Neutral Citation Number: [2015] EWHC 528 (Admin)

Case No: CO/1258/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2015

Before :

THE HONOURABLE MR JUSTICE SINGH

- -

Between :

The Queen (on the application of Black)	**Claimant**
- and -	
Secretary of State for Justice	**Defendant**

- -
- -

Ms Shaheen Rahman (instructed by **Leigh Day Solicitors**) for the **Claimant**
Mr Jonathan Hall QC (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing date: 11 February 2015

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Approved Judgment

Mr Justice Singh :

Introduction

1. This is a claim for judicial review brought by a serving prisoner against the Secretary of State for Justice, who has responsibility for prisons. Permission was granted after an oral hearing by Foskett J on 1 July 2014.

2. The main issue in this case is whether the Health Act 2006, which bans smoking in enclosed public places and workplaces, applies to all prisons, in particular state prisons, that is those prisons for which the Crown is responsible.

Factual background

3. The Claimant is serving a sentence of indeterminate detention for public protection (IPP). I am informed that in 2007 he was convicted of sexual assault and outraging public decency. At that time it was possible for an IPP sentence to be imposed in cases such as this. The IPP regime, which was first introduced by Parliament in the Criminal Justice Act 2003, was later amended by the Criminal Justice and Immigration Act 2008 and then abolished by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. However, this Claimant continues to be in prison under the IPP that was imposed on him. His tariff expired after 203 days but he cannot be released on licence until the Parole Board is satisfied that he is no longer a danger to the public.

4. Since 2009 he has been at HMP Wymott. He is a non-smoker and suffers from a range of serious health problems and takes a number of medicines. In particular he has a history of angina, dyspnoea and anterior myocardial infarction, and required surgical coronary intervention in 2009.

5. The Claimant is concerned about his exposure to second-hand smoke, sometimes also known as secondary tobacco smoke. It is generally estimated that around 80% of prisoners smoke. They are permitted to do so in their own cells.

6. The Claimant asserts in his witness statement that both staff and prisoners often smoke in areas at HMP Wymott where smoking is formally prohibited, for example on landings and in laundry rooms. The evidence about this is disputed on behalf of the Defendant by the Governor of the prison, Terry Williams. No application was made in this case to cross-examine any of the witnesses and I considered the case, as is usual, on the written evidence alone.

7. On 29 September 2013, following a number of formal and informal complaints, the Claimant submitted a complaint asking for what has been described in this case as the National Health Service (NHS) Smoke-Free Compliance Line (SFCL) to be put on the prison phone system for all prisoners.

8. A judicial review pre-action protocol letter was sent on 17 December 2013. As a result the prison agreed to install the SFCL on the Claimant's personal PIN phone account, in late January 2014. However, this did not satisfy the Claimant as it falls

short of what he seeks. He wishes the SFCL to be added globally to the phone system for all prisoners, so that calls can be made anonymously and confidentially. A similar system is in place for some telephone numbers such as the ones for the Samaritans and Crimestoppers.

9. The Claimant submits that, as things stand, it would be easy for another prisoner or prison staff to appreciate from whom a complaint had come. As evidence of the problems that might be faced in practice, he states in his witness statement (at para 23) that on or about 13 January 2014 the prison officer who informed him that the SFCL had been added to his list of phone numbers said: "You can have the grass line put on your account."

10. A further pre-action protocol letter was sent on 27 January 2014 by solicitors acting on behalf of the Claimant. In his reply of 10 February 2014 the Secretary of State said that he considered that the Claimant's anxieties were "exaggerated", that the Claimant had achieved what he had set out to and that it was unnecessary and disproportionate to launch judicial review proceedings.

Material legislation

11. The Health Act 2006, which came into force on 1 July 2007, introduced a scheme to ensure that enclosed public places and workplaces in England were smoke-free. I will return to consider the background to that Act later.

12. Part 1 of Chapter 1 of the Act makes provision for the prohibition of smoking in certain premises, places and vehicles. By section 2(1), premises are "smoke-free" if they are open to the public and used as a place of work by more than one person. By section 2(7), premises are open to the public if the public or a section of the public has access to them, whether by invitation or not, and whether on payment or not.

13. By section 3(1), regulations may be made for specified descriptions of premises, or specified areas within specified descriptions of premises, not to be smoke-free despite section 2. Those regulations are the Smoke-Free (Exemptions and Vehicles) Regulations 2007 (SI 2007 No.765).

14. By Regulation 5, a designated room that is used as accommodation for persons aged 18 years or over in the premises specified in Regulation 5(2) is not smoke-free. The premises so specified include prisons, as well as care homes and hospices: see sub-paragraph (c).

15. By section 7(2) of the Act an offence is created of smoking in a smoke-free place. By section 7(4) it is a defence for a person charged with an offence under subsection (2) that he did not know or could not reasonably have been expected to know that it was a smoke-free place. By section 7(6) an offence under that section is liable on summary conviction to a fine not exceeding a level on the standard scale specified in the Regulations.

16. Section 8(1) of the Act imposes a duty on any person who controls or is concerned in the management of smoke-free premises to cause a person smoking there to stop

smoking. Section 8(4) creates a criminal offence for failure to comply with that duty, subject to a statutory defence under subsection (5). That subsection provides that:

> "It is a defence for a person charged with an offence under subsection (4) to show –
>
> (a) that he took reasonable steps to cause the person in question to stop smoking;
>
> (b) that he did not know, and could not reasonably have been expected to know, that the person in question was smoking; or
>
> (c) that on other grounds it was reasonable for him not to comply with the duty."

17. By section 10, and the Smoke-Free (Premises and Enforcement) Regulations 2006 (SI 2006 No.3368), the function of enforcement of the provisions of the Act is given to local authorities. Schedule 2 to the Act provides that an authorised officer of the enforcement authority has the right to enter premises which he considers it is necessary for him to enter for the purpose of the proper exercise of his functions by virtue of Chapter 1 of Part 1 of the Act on production of written authority.

Grounds of challenge

18. Although the grounds of challenge were formulated somewhat differently in the original claim for judicial review, three main submissions were made on the Claimant's behalf at the hearing before me.

19. First, he submits that Chapter 1 of Part 1 of the Health Act 2006 applies to prisons and in particular to prisons for which the Crown is responsible. In this context he submits that Chapter 1 binds the Crown.

