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RESEARCH ARTICLE

Legal implications of smoking (bans) in English prisons

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Abstract

The high prevalence of tobacco smoking in prison, and certain aspects inherent in prison culture make smoking in that environment particularly difficult to regulate. Over the last decade, the UK government has adopted and sought to implement gradually its plan to make all prisons smoke-free nationwide. The UK Supreme Court recently ruled in *Black* that the Health Act 2006, which prohibits smoking in most enclosed public spaces, does not bind the Crown and consequently does not apply to public prisons. Both developments have implications for the human rights protection of smoking and non-smoking prisoners. This paper considers how English smoking and non-smoking prisoners' (human) rights are currently protected, and what the legal implications are of a complete ban on smoking in English prisons. The paper reflects on whether an indoor smoking ban might strike a better balance between the competing rights and interests of smoking and non-smoking prisoners than a complete ban.

Keywords: criminal justice; human rights; prisons; smoking bans; European Convention on Human Rights; Health Act 2006; *R (on the application of Black) v Secretary of State for Justice*

Introduction

The harmful effects of active and passive smoking are well-documented.[1] The increased societal awareness of the detrimental health effects of second-hand smoking specifically has motivated efforts to regulate smoking in the presence of non-smokers, particularly in enclosed public spaces. It is therefore not surprising that the UK government has made various attempts to make prisons entirely smoke-free,[2] and that aim continues to be on the agenda. Since January 2018, over 60 public prison establishments are smoke-free. In prisons which are not yet smoke-free, at least one wing is required to be smoke-free.[3] The UK government's plan to introduce a complete smoking ban in prison is in line with a general trend in other common law countries. The Isle of Man imposed a complete ban on smoking in prison in 2008, and New Zealand in 2011. Canada banned smoking in all federal prisons in 2006 and it is now also banned in nearly all provincial prisons. Parts of the Australian penal system

[†]I am grateful for comments from both Professor Lucia Zedner and Lewis Graham, and from the anonymous reviewers. Any errors and omissions remain my own. Unless otherwise stated, all URLs were last accessed 7 March 2019.

[1]See for instance S Chapman *Public Health Advocacy and Tobacco Control: Making Smoking History* (Oxford: Blackwell, 2007); P Boyle *Tobacco: Science, Policy, and Public Health* (Oxford: Oxford University Press, 2010); I Hayashi (ed) *Smoking: Health Effects, Psychological Aspects and Cessation* (Hauppauge: Nova Science Publishers, 2012); J Drope et al *The Tobacco Atlas* (Atlanta: American Cancer Society and Vital Strategies, 6th edn, 2018), available at https://tobaccoatlas.org/wp-content/uploads/2018/03/TobaccoAtlas_6thEdition_LoRes_Rev0318.pdf; World Health Organization (WHO) *Tobacco Fact Sheet* (9 March 2018), available at http://www.who.int/en/news-room/fact-sheets/detail/tobacco.

[2]See for example Letter from Prisons Minister Andrew Selous to Robert Neill MP, Chairman of the Justice Select Committee regarding smoking in prisons, *Smoking in Prisons* (29 September 2015), available at https://www.gov.uk/government/speeches/smoking-in-prisons.

[3]HM Prison and Probation Service Instruction *National Policy, Organization and Summary Arrangements for the Management of Health and Safety* (7 February 2018), AI 04/2015 PSI 06/2015 PI 03/2015, pp 47–48.

have been smoke-free since 2013. In the United States smoking was banned in federal prisons in 2004, and by 2007 87% of prisons and jails had smoke-free policies.[4]

There are a number of elements inherent in prison culture that make smoking in those environments particularly difficult to regulate. First, tobacco is the drug of choice of many prisoners, with prevalence rates of 80% of prisoners in English prisons, compared to 21% in the general population.[5] In other words, in England tobacco use in prison is almost four times higher than the national average. The high prevalence of smoking in prison is not just true of English prisons, but of prisons in general, with prevalence rates ranging from 64% to more than 90% of the prison population, depending on the country studied.[6] Secondly, tobacco serves a range of functions in prison which it does not necessarily serve in the community, contributing to the unique role it plays in prisoners' lives. Tobacco helps prisoners to cope with boredom and stress, it relieves anxiety and tension.[7] As the vast majority of prisoners smoke and smoking is considered the norm, smoking together fosters a sense of community[8] and can even constitute a form of joint defiance of authority.[9] Furthermore, cigarettes and tobacco are traded as merchandise and used as a currency.[10] In sum, it is difficult to regulate smoking in an environment where it is an engrained part of the culture and social norms.[11]

From a legal viewpoint, the situation is not straightforward either, where rights and interests of smoking and non-smoking prisoners and staff compete. International law, European human rights law, and UK domestic law affect the position of the parties involved. The Health Act 2006 stipulates that enclosed public spaces should be smoke-free, with certain exceptions. While Her Majesty's Prison Service was long under the impression that the Health Act 2006 applied to its premises, the UK Supreme Court recently held in *R (on the application of Black) v Secretary of State for Justice* that the Act does not bind the Crown, and consequently does not apply to public prisons.[12]

In light of this recent jurisprudential development and the government's plans to make all prisons smoke-free, it is worth reflecting on the questions of how English smoking and non-smoking

[4]The Offender Health Research Network *Smoking in Prison in England and Wales: An Examination of the Case for Public Health Policy Change* (February 2014) pp 16–22, available at http://www.ohrn.nhs.uk/OHRNResearch/Smoking.pdf; A Mackay 'The human rights implications of smoking bans in closed environments: what Australia may learn from the international experience' (2016) 46 International Journal of Law, Crime and Justice 13 at 14.

[5]University of Stirling, Open University, and Centre for Tobacco Control Research *Stop Smoking Support in HM Prisons: The Impact of Nicotine Replacement Therapy* (25 January 2007) p 2, available at https://bulger.co.uk/prison/Stop%20Smoking%20Support%202006.pdf; M Baybutt, C Ritter, H Stover 'Tobacco Use in Prison Settings: A Need for Policy Implementation', p 141, available at http://www.euro.who.int/__data/assets/pdf_file/0004/249205/Prisons-and-Health,-16-Tobacco-use-in-prison-settings-a-need-for-policy.pdf with reference to M Baybutt et al 'Report of North West Case Studies of Best Practice and Innovation' (2011) (prepared as part of the Tobacco Control in Prisons and Criminal Justice Settings: Regional Coordination Pilot Project) (unpublished document); Public Health England *Health Matters: Smoking and Quitting in England* (15 September 2015), available at https://www.gov.uk/government/publications/health-matters-smoking-and-quitting-in-england/smoking-and-quitting-in-england. For figures pertaining to Scottish prisons specifically see Scottish Prison Service *Prison Survey 2015* (December 2015) p 3, available at http://www.sps.gov.uk/Corporate/Publications/Publication-4565.aspx.

[6]Baybutt, Ritter and Stover, above n 5, p 138.

