Neutral Citation Number: [2011] EWHC 3379 (QB)

Case No: HQ08X00843

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2011

Before :

MR JUSTICE HICKINBOTTOM

- -

Between:

(1) DESMOND GRANT
(2) ROGER CHARLES GLEAVES

Claimants

- and -

THE MINISTRY OF JUSTICE

Defendant

- -
- -

Hugh Southey QC and Nick Armstrong (instructed by **Scott-Moncrieff & Associates LLP**) for **Desmond Grant**
Roger Charles Gleaves acting in person
James Eadie QC and David Pievsky (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 17, 18, 21, 22, 23, 24, 25, 28 and 29 November 2011

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Approved Judgment

MR JUSTICE HICKINBOTTOM :

Introduction

1. HMP Albany is a closed prison, for which the Defendant is responsible by virtue of the Prison Act 1952. Most of the prisoners there are category B sex offenders accommodated in single cells in five four-storey wings, each landing accommodating 24 prisoners. There is no in-cell sanitation. Each landing has a recess area, with toilets and washing facilities; and other areas of the prison (such as the workshop area and gym) have their own toilets.

2. However, there are times when prisoners are confined to their cells. For about 13 hours every evening/night, they are all so confined and they do not have free access to a toilet; although, during this period, each cell door has an electronic unlocking system which, when working properly, enables one prisoner per self-contained landing out of his cell at any time to use the facilities. That electronic system may involve queuing; and, for one reason or another, the system sometimes fails. Prisoners are also locked in their cells at lunchtime and other periods of the day, and may be locked in if they do not work or on the occurrence of certain events (e.g. when a workshop is closed or due to staff shortages). During some of these daytime periods of lock in, a prisoner who wishes to use the toilet is able to contact a prison officer in the wing control room and ask for his cell door to be manually unlocked to enable him to do so. It is in dispute as to how effective that system is. In any event, at other times (e.g. at lunchtime), there is no such facility.

3. Although there is substantial dispute as to how often this occurs, it is not contentious that, in the regime I have described, a prisoner who wishes to go to the toilet may be locked in his cell and be unable to obtain prompt release to use the facilities in the recess. For that contingency, in each cell there is a plastic bucket with a lid, into which he is able to urinate or defecate. In each recess area there is a sluice into which he can empty the bucket, and where he can clean it, when he next has an opportunity to leave his cell. This known as "slopping out".

The Claims in Brief

4. Save for a 3 month period in 2007 (when he was at another prison), Desmond Grant was detained in HMP Albany from July 2004 to May 2011, and Roger Gleaves from January 2004 to January 2006. They each claim that, in detaining them in conditions such as pertained at HMP Albany whilst they were there, the Defendant breached their human rights under Articles 3 and 8 of the European Convention on Human Rights. They claim a declaration that their human rights have been breached. Mr Grant also claims damages. Mr Gleaves dropped his claim for damages during the course of the trial.

5. Article 3, headed "Prohibition of Torture", provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

In this case, the Claimants do not suggest that their treatment in prison was either torture or inhuman; but they do submit that it was "degrading treatment" within Article 3.

6. Article 8, "Right to Respect for Private and Family Life", provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Claimants contend that the conditions in the prison breached their right to respect for their private life.

7. The Claimants allege there are five grounds upon which the prison conditions at HMP Albany violated their human rights, as follows, the focus being on the sanitation regime to which I have referred.

8. Ground 1: In respect of Article 3, any requirement for a prisoner to urinate or defecate into a bucket is humiliating; and is, necessarily and of itself, degrading and a violation of Article 3.

9. Ground 2: Mr Grant claims that the fact that his cell space was less than the Council of Europe recommendation of 6m² was in itself a violation of Article 3.

10. Ground 3: As an alternative to Ground 1, it is submitted by both Claimants that the requirement to use and thereafter slop out a bucket is degrading for the purposes of Article 3, when considered in the context of all of the conditions at HMP Albany, particularly the allegedly inadequate space, light and ventilation in each cell.

11. Ground 4: In respect of Article 8, the primary submission is that the requirement to use and slop out a bucket in the circumstances at HMP Albany fails to respect the human dignity of the Claimants, and hence their right to respect for their private life in the terms of Article 8 was breached.

12. Ground 5: However, even if the Article 8 rights of the Claimants themselves were not directly breached, in the alternative they submit that there was an unacceptable risk that the sanitation arrangements at HMP Albany would breach of their Article 3 and Article 8 rights; and that risk was itself amounted to a breach of their Article 8 rights.

13. Mr Grant and Mr Gleaves are the only two claimants before me. However, there are approximately 360 other prisoners and ex-prisoners who make similar claims in respect of the conditions at HMP Albany, and others who make similar claims in respect of the other eight prisons in England & Wales that have accommodation without in-cell sanitation. Given the number of claims, on 24 June 2008 Master

Miller gave directions for the selection of four lead cases to illustrate the issues involved in the cohort as a whole, and four claims were duly selected including those of Mr Grant and Mr Gleaves. By a further Order of 27 November 2008, one of the selected cases having discontinued, it was replaced. Shortly before trial, one of the four proceeding lead cases was discontinued, and another was struck out for want of prosecution. That left the lead claims of Mr Grant and Mr Gleaves.

14. At trial, Mr Grant was represented by Hugh Southey QC and Nick Armstrong of Counsel, and the Defendant by James Eadie QC and David Pievsky of Counsel. Mr Gleaves was, by trial, acting in person. In addition to the submissions made at the hearing, further written submissions were made in the case of Mr Grant, concluding with those of Mr Southey and Mr Armstrong dated 13 December 2011.

15. I heard evidence from both Claimants, and a number of prison officers and others involved in the management of the prison estate generally and of HMP Albany in particular, including those involved in the medical and religious affairs of the prison. I also received a very substantial amount of expert evidence: the Claimants calling Alan Hawes (environmental health), Professor Michael Corcoran (lighting and ventilation), Professor Thomas Markus (purportedly "legal and constitutional issues", but in reality building design and regulation) and Professor Canter (environmental psychology); and the Defendant calling Mel Cairns (environmental health) and Professor David Cooke (clinical psychology).

Convention Rights

16. The European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") was agreed by the Council of Europe on 4 November 1950, and ratified by the United Kingdom in 1951. It came into force on 3 September 1953. By virtue of section 6 of the Human Rights Act 1998, it is unlawful for a public authority in the United Kingdom to act in a way that is incompatible with a Convention right, defined by reference to various Articles in the Convention and its Protocols; and, by sections 7 and 8 of that Act, victims of such unlawful acts have a right to pursue the relevant public authority in the domestic courts for relief including damages.

17. The rights given by the Convention were first spelled out in the Universal Declaration of Rights, declared by the United Nations General Assembly on 10 December 1948, in the aftermath of the Second World War.

18. Respect for human dignity is a value inherent in the Declaration, the very first recital of which recognises "the inherent dignity… of all members of the human family…". Article 1 declares that: "All human beings are born… equal in dignity…".

19. That is reflected in the Convention. It is well-recognised that respect for human dignity and freedom is "the very essence of the Convention" (Pretty v United Kingdom (2002) 35 EHRR 1 at paragraph 65), the Convention translating that value into various specific rights of individuals, particularly Article 2 (which guarantees the right to life), Article 3 (which prohibits torture, and inhuman and degrading treatment), and Article 4 (which prohibits slavery). These rights are particularly precious: they enshrine the most fundamental values of a democratic society, where "the demands of humanity are at their most stringent" ("Human Rights: Judicial

Protection in the United Kingdom", Beatson, Grosz, Hickman, Singh & Palmer (Sweet & Maxwell, 2008), at paragraph 2-12). They are, as such, absolute rights and effectively non-derogable. However, the value of human dignity also finds important expression in Article 8 (which guarantees respect for family and private life), albeit there as a relative right, i.e. a right which can be the proper subject of interference by the state on lawful and necessary grounds.

20. Article 5 renders state detention of a person after conviction lawful and legitimate. Those who are deprived of their liberty in accordance with Article 5 of course do not forfeit the protection of the other fundamental rights and freedoms guaranteed under the Convention; although the manner and extent to which they may enjoy those other rights will inevitably be influenced by the context.

21. I was referred to a great many – I am tempted to say, a plethora – of Strasbourg cases concerning Articles 3 and 8, and particularly cases of applicants whose complaints arose from their treatment in prison. I must in the course of this judgment consider the facts of some of those cases, particularly because Mr Southey criticised authorities from the home jurisdictions of Scotland, Northern Ireland and the Republic of Ireland which have not found breaches of Convention rights in prison cases, for not having properly considered the Strasbourg jurisprudence. However, at this stage I deal with the following matters of general principle derived from those cases, namely (i) the proper approach to Strasbourg jurisprudence (paragraphs 22-29 below) and (ii) the living nature of the Convention (paragraph 30); before turning to some matters of principle arising from Articles 3 and 8 discretely.

The Proper Approach to Strasbourg Jurisprudence

22. First, in considering an issue involving a Convention right, Section 2 of the Human Rights Act 1998 requires a domestic court to "take account of" the judgments of the European Court of Human Rights in Strasbourg ("the Strasbourg court"). On its face, that does not bind a domestic court to follow Strasbourg cases: it is simply an obligation to take them into account, so far as they are relevant. However, because any domestic case might go to Strasbourg where the European Court of Human Rights is likely to follow its own line of authority where that is clear and consistent, it is now well established that, absent special circumstances, a domestic court should itself follow any clear and consistent jurisprudence of the Strasbourg court (see, e.g., R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23 at [26] per Lord Slynn).

23. That reflects the fact that the Convention is an international instrument. It sets international norms of treatment which can never be legally justified, which need to be uniform throughout the states party to it and which cannot be authoritatively expounded by a national court but only by the Strasbourg court (R (Ullah) v Special Adjudicator [2004] UKHL 26 at [20] per Lord Bingham).

24. The fact that the Convention sets international norms does not of course prevent states from providing more generous rights to those living within its jurisdiction. Indeed, in most countries (including the United Kingdom) it is hoped and expected that national prison condition standards will be set a significantly higher level than that required by the Convention, which reflects the minimum standard required by basic human need

and dignity, and that there will be continued efforts to improve the conditions in which people are detained by the state.

25. However, it is vital that such national standards should not be confused or elided with Convention standards; because purporting to interpret Convention rights more generously than Strasbourg would undermine the whole international nature of the Convention. As Lord Bingham put it in Ullah (at [20]):

> "...it is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."

26. The danger of doing otherwise was stressed by Lord Brown in R (Al-Skeini) v Secretary of State for Defence [2007] UKHL 26. In holding that the House of Lords should not construe Article 2 of the Convention (the right to life) "any further than the Strasbourg jurisprudence clearly shows it to reach", of the passage of Lord Bingham in Ullah which I have quoted, he said (at [106]):

> "I would respectfully suggest that last sentence could as well have ended: 'no less, but certainly no more'. There seems to me, indeed, a greater danger in the national court construing the Convention too generously in favour of an applicant than in construing it too narrowly. In the former event the mistake will necessarily stand: the member state cannot itself go to Strasbourg to have it corrected...".

27. Neither does the fact that the Convention sets norms prevent international organisations such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") from striving to improve prison conditions and recommending such improvements. The CPT was set up in 1987 under a Council of Europe Convention (to which the United Kingdom has been a party since 1989), with the following brief (Article 1):

> "The [CPT] shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment."

28. Its role is to advise states and assist them in preventing ill-treatment of prisoners (CPT Standards CPT/Inf/E (2002) 1: Rev 2010, at page 4), which it performs by announced and unannounced visits upon which it reports. All of its reports on visits to the United Kingdom are public. Any perusal of them makes clear that the CPT considers its role to be wide and, in those reports, it not only identifies potential breaches of Article 3 but expresses all kinds of concerns, suggestions and preferences, with a view to improving prison conditions generally. The views of the CPT and other relevant bodies are, understandably, taken into account by the Strasbourg court; but they are

not taken as, neither are they intended to be, determinative of any question as to whether particular treatment is in violation of Article 3: that is a question for the court. Hence, for example, in relation to the CPT recommendation for personal space in a single occupant cell of 7m², the Strasbourg court talked of it merely in terms of "an approximate, desirable guideline", not in terms of a requirement of Article 3 (Malechkov v Bulgaria (2007) Application No 57830/00 at paragraph 137). That approach is typical.

29. Mr Grant makes a discrete claim that his Article 3 rights were violated by virtue only of his cell size being below that recommended by the Council of Europe, namely 6m² (Ground 2). In the commentary to the European Prison Rules 2006 (although not in the Rules themselves), there is a recommendation of 6m². However, clearly, that is not a mandatory requirement. Indeed, Rule 18.3 provides that, "Specific minimum requirements in respect of [floor space] shall be set in National Law". That claim was not actively pressed by Mr Southey at trial; and with good reason. Neither that figure in the European Prison Rules commentary, nor, for that matter, the CPT recommended figure for single cells 7m² (see paragraph 28 above), are mandatory requirements; nor do they purport to set a minimum cell size for Article 3 purposes. The claim based on Ground 2 consequently fails.

The Living Nature of the Convention

30. The Convention is a living instrument, which must be interpreted in the light of current conditions (see, e.g., Tyrer v UK (1978) 2 EHRR 1 at paragraph 31). In Selmouni v France (1999) 29 EHRR 403 (a case concerning the repeated and sustained beating and deliberate humiliation of a prisoner in police detention, found to amount to torture under Article 3), the Strasbourg court referred to "the increasingly high standard being required in the area of the protection of human rights and fundamental liberties…." (paragraph 101); and commentators have identified, with justification, that human rights standards have been the particular subject of evolution and betterment in the field of prison conditions (see, e.g., "Law of the European Convention of Human Rights", by Harris, O'Boyle & Warbrick (2nd Edition, Oxford, 2009) at page 71). Mr Southey accepts that the current sanitation regime at HMP Albany would not possibly have been a breach of Article 3 or Article 8 in the 1950s, when the Convention became effective. But, with the evolution of the relevant human rights standards, he submits that it is a breach now and was a breach at all times material for the Claimants (i.e. since 2004).

Article 3: Introduction

31. Mr Southey made clear that the Article 8 claim was free-standing, and pursued with vigour. However, the Claimants' primary claim is that their treatment in the prison was degrading and consequently a violation of Article 3. In those circumstances, it would be helpful to consider first the scope of, and legal test for, "degrading treatment". I shall do so in two parts: the general Strasbourg jurisprudence on degrading treatment (paragraphs 32-57, and then the Strasbourg cases specifically on the use of buckets as a toilet in a locked cell (paragraphs 58-68). Finally in respect of Article 3, I shall consider the burden and standard of proof in Article 3 claims (paragraphs 69-78.5).

Article 3: "Degrading Treatment"

32. "Degrading treatment" can be defined in terms of "an assault on... a person's dignity and physical integrity", which Article 3 is specifically designed to protect (see Tyrer at paragraph 33).

33. Although it might be said that the use of any unjustified force on a person detained by the state will inevitably lower the victim's human dignity (see, e.g., Ribitsch v Austria (1995) 21 EHRR 573 at paragraph 38, and Selmouni at paragraph 99), the Strasbourg court has consistently looked at physical assaults by agents of the state on the vulnerable in their custody (including prisoners) as a particular category of Article 3 case. This is understandable, given the genesis of Article 3 in the aftermath of the atrocities of the Second World War. There is a well-established line of Strasbourg cases that, unless they are justified, any act of violence or physical force by agents of the state towards a person in state detention, that causes that person any injury, violates Article 3. The burden of showing that injuries obtained whilst in state detention falls upon the state (see paragraph 71 below). The use of force against a prisoner will only be justified if it was made strictly necessary by the conduct of the detainee himself, and it the degree of force used was the minimum possible level. The resulting injuries need not be substantial – they may be "relatively slight" (Tomassi v France (1992) 15 EHRR 1 at paragraph 113; see also Maryin v Russia (2010) Application No 1719/04 at paragraph 39) – but the cases all concern applicants who have suffered some injury.

34. Although hypothetically a prisoner who complains of the use of force against him that causes no injury could prove a violation of Article 3, such force is likely to be considered *de minimis* and a violation not proved, unless the applicant can show other circumstances that caused him humiliation or degradation.

35. In any event, neither of the Claimants suggests that he was subjected to any violence or force in prison, nor does he suggest that he suffered any physical or mental injury or psychological condition as a result of the regime at HMP Albany. I therefore need not consider further the Strasbourg cases involving the use of force. They are of no assistance in the context of the cases before me.