20. Secondly, he submits that Articles 8 and 14 of the Convention rights require that he be allowed access to the SFCL and succeeding compliance line without the imposition of conditions on that access, in other words that calls to the line ought to be confidential and anonymous.

21. Thirdly, he submits that the Secretary of State's failure to enforce Rules 20(1) and 34(2) of the Prison Rules 1999 (SI 1999 No.728) amounts to a breach of his legitimate expectations and the Secretary of State's public law duty.

Standing

22. At one time there was an issue raised on behalf of the Secretary of State as to whether the Claimant has standing to bring this claim for judicial review. However, since

permission has now been granted, the Defendant has not actively pursued that objection and has focussed on the merits of this claim for judicial review.

23. Standing is not a matter for the parties alone, since it goes to the Court's jurisdiction and jurisdiction cannot be conferred by consent: see R v Secretary of State for Social Services, ex p. CPAG [1990] 2 QB 540. However, in the circumstances of the present case, I am satisfied that the Claimant does have standing to bring this claim for judicial review, since I consider that he is a person with a sufficient interest in the matter to which it relates: see section 31(3) of the Senior Courts Act 1981 and R v Commissioners of Inland Revenue, ex p. NFSSB [1982] AC 617.

The First Issue: Applicability of the Health Act 2006

24. The Claimant submits that, in deciding that he will not grant to all prisoners the right of access to the SFCL helpline, and that he will not do so on a confidential and anonymous basis, the Secretary of State has proceeded on an erroneous understanding of the law.

25. The Secretary of State is of the view that Chapter 1 of Part 1 of the Health Act does not bind the Crown and that, accordingly, it does not apply to state prisons. If that is right, the Secretary of State contends, local authorities have no enforcement powers in respect of such prisons and there would be no point in allowing access to the SFCL helpline, since there is nothing that could be done to give effect to a complaint by a prisoner if one were made.

26. It would appear from the evidence before the Court that that is also the stance taken by the Department of Health: see the witness statement of Sheila Mitchell, filed on behalf of the Defendant, at para 13. It can be seen therefore that the question of the applicability of the Act to state prisons is of importance both to this case and more generally.

Relevant legal principles on when a statute binds the Crown

27. In considering whether the Crown is bound by a statute, the relevant principles can be derived from the following authorities.

28. In Province of Bombay v Municipal Corporation of the City of Bombay [1947] AC 58 the Judicial Committee of the Privy Council had to consider whether the Crown was bound by section 222(1) and section 265 of the City of Bombay Municipal Act 1888, which in effect gave the Municipality power to carry water mains for the purposes of water supply through, across or under any street and "into, through or under any land whatsoever within the city." The Privy Council allowed an appeal against the decision of the High Court of Bombay, which had held that the Crown was bound by the legislation in question. The judgment of the Privy Council was given by Lord Du Parcq.

29. Lord Du Parcq set out the basic principle as follows at p.61:

> "The maxim of the law in early times was that no statute bound the Crown unless the Crown was expressly named therein… but the rule so laid down is subject to at least one exception. The Crown may be bound, as has often been said, 'by necessary implication'. If, that is to say, it is manifest from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named. It must then be inferred that the Crown, by assenting to the law, agreed to be bound by its provisions."

30. At p.62 Lord Du Parcq rejected the contention on behalf of the Respondent that, whenever a statute is enacted "for the public good", the Crown, although not expressly named, must be held to be bound by its provisions and that, as the Act in question was manifestly intended to secure the public welfare, it must bind the Crown. As Lord Du Parcq said at p.63, every statute must be supposed to be "for the public good", at least in intention, and even when it is apparent that one object of the legislature is to promote the welfare and convenience of a large body of the King's subjects by giving extensive powers to a local authority, it cannot be said that the Crown is necessarily bound by the enactment.

31. Later on p.63 Lord Du Parcq said:

> "Their Lordships prefer to say that the apparent purpose of the statute is one element, and may be an important element to be considered when an intention to bind the Crown is alleged. If it can be confirmed that, at the time when the statute was passed and received the Royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound. Their Lordships will add that when the Court is asked to draw this inference, it must always be remembered that, if it be the intention of the legislature that the Crown shall be bound, nothing is easier than to say so in plain words."

32. The principles applied by the Privy Council in the Bombay case were based upon principles of English law, which were said to be the same for material purposes as those to be applied in that case. The relevant principles were recently considered by the Divisional Court in R (Revenue and Customs Commissioners) v Liverpool Coroner [2014] 3 WLR 1660. In that case the Coroner, who was conducting an investigation into a person's death, issued notices under para 1(2) of Schedule 5 to the Coroners and Justice Act 2009, requiring the Revenue and Customs Commissioners to provide occupational information concerning the deceased for the purpose of investigating whether he had died as a result of an industrial disease. The Commissioner sought judicial review of the decision to issue those notices and

asserted that the 2009 Act, which did not expressly bind the Crown, did not do so by necessary implication either. The judgment of the Court was delivered by Gross LJ.

33. At para 38 Gross LJ said:

> "In our judgment the test as to whether particular legislation binds the Crown is well settled, remains good law and is not to be whittled down. It can be simply stated: the Crown is not bound by legislation unless either expressly named therein or, if not so named, by necessary implication: Province of Bombay v Municipal Corporation of the City of Bombay [1947] AC 58."

34. At para 42 Gross LJ quoted from the judgment of Diplock LJ in BBC v Johns [1965] Ch 32, at pp.78-79, where it was said:

> "Since laws are made by rulers of the subjects, a general expression in a statute such as 'any person' descriptive of those on whom the statute imposes obligations or restraints is not to be read as including the ruler himself… The modern rule of construction of statutes is that the Crown, which today personifies the executive Government of the country and is also a party to all legislation, is not bound by a statute which imposes obligations or restraints on persons or in respect of property unless the statute says so expressly or by necessary implication."

35. In the same paragraph Gross LJ noted that, as observed by the House of Lords in Lord Advocate v Dumbarton District Council [1990] 2 AC 580, the rule of construction is not limited to provisions which, if applicable to the Crown, would prejudicially affect its property, rights, interests or prerogative, but applies to any statute irrespective of whether the Crown is acting within its rights or without any right. As Lord Keith of Kinkel remarked at p.598 in that case, the very notion of a statutory provision being binding on a person "connotes that that person's freedom of action is thereby in some measure constrained".