[7]See for instance R Richmond et al 'Promoting smoking cessation among prisoners: feasibility of a multi-component intervention' (2006) 30 Australian and New Zealand Journal of Public Health 474; T Butler et al 'Should smoking be banned in prisons?' (2007) 16 Tobacco Control 291 at 291; R Richmond et al 'Tobacco in prisons: a focus group study' (2009) 18 Tobacco Control 176 at 177; SA Papadodima et al 'Smoking in prison: a hierarchical approach at the crossroad of personality and childhood events' (2010) 20 European Journal of Public Health 470; C Ritter et al 'Smoking in prisons: the need for effective and acceptable interventions' (2010) 32 Journal of Public Health Policy 32 at 38. See also DH and Prison Health Service *Best Practice Guidance for Developing Smoking Cessation Services in Prisons* (March 2003) p 18, available at http://webarchive.nationalarchives.gov.uk/20120106110849/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4034484.pdf.

[8]Butler et al, above n 7, at 291.

[9]DH and Prison Health Service, above n 7, p 19.

[10]See for example Butler et al, above n 7, at 291; Richmond et al (2009), above n 7, at 178; Ritter et al, above n 7, at 38.

[11]Butler et al, above n 7; Richmond et al (2009), above n 7.

[12][2017] UKSC 81, [2018] 2 WLR 123 (hereinafter *Black*).

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prisoners' rights are currently protected, what the legal implications are of a complete ban on smoking in prisons, and whether such a ban is desirable. This paper consists of two main parts. The first part offers a comprehensive overview of the current state of the law on smoking in English prisons. It sets out the legal position of non-smoking and smoking prisoners, and comes to a conclusion on the legality of the anticipated complete smoking ban. While from the government's perspective a total smoking ban in prison is seen as the right way forward, the second part discusses a different way of regulating smoking in prison, namely restricting smoking indoors but permitting smoking in designated outdoor areas. The second part explores whether such a model may strike a better balance between the seemingly competing rights of smoking and non-smoking prisoners, and whether it could be effective and manageable in English prisons.

1. The legal position of the non-smoking and smoking prisoner in England

English prisoners' legal status in respect of smoking is affected by international law, European human rights law, domestic legislation, and individual prison policies. The respective legal positions of the non-smoking and the smoking prisoner will be discussed in turn.

(a) Legal position of the non-smoking prisoner

(i) The WHO Framework Convention on Tobacco Control

In response to the globalisation of the tobacco epidemic,[13] the World Health Organisation adopted a Framework Convention on Tobacco Control (FCTC) on 21 May 2003.[14] At present, there are 181 parties to the Convention, including the UK. Article 8.1 of the FCTC stipulates that the contracting parties 'recognize that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability'. Furthermore, under Art 8.2 the contracting parties are bound to adopt and implement measures 'providing for the protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places'.

(ii) Domestic law: the Health Act 2006 and the UK Supreme Court decision in Black

In line with the UK's obligations under the FCTC, Chapter 1 of Part 1 of the Health Act 2006 was enacted, which prohibits smoking in most enclosed public places and workplaces.[15] Section 3(1) of the Act allows the 'appropriate national authority'[16] to make regulations exempting specified premises of the smoking prohibition. Section 3(2) includes a non-exhaustive list of premises which may be so exempt, namely 'any premises where a person has his home, or is living whether permanently or temporarily (including hotels, care homes, and prisons and other places where a person may be detained)'. In accordance with s 3 of the Act, the Smoke-free (Exemptions and Vehicles) Regulations 2007 were enacted.[17] Prisons were given a partial exemption, in the sense that they may designate bedrooms or other rooms where it is permitted to smoke.[18] These rooms have to fulfil certain criteria, such as having a ventilation system which does not ventilate into any other part of the building, and a clear sign that it is a room in which smoking is permitted.[19]

[13]Foreword to the WHO Framework Convention on Tobacco Control (Geneva, 21 May 2003) *UN Treaty Series*, vol 2302, v.

[14]WHO Framework Convention on Tobacco Control (Geneva, 21 May 2003) *UN Treaty Series*, vol 2302, p 166. It entered into force on 27 February 2005.

[15]Health Act 2006, s 2(1). The Health Act 2006 entered into force on 1 July 2007. Before the enactment of the Health Act 2006, tobacco smoking in prison was considered a privilege under the Prison Rules 1999, SI 1999/728 (see Prison Rules 1999, rr 8 and 25(2)).

[16]This is the Secretary of State in England and the National Assembly in Wales: *Black*, above n 12, at [16].

[17]Smoke-free (Exemptions and Vehicles) Regulations 2007, SI 2007/765.

[18]Ibid, reg 5.

[19]Ibid, reg 5(3).

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Her Majesty's Prison Service has always assumed, since the enactment of the Health Act 2006, that it applied to its premises. This is clear from the Prison Service Instruction 09/2007 'Smoke-free Legislation: Prison Service Application',[20] and the foreword to a research study 'Stop Smoking Support in Prisons'[21] which was signed by the Director of Prison Health at the Department of Health and the Deputy Director General of Her Majesty's Prison Service.[22] Both documents state that, following the enactment of the Health Act 2006, the new smoking policy in prisons entails that all indoor areas of the prison will be smoke-free, with the exception of cells which are solely occupied by smokers. In other words, prisoners would continue to be allowed to smoke outside, and in their own cells provided they do not share them with non-smokers.

The position that the smoking ban applied to Her Majesty's Prison (HMP) Service was challenged in the case of *R (on the application of Black) v Secretary of State for Justice* (hereinafter '*Black*').[23] The case was brought by a prisoner serving an indeterminate sentence at HMP Wymott. Although the case was brought in respect of HMP Wymott and will be discussed here only in terms of its impact on prisons, the judgment has wider implications, as the issue at hand affects all premises occupied by the Crown.[24] The appellant was a non-smoker who suffered from a number of health problems, including hypertension and coronary heart disease. He claimed that his health issues were exacerbated by exposure to second-hand tobacco smoke in the common parts of the prison. In September 2013, the appellant requested that all prisoners would be given access to the NHS Smoke-Free Compliance Line (SFCL), which allows members of the public to report breaches of the Health Act 2006 smoking ban. He wrote a letter to the Secretary of State indicating that he would commence judicial review proceedings if necessary. In January 2014, the prison granted him access to the SFCL on his individual prison phone account, but did not extend this to the other prisoners. The Secretary of State responded to the letter, stating that the smoking ban did not apply to the Crown and that it thus did not affect the prison. The appellant launched judicial review proceedings in March 2014, challenging the Secretary of State's refusal to provide confidential and anonymous access to the SFCL for all prisoners. He was successful in the High Court, which held that the Health Act 2006 bound the Crown and quashed the Secretary of State's decision.[25] The Secretary of State appealed successfully to the Court of Appeal, which ruled that the Act did not bind the Crown.[26] The appellant appealed to the Supreme Court.[27]

The issue before the Supreme Court was primarily one of statutory interpretation, namely whether the Health Act 2006 bound the Crown. The basic principle is that a statutory provision does not bind the Crown except when express words indicate this, or by 'necessary implication', which entails that Parliament must have meant to bind the Crown.[28] Applying this principle in the case of *Black*, the Supreme Court found that there was no express mention that the Act bound the Crown, and neither that the Act bound the Crown by necessary implication.[29] As this paper is not concerned with matters of statutory interpretation, the Court's reasoning on this point will not be analysed further. It suffices to mention that Lady Hale concluded in her judgment, 'not without considerable reluctance', that the prohibition on smoking in public places contained in Part 1 of Chapter 1 of the Health Act 2006 did not bind the Crown, and dismissed the appeal.[30]

[20]Smoke-free Legislation: Prison Service Application, PSI 09/2007 (2 April 2007).