36. In respect of Article 3 generally, "degrading treatment" means treatment "such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical and moral resistance" (Republic of Ireland v United Kingdom (1978) EHRR 25 at paragraph 167, ("Ireland")). It is important to note that "degrading treatment" is defined in terms of its effects on the victim, a point to which I shall return (see paragraph 47 and following below).

37. It has frequently been said that, for treatment to amount to a breach of Article 3, it requires a "minimum level of seriousness" (Gorodnichev v Russia (2007) Application No 52058/99 at paragraph 100) or, more usually, a "minimum level of severity" (see, e.g., Pretty at paragraph 52). This has been described as "in the nature of things, relative" (Selmouni at paragraph 100); but that does not mean that the Article 3 norm for degrading treatment is variable. As Selmouni goes on to explain (in paragraph 100), it simply means that the assessment of the minimum level of severity "… depends on all the circumstances of the case such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age a state of health of the victim etc".

38. Furthermore, in the context of prison conditions, although the court may focus on particular aspects (notably of course those of which specific complaint is made), in considering whether the minimum level of severity is met, it looks at the conditions as a whole and their effect as a whole. That is the consistent approach of the Strasbourg court: to look at all of the relevant circumstances of each case.

39. Those will include the following, which are particularly important in this case: (i) the intention or object of the treatment, (ii) the fact that the victim is in state detention, and (iii) the degree of suffering or humiliation caused to the victim by the treatment. To an extent, of course, those factors overlap; but I can conveniently deal with them in turn. (ii) and (iii) give rise to major issues between the parties.

The intention or object of the treatment

40. Although an intention to degrade is not a prerequisite for a finding of a violation of Article 3, whether there is or is not such an intention is an important factor to be taken into account (Peers v Greece (2001) 33 EHRR 51 at paragraph 74, and Kalashnikov v Russia [2003] 36 EHRR 34 at paragraph 101). The potential importance of the factor is effectively stressed in V v United Kingdom (1999) 30 EHRR 121 at paragraph 71:

> "The question whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account but the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3."

The fact that the victim is in state detention

41. As I have indicated, the Strasbourg jurisprudence makes clear that any particular vulnerability of the victim – because of his age, disability or the fact that he is in the especial control of the state because he is in state detention – is an important factor.

42. However, Mr Southey submitted that there was a general principle relating to prisoners, deriving from the following passage from Kalashnikov. At paragraph 95, the Strasbourg court said:

> "… The suffering and humiliation involved [for there to be a violation of Article 3] must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.
>
> Measures depriving a person of his liberty may often involve such an element. Yet it cannot be said that detention on remand in itself raises an issue under Article 3 of the Convention. Nor can that Article be interpreted as laying down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to obtain specific medical treatment.
>
> Nevertheless, under this provision the State must ensure that a person in detained in conditions which are compatible with respect for human dignity, that *the manner and method of the*

> *execution of the measure do not subject him to distress or hardship of an intensity exceeding that unavoidable level of suffering inherent in detention* and that, given the practical demands of imprisonment, his health and well-being are adequately secured."

I have emphasised the particular passage relied upon by Mr Southey which, typical of the Strasbourg court, is repeated verbatim or in substance in several later cases.

43. Mr Southey submitted that this case founded a new principle, clearly and consistently followed in later cases, that, insofar as treatment and conditions in prison are concerned, anything which is not "inherent" or necessarily part of the prison sentence, that is or might be distressing to a prisoner, is a violation of Article 3. That is because the state is not able properly to impose distress on a prisoner, over and above the distress inherent in the sentence itself. To that extent, he submitted, Kalashnikov lowered the threshold for the minimum level of severity for Article 3 purposes.

44. Boldly as it was put, I cannot accept that submission, for the following reasons.

44.1 The emphasised passage relied upon has to be considered in context. The passage, in my respectful view, is not easy to construe. However, the first part (again, often cited verbatim in other cases) does no more than stress that conviction and punishment inevitably in themselves involve a substantial amount of humiliation and distress, and that has to be ignored in assessing humiliation and distress for Article 3 purposes – because it derives from a purpose legitimised by Article 5. It does not suggest that any humiliation or distress over and above the inevitable level engendered by the prison regime is a necessary violation. Indeed, where the court says shortly before the emphasised passage relied upon by Mr Southey that, "Measures depriving a person of his liberty may often involve such an element", that appears to mean that detention often does involve an element of suffering and humiliation beyond that inevitably connected with the particular punishment, but which is not, simply by virtue of that, a breach of Article 3. However, in any event, by the examples given (a prisoner on remand, and a prisoner's additional suffering as a result of an inability to attend a civil hospital in respect of his health needs), it is clear that the court does envisage legitimate conditions of detention which impose on a prisoner more than the minimum distress necessitated by the sentence.

44.2 On the basis of Mr Southey's proposition, virtually every aspect of a prisoner's life that might cause a prisoner distress would be a prima facie breach of Article 3, because few are inherent or unavoidable in prison life, and most are capable of causing distress; e.g. eating food in a locked cell because there is no canteen, or (as Mr Eadie posited) sharing (or for some prisoners, not sharing) a cell. Any of those situations might be distressing for a prisoner, and none is inherent in a prison sentence: but it cannot sensibly be said that all are actual or potential breaches of Article 3.

44.3 I disagree that Kalashnikov, and following cases, have "lowered the threshold" for the minimum level of threshold for Article 3.

44.4 First, as Mr Eadie submitted, on the basis of Mr Southey's submission, the minimum level of severity would effectively be replaced by a new test (termed by Mr Southey, "the Kalashnikov approach"): it removes the threshold rather than lowers it.

44.5 But, in any event, the term "lower threshold" for that level of severity in prison cases is at least unhelpful and, in my view, inappropriate. The requirements of Article 3 as a norm must be both consistent and, given the nature of the obligations and rights that arise from it, exacting. As I have explained, although there are references to the minimum level of severity being "relative" in the Strasbourg cases, that simply means that cases are fact specific: it does not mean that the threshold is variable, and the cases generally do not speak of higher or lower or variable thresholds. They speak of cases being dependent upon their own circumstances. Sometimes, in a particular case, a small number of factors (or even one factor) may be of great weight or even determinative in overcoming that threshold. But I do not consider it is helpful to think in terms of the threshold of severity being lowered in such cases. Analytically, in the light of the fundamental nature of Article 3 rights and the state's obligations under that provision, it is better, in my view, to consider the threshold to remain constant and high, with the relevant factors in the assessment (including the fact that the victim is in state detention) being accorded proper weight in assessing whether the threshold has been met. The fact that the victim is in state custody will, of course, often be a factor of very considerable weight, and may, on the facts of a particular case, be a determinative factor. But that is a different thing from treating the threshold of severity as being lowered in prison cases.

44.6 Further, even after Kalashnikov, the Strasbourg cases on prison conditions do not use the analysis suggested by Mr Southey. They continue to speak in terms of whether the minimum level of severity has been proved.

44.7 For example, in Andrei Georgiev v Bulgaria (2007) Application No 61507/00, the prisoner was held below ground in a cell with up to four other prisoners, with whom he shared a lice infested bed-rack, with living area restricted to 1.22-3.04m² each. There was no direct sunlight, and no ventilation save for that which came from a window above the door. There was no in-cell sanitation. As a result of overcrowding, the court accepted that the applicant had "endured some distress and hardship" for his 23 days in detention, but "[did] not find that in the particular circumstances of the… case the treatment complained of went beyond the threshold of severity under Article 3…". In Iorgov v Bulgaria (No 2) (2010) Application No 36295/02, for four years the applicant had a 4.5m² cell with light coming from only an internal corridor and a light bulb by which it was not possible to read or write. He was allowed out three times a day to use the sanitation facilities, and had a bucket in his cell to use as a toilet for the rest of the time. He had very limited exercise, handcuffed; and very limited communication with other prisoners. He was then transferred to a cell with four other prisoners, with better (but unparticularised) access to toilet facilities. Again, the court held that these conditions were compatible with respect for the applicant's dignity.

44.8 In each of those cases, there were many aspects of the prison regime that were not inherent in the sentence imposed. The court made clear that the identification of such excesses is necessary for there to be a violation of Article 3, but never suggests that it is sufficient. In each case, the court considered the whole of the conditions under which the applicant was detained, and their effect upon him. The court's analysis in

these cases is simply not that relied upon by Mr Southey; and the results in the cases are incompatible with his suggested principle.

44.9 Mr Southey also relied upon the recent case of Bădilă v Romania (2011) Application No 31725/04 as illustrating "the Kalashnikov approach", in the context of cell size. That is based upon the conclusion of the court (in paragraph 79), that "the conditions of detention caused [the applicant] suffering that exceeded the unavoidable level of suffering inherent in detention, and that attained the threshold of degrading treatment proscribed by Article 3". The applicant was detained for 7 years in a number of institutions including a prison hospital. In one (Giurgui Prison), he was in an overcrowded multiple-occupation cell, which gave each prisoner less than 3m² personal space with the result that the applicant was deprived of the possibility of maintaining adequate personal hygiene. A violation of Article 3 was found on that basis.

44.10 Mr Southey submitted that this case showed (i) that the threshold for an Article 3 violation is low in a prison context, and (ii), following Kalashnikov, the court found that the applicant's suffering as a result of the lack of space was itself sufficient to found a violation, as it was not an inherent part of the prison regime.

44.11 However, with respect, that is not the purport of the judgment. Kalashnikov is indeed mentioned (in paragraph 78); but simply as an example of a case in which a violation of Article 3 has been found in a case concerning prison conditions, particularly focusing on a lack of space and adequate sanitation. It is not cited as founding any principle. The finding that "the conditions of detention caused [the applicant] suffering that exceeded the unavoidable level of suffering inherent in detention" was, as I have explained, necessary but not sufficient to find a violation of Article 3. Nor does the case refer to a "lower threshold" for Article 3 in a prison context. As other cases to which I have referred, the court considered the conditions of the applicant's detention as a whole, finding that they amounted to a breach of Article 3. Given the court's finding that there was no possibility of the applicant maintaining adequate personal hygiene in all the circumstances of the detention (including, of course, the limited personal space he had), that conclusion may not have been difficult to draw. But it was simply not based upon the principle for which Mr Southey contends.

45. Therefore, I do not consider that Mr Southey's submission is supported by either principle or the Strasbourg jurisprudence. Kalashnikov is not authority for the principle Mr Southey seeks to draw from it; nor do I consider the later authorities even support any such principle, yet alone provide a clear and consistent line of authority for it. Indeed, they are to an extent incompatible with it.

46. The Strasbourg cases consistently adopt the following approach in prison cases. Where treatment or conditions in prison generate more humiliation, distress or other suffering than is inherent in a prison sentence, in order to prove a violation of Article 3, it is necessary for a complainant to show that, in all of the circumstances, the treatment or conditions satisfy the minimum severity test. That test has a high threshold; although the fact that the complainant is vulnerable because in state detention will often be a significant factor so that, even if treatment would not be humiliating if endured outside prison, it may well be found to be humiliating and degrading if suffered in a prison context.

The degree of suffering or humiliation caused to the victim by the treatment

47. Given that "degrading treatment" is defined in terms of effects upon the victim (see paragraph 36 above), it is unsurprising that, despite the test being said to be objective, the focus of many of the Strasbourg cases where "minimum level of severity" is in issue has been upon the actual victim's feelings of fear, anguish and inferiority that have been aroused by the ill-treatment, and the extent to which the treatment has broken their physical and moral resistance.

48. A high level of suffering is usually required, variously put in terms of (e.g.) "…intense suffering …" (Iovchev v Bulgaria (2006) Application No 41211/98, at paragraph 133, "… serious suffering…" (R (Limbuela) v Secretary of State for the Home Department [2005] UKHL 66 at [8] per Lord Bingham, and "… intense physical or mental suffering" (Pretty, at paragraph 52). In other cases, the court has asked whether the treatment "adversely affected his or her personality in a manner compatible with Article 3" (Kalashnikov at paragraph 95).

49. Generally, the Strasbourg court looks for positive evidence of such suffering, e.g. evidence that a medical, psychiatric or psychological condition has resulted from the ill-treatment, or at least contemporaneous complaints about that treatment. However, in some cases, it has been prepared to assume that level of suffering from the treatment or conditions it has found to have taken place. For example, in Filiz Uyen v Turkey (2009) Application 7496/03, the court made the perhaps unsurprising assumption that, where a woman prisoner had been subjected to an intimate gynaecological examination handcuffed to one female security officer and in the presence of three other, male officers, that must have caused the applicant humiliation and distress sufficient for a violation of Article 3.

50. In other, quite rare cases, even where there has been no evidence of the applicant having suffered any distress of other harm as a result of the ill-treatment, the Strasbourg court has found that the victim has suffered extreme humiliation sufficient for a breach of Article 3 because, looked at on an objective basis, his dignity has been diminished to a sufficient degree. Keenan v United Kingdom (2001) 33 EHRR 38 concerned the suicide of a mentally ill young man whilst on segregation punishment in Exeter Prison. It was unclear the extent to which his symptoms of paranoid-type fear, violence and suicidal tendencies before his death stemmed from his underlying chronic mental disorder, and the extent to which they resulted from the conditions of his detention. The Strasbourg court accepted that there were many cases where proof of the actual effect of the victim is a significant consideration in assessing whether a violation of Article 3 has occurred; but it stressed that the relevant test was essentially objective. It said (at paragraph 112):

> "[T]reatment of a mentally ill person may be incompatible with the standards imposed by Article 3 in the protection of fundamental human dignity, even though that person may not be capable of pointing to any specific ill-effects."

Hence, certain treatment by its nature may insult and lower the human dignity of the victim, even where, perhaps as a result of his own vulnerability, he is not properly able to appreciate and/or protect himself effectively from the degradation to which he is subject.

51. Mr Eadie submitted that the test was therefore neither exclusively subjective nor exclusively objective – it has strands of both subjectivity and objectivity – and some of the Strasbourg cases do seem to proceed on that basis. It is certainly not solely a subjective test.

52. In my view, the test with regard to minimum severity is an objective test, to be determined on the basis of all relevant circumstances, including the effects that the treatment or conditions are likely to have upon a person with the attributes of the victim. However, the definition of "degrading treatment" is focused on the effects on the victim; and, as the Strasbourg cases indicate, unless a claimant can show, by direct or inferential evidence, that the ill-treatment in fact caused him serious suffering in terms of (e.g.) physical or psychiatric injury, or psychological harm or particularly serious evidenced distress, it will usually be difficult for him in practice to show that that objective test has been satisfied. (I return to this below, in the context of the burden and standard of proof in Article 3 claim: see paragraphs 74 and following). He may be able to do so if, for example, (i) it can be inferred from the nature of his ill-treatment that he must have suffered distress or anguish of a sufficient level, or (ii) he suffered from a mental condition that meant that he could not fully appreciate his own suffering, or protect himself from it by (e.g.) pursuing a complaints procedure.

53. In this context, the Strasbourg jurisprudence well-recognises that a person subject to detention by the state is in a peculiarly vulnerable position; and, as an alternative to his wider submission in relation to Kalashnikov (dealt with above), Mr Southey submitted, that, for a prisoner, that jurisprudence showed that certain treatment by its very nature, whatever the circumstances, breached Article 3. Apart from unjustified force (dealt with above: see paragraphs 33-4), he relied upon cases involving (i) unjustified handcuffing (Gordnichev at paragraph 101, Filiz Uyen at paragraph 30, and Kashavelov v Bulgaria (2011) Application No 891/05 at paragraph 38); (ii) unjustified strip searching (Frérot v France (2007) Application No 70204/01 at paragraph 47, and Wieser v Austria (2007) Application No 2293/03 at paragraph 39); and (iii) cell size (Bădilă especially at paragraph 72).

54. However, that proposition goes too far. The cases do indeed find that, for a detained person, in certain circumstances it is degrading for him to be subject to unjustified handcuffing or strip searching; but the limitations of these cases must be marked. The handcuffing cases each make clear that handcuffing a prisoner is not in itself a breach of Article 3: the circumstances of the handcuffing have to be taken into account, and it will only be breach of the handcuffing if it is both unjustified and (e.g.) done with force, or in public, or is routine and arbitrary. Similarly, the strip search cases make clear that strip searching of prisoners in itself is unobjectionable in terms of Article 3, except where the particular circumstances of the search make it so; e.g. if it is done with unjustified anal inspection, or with force in the victim's home whilst he is handcuffed, or in front of someone of the opposite sex, or is routine and arbitrary.