36. At para 44 of his judgment Gross LJ drew attention to the case of Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988, at paras 16-27, where Lord Hoffmann set out his exposition of the process of implication in many different types of instrument, whether a contract, articles of association or a statute. Gross LJ observed that that exposition "serves as a reminder of the Court's task of ascertaining the true intention of the legislature from the terms of the statute understood in context".

37. At para 46 Gross LJ sought to pull the threads of the analysis together and stated that in deciding whether a statute binds the Crown by necessary implication:

> "(1) The Court's task is to ascertain the true intention of the legislature from the terms of the statute understood in context. If the legislative purpose thus ascertained would otherwise be frustrated, then the statute would bind the Crown by necessary implication.
> (2) The mere fact that a statute would not operate 'reasonably efficiently' unless the Crown was bound would not suffice; nor would it suffice that the statute was enacted 'for the public good', though the purpose of the statute would or may be a relevant factor in determining whether the Crown was bound.
> …"

38. Applying those principles to the case before it, the Divisional Court held that the intention of the legislature in enacting the 2009 Act, and in particular Schedule 5, was plain. It was apparent from the history of that legislation that the Act was intended to strengthen the powers of Coroners and thereby to discharge the obligation under Article 2 of the European Convention on Human Rights to conduct an effective investigation into a person's death, in particular where there was reason to believe that the state may have been responsible in some way. As the Court observed at para 48:

> "The paradigm case when an Article 2 obligation is likely to arise concerns emanations of the Crown. Moreover, we can discern no coherent, still less cogent, reasons for Schedule 5 applying to the police, the NHS and private prisons but not binding the MOD, the Commissioners or prisons in the public sector; there is nothing whatever to suggest a legislative intention to draw so curious a distinction. It is thus our clear view that the legislative purpose of Schedule 5 would be frustrated if it was not binding on the Crown. Accordingly, notwithstanding our cautious starting point in the absence of any express provision in the 2009 Act binding the Crown, we concluded that Schedule 5 does bind the Crown by necessary implication."

39. At para 49 Gross LJ was mindful of the submission that generally speaking co-operation is to be expected from emanations of the Crown not subject to any legal duty. This had been a factor in the consideration by the Privy Council in the Bombay case. Gross LJ stated:

> "We can well understand the Privy Council's concern in the Bombay case to keep the Crown's subservience to the Municipal Corporation within the limits of sensible cooperation; suffice to say that in the sphere of fulfilling Article 2 obligations, very different considerations arise."

40. To the deceptively simple question "what is the Crown?" the answer is not necessarily simple: see Sir William Wade, 'The Crown, ministers and officials: legal status and liability' in M. Sunkin and S. Payne, The Nature of The Crown: a legal and political analysis (1999), at p.23. Nevertheless, valuable guidance was given by Lord Diplock in Town Investments Ltd v Department of the Environment [1978] AC 359, at pp.380-381. In that passage Lord Diplock noted the transformation which has occurred with the continuous evolution of the constitution of this country from that of personal rule by a feudal landowning monarch to the constitutional monarchy of today but that the vocabulary used by lawyers has not kept pace with that evolution and remains more apt to the constitutional realities of the Tudor or even the Norman monarchy. He regarded the phrase "the Crown" as no doubt a convenient way of distinguishing the monarch when doing acts of government in his political capacity from the monarch when doing private acts in his personal capacity, at a period when legislative and executive powers were exercised by him in accordance with his own will. Lord Diplock went on to observe that today the legislative and executive functions of the Crown are in reality separate. He continued that, where what is concerned is the legal nature of the exercise of executive powers of government, it is preferable, instead of speaking of "the Crown", to speak of "the Government". He described that as being:

> "A term appropriate to embrace both collectively and individually all of the ministers of the Crown and parliamentary secretaries under whose direction the administrative work of Government is carried on by the civil servants employed in the various Government departments. It is through them that the executive powers of Her Majesty's Government in the United Kingdom are exercised, sometimes in the more administrative matters in Her Majesty's name, but most often under their own official designation. Executive acts of Government that are done by any of them are acts done by 'the Crown' in the fictional sense in which that expression is now used in English public law."

41. Although that passage pre-dates constitutional developments since 1998, in particular the devolution of powers to Scotland, Wales and Northern Ireland, it is also helpful as a reminder that "the Crown" is a reference to Her Majesty's Government in respect of the United Kingdom as distinct from any of the constituent parts of it.

The parties' submissions

42. The Claimant's fundamental submission is that the Secretary of State has proceeded on an erroneous understanding of the law and has made decisions which are therefore vitiated by that error of law. The Claimant submits that the Secretary of State has erred in law because, on its true construction, Chapter 1 of Part 1 of the Health Act 2006 does apply to state prisons. In the context of this argument, the Claimant submits that, while it is common ground that there is no express provision in the Act stating that Chapter 1 applies to the Crown, this follows as a matter of necessary implication.

43. In the alternative, to the extent that the Act is ambiguous, the Claimant submits that recourse may be had in this case to Parliamentary material, in accordance with the decision of the House of Lords in Pepper (Inspector of Taxes) v Hart [1993] AC 593.

44. The Secretary of State submits that the test for necessary implication is not satisfied in the present context. In accordance with the authorities which I have already cited, he submits that the test is not satisfied merely by showing that the legislation could not operate with reasonable efficiency unless the Crown was bound by the Act. He submits that nothing shows from the terms of the Act itself that the beneficent purpose of the Act would be "wholly frustrated."

45. As to the alternative argument on behalf of the Claimant, the Secretary of State submits that the criteria for the admissibility of Parliamentary material in Pepper v Hart have not been satisfied in the present case. He submits that there is an inherent tension between the submission that the Crown is bound by the Act as a matter of necessary implication and yet reliance on Pepper v Hart, since he submits that, in a case of ambiguity, the necessary implication simply cannot be made, in accordance with the test in the Bombay case. He further submits that the Parliamentary material invoked in the present case is far from clear and does not satisfy the strict criteria for the admissibility of such material set out in Pepper v Hart.

