

**R v SECRETARY OF STATE FOR HOME
DEPARTMENT EX PARTE GLEN FIELDING
[1999] EWHC Admin 641 (5th July, 1999)**

IN THE HIGH COURT OF JUSTICE CO/590/98
QUEEN'S BENCH DIVISION
CROWN OFFICE LIST

Royal Courts of Justice
Strand
London WC2A 2LL

Monday 5th July 1999

MR L DANIEL (instructed by Glen Fielding, Liverpool L7 7EL) appeared on behalf of the Applicant.

MR D ELVIN (instructed by the Treasury Solicitor, London SW1H 9JS) appeared on behalf of the Respondent.

J U D G M E N T
(As Approved by the Court.)

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Monday 5th July 1999

JUDGMENT

1. MR JUSTICE LATHAM: In June 1996, the applicant was sentenced to four and a half years imprisonment. He is a practising homosexual who enjoys both active and passive penetrative sex. He is at present at liberty, but on licence. Whilst in Littlehey prison, a prison run by the Prison Service, he asked for, but was refused, condoms. He was informed, in terms to which I shall return in detail later, that to provide him with condoms would be contrary to the policy of the Prison Service. Sometime later, he was moved to

Blakenhurst prison, which is managed by a private company, where he was able to obtain condoms from the prison authorities without difficulty. In these proceedings, he seeks to challenge the policy of the Prison Service as irrational. Despite the fact that the applicant is now at liberty, the respondent does not seek to argue that the applicant has no sufficient interest to maintain these proceedings. It is accepted that, because he is on licence, he remains at risk of being recalled to an institution at which the policy, will, unless altered in the meantime, be applied.

2. In his Form 86A, the applicant describes the policy about which he complains as being expressed in three letters, the first of the 16th August 1995, the second of the 18th April 1997, the third of the 7th July 1997. These documents emerged during correspondence between the applicant's solicitors and, in the first instance Littlehey prison, and subsequently the Prison Service itself during the course of the spring and early summer of 1997.

3. In reply to the applicant's solicitors request to know why he had been refused condoms, Mr Pettit, the relevant Governor of Littlehey prison, replied by letter of the 22nd April 1997 in which he stated that the matter was one for the Senior Medical Officer, to whom he had referred the applicant's request, and enclosed a copy of a memorandum provided for him by Doctor Rupasinghe, the Acting Senior Medical Officer, dated the 18th April 1997.

This read as follows:

"The Prison Service policy is that condoms will not be issued to any prisoner locally or nationally except for the prisoner's (sic) on home leave or discharge.

However, under very rare and exceptional circumstances, the Prison Medical Officer has the discretion to issue condoms to inmates with certain clinical conditions like HIV. Unfortunately in Fielding's case, there is no clinical evidence to justify this."

4. The solicitors persevered, and received a letter from Len Curran, the Policy Advisor on Communicable Diseases and Research Co-ordinating and Planning, dated the 7th July 1997. The relevant parts of this letter read as follows:

"Sex between prisoners is not condoned by the Prison Service but it is recognised that in reality it occurs.

The current policy on the issue of condoms to prison inmates gives to medical officers the freedom to prescribe condoms if, in their clinical judgment, there is a known risk of HIV infection. This is covered in advice given to the prison medical officers in the Dear Doctor Letter (DDL(97)10) again attached."

5. The Dear Doctor Letter is dated the 16th August 1995. It is written by Rosemary Wool, Director of Health Care of the Prison Service, and was written to the Heads of Health Care in all prison service establishments. It reads as follows:

"Transmission of HIV within prisons: the prescribing of condoms

6. I wrote to you on the 18 May 1994 (DDL(94)6) following the first recorded case of sexual transmission of HIV infection from one inmate to another. In that DDL I pointed out that doctors have a duty of care to prescribe as they see fit in order to reduce the risk of infection with unprotected sex. It seems that few of you interpreted this advice as including prescribing of condoms to patients known to be at risk of contracting HIV. Prisoners do not have the opportunity to purchase across the counter medication or devices or dressings and therefore these must be supplied by the prison doctor.

7. The purpose of this DDL is to make it clear that prison doctors are free, in the exercise of their clinical judgment, to prescribe condoms for individual patients. The capacity to prescribe within prisons is indeed likely to reduce the likelihood of a prison doctor being found in breach of his/her duty of care if a prisoner/patient contracts HIV in prison.