[21]*Stop Smoking Support in HM Prisons: The Impact of Nicotine Replacement Therapy*, above n 5, p 1.

[22]*Black*, above n 12, at [21].

[23]Ibid.

[24]Ibid, at [1]. Premises occupied by the Crown include central government departments, such as care homes (see case comment 'Smoking in Prison: The Wider Implications' (2018) 34 Personal Injury Compensation 1 at 1–3).

[25]*R (on the application of Black) v Secretary of State for Justice* [2015] EWHC 528 (Admin), [2015] 1 WLR 3963.

[26]*Secretary of State for Justice v Black* [2016] EWCA Civ 125, [2016] QB 1060.

[27]*Black*, above n 12, at [2]–[4].

[28]See for instance *Province of Bombay v Municipal Corporation of the City of Bombay* [1947] AC 58; *Lord Advocate v Dumbarton District Council* [1990] 2 AC 580.

[29]*Black*, above n 12, at [38]–[50].

[30]Ibid, at [50].

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This decision does not entail that prisoners are now allowed to smoke freely in all public prison premises. Neither does the ruling affect the implementation of the government's plans to make prisons smoke-free nationwide. The effect of the ruling is only to clarify that Part 1 of Chapter 1 of the Health Act 2006 does not apply to public sector prisons. Lady Hale said in her judgment that, while it may be desirable that the smoking ban did bind the Crown, it was not necessary as the 'legislation is quite workable without doing so'.[31] She added that '[t]he Crown can do a good deal by voluntary action to fill the gap'.[32] The set of rules, regulations, and guidelines by which prisons are run which restrict or prohibit smoking in prison continue to apply. Every public prison has its own policy stating whether the prison is entirely smoke-free or to what extent a partial ban applies, which prisoners have to abide by. Additionally, Prison Service Instruction (PSI) 09/2007 'Smoke Free Legislation: Prison Service Application' contains details of the arrangements in place for the management of smoking. That PSI expired on 31 March 2018, but to date there is no further information on the PSI that will replace the old one, and the extent of the changes it will make. The more recent HM Prison and Probation Service Instruction which also comments on the issue of smoking in prison contains a brief update on the plan to make all prisons smoke-free nationwide, but does not contain anything that substantially affects prisoners' legal position in terms of being allowed to smoke or exposure to smoke. It focuses mostly on setting out a range of measures to be taken and rules to follow, to protect prison staff in particular from secondary smoke exposure.[33]

By contrast, the Health Act 2006 does apply to private prisons. This raises an issue of discrimination between prisoners detained in a public and a private prison. The prisoner who is detained in a public prison is in a comparatively weaker legal position than the prisoner in a private prison, as it is clear that the means of enforcing a smoking ban under the Health Act 2006 are more effective than the means to enforce a voluntary ban in public prison premises. The prisoner detained in a private prison can rely on the Health Act 2006 and the criminal offences contained therein, namely smoking in a smoke-free area[34] or failing to prevent smoking in a smoke-free place,[35] to enforce a smoking ban. Additionally, environmental health officers can be called in to enforce the ban, either against smokers, or against occupiers and managers of the government premises, or both. The individual non-smoking prisoner in a private prison who complains about breaches of the ban does not have to bear the expense and burden of bringing proceedings to enforce it.[36] A non-smoking prisoner in a public prison, however, does not enjoy such statutory protection. Any signs displayed in public prisons cannot say that smoking is 'against the law'. The voluntarily imposed ban is not backed up by criminal sanctions against smokers or prison managers. Neither do environmental health offers have the power to enforce the ban. The individual non-smoking prisoner in a public prison can only challenge a refusal to impose or enforce a smoking ban by bringing disciplinary proceedings, and judicial review proceedings. The Supreme Court noted in its judgment that it would be unrealistic to expect people who are adversely affected by exposure to second-hand smoke in government premises to bring judicial review proceedings. The Court acknowledged that these proceedings are 'expensive, time-consuming and inaccessible to most people, nor will they necessarily procedure a remedy which is anything like as effective as the statutory enforcement process'.[37] Furthermore, the Court paid lip-service to the fact that there is no good reason to distinguish between state and private prisons. It said that any practical problems of enforcement by environmental health officers are as great in private prisons as they are in public prisons, and that prisoners in public prisons are just as much in need of protection from second-hand smoke as are prisoners in private prisons.[38] However, the Court's

[31]Ibid, at [49].
[32]Ibid.
[33]HM Prison and Probation Service Instruction, above n 3, pp 47–48.
[34]Health Act 2006, s 7.
[35]Health Act 2006, s 8.
[36]See *Black*, above n 12, at [38]–[39].
[37]Ibid, at [40].
[38]Ibid, at [42].

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conclusion that it is unnecessary for the Health Act 2006 to bind the Crown, as public prisons can adopt a smoking ban in individual prison regulations and policies, ignores this point of possible discrimination.

Nonetheless, even though the legal position of a non-smoking prisoner in a public prison may be less strong under domestic law than that of a non-smoking prisoner in a private prison, the public prisoner still enjoys protection under European human rights law. Before setting out the scope of European human rights law protection in the following sections, the question arises to what extent private prisoners equally enjoy said European human rights law protection, as the European Convention on Human Rights (ECHR) applies only to public bodies. Under s 6(3)(b) of the Human Rights Act 1998 'any person certain of whose functions are functions of a public nature' is considered a public authority, which has the duty to act in a way which is compatible with Convention rights. It is well-established under UK domestic law that private prisons perform functions of a public nature.[39] Consequently, private prisoners are also protected by the ECHR. Therefore, the following sections, which give a detailed account of smoking and non-smoking prisoners' protection under the ECHR, will not further elaborate upon this distinction between prisoners detained in a public or private prison.

(iii) Article 3 ECHR: the right not to be treated or punished in a cruel, inhuman and degrading way

As a treaty on civil and political rights, the right to health is not included in the European Convention on Human Rights.[40] Nonetheless, the European Court of Human Rights (ECtHR) has dealt with the matter of smoking in prison in the context of other provisions, namely Art 3 ECHR, which contains the prohibition on torture and inhuman and degrading treatment, and Art 8 ECHR, which includes the right to private life. Both articles have also been relied upon in conjunction with Art 14, which protects against discrimination.