The correct interpretation of the 2006 Act

46. In approaching this important point of principle, it should be appreciated that the question of the applicability of the 2006 Act goes well beyond the facts of the present case, indeed well beyond the context of state prisons. If the Act does apply to places for which the Crown is responsible, provided that the other criteria which govern the scope of the Act are satisfied, then that will have implications for the criminal law and enforcement powers of relevant local authorities in respect of a large number and type of public buildings and spaces. By way of example, court buildings and the offices of central Government departments would come within the scope of the Act.

47. I accept the submission made on behalf of the Secretary of State that the interpretation of the 2006 Act cannot be confined to prisons. In the Dumbarton case, at p.599, Lord Keith of Kinkel stated:

> "A statute must, in the absence of some particular provision to the contrary, bind the Crown either generally or not at all. There is no logical room for the view that it binds the Crown when the Crown is acting without any right to do so but not when the Crown does have such rights."

Although that passage is not directly in point, I accept that it lends support to the Secretary of State's submission in this regard.

48. However, if Chapter 1 of Part 1 of the Act does not apply to such places, on the ground that it does not bind the Crown, it is fairly accepted on behalf of the Secretary of State that a large number and type of public buildings and spaces would fall outside the scope of the Act. This would have the consequence that members of the public

and/or those working in such places would fall outside the scope of protection that the Act would otherwise give them. The Secretary of State accepts that, on his submission, the criminal law would not apply to such places; rather, reliance would have to be placed on the rights of the Crown as a landowner or employer and/or on compliance with Government policies.

49. In my judgment it is clear from the terms of the 2006 Act, read in its proper context, in accordance with the principles I have set out earlier, that the intention of Parliament was indeed that it should apply to all public places and workplaces which fell within its scope, including those for which the Crown is responsible. In my view, the beneficent purpose of the Act would be wholly frustrated if the Crown were not bound by it. In my view, it is clear from the terms of the statute, understood in context, that Parliament had decided that the time had come when the criminal law had to enter this area of social life; the time had passed when it could simply be left to action through the powers of employers, landowners and Government policy.

50. I begin with the words used in the statute itself. In my judgment, the policy of the Act was to introduce in England for the first time a general prohibition on smoking in the places which fall within the scope of the Act and then to allow for specific exemptions to be made, in particular through the regulations which can be made under section 3.

51. Furthermore, the express reference to the possibility of an exemption being made in respect of prisons in section 3(2) of the Act is a statutory indicator that Parliament did envisage that, unless an exemption applied, prisons would be covered by the Act. Although there are currently 14 prisons in the private sector, and I am informed by the parties that there were about 10 private prisons in 2006, there is no indication in the statute that Parliament intended the reference in the Act to prisons to be confined to a small number of private prisons or indeed to draw any distinction between private prisons and state prisons in this context.

52. It is also permissible to make reference to the Regulations of 2007, in particular Regulation 5 as an aid to the construction of the primary Act. As was common ground before me, it is permissible to look at subordinate legislation, especially where the draft subordinate legislation is contemporaneous with the passage of the primary legislation: see Hanlon v Law Society [1981] AC 124 at pp.193-4 (Lord Lowry). In R v Secretary of State for the Home Department, ex p. Mehari [1994] QB 474, at p.486, Laws J said that delegated legislation can be used to construe primary legislation when the two are meant to form a comprehensive code. See also Bennion, Statutory Interpretation, 5th ed. (2008), para 233.

53. Consistent with the scheme of the Act, as reflected in the power to make exemptions in section 3(2), Regulation 5(2)(c) makes an exemption for designated rooms in prisons. Again, there is no distinction drawn in the Regulations between private prisons and state prisons.

54. Furthermore, in my view, this interpretation of the Act is supported by the background to its enactment. The Secretary of State accepts that in principle the Court is entitled to look at Explanatory Notes: see R (Westminster City Council) v National Asylum Support Service [2002] 1 WLR 2956, at para 5 (Lord Steyn). It is also permissible to look at White Papers: see R v Secretary of State for Health, ex p.

Quintavalle [2005] 2 AC 561, at paras 22-23 (Lord Hoffmann), in order to assist in identifying the object of the Act that Parliament might have had in mind in order to assist in the interpretation of that Act. Accordingly, I turn to the background to the Act.

Background to the 2006 Act

55. The legislative background to the 2006 Act was summarised in appendix A to the judgment of the Court of Appeal in R (N) v Secretary of State for Health [2009] EWCA Civ 795. I have drawn on that appendix in summarising the background here.

56. The 1998 Act White Paper 'Smoking kills' estimated that smoking in the United Kingdom each year caused 46,500 deaths from cancer and 40,300 deaths from all circulatory diseases. Those who smoke regularly and who then die of smoking-related diseases lose on average 16 years from their life expectancy when compared with non-smokers.

57. In reports of 1998 and 2004, the Scientific Committee on Tobacco and Health concluded that exposure to second-hand smoke was a cause of a range of serious medical conditions and recommended restrictions on smoking in public places and workplaces so as to protect non-smokers. The overall increased risk of lung cancer for non-smokers exposed to second-hand smoke was put at 24%. In December 2005 the House of Commons Health Committee reported that second-hand smoke caused at least 12,000 deaths a year in the UK and, of those deaths, five hundred were due to the presence of smoke in the workplace.