55. In relation to cell size, Bădilă again does not assist Mr Southey's submission. He particularly relied upon the passage in paragraph 72 of that case:

> "[I]n previous cases where applicants had at their disposal less than three square meters. The court has found that the overcrowding was so severe as to justify *of itself* a finding of violation of Article 3." (emphasis added)

56. However, it is clear from the judgment of the Strasbourg court that it did not find a violation of Article 3 based solely on that fact that the applicant had only 3m² of personal space. As indicated above (paragraphs 44.9-44.11), the court in fact took into account all the circumstances of the detention, and were particularly moved by their finding that in all of those circumstances it was the impossible for the applicant to maintain adequate hygiene. It may be that, when a prisoner's personal space is less than 3m², then problems of adequate hygiene become all but inevitable; but, contrary to Mr Southey's submission, that case too supports the view that, in all Article 3 cases, the threshold of the necessary severity is required to be met and is high (dealt with above); and, in making the assessment as to whether it is met, the court is required to consider all the relevant circumstances.

57. Therefore, these Strasbourg cases consistently show that in every prison case, other than the unjustified use of force with resulting injury, the assessment of whether a case meets the minimum level of severity requires the treatment or conditions of the prisoner to be considered in full context.

Strasbourg Case Law: Bucket Sanitation and Degrading Treatment

58. Mr Southey submitted that cases in the Strasbourg court concerned with the use of a bucket as a toilet were consistent with what he called the Kalashnikov approach, and showed a clear and consistent line of Strasbourg authority to the effect that requiring a prisoner to use a bucket for such purposes is in itself a violation of Article 3.

59. In support of those submissions, he relied upon a substantial number of Strasbourg cases involving the use of a bucket in the presence of other prisoners and in a solitary cell. In relation to the former, the main cases to which I was referred were as follows: Kehayob v Bulgaria (2005) Application No 41035/98, Cenbauer v Croatia [2007] 44 ECHR 49, Iovchev v Bulgaria (2006) Application No 41211/98, Dobrev v Bulgaria (2006) Application No 55389/00, and Gavazov v Bulgaria (2008) Application No 54659/00. In respect of the use of a bucket in a single cell, I was particularly referred to the following cases: Malechkov v Bulgaria (2007) Application No 57830/00, Onoufriou v Cyprus (2010) Application No 24407/04 and Radkov v Bulgaria (No 2) (2011) ECHR 1832/05. I have considered all of these cases, with care.

60. As I have explained above, the Strasbourg cases generally do not support Mr Southey's propositions. Neither, in my view, do these cases concerning the use of buckets for sanitation purposes.

61. First, although the result of some of them may be consistent with the result that would have been found on the basis of the Kalashnikov approach suggested by Mr Southey, none of them propound that approach. Far from there being a clear and consistent line of Strasbourg authority, none of them suggests that the principle proposed by Mr Southey has ever been applied.

62. Second, in relation to his alternative submission – that any requirement for a prisoner to use a bucket for toilet purposes is necessarily a violation of Article 3, irrespective of the circumstances of the use – Mr Southey relied particularly upon Malechkov. This was a single occupation cell case. At paragraph 140, the court said:

> "In any event and despite being accommodated alone in a cell, subjecting a detainee to the inconvenience of having to relieve himself in a bucket cannot be deemed warranted, except in specific situations where allowing visits to the sanitary facilities would pose concrete and serious security risks (see, *mutatis mutandis*, [Peers at paragraph 75, II v Bulgaria (2005) Application No 44082/98 at paragraph 75, Kalashnikov at paragraph 99 and Kehayov v Russia (2005) Application No 41035/98]. The Government did not invoke any such risks as grounds for the limitation on visits to the toilet by the applicant during the period in question…"

He submits that that passage was followed in Radkov (No 2) (at paragraph 49), evidencing a clear and consistent line of Strasbourg jurisprudence.

63. However, the quotation in Malechkov again has to be seen in context. The conditions in Pazardzhik Prison, where the applicant was held, were very different from HMP Albany. The applicant was effectively in solitary confinement for four months, without exposure to natural light and without any possibility of physical or other out of cell activities. His bedding was dirty and tattered. He was allowed out of his cell for access to sanitation facilities only two or three times a day, for a matter of minutes. Otherwise, he had to use the bucket. Other than these excursions to the toilet outside his cell, his only other exits were occasional, for questioning or to attend court. The Strasbourg court found, not that the use of a bucket was in itself a breach of Article 3, but that "the cumulative effects of the unjustifiably stringent regime" caused distress and hardship that went beyond the threshold of severity for Article 3 purposes (see paragraph 146). On the basis of all of the circumstances of that case, that conclusion is again unsurprising.

64. In Radkov (No 2), the applicant spent 5 years in Lovech Prison. The facts are not entirely clear from the judgment, but it appears that he was initially in a single 4m² cell, but then in a 12.6m² cell shared with other prisoners. They had no sanitation facilities, and each prisoner was allowed to go to the toilet only three times a day, for ten minutes at a time. Otherwise, they had to relieve themselves in a bucket. The domestic court found that there had been a violation of Article 3 during the period the applicant shared a cell; the Strasbourg court, quoting part of the passage from Malechov above, extended that conclusion to the period he had a single cell.

65. Whilst Radkov (No 2) may not be an easy decision to construe, I am very firmly of the view that, even considered with Malechkov, it does not amount to a clear and consistent line of Strasbourg jurisprudence to the effect that required use of a bucket for toilet purposes in a locked cell is, in itself, a violation of Article 3. Indeed, in my judgment, it cannot possibly be construed to do so.

66. Malechkov did not purport to propound a new principle: in the quoted passage, the court purported to follow Strasbourg jurisprudence which generally considered sanitation facilities in the context of the conditions in the prison as a whole. As I have indicated, Malechkov itself followed that line: it did not follow rely upon the proposition that the use of a bucket was sufficient. If the court in Radkov (No 2) considered that it did, it was mistaken. But I do not consider that the court in Radkov (No 2) did seek to rely on any such principle itself. First, it did not have to do so: it

was not simply the sanitation conditions in the relevant prison were poor; and it would have been remarkable if, in finding a violation of Article 3, the Strasbourg court had ignored the clear and consistent approach of its earlier jurisprudence in prison condition cases of considering all of the relevant circumstances. Paragraph 51 of the judgment appears to be written in conventional terms, suggesting that the court in fact did take into account all of the prison conditions (except food, which the domestic court found to be acceptable). Second, Radkov (No 2) was determined by the Fifth Section of the Strasbourg court, the same constitution that determined Iorgov (No 2) (the facts of which are set out in paragraph 44.7 above). Iorgov (No 2) was of course heard after Malechkov. It makes abundantly clear that Malechkov did not formulate the principle contended for by Mr Southey as a principle of Strasbourg law.

67. I do not consider that these cases amount to a clear and consistent line of Strasbourg authority to the effect that required use of a bucket for toilet purposes in a locked cell is, in itself, a violation of Article 3. Indeed, on a fair reading of them, I do not consider that they offer any support for that principle at all. These cases, consistent with the other Strasbourg jurisprudence to which I have referred above, show that, where a prisoner is required to use a bucket as a toilet in a locked cell, in assessing whether there has been a violation of Article 3, a court is required to consider all of the circumstances of the complainant's detention, including the circumstance of his use of the bucket.

68. For those reasons, the Claimants fail in their claim on Ground 1: in respect of Article 3, in my judgment, a requirement for a prisoner to urinate or defecate into a bucket is not, necessarily and of itself, degrading and a violation of Article 3. Whether it is so degrading will depend upon all the circumstances of his case.

Article 3: The Burden and Standard of Proof

69. I do not consider the standard of proof determinative in these claims (see paragraph 228 below); but the issue of the standard of proof on a claimant in an Article 3 claim was argued and, as I know there are other actions following these claims to which it might possibly be relevant, I should set out my views.

70. The Strasbourg court has often said that it will only find a violation of Article 3 if it is satisfied "beyond reasonable doubt" that a breach has occurred (see, e.g., Kashavelov at paragraph 33). However, that has to be seen in the context of the manner in which the Strasbourg court approaches Article 3 cases.

71. First, where a person suffers injuries whilst in the detention of the state, that is treated by as a violation of Article 3, unless the state can provide an adequate explanation for those injuries, i.e. can prove that the use of force was made strictly necessary by the conduct of the detainee himself, and the degree of force used was the minimum possible level (Aksoy v Turkey (1996) 23 EHRR 553 at paragraph 61). In those circumstances, the burden of proof effectively falls upon the respondent state: it must show that the injuries were not caused by an agent of the state, or in all of the circumstances the minimum level of severity for Article 3 is not met. In many cases of ill-treatment or conditions of detention so bad that Article 3 is breached, the victim will have suffered some form of injury, whether it be physical, psychiatric or psychological. In those cases, the burden of proof will effectively be on the state, not the victim.

72. Where the state is required to justify such injuries, the Strasbourg court often talks in terms of such matters having to be "convincingly established". That approach has been adopted in our jurisdiction, for example in relation to the determination of whether there is a medical necessity for compulsory medical treatment that would otherwise amount to a violation of Article 3 (R (N) v M [2002] EWCA Civ 1789). That may possibly impose a standard of proof different from either balance of probabilities or beyond reasonable doubt: but it imposes that standard in circumstances in which the burden falls on a justifying respondent state, not upon a victim. That is not this case.

73. In cases where the burden of proof does not effectively fall on the state, it has been suggested that in Article 3 claims there is no burden of proof: the court will simply examine all of the material before it and come to conclusions on it (e.g. Ireland, a case in which perhaps relevantly both the applicant and the respondent were states, at paragraph 160-1). However, for practical purposes, as accepted by the Mr Southey before me, an individual complainant has the burden of showing that he has suffered the ill-treatment he alleges, and that that amounts to a violation of Article 3.

74. What is the standard of proof which the applicant or claimant has to satisfy? I have already indicated that the Strasbourg court is reluctant to find "degrading treatment" in a case unless an applicant can show that the ill-treatment in fact caused him serious suffering (see paragraph 52 above). In many cases, it has proved difficult to satisfy the court that such harm has been suffered.

75. For example, in Kashavelov, a prison conditions case, the court considered that it was bound to treat the applicant's allegations of ill-treatment with "certain caution" because he had not provided any evidence of the conditions (e.g. from other prisoners), nor had he adduced any medical evidence showing the impact of the conditions on his physical and psychological well-being. In Aerts v Belgium (1998) Application No 25357/94, although the court found that the conditions in Lantin Prison "fell below the minimum acceptable from an ethical and humanitarian point of view" such that detention there for any lengthy period carried an inevitable risk of deterioration of any mental condition a prisoner may have had, it refused the application because there was no evidence that the applicant in fact suffered anything more than raised anxiety as a result of those conditions – and therefore "it has not been conclusively established that the applicant suffered treatment that could be classified as inhuman or degrading" (paragraph 66).

76. These cases do not particularly focus on the standard of proof, as we understand it. It was said, by both Mr Southey and Mr Eadie, that, when the Strasbourg court says that it is or is not satisfied "beyond reasonable doubt" that a violation of Article 3 has occurred, it does not appear necessarily to mean the same thing as when that phrase is used in the context of criminal proceedings in our jurisdiction. That seems to me to have some force. Further, as I have indicated, in Aerts, the court said that it had not been "conclusively established" that any harm suffered was serious enough, a phrase which might (but does not necessarily) connote a standard of proof higher than the balance of probabilities. In terms of standard of proof, there is no clear guidance in the cases; other than the indication that victims may not find it easy to overcome the burden that they face.

77. It is now well-established in our jurisprudence that that there are generally only two standards of proof: the civil standard of preponderance of probability, and the criminal standard of proof beyond reasonable doubt (see R (N) v Mental Health Review Tribunal [2005] EWCA Civ 1605 at [60] per Richards LJ, following a review of the relevant authorities). The Claimants claim for violation of Article 3 is made under section 7 of the Human Rights Act 1998 (see paragraph 16 above), which provides that breach of a Convention right is a statutory tort. Leaving aside any guidance there may be from Strasbourg (and there appears to be little or none), where a claimant has the burden of proof under those provisions, the standard would undoubtedly be the balance of probabilities. In my view, there is no justification for any other standard.

78. It may be helpful to make the following points on that conclusion.

78.1 The balance of probabilities is immutable as a standard; but it is flexible in its application. In particular, it "enables proper account to be taken of the seriousness of the allegations to be proved and of the consequences of proving them" (N at [59], per Richards LJ). So, especially cogent evidence will be required to satisfy a mental health tribunal that (on the balance of probabilities) the conditions of continuing detention are met (N at [72]), or a court that sexual abuse has taken place (In re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563, especially at pages 586-7, per Lord Nicholls). A finding that a state has contravened Article 3, which guarantees some of the most vital human rights, is of very substantial seriousness. Particularly given the high Article 3 threshold, a court is likely to require cogent evidence before making such a finding. The comments of the Strasbourg court in cases such as Aerts (paragraph 75 above) appear possibly to reflect that.

78.2 Furthermore, whilst the court is aware of the vulnerability of those in state detention, it must also be sensitive to the possibility that prisoners may make claims out of self-interest; and, whilst the closed nature of their community may make it more difficult for prisoners to obtain evidence of ill-treatment, it also may make it easier for prisoners to manufacture or exaggerate assertions, and particularly of the effects of treatment upon them. That is why, in cases such as Kashavelov (paragraph 75 above), the Strasbourg court has treated a complainant's own evidence with caution and looked for corroborating evidence, in the form of (e.g.) medical evidence, contemporaneous complaints and relevant reports from the CPT and other organisations who inspect and report on prisons.

78.3 As I have said, it is not entirely clear what the Strasbourg court mean by being satisfied "beyond reasonable doubt" or "conclusively established". In our jurisdiction, those phrases are usually used as terms of art to denote a particular standard of proof. There is no reason why, in Strasbourg jurisprudence, they need mean or should mean the same. In my view, they are capable of meaning the civil standard of proof, operated in the flexible way I have indicated; and I see nothing in the Strasbourg jurisprudence that moves me to find that the standard of proof should be anything other than the ordinary civil standard used in that way. I see no reason why those who claim they are victims of Article 3 treatment should be required to satisfy any higher standard of proof than that.

78.4 However, whatever the Strasbourg court means precisely by "beyond reasonable doubt" (and other phrases that it uses) in terms of standards of proof, given the

flexible nature of the application of the civil standard, in practice the same result is likely to be achieved (see N at [71]).

78.5 I note, and take some comfort from, the fact that the same view as to standard of proof on Article 3 claims appears to have been taken by the Inner House of the Court of Session (Napier v The Scottish Ministers (2005) SLT 379).

Article 8: Introduction

79. A breach of Article 8 is proved where a complainant can show an interference with his right to private life, unless the state can show that such interference was in accordance with the law and necessary in a democratic society with reference to one of the considerations set out in Article 8(2) (see paragraph 6 above).

80. The Convention guarantees "respect to private life". It does not guarantee absolute privacy, although privacy is one important aspect of the right, as is human dignity. Where actions of the state (including treatment and conditions in prison) interfere with a person's privacy or dignity such that they adversely affect the physical, psychiatric or psychological well-being of that person, that may constitute an interference with Article 8.

81. I am in no doubt that a prison sanitation regime is capable of such interference. However, Article 8 cannot simply and automatically be invoked in circumstances in which an Article 3 claim fails. Although each right is based upon human dignity, they each have a different focus. It is instructive that, in the Strasbourg Article 3 cases involving prison conditions (including those where the sanitation regime is a major source of complaint), even where those cases have failed, Article 8 has not even invoked.

82. In In re Carson [2005] NIQB 80, a Northern Ireland case involving a complaint about prison conditions and especially the sanitation regime in HM YOC Hydebank, Girvan J (as he then was) put the burden on the complainant thus:

> "For the applicant to succeed in establishing that the Prison Service has breached her Article 8 rights it would have to be demonstrated that the overall system in respect of the imprisonment was such that it could be said that the state had in fact in all the circumstances failed to have respect for her private... life bearing in mind that she was a prisoner lawfully deprived of her liberty.... The prisoner is entitled to expect that there will be in place sufficient and adequate toileting and hygiene facilities to cope with her requirements and if these facilities are not adequate then her private life may well be infringed."

83. It seems to me that that identifies the broad approach, provided that (i) the "overall system" includes consideration of failings of the system in place and their effects, and (ii) there is particular consideration given to the extent complainant's privacy, as well as general dignity, is compromised.