The ECtHR has found a breach of Art 3 ECHR on numerous occasions where a non-smoking prisoner was exposed to second-hand smoke, both in their cell shared with a smoking prisoner or in the communal parts of the prison.[41] In *Vasilescu v Belgium*, the applicant had requested a non-smoking cell, but due to overcrowding he had to share a cell with other smoking inmates. Moreover, he had to sleep on a mattress because there was an insufficient number of beds, and he spent 60 days in a cell where there was no toilet and running water available.[42] The Court concluded that the whole of the deplorable detention circumstances had subjected the applicant to hardship exceeding the unavoidable level of suffering inherent in detention, and that this amounted to inhuman and degrading treatment in violation of Art 3.[43] The applicant also invoked Art 14 in conjunction with Art 3, claiming that there was a difference between Belgian and non-Belgian detainees in respect of the detention circumstances and the conditions for granting conditional release. However, the Court found that the applicant had not convincingly demonstrated that he had suffered discriminatory treatment, and rejected this claim as manifestly ill-founded.[44]

The applicant in *Ostrovar v Moldova* claimed that he was detained for 23 hours a day in a very crowded cell with other prisoners who were allowed to smoke in their cells due to lack of alternative smoking facilities. The prison authorities were aware that the applicant suffered from asthma but did not take any steps to separate him from smokers. Specifically in respect of the exposure to smoke, the

[39] *L v Birmingham City Council* [2007] UKHL 27, [2007] 3 WLR 112, at [63].

[40] However, in its Art 2 ECHR (right to life) case law the European Court of Human Rights has carved out a small space for a 'right to health' in certain circumstances: see L Graham 'The European Court of Human Rights and the emerging right to health' (*OxHRH Blog* 11 May 2017), available at http://ohrh.law.ox.ac.uk/the-european-court-of-human-rights-and-the-emerging-right-to-health.

[41] For a similar reasoning and outcome in respect of exposure to smoke in psychiatric institutions see for instance *Oprea v Moldova* ECtHR 21 December 2010, specifically at [9], [36], [42].

[42] *Vasilescu v Belgium* ECtHR 25 November 2014, at [6]–[20], [90]–[98].

[43] Ibid, at [99]–[107].

[44] Ibid, at [115]–[119].

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Court found that the government had not fulfilled its obligation to safeguard the applicant's health by allowing him to be exposed to cigarette smoke which was dangerous in view of his medical condition.[45] In addition, there was lack of full medical assistance, inadequate food, no access to decent toilet and showering facilities, and the inmates were exposed to a range of infectious diseases. The Court found that the suffering resulting from the cumulative effects of the detention conditions exceeded the severity threshold of Art 3 and concluded that it had been violated.[46]

In *Florea v Romania*, the Court also found that a combination of detention circumstances in which the applicant had lived for three years amounted to a violation of Art 3. The detention circumstances included overcrowding, having to share a bed with other inmates or having to sleep on the floor, poor quality of the food, and forced exposure for 23 hours per day to passive smoking in his cell, which caused the applicant's health to deteriorate. The common areas of the prison, including the prison infirmary, were not smoke-free either.[47] The Court distinguished this case from an earlier case *Aparicio Benito v Spain* (see below),[48] in which the applicant complained about smoking in the communal areas but had an individual cell at his disposal, and where the Court did not find a violation of Arts 2 and 8.[49]

In most of the cases where the Court found a violation of Art 3, it was a combination of prison conditions that led the Court to find that Art 3 had been violated, of which exposure to smoke was but one of the circumstances.[50] It is not crystal clear from the Court's jurisprudence whether the element of exposure to second-hand smoke by itself would be enough to qualify as a violation of Art 3. The Court has been more explicit about this in respect of overcrowding and lack of space, for instance. If the overcrowding is flagrant, then that element in itself can amount to a violation of Art 3.[51] If the lack of space in itself is not as significant, then the Court can take into account other detention circumstances and the combination of all detention conditions can still amount to a breach of Art 3. Nonetheless, it seems implicit in *Elefteriadis v Romania*, where the issue of exposure to smoke was central, that if exposure to smoke persists over a prolonged period of time and causes significant health problems, it can be sufficient to attain the minimum threshold to constitute a violation of Art 3. The case concerned a prisoner whose health had deteriorated due to exposure to fellow prisoners' smoke in shared cells for almost 10 months, and while being transported to court and in the waiting areas before his court appearances. The applicant claimed that, as a result, he had contracted respiratory diseases for which he did not receive proper medical care. The applicant made several requests to transfer to an individual cell.[52] The Court found that the conditions in which the applicant had been held contravened Romania's obligation to take measures to protect the applicant's health, especially since they were aware of his medical condition, and found that Art 3 had been violated.[53] The Court emphasised that logistical and financial problems do not relieve Member States of their obligation to organise prisons in such a way that ensures that detainees enjoy respect for their human dignity. This can include the obligation to take measures to protect prisoners against the harmful effects of passive smoking when medical recommendations advise against exposure to second-hand smoke.[54]

[45] *Ostrovar v Moldova* (2007) 44 EHRR 19, at [85].

[46] Ibid, at [76]–[90].

[47] *Florea v Romania* ECtHR 14 September 2010, at [46]–[65].

[48] *Aparicio Benito v Spain* ECtHR 13 November 2006.

[49] *Florea v Romania*, above n 47, at [61].

[50] See for instance *Kalashnikov v Russia* (2006) 36 EHRR 34; *Vasilescu v Belgium*, above n 42; *Ostrovar v Moldova*, above n 45; *Florea v Romania*, above n 47.

[51] *Melnik v Ukraine* ECtHR 28 March 2006, at [102]–[103]; *Kadikis v Latvia (No 2)* ECtHR 4 May 2006, at [52]; *Andrey Frolov v Russia* ECtHR 29 March 2007, at [47]–[49]; *Kantyrev v Russia* ECtHR 21 June 2007, at [50]–[51]. The ECtHR has made use of its pilot-judgment procedure on numerous occasions to address the structural issue of overcrowding in prison: see for example *Ananyev v Russia* (2012) 55 EHRR 18; *Torreggiani and Others v Italy* ECtHR 8 January 2013; *Varga and Others v Hungary* (2015) 61 EHRR 30; *Rezmiveș and Others v Romania* ECtHR 25 April 2017.

[52] *Elefteriadis v Romania* ECtHR 25 January 2011, at [5]–[26], [37], [44].

[53] Ibid, at [46]–[55].

[54] Ibid, at [48].