58. In the Department of Health's White Paper 'Choosing Health, making healthy choices easier' (2004), the Government set out a change of policy since the 1998 White Paper. At that time it had been decided that the case for legal action to restrict smoking was not sufficiently strong. At para 76 of the 2004 White Paper it was said that, however, "change has been slow and public demand for action has increased. It is one of the few instances in this White Paper where we believe the right response is Government action in the form of legislation." In the same paragraph there then followed in bold type the following:

> "We therefore intend to shift the balance significantly in favour of smoke-free environments. Subject to Parliamentary timetables, we propose to regulate, with legislation where necessary, in order to ensure that:
>
> (i) All enclosed public places and workplaces (other than licensed premises which are dealt with below) will be smoke-free…"

59. At para 77 the White Paper stated that a staged approach would be used to introduce smoke-free places. One of those stages would be that by the end of 2006, all Government departments and the NHS would be smoke-free. By the end of 2007, all

enclosed public places and workplaces, other than licensed premises (and those specifically exempted) would, subject to legislation, be smoke-free. In the same paragraph the White Paper stated:

> "We will use the intervening period of time to consult widely in the process of drawing up the detailed legislation, including on the special arrangements needed for regulating smoking in certain establishments – such as hospices, *prisons* and long stay residential care. …" (Emphasis added)

60. The Explanatory Notes to the Health Act 2006 note, at para 6, that Chapter 1 of Part 1 of the Act makes provision for enclosed and substantially enclosed public places and shared workplaces to be smoke-free. This was said to follow the publication of the White Paper of 2004 "which set out the Government's proposals to shift the balance significantly in favour of smoke-free environments. The Act will also give the appropriate national authority (Secretary of State in the case of England and the National Assembly for Wales in the case of Wales) powers to make regulations to exempt premises or part of premises from smoke-free legislation…"

61. At para 42 of the Explanatory Notes it was said that section 3(2) of the Act gives examples of the type of premises which might be specified under the exemption regulations to be made by the appropriate national authority. It continued:

> "These might include, in particular, premises where someone has their home or where they are living, whether permanently or temporarily. Such premises might include places such as rooms in a hotel, bed and breakfast accommodation, a hostel or a care home. They could also include a place where a person is detained, such as a *prison*." (Emphasis added)

62. Para 45 of the Explanatory Notes said that section 3(6) makes provision in respect of the matters such regulations may deal with. It continued that subsection (7) provides that regulations may also make provision for the designation of rooms in which smoking may be permitted. It continued:

> "This would enable provision to be made for designated smoking rooms, for example, in premises such as hotels, *prisons* or long term adult care homes or in other premises where it may be impossible for smoking to take place outside for safety, health or practical reasons, such as oil rigs." (Emphasis added)

International context

63. It is also important to note the international and European context in which the 2006 Act falls to be interpreted.

64. The United Kingdom is a party to the 2003 Framework Convention on Tobacco Control, drafted under the auspices of the World Health Organisation (WHO). Article 8 of that Convention, which has the side-note 'Protection from exposure to tobacco smoke', provides that:

> "1. Parties recognise that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability.
>
> 2. Each party shall adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for protection for exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate other public places."

65. The Council of the European Union made a Recommendation on 30 November 2009 on a Smoke-Free Environment (2009/C 296/02). In recital (3) of the preamble to that Recommendation it is stated that:

> "Exposure to environmental tobacco smoke (ETS) – also referred to as second-hand tobacco smoke – is a widespread source of mortality, morbidity and disability in the European Union."

66. Para 1 of the Recommendation was that Member States should provide effective protection from exposure to tobacco smoke in indoor workplaces, indoor public places, public transport and, as appropriate, other public places as stipulated by Article 8 of the WHO… Convention… and based on the annexed guidelines … within five years of the [Convention's] entry into force for that Member state, or at the latest within three years following the adoption of the Recommendation.

67. Nowhere in this international material is there any distinction to be found between, for example, private prisons and those which are within the state sector. On the contrary, in my view, it would be inconsistent with the fundamental objectives of the international framework for there to be such a distinction. While not conclusive, this is another indicator which supports what I consider to be the correct interpretation of the 2006 Act.

Contrary indicators

68. The most powerful indicator to the contrary in the terms of the Act itself is to be found in section 23. Subsection (1) of section 23 expressly provides that Chapter 1 of Part 3 of the Act, which relates to drugs, medicines and pharmacies and particularly the supervision of management and the use of controlled drugs, "binds the Crown." This reinforces the point made in the authorities that, where Parliament wishes to bind the Crown by statute, nothing could be easier to do than to say so in plain terms.

69. Nevertheless, in the circumstances of the present case, I do not regard this as an insuperable obstacle to the construction which otherwise I believe to be correct. First, of course, section 23 is to be found in another part of the Act, not in Part 1, with which the present case is concerned. When it comes to Chapter 1 of Part 1 of the Act, that fact that there is no express reference to whether the Crown is bound does not mean that the principles on "necessary implication" become irrelevant. The question is still whether the beneficent purpose of that chapter or part of the Act would be wholly frustrated if it did not bind the Crown.

70. Secondly, in my judgment, section 23 is concerned to specify the exact way in which Chapter 1 of Part 3 is to bind the Crown. This is made clear by subsections (2) and (3). Subsection (2) provides that:

> "No contravention by the Crown of any provision of this Chapter shall make the Crown criminally liable; but the High Court (or, in Scotland, the Court of Session) may declare unlawful any act or omission of the Crown which constitutes such a contravention."

Subsection (3) provides that:

> "The provisions of this Chapter apply to persons in the public service of the Crown as they apply to other persons."

In my view, it was because Parliament wished to make those additional legal provisions clear that one finds section 23 in the Act. When it comes to Chapter 1 of Part 1 of the Act, in my judgment, it has a beneficent purpose which would be wholly frustrated if it did not bind the Crown.

71. On behalf of the Secretary of State reliance was also placed upon a passage in the Government response to the House of Commons Health Committee's first report of Session 2005-06: Smoking in Public Places (Cm 6769) at paras 7-9. The background to that was that the Health Committee had reported (at para 62) that neither the Department of Health nor any other Government witnesses had made reference to the issue of Crown immunity during its inquiry. It was not mentioned in the Explanatory Notes to the Bill nor was any reference made by Ministers at the Bill's second reading. The Committee found those omissions to be "extraordinary especially as

Crown immunity removes the necessity for exempting many premises." The Government response at para 7 was as follows:

> "Through convention, legislation is not usually binding on Crown land. The Health Bill is no exception. No specific reference was therefore made since this legislation followed this usual convention.
>
> While Crown immunity does remove the requirement for specific premises to be exempted from smoke-free legislation, it is important that plans are in place for such places to become smoke-free, keeping in the spirit of the legislation. Strategies are in place which will see all central Government and NHS buildings in England become totally smoke-free by the end of 2006. Specific issues surrounding prisons, mental health units and the armed forces are discussed below."

72. It is clear from paras 8 and 9 (which in turn cite paras 72 and 73 of the Health Committee's report) that the Health Committee was very concerned about the possible exemption of prisons from the decision that workplaces should be smoke-free.