84. Therefore, as with the Article 3 claim (based on Ground 3), the main, direct Article 8 claim (based on Ground 4) requires consideration of all of the circumstances, including the conditions at HMP Albany (especially the sanitation regime) and their effects upon the Claimants. I shall return to the direct claim shortly (see paragraphs 90 and following below).

Article 8: The Indirect Claim

85. However, in addition to the direct Article 8 claim, Mr Southey relied upon what he described as an indirect Article 8 claim (Ground 5). He submitted that, even if the Article 8 rights of the Claimants themselves were not "directly" breached as I have described:

> (i) the sanitation regime at HMP Albany carries an unacceptable risk of both Article 3 and Article 8 being breached;
>
> (ii) following R (Medical Justice) v The Secretary of State for the Home Department [2010] EWHC 1925 (Admin) and R (Suppiah) v The Secretary of State for the Home Department [2011] EWHC 2 (Admin), a system that carries an unacceptable risk of illegality is unlawful as a matter of domestic law; and
>
> (iii) that unlawful system of sanitation at HMP Albany is an interference with the Claimants' Article 8 rights.

86. Mr Southey said that this was a relatively new argument. If the submission were correct, it would have some surprising consequences. It would convert most, if not all, risks of breaches of Article 8 (*quaere* of any other Convention right) into actual breaches of Article 8. Furthermore, as it is reliant upon our own (new) domestic law, it would mean that the scope of Article 8 would be considerably wider in England and Wales than in jurisdictions without the benefit of Medical Justice and Suppiah.

87. However, I do not consider it is correct. As I have indicated, for an Article 8 breach, a complainant must show first an actual interference with his right to family or private life, which then the state can seek to justify by showing that the interference is both in accordance with the law and also necessary in a democratic society. The complainant does not have to show that the matter of which he complains is (domestically) unlawful, nor does it progress his Article 8 claim to do so (although of course it might in due course enable him to defeat a possible defence of justification by the state). Leaving aside the issue in this particular case as to whether the sanitation regime in HMP Albany results in an "unacceptable" risk of a breach of prisoners' human rights, the legal analysis upon which Mr Southey relies lacks the basic building blocks for an Article 8 claim.

88. Further, I agree with Mr Eadie's submission: the outcome of this analysis is neither logical nor defensible. It would equate the risk of an interference with Article 8 rights with an actual interference, thereby effectively eradicating the interference threshold: it would, as Mr Eadie elegantly put it, counter-intuitively trump the fundamental question of whether the applicant's human rights have been violated. It would effectively render Article 8(2) otiose. It would result in differing Article 8 rights in England & Wales from other Convention states. It would not only render wrong

domestic cases from Scotland, Northern Ireland and the Republic of Ireland, but would also be inconsistent with many Strasbourg cases.

89. For those reasons, I do not accept the analysis upon which Ground 5 is founded. The claim on that ground fails.

90. Consequently, I do not consider the Claimant's claims have merit, insofar as they are based upon Ground 1 (see paragraph 68 above), Ground 2 (paragraph 29) or Ground 5 (paragraph 89). That leaves for consideration Grounds 3 and 4, which each require consideration of the prison conditions to which the Claimant's were exposed, and their effects, in the context of Article 3 and Article 8 respectively. I now turn to those.

Prison Conditions at HMP Albany: Introduction

91. HMP Albany is a prison operating in closed conditions with single cellular accommodation. It was built in the 1960s, and opened in 1967 with two additional wings (Wings F and G) being added in 2003. It has a capacity of 567 prisoners, all male.

92. The cells in Wings F and G have integral sanitation, in the form of flushing toilets and sinks, and are designated as Category C (lower security) accommodation. Those cells are not in issue in these proceedings. Wings A to E are designated as Category B (higher security) accommodation. Each wing houses a maximum of 96 prisoners on four landings. Each landing has three accommodation spurs with eight cells, four down each side.

93. On each landing there is a recess area with automatically flushing urinals, toilet cubicles with doors, sinks and a sluice area. Outside the recess, there is a washing-up area, with hot water for making drinks. The prisoners have flasks to take hot water to their cells.

94. All of the cells are single occupancy: there is no sharing. Although some cells are slightly larger, most cells are approximately 5.33m² in floor area. Each cell has a bed down one side wall, a work surface running down the other side, a table, a chair, a stool, shelving and cupboards. There is an opening window opposite the door, and a fluorescent light running across the cell ceiling. Most prisoners have radios in their cells; and those on enhanced status under the incentives and earned privileges ("IEP") scheme also have a television.

The Sanitation Regime: Historic Reports

95. The sanitation regime at HMP Albany, and at other prisons with an electronic cell door locking system, has been the subject of a number of reports, many critical.

96. In 1989, HM Chief Inspector of Prisons ("HMCIP"), Judge Sir Stephen Tumim produced a report with the self-explanatory title, "Prison Sanitation: Proposals for Ending Slopping Out". In it, he reviewed earlier calls for ending the practice of slopping out, going back to the 1950s, and noted that even HM Prison Service found it objectionable. Judge Tumim referred to prisoners, sharing a cell, using the bucket as a toilet and being unable to empty it until the morning, when they would queue

with all other prisoners to do so (paragraphs 1.1 and 1.2). Some prisoners were confined to their cells for the vast majority of the day (up to 23 hours), and were required to use a bucket which they had an opportunity to slop out very infrequently. The bucket was an essential part of the sanitation system, and all prisoners would be forced to use it frequently, on a daily basis.

97. Judge Tumim proposed four possible systems that, in his view, would provide prisoners with acceptable access to a toilet:

(i) open access to out-of-cell sanitation;

(ii) integral sanitation, i.e. each cell having its own toilet and wash basin;

(iii) manual unlocking, where prison staff have physically to unlock a cell when a prisoner wishes to use the toilet; and

(iv) an electronic door locking/unlocking system.

98. Of the electronic system, he said this (at paragraph 2.11):

> "This system is being considered for a number of establishments. It is expensive, at about £5,000 per cell. It can be a useful option in establishments where drainage services are insufficient for integral sanitation, and where the problem cannot be remedied. However, in prisons where it has not been designed into the original structure it has been known to fail. The system may be a useful option for some establishments, but if installed, manual unlocking would have to be available in case of failure. It is our view that under no circumstances should the retention of chamber pots be seen as an acceptable alternative."

99. That report was adopted by Lord Woolf in his 1991 report into the disturbances at HMP Strangeways. He considered the practice of slopping out contributed to the disturbances, and said that it had to end.

100. Those reports were apparently heeded, and, on 12 April 1996, traditional slopping out purportedly ended, with a ceremony at HMP Armley.

101. Of the Tumim Report alternatives, for closed prisons security implications meant that open access was not option, and a manual unlocking system was regarded as unviable because of the numbers of staff that would be required to operate it. In many prisons, in-cell sanitation was also not regarded as financially viable, because the water and sewerage systems were inadequate, and the cell size was too small to allow for integral sanitation except by converting many cells to toilets. An electronic door locking system was consequently regarded as being the only viable option for some closed prisons, including HMP Albany.

102. I deal with the particulars of the system at HMP Albany below. In short, there is an electronic system called "Night San", which is backed up by a manual unlocking

system, which is itself backed up by each cell having a bucket for use in "exceptional circumstances".

103. That system, however, continued to attract adverse comment. Following an announced inspection by HMCIP Dame Anne Owers in June 2002, she reported:

> "The Night Sanitation system arrangement was unsatisfactory in that it imposed a degree of unacceptable and degrading 'slopping out'. The denial of access to a lavatory between 5pm and 8am was unacceptable, especially given an average prisoner age of 47 years and the number of those known to be suffering from medical conditions for which quick access to proper lavatory facilities was essential."

She suggested (at paragraph 3.14) that the regime might be in breach of human rights standards.

104. After her November 2007 inspection, she reported (at paragraph 3 of the introduction, and paragraph 2.10 of the main body of the report respectively) that:

> "If the Night Sanitation system worked, prisoners had very limited access to toilets during periods of lock-up (which could be 14 hours at a time; if the system broke down, they had none. All prisoners were therefore issued with buckets. This is unacceptable in a 21st century prison."

> "... On occasions, the entire system broke down, and when this happened staff were detailed to open cells individually, although prisoners were told to use their buckets, sometimes for prolonged periods."

105. Similarly, the HMCIP report after the October 2010 inspection of HMP Isle of Wight (of which, by then, Albany formed part) said (in its introduction):

> "Accommodation was generally satisfactory, with the glaring exception of Albany's poor functioning automatic Night Sanitation arrangements, which remained unacceptable and degrading";

and further (at paragraph 2.3):

> "A lidded bucket was provided to use as a toilet if there were breakdowns or delays with the system, which was degrading and unacceptable...".

106. The report also criticised the sanitation arrangements during the day (at paragraph 2.3):

> "Arrangements for prisoners locked up during the day to access toilets were poor. Prisoners repeatedly told us that if they requested to be unlocked during the day to use the toilet they were threatened with warnings under the [IEP] scheme."

107. With regard to the night time system, similar concerns have been expressed in HMCIP Reports on prisons other than HMP Albany that have a similar system and in Independent Monitoring Board ("IMB") reports, notably in its August 2010 report, "Slopping out? A Report on the Lack in In-cell Sanitation in Her Majesty's Prisons in England & Wales". In that report, of HMP Albany, it said of the electronic door system:

> "Unfortunately, it regularly fails, leaving inmates having to rely, to a large extent, on mop and slop."

108. Finally, in his Annual Report for 2010-11, the HMCIP said this (at page 32):

> "A number of prisons including Albany... still had electronic Night Sanitation in use. Prisoners complained of long waits to be able to access toilets, and this resulted in urine and faeces being thrown out of windows. The inadequacy of the system was accepted by some prisons with Albany routinely issuing buckets to prisoners. This was effectively a return to slopping out."

109. The Claimants understandably rely heavily upon those reports. Although of course the question of whether the conditions at HMP Albany were degrading for the purposes of Article 3, or otherwise in breach of the Claimants' human rights, is a matter for the court, the observations of HMCIP and the IMB, and the factual basis upon which they are made, following extensive inspections and with their particular experience, are worthy of considerable respect. I shall return to them, once I have considered the specific evidence before me as to those conditions (see paragraph 228 below).

The Prison Service's Response

110. The Prison Service favours in-cell sanitation (Michael Spurr 19 May 2009 Statement, paragraph 8: Mr Spurr is the Chief Operating Officer of the National Offender Management Service Agency); and, for some years, all new build prisons have had cells with integral sanitation. However, because of the difficulties of adaptation, some older prisons, including HMP Albany, still have the Night San system, described below.

111. Following HMCIP's June 2002 Report referred to above, in December 2003 HMP Albany put in a bid to HM Treasury for funding to provide in-cell sanitation in the prison, but that was unsuccessful. The bid for funding for integral sanitation was resubmitted in February 2004, January 2006 and March 2007 without success. The refurbishment of the prison with integral sanitation is not, at present, regarded as financially viable.

112. However, following consultation with the prisoners, in 2003, the Night San system was altered to this extent: two exits per prisoner per night of ten minutes each, were replaced by three exits of nine minutes each; and, in early 2006, the time the Night San system was operational, was extended in the morning from 5.30am to 6.30am. Funding has been made available for the Night San system, for a both a minor

upgrade (February 2008) and a major upgrade (on which work was completed in May 2011).

113. There has been little consideration of replacing the bucket as an in-cell sanitation receptacle. The view has been taken that it is only for extraordinary use, on rare occasions, and to replace it with something that is (e.g.) weight-bearing or even a chemical toilet is both unnecessary and inappropriate, possibly encouraging more than rare use, which the Defendant does not wish to do.

The Parties' Evidence: Introduction

114. I now turn to the parties' evidence as to the prison conditions. I deal with this in four parts. First, I set out the day and night sanitation regime, drawn mainly from the Defendant's evidence (paragraphs 115-148). Second, I deal with conditions at HMP Albany, other than sanitation (paragraphs 149-178). Third, I cover the Claimants' evidence as to the prison conditions encountered (paragraphs 179-196). Finally, I shall set out the main findings of fact, not already drawn, in a concluding section (paragraphs 197-220).

The Day Sanitation Regime

115. When outside their cells, the prisoners have at all material times had full and unrestricted access to toilet facilities, either on their own landing or where they are working or recreating. In addition to the facilities on each landing, there are, for example, toilets in the workshops and gym area. There are five or six showers on the ground floor of each wing, and showers in the prison gym. Prisoners are able to use the showers daily. No criticism is made of the available sanitation facilities when prisoners are out of their cells.

116. The time prisoners spend out of their cells has varied, because of changes in the daily routine from time-to-time. However, the following gives an adequate indication of out of cell time, for the purposes of these claims. Prisoners who are employed or in education (as the Claimants for the most part were) have historically spent 7-11 hours out of their cells per day, although of course the time spent locked in the cell is not continuous, but broken up. In addition to the evening/night, prisoners are confined to their cells for lunch and tea, but are out of their cells for employment, education and gym in the morning and afternoon, and association for four evenings per week. Consequently, the routine currently gives prisoners 9.25 hours out of cell Mondays to Thursdays (but broken up into three separate periods of 4.75, 3.5 and 1.5 hours respectively), 8.4 hours out of cell on a Friday (broken up into two periods of 4.75 and 3.67 hours respectively) and 7.25 hours on Saturday and Sunday (broken up into two periods of 3.75 and 3.5 hours respectively). Before 2009, the periods out of cell appear to have been somewhat more generous during the week. An average of 10.5 hours out of cell was achieved in 2005. HMCIP reports have consistently said that prisoners at HMP Albany spend adequate time out of cell.

117. Some prisoners are locked up during the day; for example, if they are in neither work nor education, they may be locked up whilst others are doing those activities. However, only about 30% of the men do not work or attend education; and, of those, half are over 65 years of age; those who are over 65 years old are not locked up even if they do not work. That means that only a maximum of 10-15 prisoners per wing

are usually locked up during the day. They are let out at lunchtime and for evening association, when they are able to use the external facilities. When they are locked in their cell during the day, they access the recess toilets by using their cell bell, which alerts the duty prison officers. There are three wing officers on duty per wing, as well as a Senior Officer and Principal Officer on duty. During the day, only one officer is required manually to unlock a cell.

118. If a bell rings in the wing control room, the duty officers do not know why it has been rung. An officer has to attend the cell to find out what the prisoner's need might be, and in any event to reset the bell.

119. The officers who gave evidence each said that they would ensure that every call was attended by an officer; and, having got to the cell, if a toilet were required, the officer would open the cell to allow access to the recess. Officers Sharon Drewell, Joe Pullinger and Richard Kent each said that this was part of their general duties, and none had ever refused to allow access to a toilet during the day. Anthony Hayden, the Deputy Governor at HMP Albany until his retirement in April 2008, said that failing to let out a prisoner who required the toilet would be a dereliction of duty and a potential disciplinary matter.

120. When the comment in HMCIP October 2010 Report (that prisoners had said that they had been threatened with IEP warnings if they so much as asked to be released to do to the toilet during the day: quoted in paragraph 106 above) was put to the officers, they each strenuously denied ever behaving in that way, or seeing any other officer do so.

121. The officers denied they would generally be too busy to answer a call: Officer Kent said, compellingly, "A report can wait for 5 minutes. It doesn't take long to let the chap out of his cell to use a toilet: any refusal would need to be accompanied by a 'good reason why'". When there were staff shortages, during a prison officers' strike on 29 August 2007, ad hoc arrangements would be put in place.

122. That was the prison officers' evidence as to the how the system allowing access to the recess toilets by manual unlock operated during the day. However, each of the Claimants had activities during the day, for most of their stay at HMP Albany. Mr Gleaves was on education after an initial three week induction period (see paragraph 190 below). Mr Grant said, in oral evidence for the first time, that his workshop was closed for 2 months per year see paragraph 187.1 below), which surprised Governor Jones. Officer Bird said that, when the workshops were closed, extra periods of association were sometimes organised so that prisoners were not locked up in their cells.

123. There are other times when prisoners are locked in their cells during the day, when staff are unavailable. For example, there are quarterly Governor briefings to staff (which effectively extend the lunchtime lock-up by about half an hour), and Prison Officer Association quarterly meetings (which usually last the afternoon), rare staff strikes (e.g. 29 August 2007) and occasionally when staff are ill or late for work delaying the unlock for (usually) only minutes. However, the officers said that these occasions are generally infrequent, and some (e.g. when staff are late) short in duration.