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Equally, overcrowding does not relieve a Member State of its obligation to protect a prisoner's health.[55]

The Art 3 jurisprudence demonstrates that Member States have a positive obligation to take measures to ensure that the detention circumstances are such that they safeguard prisoners' health, which may include taking steps to protect a prisoner against the harmful effects of second-hand smoke. In order to find a violation of Art 3, the prisoner will have to demonstrate that the state has taken insufficient measures to protect him/her against passive smoking, resulting in deteriorated health. A prisoner would be protected under Art 3 if he/she is systematically exposed to second-hand smoke over a prolonged period of time,[56] or exposed to high amounts of smoke for a shorter duration,[57] and suffers from health problems as a result. This seems to be the case particularly if the prison authorities are aware of the health condition and fail to take action, or disregard the advice of medical professionals, as in *Elefteriadis*. Though an aspect of health is implicit in Art 3, a qualification as 'inhuman and degrading treatment' requires a higher threshold than a violation of a right to health.[58] In other words, while the non-smoking prisoner clearly derives some protection from Art 3, it only establishes a minimum standard. A prisoner who has only been exposed to smoke for a limited period of time and whose health has not weakened as a consequence of the exposure, would fall below the threshold that is required to amount to a violation of Art 3.[59]

(iv) Article 8 ECHR: the right to a private life

Article 8 ECHR guarantees the right to private and family life, home, and correspondence. Prima facie, it seems that Art 8 can offer protection for prisoners being exposed to smoke which does not attain the minimum level of severity required by Art 3. The ECtHR has held that whilst the concept of private life contained in Art 8.1 is a broad one and not susceptible to exhaustive definition, it may, depending on the circumstances, cover the moral and physical integrity of the person. These aspects of the concept of private life extend to situations of deprivation of liberty.[60] In *Aparicio Benito v Spain* the ECtHR explicitly said that exposure to second-hand smoke in prison can potentially engage Art 8 ECHR.[61] However, at present none of the cases before the ECtHR or before UK courts challenging exposure to cigarette smoke in prison based on Art 8 ECHR have succeeded.

The applicant in *Aparicio Benito v Spain* had an individual cell, but complained that he was exposed to smoke in the shared television room. The applicant pointed to various studies indicating that passive smoking entails a risk to develop deadly respiratory diseases, alleging a violation of the right to life under Art 2 ECHR. The ECtHR found that it had not been proven that the applicant had suffered damaging effects to his health from exposure to smoke that would constitute a violation of Art 2, and rejected the claim as manifestly ill-founded.[62] Additionally, the applicant alleged a violation of Art 8. The ECtHR found that as a non-smoker, being forced to share an environment where it is possible to smoke in certain areas can constitute an interference with one's private life in the sense of Art 8.1 ECHR. However, since there was no common standard or uniform practice amongst the Member States concerning smoking in society in general and the regulation of smoking in prison specifically, it was not up to the Court to impose on the Member States particular rules to regulate each sector of society. The Court highlighted that there are Member States where each prisoner has their own individual cell, whilst there are other Member States where smoking and non-smoking prisoners

[55]Ibid, at [50].

[56]Such as a period of almost ten months in *Elfteriadis v Romania* (ibid).

[57]For instance confinement for 23 hours a day in one cell with a large number of smoking inmates in *Ostrovar v* Moldova, above n 45, and *Florea v Romania*, above n 47.

[58]E Brems 'Forced exposure to passive smoking violates human rights' (*Strasbourg Observers Blog* September 2010), available at https://strasbourgobservers.com/author/ebrems/page/3/.

[59]See E Maes and F Verbruggen '"Dan is het kot te klein…": roken in de gevangenis' in I Samoy and E Coutteel (eds) *Het rookverbod uitbreiden? Juridisich onderzoek, casussen & aanbevelingen* (Leuven: Acco, 2016) p 254.

[60]*Raninen v Finland* (1998) 26 EHRR 563.

[61]*Aparicio Benito v Spain*, above n 48.

[62]Ibid, at [1].

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have to share the same cell. Furthermore, in some Member States smoking is only permitted in certain areas, whereas in others there is no such spatial restriction. In light of the absence of a common standard amongst Member States, and in light of the specific circumstances of the case, namely that the applicant had an individual cell at his disposal, the Court rejected the application as manifestly ill-founded.[63]

Another application based on Art 8, challenging exposure to smoke in a shared cell with smoking inmates, was rejected in *Stoine Hristov v Bulgaria*. The Court referred to *Aparicio Benito v Spain*, but did not consider it necessary to decide whether Art 8 ECHR requires that Member States ensure that non-smoking prisoners are detained separately from smoking prisoners, as the Bulgarian authorities had taken measures to allow the applicant's request to be placed in a non-smoking cell.[64]

In the domestic case of *R (on the application of Smith) v Secretary of State for Health* (hereinafter *Smith*) the appellant had been made to share a cell with a smoker for a week, contrary to his wishes.[65] The Administrative Court refused permission to apply for judicial review against that decision.[66] Upon appeal by the prisoner, the Court of Appeal acknowledged that exposure to second-hand smoke can engage Art 8, but found that in this case the length of exposure to smoke had not been of sufficient 'intensity, duration or effect to attain the necessary minimum level for interference with Article 8'.[67] The Court of Appeal added that the ECHR 'should not be interpreted or applied in our domestic courts more generously than the Strasbourg jurisprudence clearly requires'.[68] Furthermore, the applicant alleged he was being discriminated against. He argued that being a prisoner amounts to a 'status' in the sense of Art 14,[69] and that his case fell within the ambit of Art 8 in conjunction with Art 14 ECHR. He claimed that the situation of a non-smoking prisoner and a non-smoking person in the community are analogous, and that the former was being treated differently to the latter by being required to share a cell with a smoker, amounting to discrimination. The Court of Appeal rejected the Art 14 claim on two grounds. First, the Court of Appeal referred to the wide margin of appreciation in this regard, as the ECtHR has stated that there is no consensus amongst Member States in relation to passive smoking except in cases where the facts are considerably more extreme and Art 3 would be engaged. Secondly, the Court of Appeal was not persuaded that prisoners and the general public were in an analogous position, as 80% of those in custody are smokers.[70] The Court of Appeal provided no further explanation as to why this figure precludes an analogy between the two categories. Presumably the Court referred to the high prevalence of smoking in prison compared to society in general implicitly to make the point that smoking is more difficult to regulate in prison than it is in the community (see introduction). However, the Court's point that prisoners and the general public are therefore not in an analogous position, is questionable. The higher prevalence of smoking in prison does not explain the purported lack of analogy between prisoners and the general public. One of the main aims of discrimination law is to protect minorities from unfair treatment. The fact that the majority of prisoners are smokers should not mean that non-smoking prisoners are any less entitled to protection from second-hand smoke than non-smoking individuals in the community are. Indeed, the fact that prisons are closed institutions increases prisoners' vulnerability to the risk of ill or unfair treatment. Non-smoking prisoners cannot simply leave their cell to avoid the harmful effects of their cellmate's smoking, whereas people in the community generally do have that freedom, which is an argument in favour of extra protection of non-smoking prisoners.

It is clear that Art 8 entails a positive obligation for Member States to respect private life which extends to situations where people are deprived of their liberty. However, it follows from the

[63]Ibid, at [2].
[64]*Stoine Hristov v Bulgaria* ECtHR 16 October 2008.
[65]*R (on the application of Smith) v Secretary of State for Justice* [2014] EWCA Civ 380 (hereinafter: *Smith*).
[66]*R (on the application of Smith) v Secretary of State for Health* [2013] EWHC 667 (Admin).
[67]*Smith*, above n 65, at [48].
[68]Ibid, at [48].
[69]*Shelley v UK* (2008) 46 EHRR SE16.
[70]*Smith*, above n 65, at [43]–[46].

