for Justice** and **Shahid v Scottish Ministers**. In **Shahid v Scottish Ministers** the court considered the effect of a breach of rule 94 of the Prison and Young Offenders Institution (Scotland) Rules 1994 which provides for removal from association of prisoners in certain circumstances and conditions. Shahid was in segregation for 14 months without authorisation contrary to rule 94. Affirming its decisions in **Hague** and **Bourgass**, that a prisoner has no right to associate while in prison, the court found that rule 94 does not of itself confer an entitlement to the appellant to a remedy in damages in the event of a breach of the rule. In **Hague**, Lord Jauncey stated:

[21] [1991] 3 All ER 733.

> "The rules are regulatory in character, they provide a framework within which the prison regime operates but they are not intended to protect prisoners against loss, injury and damage nor to give them a right of action in respect thereof. I would only add that if a prisoner suffered in health as a result of segregation contrary to the rules he would in all probability have a right of action in negligence against the prison authorities."[22]

[74] The above authorities show that a prisoner does not have a cause of action in damages where there is a breach of the prison rules. His recourse would be a remedy applicable to an administrative action. However, where there is an abuse of power, there would be a cause of action for misfeasance in public office. A person who is lawfully committed to prison is subject to the **Prison Act** and **Prison Rules** and the regimes established under those legislation. They regulate his daily activities. A prisoner is not at liberty to do as he pleases.

[75] It appears from the judgment that Mr. Molyneaux's segregation was due in part to his poor behaviour towards other prisoners and prison officers and his refusal to sign the IEPS compact. There was a misunderstanding on the part of the prison authorities of the effect of the IEPS and its relation to the **Prison Rules**. The Prison Authorities seem to be of the view that with the establishment of the IEPS, the IEPS superseded the **Prison Rules**. Therefore, Mr. Molyneaux having been assessed at basic level, based on the IEPS he was to be given 1 hour for recreation but he was not to be permitted to engage in purposeful activity with other prisoners. This was a misapprehension of the **Prison Rules**. As stated earlier, the **Prison Rules** were not amended by the IEPS and they remained in full effect. There was also evidence from the respondents which was accepted by the learned judge of a genuine desire by the prison authorities to protect inmates and officers having regard to the resources available.

[76] In view of the above circumstances, just satisfaction can be afforded to Mr. Molyneaux by making declaratory orders and an award of costs both in the lower court and in this court. Those costs are assessed summarily in the sum of $3,000.00

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[22] [1991] 3 All ER 733 at p.18.

in the lower court and $2,000.00 in this Court being two thirds of the cost in the lower court, a total of $5,000.00.

Conclusion

[77] The IEPS is merely a tool working in conjunction with the **Prison Act** and the **Prison Rules** to promote rehabilitation amongst the prison population. For such rehabilitation to truly take root, cooperation from those men and women who these schemes intend to serve is required. In view of the reasons stated above, I would allow the appeal in part, and allow the counter appeal and make the following declarations and order:

(1) That the appellant's removal from association during the period in the juvenile cell was contrary to rule 26 and unlawful.

(2) That the appellant was kept in cellular confinement during the period in the juvenile cell contrary to rules 33 and 34 and his confinement was unlawful.

(3) The IEPS was ultra vires the **Prison Rules** insofar as it sought to restrict association with other prisoners to 1 hour for prisoners on the basic level.

(4) Costs to the appellant in the court below and this Court in the total sum of $5,000.00.

I concur.
Margaret Price-Findlay
Justice of Appeal [Ag.]

I concur.
Dexter Theodore, QC
Justice of Appeal [Ag.]

By the Court

EASTERN CARIBBEAN SUPREME COURT
SEAL
COURT OF APPEAL

Chief Registrar