The Night Sanitation Regime

124. The main period prisoners are locked in their cells is of course during the evening/night. Lock up varies between 5pm and 6.45pm, and unlock between 7.30am and 8.15am. The period of evening/night lock up varies between just over 13 hours and just over 15 hours. At either end, there are periods of staff changeover and roll call, when the men are locked in their cells but the Night San system is not operational: which are 30 minutes and 60 minutes respectively during the week, but up to 90 minutes and 105 minutes respectively at the weekend.

125. For the evening/night lock up period, computer-controlled "Night San" electronic locks to the cells were installed in about 1992. This system operates not only at HMP Albany but a number of other prisons in England & Wales, affecting in total about 2,000 cells.

126. The system enables a prisoner to leave his cell at night to use the toilet facilities. If he wishes to do so, he presses a button on the electronic control panel of the door and, when the light on the panel goes green, he is able to go out and visit the facilities in the landing recess area. The system allows him to leave his cell up to three times per night, for up to nine minutes on each occasion, although the exit provisions have changed from time-to-time: initially, as I have indicated, there were two exits of ten minutes each allowed, and after 2003 three exits of nine minutes each. Sometimes, but not always, the night duty staff give a prisoner a warning at seven minutes that he has only two minutes remaining. On his return to his cell, the prisoner types in a number code that appears on the panel, in order to ensure that his cell is automatically locked. That enables another prisoner to leave his cell and use the facilities.

127. The Night San system is available from lock down in the evening to 6.30am. The system does not allow any prisoner to unlock his cell after 6.15am, to ensure that all prisoners are locked in their cells by 6.30am so that staff changeover and roll call can take place.

128. For safety/security reasons, the system only allows one prisoner per landing out of his cell at any one time. Therefore, if a prisoner presses his button and another prisoner is already out of his cell on the same landing, an amber light is shown on his control panel; and he must wait until that prisoner (and any other prisoners in the queue) returns to his cell.

129. If, after using the sanitation facilities, a prisoner takes longer than the allotted minutes to return to his cell and relock his door, or if he tries to make more than his allotted exits per night, the system will automatically prevent him from leaving his cell again that night. Unless the prisoner has good reason for being out of his cell for more than the allotted minutes, he may also get a "Night San warning" for being out of his cell for too long. That does not automatically attract any sanction, but repeated misuse can lead to a loss of privileges. Some of the officers (e.g. Officer Drewell) said that they would ask a prisoner if there had been a good reason for him being out of his cell for more than the allotted minutes. Others simply indicated there was nothing preventing a prisoner giving a reason, and it would be noted. However, that discipline (of ensuring that men do not abuse the system by spending periods socialising at night is a regarded as a required element, because some prisoners have been known to use the exit system in order to leave their cells for other reasons, e.g. to socialise with

other prisoners. That may mean that other prisoners are denied prompt access to the toilet facilities.

130. If a prisoner has any particular problem at night, he can press either his cell bell (which the Prison Night Patrol Officer will answer), or a bell on the control panel (which puts him through to the wing control room). If a prisoner rings his bell with a view to obtaining a fourth exit, then the officers generally said that they would exercise a discretion as to whether to let them out to go to the toilet or not, dependent upon all of the circumstances, including the apparent state of the prisoner (who they said they may well know), staffing levels and the other tasks they had on. At night, it required two officers to attend to release a prisoner to go to the toilet. Officers generally indicated they might be sceptical if they were told that the prisoner had drunk too much tea or coffee, and would have been more sympathetic to someone who (e.g.) appeared to have diarrhoea.

131. Special arrangements are made for those who have chronic medical needs (e.g. they are given more exits per night), or mobility difficulties (e.g. they are assigned to cells with integral sanitation, or given a commode).

132. In terms of waiting times, the busy period is between 10-11pm, when the queue usually reaches 4-5, or sometimes more if the men have been watching a particular event on the television such as football. After that, the queue is usually no more than 1-2 – and, as the night wears on, there are usually no queues at all, so that a prisoner can usually gain immediate access to the recess toilets if he needs them.

133. The periods of the evening/night when the Night San system is routinely suspended are short. It is suspended for roll call or patrols; but that is done per landing, and the period taken is short: a matter of just a few minutes. Checks on prisoners at particular risk of self-harm are exceptional on routine landings: if someone requires very frequent monitoring, he is moved to a more appropriate location. Self-harming incidents might provoke a lock-down, and the de-activation of the Night San system, but they are rare – perhaps 3-4 times per year.

134. It is not suggested by the Defendant that the Night San system never failed. It clearly did. At times, it has been substantially unreliable.

135. As a result of concerns expressed about the reliability of the system, although faults had always been recorded, on 18 July 2005, Mr Spurr sent a memo to all duty Governors, instructing them to sign the Night San fault log to indicate that they were satisfied that any fault was being appropriately addressed.

136. The failures have varied greatly, in nature and length, from a single cell door not operating to the system failing to work in an entire wing.

137. There was a major failure of the system in C Wing from 18-24 August 2007. A notice was circulated to prisoners on that wing, notifying them of the problem. Extra staff were not immediately called in to assist with manual unlock arrangements during the night because, each day, the prison was assured by contractors that the problem would be fixed. Eventually, extra night staff were brought in. As a result of these problems, Governor Jones introduced a system whereby, each day, the risk of Night San failure

was reviewed and a decision taken as to whether to bring in extra staff (see paragraph 140.5 below).

138. In early 2008, work was done to upgrade the Night San computer, which unfortunately and unexpectedly had a detrimental effect on the stability of the computer system as a whole. In January 2009, for example, there were a recorded 31 wing crashes, 26 perimeter crashes and 8 commander crashes (although most of those were capable of prompt resolution). It took a considerable time to identify the precise cause of those problems; and there were many and regular failures of the Night San system, although most required mere rebooting. In late 2009, an expert report was obtained, which resulted in significant further work being done to the system, which was completed in May 2011. The evidence was that the system has been relatively stable since that work has been done.

139. There has therefore been a history of persistent varied problems with the Night San system. However, the evidence was that most of the problems encountered were disruptive for the prison management and those officers on duty, but had modest significant impact on the prisoners themselves. Where there was a problem with a single door, the prisoner could be and was moved to another cell. Where the system failed more generally, it was usually rectified by a reboot, which would take less than five minutes. Frequent breakdowns occurred that were rectified by a simple reboot, which caused the prison officers considerable extra work and frustration, but did not greatly affect the prisoners. Longer and more extensive problems were rarer. The problems very rarely affected the whole prison. They sometimes affected a whole wing: the August 2007 problems were confined to Wing C.

140. The faults that did occur were logged, and, the Defendant's witnesses said, taken seriously.

140.1 Governor Jones said resolving problems with the Night San system was given "first priority". There was evidence to the same effect from Philip Parkinson (another member of the prison staff at HMP Albany since 2002, at Governor grade since April 2009), and Nigel Twine (HMP Albany Site Manager).

140.2 The first call was to the control room (which could reboot), then calling in the Works Department, and then, if necessary, calling in the external contractors. Many problems, it was said, could be and were resolved quickly, e.g. by moving an individual prisoner affected, or by a reboot.

140.3 When it was clear that there was a serious breakdown that could not be resolved quickly, the prisoners were informed, sometimes in writing, that access to toilet facilities that night might be interfered with. Officer Roy Young described the prisoners' reaction as generally "sympathetic", when such incidents occurred.

140.4 In an April 2006 policy document produced by HMP Albany, it was suggested that, in the event of a system failure, "Each cell should at all times be equipped with a slop pail and lid": and recorded in the minutes of a Prison Officers Association meeting in shortly afterwards (27 July 2006), "In the case of system failure, prisoners would have to use the buckets provided in their cells". Mr Southey submitted, as must be the case, that there was a disincentive to call in extra staff to deal with manual unlocks at night, because that had budgetary implications; and he put to the various officers that,

in reality, if the Night San system failed and could not be rectified promptly, then the prisoners were simply left to use their buckets. However, the prison officers' evidence was that the first line of back up was to bring in extra staff to effect a manual unlocking system.

140.5 It had always been open to the Governor to bring in more staff at night to enable a manual system of door unlocking to operate. After the August 2007 problems, Governor Jones introduced a system whereby a Deputy Governor reviewed the fault log each day at lunchtime, and took a view on whether, given the perceived risk of Night San failure the following night, contingencies should be put in place. Additional staff would be brought in where the system was likely to fail, or if there was a significant risk that it would fail; and, indeed, there was considerable documentary evidence that extra staff were brought in from time-to-time. When they were brought in, an extra two officers per wing were typically employed. They did not of course seek to replicate the Night San system: these additional officers would patrol the landings on a rolling basis, and let out any prisoners who wished to use the toilet. That reduced abuse that is inherent in the Night San system – so the average time spent out of cell was (said Officer Young) "very much down". If there was a breakdown without additional officers being brought in (e.g. because the risk materialised when the system was activated or during the night), then two of the duty officers would patrol the landings and did what they could. Officer Young said that that was effective.

141. However, the Defendant's witnesses accepted that, from time-to-time, a prisoner locked in his cell would need to use the toilet, and for one reason or another would not be unlocked in time for him to do so. In those circumstances, the ultimate back-up are the in-cell facilities.

142. Each cell is provided with a 5 litre bucket with a lid, toilet rolls, a handwash bowl, a 2 litre jug, soap, a toothbrush and toothpaste, deodorant, a towel and air freshener. Prisoners can also purchase a hot water flask, that enables them to take hot water to their cell. They are responsible for cleaning their own cells, and are provided with cleaning materials including disinfectant. On induction to the prison, as part of a two week Preparation for Work course, each prisoner is given instruction on food and personal hygiene, and both how to keep his cell clean and how to use, empty and clean the bucket. That is supported by a booklet which the prisoner keeps for future reference.

143. Once the bucket has been used, it can be emptied in the sluice area at the first opportunity the prisoner has to be released from his cell. At night, that could be by way of a Night San exit.

144. The sluice in the recess area has hot and cold taps, and it flushes like a toilet. Available adjacent to it are cleaning solution and disinfectant, and brushes.

145. Ms Mary Wozencraft is the Cleaning Adviser at HMP Albany. She said that the sluice area was cleaned twice a day, by prisoners under the supervision of a Domestic Officer. Being a prisoner cleaner is a sought after job, because it carries particular responsibilities, is accordingly slightly higher aid than other work and may lead to opportunities for employment upon release. Ms Wozencraft checks that the cleaning takes place as it ought, by monthly unannounced checks and by herself checking the

checklists provided to the Domestic Officer to complete on a daily basis. The HMCIP Reports have consistently reported that the general cleanliness of HMP Albany is good: "Prisoners have the benefit of an exceptionally clean environment... Clean environment was, for inspectors, a first and lasting impression" (2002 Report, paragraph 1.07; reiterated in the 2005 Report, paragraph HP8).

146. In relation to the slopping out procedure, the evidence of the prison officers was that, in the morning, generally no more than 4-5 prisoners per landing slopped out at all, and some of those have used their bucket, not for sanitation purposes, but for washing water or tea slops: Officer Bignell, a wing officer, said that he thought that less than 10% of prisoners used the bucket to urinate or defecate, most regulating themselves so that they did not need to use their bucket regularly. Officer Pullinger, a wing officer, confirmed those numbers – no more than 4-5 prisoners would empty their bucket in the morning – and he said that, when they did so, there was "no rush". There is a 50 minute period between unlock and movement to labour.

147. Officer Pullinger said that he could not recall seeing any prisoner empty faeces out into the sluice, although he was often the duty officer in the landing area in the mornings. However, other officers considered that Mr Grant's claim – that he used the bucket 3-4 times a week to urinate, and once a month to defecate – was not incredible or implausible.

148. Although Ms Wozencraft said, frankly, that some prisoners had said to her they found using a bucket "undignified", there was no evidence of any complaints about the sanitation regime, by the Claimants or indeed any other prisoners. Officer Young (Acting Principal Officer) said that, after Mr Gleaves had made his Article 3 claim, he (Officer Young) prepared a document, "The Albany Electronic Unlock Policy", which was circulated to prisoners. It stated that, if there were any complaints about the system, they should be reported to him. None has been made.

Other prison conditions

Introduction

149. In addition to sanitation, the Claimants criticised the following aspects of their prison conditions: cell size, lighting and ventilation. They did so on two bases. First, they alleged that inadequate space, lighting and ventilation in each itself added to their distress. Second, they alleged that these features of the cell made the sanitation facilities worse, because they made using the bucket and retention of waste in a locked cell more distressing.

Cell size

150. I already dismissed Mr Grant's discrete claim that his cell breached Article 3, simply because it fell below the cell size recommended by the Council of Europe, of 6m² (paragraph 29 above). I do not need to say anything further about that claim.

151. At trial, the Claimants more generally sought to criticise the space in their cells, through the evidence of Professor Thomas Markus, instructed on behalf of Mr Grant. Professor Markus is an architect by background, and is Emeritus Professor of Building Science at the University of Strathclyde. His report focused on various

standards and comparators for cell size. He frankly accepted in cross-examination that the exercise he had conducted did not require any expertise. Mr Eadie consequently, with some force, questioned the purpose and indeed admissibility of this evidence; and also criticised Professor Markus's approach to his task. However, I need not involve myself with those issues; because, in my judgment, the evidence, even if admissible, does not at all assist the Claimants' case.

152. The thrust of Professor Markus's evidence was twofold, namely that the cell size at HMP Albany of 5.33m² was (i) below the relevant domestic standard of 5.5m² and (ii) out of line with other guidelines and recommendations.

153. The first proposition is simply misconceived. No cell size is mandated in the Prison Service Orders. For his figure of 5.5m², Professor Markus relied upon an HM Prison Service Guidance document, "Self-Certification Planning Parameters" (April 1999). On page 4 of annexe A to that document, there are plans for "single occupancy wet cell", with the following rubric in the corner: "min. flr. area existing build 5.5m²". That figure is repeated as the appropriate guideline for single wet cells in the body of the document. That is the derivation of the figure upon which Professor Markus relies.

154. However:

154.1 The fact that the HMP Albany cells might be 0.17m² short of the figure upon which reliance is placed would be immaterial for the purposes of Article 3.

154.2 The figures in that document are not mandatory: they are expressed to be by way of "reference check only".

154.3 In any event, the figure of 5.5m² relates to a "wet cell". That is defined on page 8 of the document, as a cell "with integral sanitation". A cell "without integral sanitation" is defined as a "dry cell". A single occupancy dry cell has a recommended floor area of 4.5m². It is quite clear from reading the guidance document as a whole (and, in any event, agreed between the parties: see paragraph 2 of the Agreed Statement of Facts) that "integral sanitation" means having a flushing toilet and sink. Therefore, on the basis of this guidance, it is the figure of 4.5m² rather than 5.5m² which applies. The HMP Albany cell size is well in excess of that figure.

155. Nor, on a fair reading, do the references to other guidance and recommendations on cell size suggest that 5.33m² is outside the normal range for such a cell.

156. Some recommendations are higher: the American Federal Prison recommendation is reported by Professor Markus as being 5.6m² (although apparently 60% of Federal prisoners have less than the specified minimum areas), and the CPT has recommended a minimum single cell area of 7m². As I have already indicated in relation to Mr Grant's specific claim in relation to it (paragraph 29 above), in the commentary to the European Prison Rules 2006 (although not in the rules themselves), there is a recommendation of 6m² as the minimum for a single cell. However, as Professor Markus fairly remarked, some recommendations and standards are lower than the HMP Albany cell size. For example, he reports (Report, paragraph 4.2): "The Council of Europe notes that 'several (Western) countries' usually aim 'to

allow each prisoner at least 5m²' and in Central and East European countries the standard is 'at least' 3m² - 4m²...".

157. Mr Southey submitted that the size of Mr Grant's cell is reduced by the heating pipe which runs under the window: that effectively reduces the size of the cell, because of the risk of burns. However, leaving aside the point that the pipe runs under the bed and shelf on each side of the room, the areas considered in all of the standards and recommendations are generally of gross floor area, and take account of furniture, fires, pipes etc.

158. Nothing in these guidelines and recommendations suggests that the 5.5m² cell space in HMP Albany is in breach of any national standard – it is well within the national guidance – or that it is significantly out of line with other current national or international guidelines or recommendations.