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ECtHR and UK jurisprudence that at present, where there is no common standard between Member States, Art 8 does not entail a positive obligation to separate smoking prisoners from non-smoking prisoners. Prisoners do not derive a right from Art 8 to a smoke-free cell, let alone a right to an entirely smoke-free prison.[71] In that sense, in situations where detention circumstances do not attain the minimum level of severity to engage Art 3, Art 8 has presently not offered any further protection. If Member State standards on how to regulate exposure to second-hand smoking in prison were to converge, prisoners might derive further protection from Art 8 in the future, but that remains a distant prospect.

(b) Legal position of the smoking prisoner

(i) Prison policy

The legal grounds for possible protection of the smoking prisoner in England are not as varied as those on which a non-smoking prisoner could rely. While the legal status of the non-smoking prisoner in a public prison is weaker than that of the non-smoking prisoner in a private prison in terms of enforcing a smoking ban (see previous section), it seems that the legal position of smoking prisoners under UK law is similar, regardless of whether they are detained in a public or private prison. Following *Black*,[72] it is clear that the Health Act 2006 and its exceptions apply to private prisons. As mentioned, reg 5 of the Smoke-free (Exemptions and Vehicles) Regulations 2007 gives the person who is in charge of a prison the authority to designate certain cells and communal rooms where smoking is permitted.[73] If a private prison has adopted such policy that specifies that smoking is permitted in certain areas, a smoking prisoner will be able to rely on that policy to enforce his/her right to smoke. The Health Act 2006 and its exceptions do not apply to public sector prisons, but prisoners continue to be bound by individual prison policies (see previous section). To that extent, the position of the smoking prisoner in a public prison is similar to that of the smoking prisoner in a private prison: under domestic law, they will be able to derive a right to smoke in certain areas provided that the individual prison policy stipulates so. In light of the government's aim to make all prisons entirely smoke-free nationwide, in the future there will no longer be any domestic legal basis from which prisoners derive a right to smoke.

(ii) Article 8 ECHR

Under European human rights law, prima facie a smoking prisoner derives protection from his/her Art 8 right to private life. The Strasbourg jurisprudence makes it clear that the notion of personal autonomy is an important principle underlying the interpretation of Art 8 guarantees.[74] The Court has acknowledged in the context of Art 8 that 'the ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned'.[75] In other words, the right to private life entails a right to do things that may harm oneself, including for example smoking. With *Golder v UK*, the ECtHR has abandoned the 'inherent limitations doctrine', which held that right restrictions were an inherent feature of imprisonment.[76] Since then, the starting point is that prisoners continue to enjoy all fundamental rights and freedoms guaranteed under the ECHR save for the right to liberty. Any restriction of ECHR rights needs to have a legal basis and must be justified, which means the interference needs to serve a legitimate aim and be 'necessary in a democratic society' in

[71]See Maes and Verbruggen, above n 59, p 253.

[72]*Black*, above n 12.

[73]Smoke-free (Exemptions and Vehicles) Regulations 2007, above n 17, reg 5.

[74]*Goodwin v UK* (2002) 35 EHRR 18 at [90]; *Pretty v UK* (2002) 35 EHRR 1 at [61]; *KA and AD v Belgium* ECtHR 17 February 2005, at [83].

[75]*Pretty v UK*, above n 74, at [62].

[76]*Golder v UK* (1975) 1 EHRR 524.

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light of that aim.[77] In principle, prisoners thus retain their Art 8 rights upon incarceration, and by implication the right to do harmful things such as smoking as an aspect of their right to private life.[78]

However, the ECtHR has never explicitly acknowledged that prisoners have a right to smoke. In the cases brought by non-smokers who have health problems caused by exposure to second-hand cigarette smoke in prison (see previous section), the Strasbourg Court never considered the issue from the perspective of the smoking prisoner. The Court has only expressed itself on the Member States' obligations to safeguard the health of non-smoking prisoners. Neither has a case brought by smokers arguing that the imposition of a prison smoking ban breaches their human rights ever made it to the ECtHR. If such a case were ever presented to the Court, it can be expected that it would reason as follows. The Court might find that a smoking ban constitutes an interference with the smoking prisoner's Art 8.1 rights. Provided that such interference has a legal basis, the question of whether the interference amounts to a violation depends on the justification under Art 8.2, namely whether the interference serves a legitimate aim and whether it is necessary in a democratic society in light of those aims. A prohibition on smoking in prison would be introduced in light of mainly two legitimate aims contained in Art 8.2. First, one of the legitimate aims explicitly contained in Art 8.2 is protection of the rights and freedoms of others. As mentioned above, one of the rights of others that is directly engaged in the issue of smoking in prison, is non-smoking prisoners' Art 3 rights. Accordingly, it is worth considering how the conflict between the smoking prisoner's Art 8 right and the non-smoking prisoner's Art 3 right would play out. As has been argued in the previous sections, Member States in principle have positive obligations to protect both rights. In the event of a conflict between them, the state's obligations under Art 3 would take precedence over any obligations under Art 8, as Art 3 is an absolute right. An interference with smoking prisoners' Art 8.1 rights would thus be justified under Art 8.2 in light of the protection of non-smoking prisoners' Art 3 rights. However, for any kind of exposure to second-hand smoke which does not attain the minimum threshold of 'inhuman and degrading treatment' required for an Art 3 violation, Member States are given a fairly wide margin of appreciation. It is thus up to the Member States to decide how strict they want to be in respect of smoking regulation. As mentioned, the UK is making use of that margin of appreciation by gradually implementing a complete smoking ban in all prisons. A smoking ban could then still be justified in light of a second legitimate aim under Art 8.2, namely the protection of health of other prisoners and prison staff. In sum, protecting prisoners' right not to be subjected to torture and inhuman and degrading treatment, as well as protecting the health of prisoners and staff, are legitimate aims that can prima facie justify interference with the smoking prisoner's Art 8 right.

The question of whether a complete smoking ban in prison would satisfy the test under Art 8.2 would then ultimately depend on whether a complete ban can be considered proportionate to achieve the aims mentioned. The UK Supreme Court's reasoning in the case of *McCann v State Hospitals Board for Scotland* (hereinafter *McCann*), which concerned a smoking ban in a Scottish hospital where mentally ill patients were detained, gives an insight into how a complete ban in English prisons could be considered compatible with Art 8.[79] The Supreme Court found that the comprehensive smoking ban constituted an interference with Art 8 ECHR.[80] The Court acknowledged that lawful deprivation of liberty involving long-term detention in an institution inevitably curtailed a detainee's private sphere, which meant that the court had to 'assiduously uphold the right to respect for what little remained of that sphere'.[81] But the smoking ban was justified under Art 8.2 because it pursued

[77]See for instance *Hirst v UK (No 2)* (2006) 42 EHRR 41 at [69]; *Munjaz v UK* ECtHR 17 July 2012 at [79].