8. Legal Advice is that consenting acts between adult prisoners in a prison cell are not automatically unlawful and that a prison cell is in many circumstances capable of being deemed a "private place" under the terms of the 1967 Sexual Offences Act. Even in those circumstances where homosexual behaviour is not lawful (eg if one or both the participants is under the age of 18 years), neither the doctor nor the Prison Service could be liable since the demonstrable intent in making condoms available is to preserve health rather than to encourage homosexuality. The provision of condoms would not

constitute "aiding and abetting". This follows on from the judgment in the case of *Gillick v West Norfolk and Wisbech AHA and Another* (1995).

9. The burden of our legal advice is in fact that there may be a legal risk in not providing condoms in the relevant set of circumstances through a failure in the duty of care. In order to meet this duty, doctors are encouraged to prescribe condoms and lubricants where in their clinical judgment there is a known risk of HIV infection as a result of HIV risk sexual behaviour."

10. Taking these documents together, it is clear that the policy of the Prison Service, as explained to the applicant's solicitors, was that the Prison Service did not wish to be seen in any way to encourage homosexual activity in prison, and that as a result condoms were not made available freely for purchase or otherwise by inmates, but that it was recognised that such activity did occur, which required the Prison Service to take appropriate steps for the protection of the health of the inmates by encouraging prison medical officers to prescribe condoms where they perceived a health risk, particularly a risk of HIV to exist. This view is confirmed by Doctor Longfield, the Director of Health Care of the Prison Service, who in his affidavit of the 26th January 1999 said as follows:

"2. The facts of custody and the need to maintain good order and discipline mean that it would be inappropriate for prisons to take action which might be seen to encourage overt sexual behaviour by prisoners. However, it is recognised that sex in prisons is an occasional reality which carries with it public health risks. Consequently, condoms are made available to prisoners through the Health Care Centre where the doctor can form a judgment about the risks to the prisoner and others and provide prophylactics and advice as appropriate.

3. The Prison Service has always viewed the prescribing of condoms to prisoners from the perspective of protecting public health by preventing the spread of HIV and other communicable diseases amongst prisoners, and to the wider community when prisoners are released.

4. Guidance on the provision of condoms was given to prison doctors in the form of a Dear Doctor Letter (DDL), issued in August 1995. It was believed at the time that the issuing of a DDL was the most appropriate method of promulgating what is, essentially, professional guidance to Prison doctors. The guidance contained in the DDL applies equally to all prisons regardless of whether they are publicly or privately run establishments. The letter encourages prison doctors to prescribe condoms for individual prisoners if, in their clinical judgment, there is a known risk of HIV infection as a result of unsafe sexual behaviour. This was intended to include not only

cases where one (or both) of the prisoners was known to have HIV but also any prisoner (original emphasis) taking part in unsafe sex. This guidance has become the de facto Prison Service policy and is generally referred to as such."

11. But Doctor Longfield's affidavit goes on to accept that there have been problems about ensuring consistency of approach across the Prison Service, and in particular across the whole spectrum of prisons, both those run by the Prison Service, and those run privately. He further accepts that the memorandum from Doctor Rupasinghe would appear to be an example of the way in which the policy may have been misinterpreted. It is clear to me from the tone of his memorandum that Doctor Rupasinghe was applying the policy in a significantly more restrictive way than a fair reading of the Dear Doctor Letter justified. Indeed therein may lie the real vice in the present case.

12. However, Mr Daniel on behalf of the Applicant argues that this case is not simply about the misapplication of a lawful policy. He asserts that the policy, as acknowledged by Doctor Longfield, is irrational. His argument is simple and straightforward. He says that it is accepted by all responsible medical authorities that unprotected penetrative sex carries with it the risk of HIV. There is no way of determining at any one time, save in a wholly stable sexual relationship between those who can be shown not to be carrying HIV, whether one or other party to the intercourse may not be carrying HIV and therefore capable of transmitting it to the other. It follows that if a homosexual prison inmate presents himself to the authorities requesting condoms, the only inference that can be properly be drawn is that he is intending to have penetrative sex, which will by definition carry with it the risk of the spread of HIV and that therefore no question of the clinical judgment of a doctor arises. The exercise of discretion explicit in the Dear Doctor Letter is therefore either a fiction, or an unjustified interference with a homosexual's ability to obtain the means to ensure safe sex.