73. The Secretary of State submits that this passage in the Government's response makes it clear that the general principle that statutes do not bind the Crown was to be applicable in this context and that its intention was not to impose the Act itself but rather "keeping in the spirit of the legislation" to take other steps to make central Government and NHS buildings smoke-free.

74. I do not find that submission persuasive in the context of this case.

75. It is important to recall that the exercise of statutory interpretation involves ascertaining the intention of Parliament in enacting the statute concerned, not the understanding of the executive. As Lord Nicholls of Birkenhead put it in Wilson v First County Trust Ltd (No.2) [2004] 1 AC 816, at para 67:

> "It is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments."

76. As Lord Nicholls said earlier in his opinion, at paras 63-64, when interpreting a statute, and in particular when identifying the policy objective of a statutory provision, the Court may need enlightenment on the nature and extent of the social problem (the "mischief") at which the legislation was aimed: "This may throw light on the rationale underlying the legislation." This additional background material may be found in published documents, such as Government White Papers. The Court similarly must be able to have regard to information contained in Explanatory Notes prepared by the relevant Government department and published with a Bill. By

having regard to such material the Court places itself "in a better position to understand the legislation." However, as Lord Nicholls also went on to say at para 66, it is important not to confuse the "objective intention of Parliament" with the intention of Ministers. "Nor should the Courts give a Ministerial statement, whether made inside or outside Parliament, determinative weight. It should not be supposed that members necessarily agreed with the Minister's reasoning or his conclusions". It is for those reasons, as I have emphasised, it is essential that the Court should be careful to distinguish between the intention of Parliament in enacting the statute which it did and what may have been the views of Ministers or Government departments, as expressed for example in the 2006 response to the report of the Health Committee. The latter cannot be determinative of the former.

77. A similar reference to fundamental constitutional principles was made by Lord Hope of Craighead, at para 111:

> "One of these principles… is that legislation is the exclusive responsibility of Parliament. The judges' task is to interpret, not to legislate… Another is that it is the intention of Parliament that defines the policy and object of its enactments, not the purpose or intention of the executive. The courts for their part must respect this principle, which means that the legislative function belongs to Parliament not to the executive. …"

78. On behalf of the Secretary of State a further submission was made, in reliance upon the fact that the relevant "national authority" within the meaning of section 82 of the 2006 Act, may not be the Secretary of State himself. In Wales that authority would be the National Assembly for Wales. It was submitted on behalf of the Secretary of State that Parliament cannot have intended that the Crown (in the sense of the Government of the United Kingdom) should be bound in a way to be determined by the legislative body of Wales.

79. In my judgment, if that is the consequence of the legislative scheme enacted by the 2006 Act, it simply flows from the devolution arrangements which the United Kingdom Parliament has thought fit to introduce in this country since 1998. I do not consider that this point is sufficient to lead to a different construction of the 2006 Act from that which I would otherwise reach. Ultimately, of course, it would be open to the Parliament of the United Kingdom to alter the law in this respect, if it considered that only the Government of the United Kingdom should be able to make the relevant arrangements rather than the legislative body of a constituent part of the United Kingdom.

Reference to Parliamentary material

80. In Pepper v Hart, at p.634, Lord Browne-Wilkinson said:

> "I have come to the conclusion that, as a matter of law, there are sound reasons for making a limited modification to the existing rule (subject to strict safeguards) unless there are constitutional or practical reasons which outweigh them. In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases reference in Court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot see that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria."

81. I have not found helpful much of the extra-statutory material cited in this case. I accept the Secretary of State's submission that much of the material relied upon by the Claimant post-dates the 2006 Act and that the criteria for the admissibility of Parliamentary debates in accordance with Pepper v Hart are not satisfied in this case.

Conclusion on the main issue

82. I have reached the conclusion that, as a matter of statutory construction, and in accordance with the principles I have identified earlier, Chapter 1 of Part 1 of the Act binds the Crown and is applicable to all prisons, including state prisons.

The Second Issue: alleged breach of the Human Rights Act 1998

83. The Claimant relies upon two of the Convention rights which are set out in Schedule 1 to the Human Rights Act 1998: Articles 8 and 14.

84. Article 8 provides that:

> "(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 rights and freedoms of others."

85. Article 14 provides that:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or *other status*." (Emphasis added)

86. The Claimant submits that there has been a breach of his right to respect for private life in Article 8, and the right to enjoy his Article 8 rights without discrimination on a relevant ground, in breach of Article 14. As I understand it, the relevant ground of discrimination is said to be the Claimant's status as a prisoner, since, if he were in the community, the Claimant would be able to call the SFCL on an anonymous and confidential basis.

87. I must confess that it has not always been easy to follow what the Claimant is arguing. There appear to be two essential bases on which this submission is made: a narrower basis and a broader basis.

88. At the hearing before me it was made clear that the Claimant was not seeking to go beyond the original grounds of claim. There were two grounds of claim advanced originally. Ground one alleged that the Secretary of State has wrongly refused the Claimant's request to allow all prisoners in HMP Wymott (and more generally in the prison estate) to have confidential and anonymous access to the SFCL. It was then asserted that this refusal was unlawful on five separate bases. Two of those bases alleged a breach of Article 8. Para 21(iv) of the grounds alleged that the refusal is a breach of the negative obligation under Article 8 because the Defendant is interfering with the Claimant's private and family life by (a) permitting unlawful exposure to second-hand smoke; and (b) by preventing the Claimant from confidentially and anonymously informing the relevant enforcement authority of the commission of criminal offences under the Act. Para 21(v) alleged that the refusal is also a breach of the positive obligation under Article 8 by failing to take active steps to prevent breaches, taking measures effectively to deter conduct that would amount to a breach, responding to any breaches, and providing information to individuals to allow them to seek to protect themselves.

89. As will be seen from that original way of putting the ground, and as was confirmed at the hearing before me, the Claimant complains in essence that it is the failure to allow prisoners to have confidential and anonymous access to the SFCL helpline to the NHS which is alleged to be a breach of the negative and positive obligations in Article 8, if necessary read with Article 14.