[78]For a comparative perspective on prisoners' rights, and how protection of the right to privacy in prisons varies greatly between jurisdictions see L Lazarus *Contrasting Prisoners' Rights: A Comparative Examination of Germany and England* (Oxford: Oxford University Press, 2004).

[79]*McCann v State Hospitals Board for Scotland* [2017] UKSC 31, [2017] 1 WLR 1455 (hereinafter *McCann*).

[80]Ibid, at [42]–[57].

[81]Ibid, at [50].

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the legitimate aim of the protection of health and was proportionate.[82] The proportionality test used by the Court was:

> (i) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective and (ii) whether a fair balance has been struck between the rights of the individual and the interests of the community having regard to (a) the severity of the impact of the measure on the individual's rights and (b) the contribution of the measure to the achievement of the objective.[83]

The Court made reference to the fact that the State Hospitals Board for Scotland had previously trialled an indoor smoking ban, whereby patients were still allowed to smoke outside under supervision at designated times. Due to operational difficulties, said partial ban was ultimately converted into a comprehensive ban. The operational problems threatened to 'compromise the health of the supervising staff, the welfare of the patients and the security of both'. In light of the Board's efforts to first implement a partial ban before imposing the more intrusive complete ban, and the operational difficulties that it entailed, the Court was satisfied that the Board did not act disproportionality in ultimately imposing the comprehensive ban when it did.[84]

It is plausible that the UK Supreme Court would take a similar approach to complete smoking bans in English prisons as it did in respect of the Scottish hospital in *McCann*. By contrast, it is not clear whether the ECtHR would reach the same conclusion in all cases that a complete ban on smoking in prison is justified. At present, the ECtHR has never been presented with an opportunity to rule on the compatibility of a complete smoking ban in closed institutions with Convention rights. It is conceivable that a blanket smoking ban might irk the ECtHR. However, it has been demonstrated that an interference with smoking prisoners' Art 8 rights can prima facie be justified in light of the two aims mentioned, and that Member States have a very wide margin of appreciation in respect of regulating smoking where it does not attain the minimum threshold to engage Art 3. If the ECtHR could be satisfied that a Member State had taken an alternative measure to strike a balance between the smoking and non-smoking prisoners' competing rights and interests, but failed to achieve the aforementioned aims, it is likely that the ECtHR would reach the conclusion that even a comprehensive smoking ban on smoking in prison is compatible with Convention rights.

2. Is an indoor smoking ban in prison more desirable than a complete ban?

While the legality of a complete smoking ban in English prisons thus seems affirmed under domestic law, and the same might be true under European human rights law, it is worth exploring whether a less intrusive alternative to a comprehensive ban might be a more desirable way for the UK to fulfil its duties under international and European human rights law. Whether a ban on smoking in prison of any sort – total or partial – is desirable, should be assessed according to the following three parameters: (i) whether the ban strikes an optimal balance in preserving both smoking and non-smoking prisoners' human rights; (ii) whether the ban is effective in terms of achieving the aim of health protection; and (iii) whether the ban is enforceable, operational and manageable. It is argued here that from a (human) rights perspective, a partial ban where smoking is prohibited inside prison buildings but prisoners are still allowed to smoke in designated areas outside, is preferable to a complete ban. Such a partial ban would be a less intrusive measure that can achieve the legitimate aims of respecting other people's rights and protecting the health of other prisoners and staff. It would strike a fairer balance between the seemingly competing rights of the parties involved and can reconcile them to an extent. Nonetheless, a partial ban presents certain challenges in respect of the other two parameters,

[82]Ibid, at [58]–[62].
[83]Ibid, at [60].
[84]Ibid, at [60].

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namely how effective and enforceable it would be. While an indoor smoking ban was rejected in *McCann* because of its operational difficulties, it merits further investigation whether these challenges were case-specific and whether the difficulties truly outweigh the merits of an indoor ban.

(a) A better balance between prisoners' rights

In respect of prisoners' rights, it is important to keep in mind the key distinction between the prisoner's personal liberty, ie what is contained in the custodial sentence as a form of punishment, and his/her residual liberty, namely what is contained in the administration of the custodial sentence. Once this divisible view of the prisoner's liberty is adopted, it becomes imperative to distinguish between the liberty and rights lost as a consequence of imposing the custodial sanction, and those lost for the purpose of prison administration.[85] Current law on both smoking and non-smoking prisoners' rights seems to adopt this key distinction, whereby the restriction or deprivation of smoking prisoners' right to private life and autonomy is justified by recourse to the legitimate aim of health protection and other prisoners' competing ECHR rights.

However, a complete smoking ban tilts the balance of rights completely in favour of protection of non-smoking prisoners and prison staff's health, and deprives smoking prisoners of their right to private life and autonomy. The ban constitutes 'an erosion of yet another freedom of an already disenfranchised group'.[86] In their discussion of the banishment of smoking in outdoor public places in the USA, James Colgrove et al refer to a 2008 speech by Robert Rabin, the former programme director of the Robert Wood Johnson Foundation's Tobacco Policy Research and Evaluation Program, saying: 'We should not lose perspective on the question of how restrictive a society we want to create - that is, how far we want to go in reducing individual autonomy, including what can be perceived as self-destructive behaviour'.[87] Colgrove et al add: 'This question should be central as we pursue the critically important goal of reducing rates of smoking'.[88] The statement about the importance of individual autonomy was made in respect of regulating smoking behaviour in the community. The importance of individual autonomy in the community and in a prison context cannot be entirely equated. On the one hand, unlike in the community, a non-smoking prisoner cannot simply leave his/her cell to avoid the harmful effects of exposure to another inmate's smoking. On the other hand, imprisonment inevitably entails a grave restriction of autonomy that is inherent in the deprivation of liberty, and so it may become all the more important to preserve and protect whatever little autonomy the smoking prisoner retains. One could argue that individuals in the community do not merit special legal protection if their right to smoke is restricted in public enclosed spaces. Perhaps they do not even merit special legal protection if their right to smoke outdoors is restricted.[89] After all, they can still meaningfully exercise this right in their own home. The same cannot be said for prisoners. As Butler et al phrase it:

> 'While smoking bans are laudable and have a clear role in the public health arsenal, prisons cannot be viewed in the same light as restaurants, hospitals, and office buildings. Clients [prisoners] cannot just pop out for a quick smoke or hold off the urge for a couple of hours; prisoners are locked in their cells for prolonged periods with little to do'.[90]

[85]See L Lazarus 'Conceptions of liberty deprivation' (2006) 69 MLR 738, specifically at 742–744.

[86]Butler et al, above n 7, at 291–292.

[87]RL Rabin 'Tobacco control strategies: past efficacy and future promise' (2008) 41 Loyola of Los Angeles Law Review 1721.

[88]J Colgrove, R Bayer and KE Bachynski 'Nowhere left to hide? The banishment of smoking from public spaces' (2011) 346 New England Journal of Medicine 2375 at 2377.

[89]See TA Farley 'Banishing smoking from public spaces' (2011) 365 New England Journal of Medicine 1255.