13. As far as the latter argument is concerned, Mr Daniel bases it upon the proposition that any interference with an inmate's ability to have safe sex is an interference with his right under Article 8(1) of the European Convention on Human Rights to respect for his private life. Mr Daniel acknowledges that he

is not yet entitled to rely directly upon the convention. But nonetheless he argues that the fact that the applicant is entitled to respect under the Convention for his sexual orientation, and its practical consequences, is a material matter in determining the extent to which it could be said to be rational to interfere to any extent with that right. I accept that in principle. It should, however, be noted that the right which the applicant asserts is as to his ability to express his sexuality by way of penetrative sex safely. Unlike the majority of those who lose their liberty, imprisonment does not prevent him from expressing his sexuality at all. This underlines that which seems to me to be at the root of this case. The issue, as Doctor Longfield sets out clearly in his affidavit, is how best to protect the health of prisoners, and the population at large, from the spread of HIV and other communicable diseases, in the context of the particular security, welfare and policy considerations applicable to prisons.

14. There is an attractive simplicity in Mr Daniel's argument, namely that a homosexual who asks for condoms is asserting that he intends to engage in unsafe sex as to which the only prophylactic is a condom, which he should therefore be given without there being any question of clinical judgment or discretion. However, I consider that the Prison Service is entitled to take the view that it should not be seen to encourage homosexual activity in prison. That might be the message which would be given to the prison population, and the public at large, if condoms were available on demand. That is a matter of judgment for the Prison Service. Further, condoms have uses other than those for which they were designed; it seems to me to be reasonable for the Prison Service to consider it necessary for that reason that some control should be exercised. Given that the view that has been taken is not irrational, the question is whether or not the mechanism which has been chosen to control the supply of condoms is itself irrational. I have already indicated that it seems to me that the real issue is one of health, as identified by Doctor Longfield. In these circumstances, it does not seem to me to be irrational to leave the decision to the prison medical officer. He is the one who can judge whether or not a request for a condom is made for genuine health reasons.

This may require investigation, which is more appropriately carried out by a doctor. The mere fact that a person asserts that he wants a condom does not mean that he is a genuine homosexual, nor does it mean that he is necessarily intending to engage in penetrative or other dangerous sexual activity, nor does it necessarily mean that he is in truth a consenting party to whatever activity is anticipated.

15. For these reasons, it seems to me that the policy is lawful. In the result, it seems to me that whenever a prison medical officer is satisfied that a request for condoms is from a genuine homosexual who is intent on indulging in what would otherwise be unsafe sex, he should prescribe condoms. I would like to think that so long as the Prison Service continues to take the view that there should be the control inherent in the policy, the policy itself might be reformulated so as to make clear what the limits of the prison medical officers discretion should be, so as to avoid the sort of misunderstanding or misinterpretation which is clearly evident in Doctor Rupasinghe's memorandum. It follows that, although the particular decision to refuse to supply condoms about which the applicant complains was wrong, it was wrong because the policy was misinterpreted, not because the policy itself was unlawful. This application is refused.

16. MR ELVIN: My Lord, I am obliged. The Home Secretary does not seek its costs.

MR JUSTICE LATHAM: Yes, Mr Daniel.

17. MR DANIEL: My Lord, I have two short applications. The first, my Lord, and without being wishing to be disrespectful, is to ask with respect for relief in reality to Dr Rupasinghe's letter.

18. MR JUSTICE LATHAM: No, Mr Daniel. I made it plain that I was not giving any relief at all.

19. MR DANIEL: So be it. My Lord, the second application which hopefully may be longer than the first is an application for leave in relation to this

matter. My Lord, might I hand up very quickly the practice note which arose from the case of Smith v. Cosworth Casting Processes Ltd [1997] 1 W.L.R. 1538 (same handed up to judge).

20. Lord Woolf gives some guidance as to the Court of Appeal granting leave to appeal in relation to certain cases. In particular at paragraph 2 on the first page he says:

"The court can grant the application even if it is not so satisfied."

21. That is in respect to paragraph 1 as to the merits:

"There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by the court or, to be more specific, this Court may take the view that the case raises an issue where the law requires clarifying."

22. In my submission this case falls within the former of the two limbs, i.e. a case where it is in the public interest for the matter to proceed to the Court of Appeal for the Court's consideration, and it is on that basis, for the reasons that I have given in my submissions, that this matter, really as a matter of public interest, should proceed to the Court of Appeal for their consideration.

23. MR JUSTICE LATHAM: Thank you, Mr Daniel. No, permission to appeal is refused. It does not seem to me to be a case which justifies an appeal. If the Court of Appeal disagrees then it can say so.

24. MR DANIEL: My Lord, yes. My final point is to ask for legal aid taxation.

MR JUSTICE LATHAM: Yes.