90. However, there were also hints, both in the original grounds and certainly in the skeleton argument filed on behalf of the Claimant, that there was a broader allegation being made on behalf of the Claimant. For example, at para 36 of his skeleton argument, it is stated that the Claimant's argument is simply that he has an Article 8 Right not to be exposed to second-hand smoke within communal areas of HMP Wymott. It is alleged that, in the absence of effective enforcement by prison staff, a number of whom he says smoke themselves, and confidential and anonymous access to the SFCL, his right is at best "theoretical and illusory" and not "practical and effective", contrary to the established case law of the European Court of Human Rights. At para 50 of the skeleton argument, it is asserted that it is clear from the witness evidence filed on behalf of the Claimant that there is no effective enforcement of the prohibition of smoking in common areas at HMP Wymott. At para 53 of the skeleton argument, the Claimant sought a declaration that the Secretary of State is in breach of his duty under section 6 of the Human Rights Act, an order that the Secretary of State grant global, confidential and anonymous access to the SFCL, and such other order (including but not limited to damages under the 1998 Act) of the Court considered just.

91. In my judgment there is no basis whatsoever for the wider claim, insofar as it is made before this Court.

92. As I have already mentioned, the then Governor of HMP Wymott, Terry Williams, has filed a witness statement in these proceedings. In that witness statement Ms Williams describes the policies in place at HMP Wymott in relation to smoking. She says that HMP Wymott enforces the smoking policy as set out in PSI 9/2007 (that is the Prison Service Instruction sent to all prison Governors). This policy allows prisoners to smoke in their cells but not in any other enclosed places, such as communal areas in which prisoners live and work. She says that this policy is clearly understood by prisoners: during the induction to the prison this policy is made clear and is set out in the information given to prisoners. She further states that the smoking policy is enforced effectively in Wymott prison. She describes the system for oral and other warnings to be given; she also describes how the warnings are a part of the incentives and earned privileges scheme. She informs the Court that that scheme is an effective way of enforcing the policy. She does accept that, because Wymott is a Category C prison, its staffing levels are such that staff may not be present on all of the landings of all the wings all of the time. She therefore acknowledges that it is possible that some prisoners might smoke in communal areas and not be observed by staff. She also acknowledges that, given that a large proportion of prisoners do smoke, it is unlikely that many prisoners would complain about this.

93. Nevertheless the evidence on behalf of the Defendant is that the general ban on smoking in HMP Wymott is enforced effectively. That is very much in dispute on behalf of the Claimant. On his behalf reference was made to the Annual Report for 2013-14 in respect of HMP Wymott by the Independent Monitoring Board. At para 3.4.1.5 that report states:

> "Prisoners frequently flout the rule about not smoking in holding areas and officers need to be more vigilant."

94. I have already noted that no application has been made in these proceedings for cross-examination of any of the witnesses, in particular Ms Williams. In accordance with normal practice in judicial review proceedings, in my judgment, the Court has to proceed on the basis that the written evidence filed on behalf of the Defendant must be accepted insofar as there are disputed questions of fact: see R (Westech College) v Secretary of State for the Home Department [2011] EWHC 1484 (Admin), at paras 21-27 (Silber J); and the citation at para 22 from R v Board of Visitors of Hull Prison, ex p. St. Germain (No.2) [1979] 1 WLR 1401, at p.1410 (Geoffrey Lane LJ).

95. Accordingly, I reject the claim based on the Human Rights Act insofar as it is put on a broad basis.

96. I turn to the narrower basis on which it is put. As I understand it, the narrower basis on which the Claimant advances his argument based on Articles 8 and 14 is that the Secretary of State is in breach of positive obligations which are said to be imposed by those Convention rights and, in particular, that the breach consists of his failure to provide access to all prisoners to the SFCL helpline on a confidential and anonymous basis.

97. In support of his submissions based on the Convention Rights the Claimant relies upon a number of decisions of the European Court of Human Rights.

98. In Hristov v Belgium (Application no. 36244/02) the Court was asked to consider whether Article 8 obliges States to separate smoking from non-smoking prisoners. The Court considered it unnecessary to decide the point, since the Belgian authorities had already taken steps to meet the demands of the Applicant.

99. In Benito v Spain (Application no. 36150/03) the Court considered that Article 8 could be engaged when a non-smoker was exposed to second-hand smoke within a prison. However, the Court held that Article 8 had not been breached on the facts, in the light of the absence of a uniform approach by Contracting States to the problems of second-hand smoke and the fact that the only area where a non-smoker might be exposed to such smoke was in the prison's television room. The Application was held to be inadmissible on the ground that it was manifestly ill-founded.

100. In Vasilescu v Belgium (Application no. 64682/12) in a judgment given on 25 November 2014, the Court held that exposure of a non-smoker to passive smoking for five months exacerbated his conditions of detention. In that case this surpassed the minimum level of severity required to engage the prohibition of inhuman or degrading treatment or punishment in Article 3 of the Convention. The Claimant does not submit that in the present case Article 3 is engaged or breached.

101. The Claimant also relies upon the decision of the Court of Appeal in R (Solomon Smith) v Secretary of State for Justice [2014] EWCA Civ 380. On the facts of that case the Court held that the decision of Mostyn J refusing permission in the High Court was not wrong. Giving the main judgment, Treacy LJ said, at para 48:

> "…Although the [European Court of Human Rights] acknowledges the potential for exposure to second-hand smoke to engage Article 8 rights, that question is not to be viewed in a vacuum, but is to be assessed in the light of the facts and

> circumstances of the case. It seems to me that there is nothing in the European jurisprudence which would suggest that on the facts of this case, involving relatively short exposure of a non-smoker to passive smoking, the necessary minimum level for interference has been attained. …"

102. As I have already said, the Claimant's narrower submission is that the breach of Articles 8 and 14 consists of the Secretary of State's failure to provide access to all prisoners to the SFCL helpline on a confidential and anonymous basis. In my judgment, the difficulty with the Claimant's submission on this narrower ground is that there is no authority to support it, whether in the European Court of Human Rights or in the domestic Courts. Although, in principle, positive obligations can sometimes be imposed by Article 8, there is no authority supporting the argument made by the Claimant on the facts of this case, that an obligation to provide access to all prisoners to the SFCL helpline can be derived from Article 8. None of the cases cited comes near providing authority for the Claimant's submission, although they may have been cited at a time when it appeared that the submission was being advanced on a broader basis.