159. It is noteworthy that, although Mr Grant described his cell as "tiny" and makes a formal claim that any prison cell of less than 6m² is necessarily in violation of Article 3 – and the cells at HMP Albany are of course not large – neither Claimant has ever made, even in these proceedings, any specific substantive criticism or complaint about the size of his cell.

160. It is also noteworthy that, in the Strasbourg cases, prison conditions involving personal space of less than 5m² have consistently been found not to violate Article 3 (Valasinas 2.7-3.2m², Nurmegomedov 3.75m², Cenbauer 2.8m², Alexov 2.98m², Iorgov (No 2) 4.5m²); although of course, as I have stressed, when considered as part of prison conditions as a whole.

161. Mr Southey submitted that the size of the cells make it more difficult to separate activities such as defecation and other activities, increasing the risk of contamination; so that the small size of the room compounded the problems of the sanitation arrangements. I deal with that submission below (paragraphs 206 and following). However, otherwise, I do not consider that the small size of the cell arguably contributes to the Claimant's claim.

Lighting

162. Each cell has a sixteen (4 x 4) pane window, of which the middle four panes open as a single window. In addition to that natural light, there is a strip light just over half a metre long, long running across the cell.

163. The Claimants relied upon the evidence of Professor Michael Corcoran, Emeritus Professor in Building Services Design at the University of Strathclyde. He considered that natural light in a cell is only adequate against the standards in BS 8206 Part 2 (1992) (Lighting for Buildings Part 2: Code of Practice for Day Lighting) for between 5% and 32% of the year. In relation to the available artificial lighting, he valuated that against section 4.3.5 of the CIBSE Lighting Guide LG9 (Lighting for Communal Residential Buildings) (1997), which provides, for study bedrooms:

> "Normally a desk is provided and the average illuminance on it should be at least 150 lux; the illuminance should not fall

> below 100 lux, or half the maximum value whichever is the higher, at any point on the desk."

However, Prof Corcoran considered that a prison cell is more akin to a day room or a lounge than a study bedroom; and, for a lounge, the CIBSE Guide recommends a maintained illuminance level of 200 lux.

164. He considered that that requirement is also found in PSO 1900, "Certified Prisoner Accommodation". Paragraph C1.18 of Appendix 1 to Annexe C of that PSO states :

> "Artificial lighting should produce up to 200 lux at table top level".

165. Prof Corcoran found that the illumination level immediately below the strip light fitting was 200 lux; at the centreline of the cell, 168 lux; at the bedhead, 115 lux; and at the centre of the desktop, 100 lux.

166. Mr Cairns, instructed on behalf of the Defendant, considered the natural lighting level in HMP Albany cells as being adequate. He used traditional tests for natural light, namely that 10% of the floor area should be glazed and it was possible to read by that light. With regard to artificial light, he frankly accepted that he had not conducted an in depth study of the lighting, but he considered it was acceptable and again it enabled reading. He considered the best CIBSE Guide comparator was a study bedroom, the standards for which range between 100-150 lux, which the cell met. Under the light fitting, even the higher standards relied upon by Prof Corcoran (200 lux) were met.

167. In my judgment, it is very clear that light is not a significant issue in this case. No one suggests that it impacts in any way upon the use of the sanitation facilities in the cell. In terms of reading and writing, Mr Gleaves appears to be industrious, but he does not complain about or criticise the lighting in his cell at all, nor does he suggest that it restricts him from doing anything. With regard to Mr Grant, he does not complain about any inability to read, merely saying that, at night, he found it difficult to do his sewing without straining his eyes. The lighting in this case did not arguably contribute to degrading cell conditions.

168. In those circumstances, I can deal with the rival submissions very shortly.

168.1 I consider Mr Cairns' approach to be the more realistic, and the more appropriate. The UN Standard Minimum Requirements for the Treatment of Prisoners, quoted by Prof Corcoran, requires that: "Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight". That was, effectively, the test adopted by Mr Cairns. There is no suggestion that either Claimant (or any other prisoner) has ever suffered any significant eye problems as a result of the cell lighting.

168.2 The domestic requirement for lighting of cells, such as it is, is found in PSO 1900: "Artificial lighting should produce up to 200 lux at table top level". Although the earlier HM Prison Service Guidance, "Prison Designed Briefing System Requirements PF23" (1991) provided (at section 3.00):

> "The light fitting should have fluorescent tubes to produce the standard lighting level of 200 lux, at cell table height"

I cannot agree with Prof Corcoran that, where PSO 1900 refers to "*up to* 200 lux", it means "*at least* 200 lux". As a matter of language, the words cannot have that meaning; and it is inconsistent with Prof Corcoran's interpretation of another document (HM Prison Service Cell Certification Planning Parameters Report: April 1999) that certification requires an illumination of 200 lux directly under the illuminaire. On Prof Corcoran's readings, there was of course 200 lux under the illuminaire, in this case.

168.3 I do not consider it is always helpful to refer to domestic standards in the context of a prison cell. Consideration of whether a prison cell is more akin to a study bedroom or a lounge seems to me rather unreal. However, given that choice, I have no doubt it is more like a study bedroom. The cell complied with the CIBSE Guide recommendations for such a room.

169. It is not suggested that lighting has any significance to the cell sanitation facilities. For the reasons I have given, lighting simply has no relevance to these claims at all.

Ventilation

170. It is common ground that the relevant domestic requirements for the ventilation of a prison cell are found in Paragraphs 19 and 20 of Appendix 1 to Annex C of PSO 1900. Paragraph 19 applies to new build prisons only. It provides as follows:

> "The requirement for ventilation should be:
>
> Cells with mechanical extraction: two changes per hour
>
> Cells with integral sanitation annex: six changes per hour within the annex
>
> Cells with natural ventilation: 16,000mm² of openable area for rapid ventilation, provided in the window; 8,000mm² of permanent openable area for background (trickle) ventilation."

171. Paragraph 20 applies to all cells, and is applied for the purposes of cell certification under section 14 of the Prison Act 1952 and the Prison Rules 1999 (see paragraph 178.2 below). It provides:

> "For certification purposes, the standard of ventilation should be as demanded by Building Regulations, which state:
>
> 'Ventilation is adequate if it restricts the accumulation of
>
> - moisture that could lead to mould growth
> - pollutants that could cause a health hazard'
>
> A visual check can verify this."

172. HMP Albany was not a new build, so only Paragraph 20 applies to its cells.

173. The only express requirement of Paragraph 20 is for ventilation to be such that accumulated moisture and pollutants, which a visual inspection would verify. The reference to "Building Regulations" is unclear. Building Regulations do not apply to prisons. However, in context, it is clear that the Building Regulations cannot have been incorporated by reference, because their requirements are greater than those set out in Paragraph 19 of the PSO for new build prisons. If they were incorporated, that would either render Clause 19 nugatory, or mean that the regulation of ventilation in new build prisons would be less rigorous than in established prisons. Neither of those can be correct.

174. It is not disputed that the ventilation of the HMP Albany cells complies with Paragraph 20: there is no evidence of any accumulation of moisture or pollutants in the cells. Indeed, although there is apparently no trickle ventilation in the cells, the purge ventilation available from the relatively large openable window is far in excess of that required by even Paragraph 19.

175. Both Claimants claim that the smell of urine and faeces permeated their cells, and I shall return to that allegation (see paragraph 210 below). However, on the basis of the expert evidence, any such difficulties did not stem from a lack of ventilation. Neither Claimant suggested there was any other difficulty with ventilation.

176. Consequently, ventilation too is not a significant issue in these claims.

Other Conditions at HMP Albany

177. The Claimants do not complain of any other conditions at HMP Albany.

178. However, in respect of the general conditions of the prison, I should make two points.

178.1 In considering whether there has been a violation of Article 3, the Strasbourg court often looks at the wider prison regime. It is therefore right that I note that the prison has employment for all those who wish to have it, and a gym, fitness suite and a sports field. The Claimants make no criticism of the opportunities provided by the prison, such as those to leave the cell, to take up employment, to learn, to be physically healthy, and to communicate with other prisoners and those outside the prison including families and legal representatives.

178.2 Section 14 of the Prisons Act 1952 requires that:

> "No cell shall be used for the confinement of a prisoner unless it is certified by an inspector that its size, lighting, heating, ventilation and fittings are adequate for health...".

All prisoner accommodation is required to be formally certified as fit for purpose by the NOMS Regional Manager in accordance with Rule 26 of the Prison Rules 1999. Accommodation receives that certification if it is assessed as being in accordance with PSO 1999. HMP Albany has at all times been the subject of that regime. Each month 10% of the cells are checked on a rolling basis generally, but particularly to ensure that they comply with lighting, ventilation and temperature standards.

The Claimants and their Claims

Desmond Grant

179. Desmond Grant was born on 16 November 1981. In January 2002 at the Central Criminal Court, having earlier pleaded guilty to rape and abduction of a woman by force with intent to have unlawful sexual intercourse, he was sentenced to life imprisonment with a minimum term to be served of 4 years 9 months. He was transferred to HMP Albany on 15 July 2004. Save for the period October to December 2007 (when he was in another prison), he remained at HMP Albany until May 2011, when he transferred elsewhere. He was therefore at HMP Albany for about six and a half years in all. Although he did spend some time on other wings, for most of his detention he was in D Wing.

180. I have already dealt with Mr Grant's claim that the provision of a cell smaller than that recommended by the CPT was itself a breach of Article 3 (see paragraph 29 above). His main claim is that the overall prison conditions at HMP Albany were degrading because of the inadequate access to sanitation facilities, and particularly so in his case because inadequate provision was made for his religious obligations. Indeed, the primary basis of his claim as described in his witness statement (26 May 2009 Statement, paragraph 4) was that the sanitation regime at HMP Albany was such that he, as a Muslim, had been unable to carry out his pre-prayer ablutions or break his fast in a clean environment, with the result that he had had to give up his religion in 2008, which he considered discriminatory and found particularly degrading.

181. Mr Grant said that he had converted to Islam before he arrived at HMP Albany, although he did not formally profess his faith by way of the Shahadah until late 2004, and did not register with the prison as a Muslim until 19 July 2005. He did not take part in any of the Islam study sessions with the prison Imam, or any of the weekly communal prayers or other festivals in the prison (save for one Eid feast), or in any of the meetings held in the prison to discuss (e.g.) arrangements for Ramadan. However, he said that, privately, he took the faith very seriously. He prayed five times a day, and fasted during Ramadan. Prior to his prayers, he was required to go through specific ablutions, which he said took 10-15 minutes, so he could not do them within the nine minutes time allowed by the Night San system. Nor, he felt, could he adequately do them in his cell, using the limited washing facilities there. Further, he said that he found it difficult to kneel and prostrate himself in his cell, as he was required to do during his prayers.

182. It was the Defendant's case that Mr Grant was never a serious adherent to Islam. For the following reasons, I agree.

182.1 The prison Imam, Mr Abdul Saboor, gave evidence. If I might respectfully say so, he did so in a modest, dignified and entirely persuasive manner. Mr Saboor has been the prison Imam since April 2005, and was therefore the Imam during the whole of the time Mr Grant was a registered there as a Muslim. I should say that Mr Grant relied upon written evidence of Ahmed Haneef, a Minister of Religion at the Islamic Centre of England (30 March 2010 Statement), which did not appear materially to contradict Mr Saboor's evidence; but, insofar as it did, I would prefer the tested evidence of Mr Saboor.

182.2 Mr Saboor said that most of the prisoners registered as Muslims take their religion seriously, but some do not. Some register as Muslims simply to obtain the better rations of food obtained during Ramadan, and the closing feast of Eid.

182.3 He said that worship in Islam has a wide scope and, although communal prayers are important (particularly the Friday prayers), it is possible to be a Muslim in your heart and mind without any public manifestation. I, of course, accept that. However, in Mr Grant's case, when questioned about the basic tenets of the religion, Mr Grant did not seem to have even a passing knowledge. In his statement, he said that Muslims believed "in one central god and that all men are loved and not alone in the world" (25 May 2009 Statement, paragraph 6): and in his oral evidence he said that he was attracted by the strong discipline of the faith, and the "oneness" and unity of the brotherhood of the religion. He was clearly aware of the necessity for regular prayers and for washing before them. However, in cross-examination, he was unable to refer to any of the central tenets of Islamic belief. Nor did he use any of the terms one would expect an adherent to Islam to use. Further, although I understand that a Muslim can adhere to his faith without any public manifestation, it would be odd for a newly converted committed Muslim not to attend any study group or have any discussion about his faith with the prison Imam. Mr Grant attended only one Eid feast: whilst saying that he could not properly pray in his cell, he never attended communal prayers or any other festivals: he never attended any study group session: and there is no evidence that he ever discussed his religion in HMP Albany with the Imam or other prisoners or anyone else.

182.4 If Mr Grant had had difficulties in performing his prayers, one would have expected him to have complained – if not to the prison, then to the Imam. No written complaint was made to either, about the sanitation facilities generally or about the impact they had on the performance of his religion. Mr Grant said that he raised the issue of difficulties with the timing of his ablutions in a conversation with the Imam, who told him there was nothing that could be done about it. The Imam said he never received any such complaint. Mr Grant said, in terms, that the Imam was lying. I have no hesitation in accepting the evidence of Mr Saboor on that issue.

182.5 In doing so, I take into account Mr Saboor's evidence that ablutions can be performed by a healthy prisoner well within the time allowed by the Night San system; and no other prisoner ever complained about the time that he was given for performing them – or of any difficulties in praying in his cell. Mr Saboor said that, had they done so, he would have spoken to the prison authorities and tried to cater for those concerns. He said, in unchallenged evidence which I accept, that the prison authorities did what they could to enable Muslim prisoners to practise their religion and were generally very helpful in that regard.

182.6 I do not accept Mr Grant's evidence that he raised his difficulties with the Imam, nor do I accept that he did not pursue matters because he felt it would be useless to do so. The later increase in Night San ablution exits from three to six during Ramadan for Muslim prisoners, illustrates that the authorities were sensitive to the needs of practising Muslims, as the Imam confirmed. Furthermore, the Imam said that, had he been asked about ablutions within cell, he could have indicated how those could be accomplished there – he accepted not ideally, but adequately.

182.7 In March and April 2006, when Mr Grant was registered as a Muslim, he appears to have attended meetings organised for pagans. That suggests, at best, perhaps some interest in religious matters rather than the adherence to a faith.

183. For those reasons, I did not find Mr Grant a truthful witness in relation to his own religious adherence.

184. Mr Grant registered with the prison as a pagan on 2 January 2008. In his pleaded case, he asserted that he abandoned Islam because of the difficulties he had had in adhering to it because of the sanitation facilities in the prison. On the evidence, I find, very firmly, that the sanitation regime at HMP Albany did not cause him either to give up Islam or any difficulties in conducting his prayers and other manifestations of that religion.

184.1 I have found, of course, that Mr Grant was not a serious adherent to that faith (paragraphs 182-3 above).

184.2 Mr Grant complained that he could not complete his ablutions within the nine minutes allotted him by the Night San system. However, the Imam said that a healthy man such as Mr Grant could do so, and no other prisoners reported any such difficulties. If minded to, Mr Grant would have been able to complete his religious ablutions within the nine minutes allowed him by the Night San system; and, in any event, he could have adequately performed them in his locked cell, using the washing facilities there.

184.3 Mr Grant also complained about breaking his fast and praying when his bucket had waste in it. However, Mr Saboor said that, whilst no doubt unpleasant, if a Muslim had to break his fast in a locked cell in which there was a bucket containing sanitation waste, that would not compromise his religious integrity. Similarly, if he had to conduct prayers in those circumstances, as long as he had performed the religious ablutions, and the actual area in which he prayed was clean. There is no evidence before me that any Muslim prisoner had any specific difficulties with the sanitation regime in relation to the practising of his religion. The evidence of the Imam, which I accept, was that there was none.

184.4 Mr Grant said he knew of no other prisoner who had given up Islam because of the sanitation system at the prison, nor did he know of any other prisoner who had complained about those conditions as making the practice of his religion more difficult. When consulted about how well Ramadan had gone in 2007, the recorded response of Muslim prisoners at a meeting (which Mr Grant did not attend) was that it had gone well. I do not accept Mr Grant's assertion that the Governor, Chaplain and Imam had effectively conspired to hide the truth that Muslims had difficulties praying during Ramadan because of the conditions in prison.

185. In respect of his use of the bucket as a toilet, in his oral evidence, Mr Grant said that, over the six and half years he was at HMP Albany, on average he used the bucket 3-4 times a week to urinate, and once a month to defecate. He said that "sometimes I have to wait up to two hours before it is my turn" for a Night San exit (25 May 2009 Statement, paragraph 12).

186. However, I did not find that evidence compelling either, for the following reasons.

186.1 In his written statements, Mr Grant did not give any indication as to how often he used the bucket: indeed, he said that he was unable to say and could not recall how often he used the bucket (26 May 2009 Statement, paragraphs 9 and 21).

186.2 His evidence as to the circumstances in which he had to use the bucket at night was inconsistent, and particularly uncompelling. He said that, without any abuse of the system, he would still use up his three night exits before midnight or 1am, because he drank a lot of coffee; and that there were times when he had had to use the bucket to defecate at night even when the Night San system was working. However, in his Response to a Request for Information dated 24 July 2008, he said that he and other prisoners used the bucket, not routinely as he later suggested, but "when there were problems with the system or when the three access times have been used". In examination-in-chief, he confirmed that: he said that he would only have to use the bucket at night if there was a lock down or if something went wrong with the Night San system. He repeated that in cross-examination, at least in respect of defecation; and, in respect of urination, he accepted that, at night, he could regulate himself and, by retaining one of his exits, make sure he would have access to a toilet during the night. As a general proposition, he accepted that, absent a medical condition, most people could regulate themselves "most of the time" without difficulty.

186.3 Insofar as he said that he had to use the bucket at night when there was a breakdown of the system, his Response to a Request for Information dated 1 January 2009 refers to "a time in 2006-7 when the system was turned off" (paragraph 5); and a single occasion when the system was turned off so that he was denied access to the outside facilities "during the course of an evening" (paragraph 8). Although he does elsewhere refer to "a number of occasions where I have had to use the plastic bucket when there has been a problem with the system" (paragraph 10), nothing there suggests regular or routine use of the bucket.

186.4 Mr Grant did not keep any contemporaneous record of the use of the bucket, or the times when he genuinely took more than nine minutes to complete his ablutions. In 2009, he said that he was "in the process of compiling records", which he proposed to serve in due course (26 May 2009 Statement, paragraph 6); but he in fact compiled none, even after that date. In his oral evidence, he explained that, by that statement, he meant he intended to seek prison records. However, he accepted that he never even requested these; and there would have been no need or purpose in serving these on the Defendant from whom (he said) he proposed to obtain them. I am satisfied that the statement meant what it said: that he intended to compile his own record. It is telling that he did not do so.

186.5 From 1-23 May 2007, a period of about 3 weeks, the prison officers on duty at open up in the morning were asked to report if Mr Grant emptied his bucket. There are no reports of any occasion on which he did so. There is a gap in the written record from 10-22 May; which is odd, because Officers Drewell and Pullinger who gave evidence as to those observations said that the officers had been told to observe Mr Grant, and they would each have noted even a negative entry. However, in my view, it is likely that any positive observation would have indeed been noted; but in any event, the entries that are recorded do not suggest anything like the regularity of use of the bucket that Mr Grant suggests. Similarly, it is possible that an observation might have been missed; but, again, given the officers' instructions, that is unlikely. Finally, there is a note that he emptied his bowl (rather than his bucket), once; and he said in his oral

evidence that he used his bowl in which to urinate, because its diameter was larger and it was easier. Whilst using a washing bowl in which to urinate might be further evidence that Mr Grant did not truly hold the Islamic faith, I do not accept either that he found it easier, or that he would urinate in his bowl rather than his bucket by choice, or that he urinated in his bowl on that occasion. I am in no doubt that Mr Grant tailored his evidence in that regard to suit his case, once he became fully aware of the observation record.

186.6 Just as Mr Grant never complained about the sanitation regime adversely affecting his ability properly to conduct his prayers, neither did he ever complain about the use of the bucket, or the sanitation system generally, or any other aspect of his cell conditions he relies upon in this claim. He said that he did not do so because there was no possibility of anything being changed: the problem was that there was no in-cell sanitation, and the prison would not make structural alterations to the fabric of the prison simply because of a complaint by him. However, that does not follow. Mr Grant's complaint was not about the fabric of the prison: it was essentially about the operation of the system. As the Imam's evidence showed, the prison authorities were open to consider changes in that. Mr Gleaves said that some changes had been made as a result of his claim. Mr Grant was not coy about complaining about other matters. I do not accept that he did not complain about the use of a bucket because he did not think that anything would or could be done about it.

186.7 Of course, he could not have legitimately complained of every occasion that the Night San system locking him out as he had spent more than nine minutes out of his cell; because he accepted that 70% of the times he was out of his cell for longer than that there was no genuine toiletry need – he was abusing the system, and spent time when he was out of his cell at night socialising with the other prisoners on his landing. This is a particularly unattractive aspect of Mr Grant's claim. He claims that any use of a bucket for toilet purposes is grossly humiliating and degrading; but he accepts that he abused the system by spending more time out of his cell than was necessary to perform the relevant functions and return to his cell. That must inevitably have meant that other prisoners were not only discomforted but also, on Mr Grant's case, that other prisoners were obliged, more often than would otherwise have been necessary, to have humiliated and degraded themselves by having to use the bucket. In giving his evidence, Mr Grant did not appear to be troubled at all about that.

186.8 In terms of the length of wait for a Night San exit, Mr Grant said in his oral evidence that his reference to a 2 hour wait was when there was a lock down, not when the system was working. He confirmed that, even then, "I do always get out". He said in cross-examination that there were times when it was "a lot longer" than 20-25 minutes. However, that was not his consistent evidence. He said in his Response to a Request for Information dated 1 January 2009, that: "You could be waiting for 20-25 minutes"; and the last time he had had to wait for 25 minutes was on 14 September 2008 (although in his oral evidence he said that that was when the last time when the statement was drafted, not signed).

187. Mr Grant also made the following complaints about the prison conditions:

187.1 He was locked in his cell for the day when he was not working. Although he was employed throughput his stay at HMP Albany, he said that, for about 2 months each

year, he did not work because (e.g.) the workshop was closed because of staff shortages. That increased his usage of the bucket as a toilet.

187.2 When the Night San was not working, extra prison officers were brought in only two or three times during the entire period he was at the prison.

187.3 He accepted that, if he had to defecate at night, if it was working properly, he could use a Night San exit to empty his bucket, so that faeces were not in his room for more than about half an hour. However, he said that there was nevertheless a strong smell of faeces in his cell all the time and, even in the winter, he kept his window open despite the cold because of it.

187.4 He said that the sluice area was very small and got crowded easily. It was, he said, very rarely cleaned, and there was often a lot of mess including faeces around. He said it was disgusting

> "... to be crammed in there with the smell and with everyone emptying their buckets while you were waiting your turn. The smell is so bad that it makes me gag. I have known other prisoners throw up because of the smell..." (25 May 2009 Statement, paragraph 19).

He said that it was "absolute rubbish" to suggest that the sluices were cleaned twice a day, and that Ms Wozencraft was lying when she said that she checked that it was cleaned.

187.5 He never made any formal complaints about the sanitation system at HMP Albany. He said that, when he did mention them to the prison officers, he was told that:

> "... if I did make a complaint I would receive a written warning and would be locked up in my cell" (25 May 2009 Statement, paragraph 20).

187.6 He said there was poor light in his cell at night, which made it difficult for him to sew without straining his eyes.

188. In relation to effects that the conditions had upon him, Mr Grant's pleaded case is that he "suffered distress" (Re-Amended Particulars of Claim, paragraph 11). In his oral evidence, he said that he found use of, and cleaning out his bucket, "extremely unpleasant... It is really not a very nice thing to have to do... You know to squat on a plastic bucket that is very flimsy is quite degrading".

Roger Gleaves

189. Roger Gleaves was born on 5 October 1932. On 31 March 1998 at the Central Criminal Court he was sentenced to 15 years imprisonment for rape, attempted rape, incitement to rape and indecent assault of two young boys.

190. He served his sentence at HMP Albany from 22 January 2004 until 27 January 2006, when he was moved elsewhere. On first arrival, he spent the first three weeks on A Wing, whilst undergoing his induction courses. He said that, during the first week he was in his cell for 20 hours a day, and during the next two weeks for 16 hours a day.

Those courses being completed, he began work and, during the day, he was generally out of his cell for the maximum period the system allowed. He was moved to B Wing after about a month, and spent most of his time at HMP Albany in that wing.

191. With regard to the daytime system, he only complained about the first three weeks he was at HMP Albany. Generally, he said he could control himself, so that he did not need to use the toilet from breakfast until lunch, except if (for example) he was ill. However, during those first three weeks, he said that when he did ask for a manual unlock to enable him to go to the toilet he was refused on most (95%) occasions (Response to Request for Further Information dated 1 January 2009, paragraph 19).

192. In respect of the Night San system, he said that he had to use it at least once a night. He said that there was no problem if the system was working properly. He never took more than his allotted nine minutes. The only problems he had were when the system failed – he said that, during his two year stay, he was not allowed out for about 12 nights spread over 3-4 periods as a result of such failures (14 May 2009 Statement, paragraph 8) – or if he was ill. He said that, although he found the prison officers generally reasonable and not disrespectful, even if a prisoner had diarrhoea, the officers would not let a prisoner out more than three times, unless there was a medical note. If he had diarrhoea for one night, Mr Gleaves did not consider it worthwhile going to the medical staff – but, if he were ill for longer, he would go to them and they would give him medication, and the night duty officers would be alerted that he was ill and would give him the exits he required. He said that the main cause of illness was spiked food prepared by prisoners at another prison, an issue which was resolved.

193. In terms of waiting times for a Night San unlock, he said that it was always 30 minutes, and up to 60 minutes (14 May 2009 Statement, paragraph 16). However, in his Response to Request for Further Information dated 9 January 2009, he said the waiting time was between 5 and 45 minutes (paragraph 24).

194. Mr Gleaves made no contemporaneous written complaints, about the sanitation system, light, ventilation or the cell size. He said he made verbal complaints to the officers, particularly about their failure manually to unlock his door to allow him to use the toilet in his first three weeks. He said he thought there was no point in complaining, because (i) the system was the system, and it would not be changed by his complaints, and (ii) he did not wish to "rattle the cage" about it, when "he had other things on his mind". However, he made a written complaint about other matters at the rate of approximately one every two days, throughout the period of his stay at HMP Albany; had judicially reviewed the Prison Service before; and said that he was made a vexatious litigant in 1985 because he kept issuing and pursuing claims in respect of complaints about the prison in which he was then resident. He accepted that, in his level of complaints, he was a "pest and a nuisance". However, he said had not thought that he had any legal grounds upon which to complain until in Napier v The Scottish Ministers [2004] Scot CS 100 in which the Outer House of the Court of Session in Scotland found that a prisoner's Article 3 rights were violated by the prison conditions in HMP Barlinnie Prison, awarding him £2,450. Mr Gleaves obtained a copy of the opinion of the Lord Ordinary (Lord Bonomy) shortly after it was delivered in April 2004 and that, said Mr Gleaves, "started him off". He said that it alerted him to the possibility of getting some cash: and getting cash was the purpose of bringing the claim. A declaration of violation was apparently an afterthought. He

made no complaints about the conditions at HMP Albany, even after he had seen Napier. He launched proceedings the day after he left HMP Albany.

195. Otherwise, Mr Gleaves made the following further complaints.

195.1 Although he only used the bucket to defecate in those infrequent circumstances to which I have referred, Mr Gleaves said that said that the smell of faeces would sometimes drift in from other cells.

195.2 The sluice area was "very smelly and thoroughly unpleasant" (Statement, paragraph 18). Although he accepted that the smells could have come from the toilet area, rather than the sluice, he thought that that was unlikely.

196. In terms of effects, Mr Gleaves alleges that he "experienced high levels of distress as a result of the lack of sanitary facilities..." (Amended Particulars of Claim, paragraph 6(e)).

The Claims: Findings

197. In respect of the conditions at HMP Albany during the period the Claimants were there, I make the following findings, over and above the findings made above.

198. The sanitation facilities at HMP Albany are more than adequate, during the day, for men whilst out of their cells. The Claimants do not contend otherwise.

199. They are also adequate during the day when prisoners are locked up. For those who are employed or in education, the periods in cell are relatively short, and the prisoners know in advance when the regular period of lock up will occur. They are generally able to regulate themselves so that they have no need to use the toilet during those periods, except in quite exceptional circumstances, e.g. when they are suddenly struck by a virulent illness. The same is generally true for those prisoners who are locked up for longer, because they do not work or because there are staff meetings or shortages, although it is possible that a prisoner may need to urinate during these longer periods. Whilst I accept the evidence of the officers that, when staff are available, they would release a prisoner during the day to go to the toilet, I also accept that there will be times when staff will not be available to release them. There is no evidence in support of the suggestion in the HMCIP Report that officers threatened prisoners with sanctions if they even asked to be released during the day: on the evidence before me, I find that no such threats were made, and that the reference by HMCIP was mere reportage from prisoners. However, for the reasons I have given, it is possible that a prisoner would need to use the bucket to urinate if locked up during the day, albeit not routinely.

200. In respect of Mr Grant, I do not accept that he did not work (and was therefore confined to his cell for longer during the day) for as much as 2 months of the year; but I do accept that there were times when his workshop would be closed, and other arrangements (such as association) would not be made. However, he did not make any real complaint about the day time arrangements, and I find that the general propositions hold good for him.

201. I also find that they hold good for Mr Gleaves. He made no complaint of the day time arrangements, except for the first three weeks of his stay, when he said the officers did not release him to go to the toilet when requested. I accept that there may have been occasions during that short period when, during the day, Mr Gleaves had to use a bucket; but I find that he exaggerated the extent to which the officers refused manually to unlock his door, and find that the number of times that he used the bucket to urinate during that period were very few. In any event, the relevant period was very short.

202. During the evening/night lock in, generally, I find that there were no problems whilst the Night San was working properly. Mr Hawes (Mr Grant's Environmental Health Expert) accepted that the Night San system, if it worked more or less as the Defendant's witnesses indicated it did, was wholly acceptable. Although their evidence was not consistent, both Claimants at some stage of their evidence said that that was their experience – and I accept that it was. Absent illness, Mr Gleaves said that he did not have to use more than three Night San exits per night, and for a man in good health, I do not see why he would. I do not accept Mr Grant's evidence that he would routinely use up all three exits before midnight or 1am, because he drank a lot of coffee. Three exits should still have been enough; and, if not, then it would have been open to him to restrain himself drinking. Whilst I accept that, in the period 10-11pm, there may have been a queue of 20-25 minutes (and, occasionally, for example after a televised football match, possibly longer), the queues at other times were short or non-existent. Unless ill, it is difficult to see why any prisoner would ever have to use his bucket at night for defecation, and why he would need to use it to urinate except rarely. When he was required to use the bucket, he was able to use a Night San system exit to empty and clean his bucket, so that he did not have to share his cell with human waste for any substantial period of time.

203. Of course, I accept that there has been considerable problems with the operation of the Night San system. However, although time consuming and frustrating for the officers who have had to contend with them, they have to be seen in context so far as the prisoners are concerned. The August 2007 problems were clearly the most serious, although over a relatively short period of time, and they were restricted to C Wing (and so did not affect either Claimant). The problems thereafter were frequent, but usually only required rebooting or some other relatively easy and quick fix. When there were more serious problems, there was a system under which the Duty Governor of the day made a risk assessment of the system, and on the basis of that he took a view as to whether to call in extra staff that evening. I understand the potential pressure on such a Governor because of the budgetary pressures, but there is evidence that extra men were brought in from time-to-time. With two extra officers to a wing, that ought to have maintained reasonable access to the toilet by way of manual unlock for most if not all of the night. I accept that there were nights when the system failed and extra men were not brought in, and I am sceptical as to how effective the duty staff could be in maintaining an effective manual unlocking system – but the occasions on which that happened were, on the evidence, rare. Although I consider the Claimants' evidence generally exaggerated, neither Claimant really suggested otherwise.

204. Consequently, I find that a prisoner is not obliged to use his bucket to urinate except rarely; and not obliged to use it to defecate except extremely rarely and almost

exclusively restricted to sudden illness. I find that neither Mr Grant nor Mr Gleaves was obliged to use the bucket more often than that. Although the evidence is that more prisoners slop out their bucket than that suggests, that can be explained by (i) prisoners voluntarily using the bucket to urinate, rather than wait at night for a Night San slot, and (ii) prisoners using the bucket for other purposes than urination and defecation, e.g. for used washing water, tea slops etc.