103. The reality of this case may be that hitherto the Secretary of State has proceeded on the understanding that the 2006 Act does not apply to state prisons. His decision to refuse all prisoners access to the SFCL helpline was based upon that understanding of the law. That has been the subject of the first and main ground in this claim for judicial review. As I have already said, in my judgment, the Secretary of State has proceeded on an understanding of the law which is wrong. Accordingly, the Secretary of State would be expected to reconsider his decision in accordance with law. It is simply not possible to say at this stage what decision he would reach after such reconsideration. Suffice to say that there may well be good reasons, in the interests of security and order in prisons, why prisoners should not generally be allowed confidential and anonymous access to external phone numbers. The Secretary of State's policy is not in general to allow such access, although there are exceptions, for example in the case of the Samaritans and Crimestoppers, for reasons which are readily understandable. However, in my view, that stage has simply not been reached yet and may never be reached. If it were reached, and even if Article 8(1) did in principle apply, there might well be reasons why the Secretary of State would be able to rely upon Article 8(2). If he needed to he might be able to justify any discrimination said to arise under Article 14.

104. However, for the reasons I have stated, it seems to me that what this case is in substance about is whether or not the Secretary of State has proceeded on the basis of an erroneous understanding as to the applicability of the 2006 Act. In my judgment, the Convention Rights cannot be relied upon on the facts of the present case. Accordingly, I reject the second of the Claimant's submissions.

The Third Issue: legitimate expectation and Rules 20 and 34 of the Prison Rules

105. The Claimant also relies upon material provisions of the Prison Rules 1999, which are made by the Secretary of State under section 47 of the Prison Act 1952.

106. By Rule 20(1), which has the side-note "Health services", it is provided that:

> "The Governor must work in partnership with local health care providers to secure the provision to prisoners of access to the same quality and range of services as the general public receives from the National Health Service."

107. Rule 34, which has the side-note "Communications generally" provides that:

> "(1) Without prejudice to sections 6 and 19 of the Prison Act 1952 and except as provided by these Rules, a prisoner shall not be permitted to communicate with any person outside the prison, or such person with him, except with the leave of the Secretary of State or as a privilege under Rule 8.
>
> (2) Notwithstanding paragraph (1) above, and except as otherwise provided in these Rules, the Secretary of State may impose any restriction or condition, either generally or in a particular case, upon the communications to be permitted between a prisoner and other persons if he considers that the restriction or condition to be imposed -
>
> (a) does not interfere with the Convention Rights of any person; or
>
> (b) (i) it is necessary on grounds specified in paragraph (3) below;
>
> (ii) reliance on the grounds is compatible with the Convention right to be interfered with; and
>
> (iii) the restriction or condition is proportionate to what is sought to be achieved.
>
> (3) The grounds referred to in paragraph (2) above are
>
> (a) the interests of national security;
>
> (b) the prevention, detection, investigation or prosecution of crime;
>
> (c) the interests of public safety;

(d) securing or maintaining prison security or good order and discipline in prison;

(e) the protection of health or morals;

(f) the protection of the reputation of others;

(g) maintaining the authority and impartiality of the judiciary; or

(h) the protection of the rights and freedoms of any person."

108. The Claimant submits that the Secretary of State is in breach of both Rule 20(1) and 34(2) of the Prison Rules. At the hearing before me reliance upon Rule 34 was abandoned, on the ground that it added nothing to the submission based on Articles 8 and 14 of the Convention rights. For the reasons I have already given, I would reject that submission based on the Convention rights in any event in the circumstances of this case. Accordingly, in my judgment, any argument based on Rule 34(2) would also fail.

109. The Claimant submits that he has a legitimate expectation that the Secretary of State will comply with his own policies and that he is under a public law duty to do so in the absence of good reasons. In support of that proposition reliance is placed on Gransden and Co Ltd v Secretary of State for the Environment (1987) 54 P & CR 86, at p.94.

110. In my judgment, the concept of legitimate expectation has nothing to do with the present case. As I understood it, reliance upon that concept was fairly abandoned at the hearing before me. The reason for this is that the present case does not concern a policy; it concerns a rule of law, contained in Rule 20(1) of the Prison Rules. Either there has been a breach of that Rule or there has not. If there has there has simply been a breach of the law: reliance on the concept of legitimate expectation is unnecessary. Conversely, if there has been no breach of the Rule, invocation of the concept of legitimate expectation can get the Claimant nowhere.

111. Furthermore, in my judgment, there has been no breach of Rule 20(1) of the Prison Rules in the circumstances of this case. The Claimant submits that the SFCL helpline is an NHS-led service and the quality of his access to it is compromised by the lack of anonymous and confidential access to it. I do not accept that submission.

112. It may be that Rule 20(1) is properly to be regarded as what is sometimes called a "target" duty. It is expressed at a high level of abstraction. Furthermore, it may be regarded as a duty to co-operate with other authorities (hence the use of the word "partnership") to secure access to the same quality and range of services as the general public receives from the NHS. It by no means follows from the imposition of that duty of co-operation that an individual prisoner can complain by way of judicial review of a breach said to result from a particular failure to provide a particular form of treatment or service.

113. Fundamentally, however, the reason why this argument founders, in my view, is that it proceeds on the basis that the Secretary of State has made an erroneous assumption in deciding not to provide prisoners such as the Claimant with confidential and anonymous access to the SFCL helpline. That in substance is what the case is really about and has already been dealt with under the first and main ground in this claim for judicial review. If, contrary to my view as expressed earlier, the Secretary of State has not proceeded on an erroneous understanding of the applicability of the 2006 Act, in my judgment it would be impossible to derive from the general words of Rule 20(1) any obligation to provide the confidential and anonymous access to the SFCL helpline which is suggested in this case.

114. Accordingly, I reject the Claimant's third submission.

Conclusion

115. For the reasons I have set out, this claim for judicial review succeeds on the first and main ground. In my judgment, the Secretary of State has proceeded on an erroneous understanding of the law. In my view, Chapter 1 of Part 1 of the Health Act 2006 does apply to prisons and in particular to state prisons, for which the Crown is responsible.

116. I will consider any submissions that counsel have to make as to the appropriate form of relief to reflect the terms of this judgment.