205. Those findings apply to healthy, mobile prisoners, such as the Claimants. It is clear from the evidence that prisoners who need to use toilet facilities more often, or have difficulty in using the Night San system because (e.g.) of mobility difficulties, are catered for by special arrangements, such as being accommodated in cells with integral sanitation, or by the provision of a commode. Those prisoners who are acutely ill, as Mr Gleaves confirmed, can obtain temporary special arrangements from the medical staff, who (he said) were forthcoming when such arrangements were required.

206. In respect of the cells themselves, I accept that having to urinate and possibly defecate in a cell in which one has to sleep and eat, is far from ideal. There are inevitable risks of (e.g.) splashing and spillage and, I accept, there must be to some extent a higher risk of infection as a result, particularly if the prisoner does not take care. The small size of the cell must make things more difficult. However, as I have found, the obligatory use of the bucket was rare, and for defecation purposes very rare. The occasions when a used bucket would have to be in the cell for any substantial length of time would be vanishingly rare: usually, it could be emptied at night via a Night San exit to relatively promptly at other times. There were adequate washing facilities in the room. Prisoners were instructed on how to clean their cell, and were given proper provision for so doing.

207. In this regard, I should refer to the evidence of Mr Hawes. I am afraid that I did not find it compelling. Mr Eadie criticised the somewhat intemperate language in his report, and the fact that he initially relied upon solely the Claimant's documents and evidence in giving his opinion. I am afraid that criticism too, in my view, had some force. But again, my main concern is with the substance of Mr Hawes' analysis. First, he clearly approached the issue he had to address using the ideal, or certainly something in excess of the reasonable in a prison context, as a benchmark. For example, he considered the lack of an integral kitchen (including a fridge) in a cell was a point of concern; and suggested that it was an unacceptable risk for prisoners to take food (including hot tea) into their cells at all. Second, the methodology he employed in relation to risk appears to have been fundamentally flawed. He could not fully explain his assessment of risk – he referred to it as a "subjective assessment" – but it resulted in him assessing risk at levels which could not be correct. For example, he assessed the likelihood of harm arising from finding faecal matter on the table in one cell as 1 in 1, i.e. a certainty. He found a similar likelihood in relation to several other risks. Given the cleaning regime in the prison alone, those risk assessments cannot be correct.

208. Nor was I impressed by his finding faecal matter on a table in one of the cells. Of course, finding that matter where it was found was not good; but there is no evidence that it arrived there as a result of the use of the bucket in the cell to defecate, and no evidence as to whether it would have been removed promptly by normal cleaning. Nor, I am afraid, was I impressed by the evidence that recently there had been a

Norovirus outbreak at the prison: again, there is no evidence that that was in any way the result of the sanitation regime, and it appears from the few particulars that were available at trial, that it was well controlled. Mr Grant gave no evidence that he was a victim of that unfortunate virus. Mr Gleaves had of course left the prison by then. Those matters, in my view, did not substantially add to the Claimants' case.

209. There is no evidence before me that the use of buckets in cells has in fact caused any higher degree of illness or other harm to any prisoner. There is certainly no evidence that it caused harm to either Claimant. That is the case despite the size of the cell, and its ventilation. Therefore, whilst I accept, there must logically be to some extent a higher risk of infection as a result of the use of a bucket as a toilet, in a small cell, particularly if the prisoner does not take care, on all the evidence before me I am unpersuaded that the regime in HMP Albany has caused any material increase in risk to the health of prisoners.

210. Whilst I accept that prison cells may be malodorous for all sorts of reasons – and I understand why air fresheners are dispensed to prisoners – I do not accept the evidence of Mr Grant that his cell smelled of faeces all the time. The bucket had a lid (albeit not air-tight). Given the regime, faeces in a bucket could not possibly have been (and, certainly, not other than rarely have been) in any cell for any substantial period of time. Nor do I accept Mr Gleaves' evidence that the smell of faeces drifted into his cell from the cells of other prisoners: Prof Corcoran said that it is unlikely that such smells would migrate from cell to cell (Report, page 22), and I accept that.

211. In respect of the sluice, I find that prisoners have every opportunity to empty their buckets in a morning, without significant queuing and certainly without any jostling. They are able to empty their bucket in an area which is not cramped, and have proper time to empty and clean the bucket without the feeling of any undue time or other pressure. There are all necessary facilities (including flushing sluice, running hot and cold water, brushes, cleaning agents and disinfectant) to do the task.

212. The sluice is of course situated in a communal prisoners' toilet area. Again, I am sure that that general area is at times malodorous. But I do not accept that the sluice area is not kept reasonably clean. The prisoners are instructed that they must clean the sluice after use, and I accept the evidence of Ms Wozencraft that the sluice is cleaned twice a day, and that she checks that that is done. HMCIP Reports have generally indicated at least an adequate level of general cleanliness at the prison.

213. The conditions other than the sanitation facilities complied with all domestic regulations, and were not significantly outside any national or international standards. There is no evidence that any contributed to any undue difficulties for, or distress in, any prisoner; and certainly neither of the Claimants.

214. Finally, I come to the effects of the sanitation regime and other conditions on Mr Grant and Mr Gleaves. Neither claim to have suffered any physical or psychiatric or psychological conditions as a result of the conditions in the prison. As I have indicated, they each claim to have suffered "distress" as a result of the sanitation arrangements. Mr Grant said that he found use of, and cleaning out his bucket, "extremely unpleasant", and the use of the bucket to defecate "quite degrading".

215. I have indicated that the Strasbourg court is usually insistent on a sound evidential base for any finding of harm as a result of treatment alleged to result from a violation of Article 3. On the evidence before me, there is simply no evidential basis upon which I could sensibly find that either Claimant had suffered any significant harm as a result of the sanitation facilities at HMP Albany.

216. Mr Grant of course alleged considerably more use of the bucket than I have found. But in any event, he seemed insensitive to the use of a bucket by others, and frankly unconcerned about his own use of it. He asserted distress, but there is no evidence to support that assertion. Not only did he suffer no medical or psychological condition, there is no contemporaneous evidence of any distress at all. He made no complaint to anyone about either distress, or the conditions in the prison which he now claims caused it. He relied upon the evidence of Professor David Canter, Professor of Psychology at Huddersfield University. He is an environmental psychologist, who particularly studies the interaction between people and their surroundings (including buildings). His opinion was that, in certain circumstances, the use of a bucket (particularly to defecate) could cause distress. However, he was not a clinical psychologist and had neither seen Mr Grant nor visited HMP Albany, and could therefore offer no opinion of whether Mr Grant had suffered distress as a result of the conditions he had encountered there. Prof Canter's evidence offered no substantive support to Mr Grant's case.

217. So far as Mr Gleaves is concerned, he too asserted that he had "experienced high levels of distress as a result of the lack of sanitary facilities [at HMP Albany]". However, again there was no evidence to support that assertion. He had suffered no medical or psychological condition, nor was there any contemporaneous evidence of distress. He too had never complained about either the conditions of which he complains, or distress arising from them.

218. Furthermore, on 7 March 1985, Mr Gleaves was made a vexatious litigant under section 42 of the Senior Courts Act 1982 by an order of Mann J. Mr Gleaves said that that order was made because he kept issuing and pursuing claims in respect of complaints about the prison in which he was then resident. He accepted in his evidence that he had conducted litigation for "entertainment". Further, he said that he considered he had a role in organising prisoners' claims, and he had set up a business with a view to assisting prisoners in suing the Prison Service. Although, for a reason unclear to me, he dropped the damages claim during the course of the trial, he said that he originally started the proceedings with a view to "getting a bit of cash". Whilst I stress that I do not consider his claim an abuse, and his conduct of the trial before me was moderate and helpful, in my view Mr Gleaves has pursued this claim for motivations other than genuine distress suffered as a result of the sanitation arrangements at HMP Albany.

219. Finally, it is noteworthy that the Claimants have not sought to adduce any evidence from any other prisoners, either as to the sanitation regime they allege is deficient or, just as importantly, the effects that it had on them. I have no evidence that the sanitation regime had any significant detrimental effect on any prisoner.

220. Having seen and heard the two Claimants, I have no hesitation in saying that they have utterly failed to convince me that either has suffered any distress, anxiety,

feelings of humiliation or other harm as a result of the sanitation regime at HMP Albany.

The Main Article 3 and 8 Claims: Discussion

221. The sanitation regime at HMP Albany is no doubt capable of improvement. The Defendant itself accepts that, even if prisoners are only obliged to urinate in a bucket rarely and defecate in one very rarely, the practice is not ideal. Ideally, all prisoners would be housed in cells with integral sanitation.

222. However, this is not a general enquiry about the sanitation scheme at the prison, nor is it concerned with whether the regime at HMP Albany is capable of improvement and how. Those matters are for others. My only task is to decide whether, in all of the circumstances of this case, one or both of the Claimants have proved a breach of Article 3 and/or Article 8.

223. In respect of Article 3, I am not satisfied. In coming to that conclusion, I have taken into account all of the above, but particularly the following. The sanitation regime is not perfect, but it cannot be said that the Defendant has taken any step intended to lower the dignity of any prisoner. In many respects which I have noted, it has been sensitive to particular needs of prisoners, e.g. the ill, the immobile and those who keep religious observances. The regime obliges prisoners to use a bucket to urinate only rarely, and defecate very rarely. Prisoners do not share a cell, so they do not ever have to do any toilet in front of another person. Prisoners are not obliged, except again rarely, to have any waste in their cell for a substantial time. They are given instruction in how to use, and empty, the bucket: and have proper facilities to empty and clean their buckets, in a "public" sluice, but without significant queuing or jostling, and in uncramped and reasonably unrestrained circumstances. The regime causes no material additional risk to health or well-being. Given those circumstances, it is in my view unsurprising that the Claimants suffered no distress or other harm as a result of the regime.

224. I also have to take into account the relevant Strasbourg cases. I have referred to many in the course of this judgment. On the basis of those cases, it is clear that this case falls far below the minimum level of severity needed for a violation. Each of the cases where a violation has been found had conditions which were different but also, frankly on any view, markedly far more serious than the conditions in these claims: and many of the cases where no violation has been found were similarly far more serious. Reference to Iorgov (No 2) (referred to at paragraph 44.7 above) is sufficient to illustrate the high threshold required, and the distance by which these claims fall short of attaining it.

225. Nor do I consider that the result in this case is out of kilter with the cases from the home domestic jurisdictions (Napier (Scotland), Callinson v Scottish Ministers [2004] Scot CS 155 (Scotland), McKenzie v Scottish Ministers [2005] Scot CS 196 (Scotland), In re Carson (Northern Ireland), Martin v Northern Ireland Prison Service [2006] NIQB 1 (Northern Ireland), Mulligan v Governor of Portlaoise Prison [2010] IEHC 269 (Republic of Ireland) and Greens, Stanger and Wilson v Scottish Ministers [2011] CSOH 79 (Scotland)). In each of those (some with far worse conditions than those at HMP Albany), no violation of Article 3 was found, except Napier. However, Napier is in my view easily distinguished from the claims before me, because in that

case (i) the complainant shared a cell and had to perform toilet functions in front of his cell mate, and (ii) the complainant had no access to a flushing toilet over night and (iii) the conditions of detention caused him to suffer eczema. It has so been distinguished in the later Scottish cases to which I have referred.

226. For those reasons, the Article 3 claims of both Claimants (made on the basis of Ground 3) fail.

227. In relation to the dismissal of those claims, I should stress two points.

228. First, these claims have not turned on the standard of proof. To the advantage of the Claimants, I have used the civil standard, the balance of probabilities. They fall far short of the requisite standard, and in my view would fall short of any standard of proof, however applied.

229. Second, I am aware that my findings are not consistent with the factual basis upon which HMCIP and the IMB have made comments upon and recommendations about the sanitation regime at HMP Albany. There is no evidence that the Defendant has sought to engage with HMCIP, e.g. to seek to challenge the factual basis upon which the reports have been made; a point made more poignant, submitted Mr Southey, because the HMCIP apparently send a draft report to the Prison Service prior to publication.

230. However, although those bodies of course interview prisoners during the course of their inspections, they are not focused on the experiences of, and consequences for, particular prisoners, as I have been. Furthermore, the evidence upon which HMCIP has drawn its factual conclusions is unclear. It is evident that the findings of both those bodies are based largely upon what prisoners have told inspectors and, whilst I appreciate the experience of the inspectors, the extent to which that evidence was tested is again unclear. The evidence I have received has been tested by vigorous and, if I might say so, able cross-examination. I have found that both Claimants have, more (Mr Grant) or less (Mr Gleaves), exaggerated the conditions they experienced. Following the publicity surrounding Napier, there was clearly some incentive for prisoners to do so.

231. For example, there is no evidence before me, other than the reportage in the HMCIP 2010 report, that prisoners have been threatened with sanctions if they so much as request to be let out of a locked cell. Even taking into account the factual basis of that report, given the direct evidence I have heard, I simply cannot be satisfied on the evidence as a whole that any such threats were made. I am satisfied that they were not made (or heard) by any of the officers who gave evidence before me, nor to any either of the Claimants.

232. Further, I cannot give any great weight to the fact that the Defendant did not seek to take advantage of any opportunity to challenge the factual basis of the reports, with HMCIP. There are all sorts of reasons why it may not have done. Whilst I give appropriate weight to the fact that it did not, that does not mean that I have to proceed on the basis that the factual basis of the report is correct, when I have tested direct evidence before me.

233. Therefore, whilst giving the reports due respect and taking the evidence in them into account, I have relied primarily upon the direct evidence before me. Inconsistencies between my factual findings and the factual basis of those reports arises because I have been driven by other evidence, specific to the conditions to HMP Albany and the Claimants, to differ from that basis.

234. Turning to Article 8 claim, these claims also fail. The sanitation system at HMP Albany does not substantially interfere with the dignity or privacy of the prisoners, and does not interfere with the Claimants' Article 8 rights. On the findings I have made, they are bound to fail. In relation to the dignity of the Claimants, I can refer to my comments in relation to the Article 3 claim; but I particularly note the absence here of any real impact on the privacy of the Claimants. They do not share a cell, so do not have to perform any toilet function other than in private. The extent to which they have to use a bucket at all is rare, and for defecation very rare. The system does not oblige them to use a bucket when they are ill, except in circumstances where illness strikes very quickly. They are not obliged to empty and clean their buckets in cramped or jostling or unduly rushed circumstances. They are given both adequate time and proper facilities so to do.

235. Again, that result does not depart from any significant Strasbourg jurisprudence. As I have indicated, in none of the Strasbourg cases in which an Article 3 claim has failed, has an Article 8 claim been successful.

236. Nor do I consider it is out of line with the home jurisdiction domestic cases to which I have referred. In most, no breach of Article 8 was found. A breach was found in Napier but that case was, as I have indicated, very different on its facts to these; notably, in this context, because there was cell sharing in that case. Greens, where a breach of Article 8 was also found, was again different on its facts to the claims before me, particularly in the manner in which the chemical toilets in that case had to be regularly slopped out which was found particularly to invade the prisoners privacy. In Martin, where again a breach of Article 8 was found, there were also some factual differences from this case (e.g. in respect of the adequacy of the sluice area); but in any event the judge in that case appears to have found that the conditions did not in fact breach Article 8, but rather that the reasoning process of the prison authorities with regard to their Article 8 responsibilities was deficient. That judicial reasoning conflicts with that of the House of Lords in R (SB) v Denbigh High School [2006] UKHL 15 and Belfast City Council v Miss Behavin' Ltd [2007] UKHL 19, which was to the effect that, in human rights cases, the judicial focus must be on whether there is a breach of the Convention right and not the decision maker's reasoning process.

237. For those reasons, the Article 8 claims of both Claimants (made on the basis of Ground 4) also fail.

Limitation

238. The Claimants bring their claims under section 7(1) of the Human Rights Act 1998. By section 7(5), such claims must be brought within a year of the act complained of "or such longer period as the court or tribunal considers equitable having regard to all of the circumstances".

239. In each case, the Defendant relies upon a limitation defence, in respect of alleged breaches of the Claimants' Article 3 and 8 rights more than a year before the issue of proceedings. However, given my other findings, it is unnecessary for me to consider that defence in the context of these cases; and, as any extension of the one year limitation period is necessarily fact-specific, my doing so would serve no useful purpose.

Conclusion

240. For the reasons I have given, the conditions in HMP Albany did not breach the Claimants' rights under Article 3 or Article 8 of the Convention.

241. I dismiss both claims.