[90]Butler et al, above n 7, at 292.

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(b) Effectiveness

There are a number of challenges involved in implementing a partial smoking ban, in particular the effectiveness in terms of health protection and how operational and enforceable it is. In this regard, it is crucial to distinguish a partial ban where it is still permitted to smoke inside in designated areas, from a partial ban where all smoking is prohibited indoors and only allowed outside. Partial bans where smoking is still permitted in designated areas inside are not as effective as complete bans in terms of protecting the health of other prisoners and staff.[91] The communication between rooms where prisoners are allowed to smoke and rooms where it is prohibited leads to inevitable air contamination. Furthermore, staff who have to enter rooms where smoking is allowed are still being exposed to second-hand smoke.[92] Additionally, partial bans are more difficult to manage and enforce.[93] Prisoners do not always respect the smoking restrictions and continue to smoke in spite of them.

The desirability of a partial smoking ban where prisoners are only allowed to smoke outside must be assessed by these same two parameters of effectiveness and enforcement. In respect of effectiveness of health protection, less data is available about prisons where detainees are only allowed to smoke outside compared to partial bans where indoor smoking is still permitted. It is known that the concentration of tobacco particles in the air in outdoor venues is a function of the number of cigarettes being smoked, the distance from the smoker or smokers, and the wind direction.[94] Unlike with indoor smoking, outdoor tobacco smoking levels drop almost instantly after the smoking activity ceases. Nonetheless, it remains possible for outdoor smoking to present a nuisance or hazard under certain wind conditions and smoker proximity.[95] Therefore, in order for outdoor smoking in prison to have as minimal an impact on other prisoners' health as possible, it is necessary that the designated outdoor smoking area is sufficiently far removed from where non-smoking prisoners are, and that the total number of cigarettes being smoked at any given time is not too high. In an ideal world, non-smoking prisoners would also be positioned downwind from smoking prisoners. However, that would entail that the smoking area changes every day depending on the wind direction, thus confusing prisoners and guards as to where smoking is permitted. Despite the latter safeguard being near impossible to implement in a prison context, it seems that the direct health risks to others when prisoners smoke outside can be significantly reduced under the right conditions.

(c) Enforcement

Enforcing an indoor smoking ban and making it operational and manageable can entail a number of difficulties. This is illustrated by two examples of authorities which implemented an indoor smoking ban in closed institutions. The Canadian province Quebec introduced a total smoking ban in correctional facilities on 5 January 2008, which was converted into an indoor smoking ban three days later. From then on, smoking was prohibited within prison buildings, but prisoners were allowed to smoke during their one-hour daily exercise period outside. Prisoners were allowed to purchase a limited amount of tobacco from the prison canteen.[96] Enforcing the ban has proven to be difficult.[97] It was reported that some members of staff did not rigorously enforce the partial ban, stemming from a sense of disappointment that the original total smoking ban had not been implemented. Some

[91]The Offender Health Research Network, above n 4, p 4; Baybutt, Ritter and Stover, above n 5, pp 138–139.

[92]C Ritter et al 'Exposure to tobacco smoke before and after a partial smoking ban in prison: indoor air quality measures' (2012) 21 Tobacco Control 488 at 490–491.

[93]Ibid, at 490–491; The Offender Health Research Network, above n 4, p 4.

[94]NE Klepeis, WR Ott and P Switzer 'Real-time measurement of outdoor tobacco smoke particles' (2007) 57 Journal of the Air & Waste Management Association 522.

[95]Ibid.

[96]Institut National De Santé Publique Du Québec *L'interdiction de fumer en établissement de detention québécois* (Gouvernement du Québec, 2010).

[97]B Lasnier et al 'Implementing an indoor smoking ban in prison: enforcement issues and effects on tobacco use, exposure to second-hand smoke and health of inmates' (2011) 102 Canadian Journal of Public Health 249 at 251–252.

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members of the prison staff said that they had not been given clear instructions on what disciplinary proceedings to follow when confronted with illegal smoking. Other members of staff were reported to be sympathetic to the needs of smoking prisoners and condoned smoking inside in defiance of the ban. Additionally, although smoking was permitted during the daily one-hour walking break outside, prison staff were unable to prevent prisoners from taking their cigarettes back inside with them and continuing to smoke for the remaining 23 hours of the day.[98] A total of 93% of prisoners stated that they continued to smoke inside.[99] As a result, there was no evidence that the partial ban generated the expected health effects and reduced second-hand smoke. Yet, 89% of prisoners stated that they had reduced their own tobacco use and 45% reported that that the ban had improved their general health.[100]

Before the complete smoking ban was implemented in a psychiatric hospital in Scotland which was challenged in the UK Supreme Court case *McCann* (see above), a partial ban was in place where smoking was permitted in designated open-air areas on hospital grounds. The patients were allowed to smoke in existing ward gardens at eight set points every day. However, the indoor smoking ban soon proved unworkable and was converted into a total ban. The hospital had experienced considerable difficulties in implementing the partial ban, such as issues of safety and security, operational and clinical disruption, time demands on staff, fairness of the partial restrictions, and inconsistencies around the set point in the day when smoking was permitted.[101]

It is expected that many of the same difficulties would arise if a partial ban with permission to smoke outside were to be implemented in English prisons. Implementing an indoor smoking ban would require a sufficiently high number of prison guards who can oversee the process of letting prisoners go outside in a safe manner, giving the smoking prisoners controlled access to cigarettes and fire, and ensuring that non-smoking prisoners are in the right conditions not to be exposed to the smoke. Furthermore, prison staff would need to enforce the ban inside, which requires training them so that they are aware of what they have to do in terms of disciplinary action when they spot smoking in violation of the indoor ban. Additionally, the prison regime would have to be organised in such a way that prisoners are allowed sufficient time outside in order to be able to exercise their right to smoke in a meaningful way. It is known that letting prisoners go outside, especially in a high security prison, presents certain risks. Outside breaks eight times a day – as was the case in the hospital in *McCann* – seems unnecessary. One hour a day, which is the standard in many prisons and was also the case in Quebec, might be sufficient. In that regard, it does not appear that changes have to be made in respect of the number of times prisoners are allowed outside to what is already considered the standard. However, a one-hour smoking break every day entails the health hazard that prisoners will smoke a high number of cigarettes in a short period. This is an additional reason for why the number of cigarettes made available for purchase per prisoner should be limited, aside from the need to ensure that the total number of cigarettes being smoked at any given time is not too high in order to reduce the negative health effects on non-smoking prisoners in the vicinity (see previous section). While restricting the number of cigarettes that prisoners are permitted to smoke in a given day would constitute an interference with their Art 8 rights, such interference would be justified in light of the legitimate aims of other prisoners and staff's rights and health protection and would still be less intrusive and strike a better balance between competing rights and interests than banning smoking altogether. Finally, another important point not to lose sight of when implementing an indoor smoking ban, is that the same number of outdoor breaks should be guaranteed to all prisoners, regardless of their smoking habits. Giving smoking prisoners' more time outside in order to allow them to exercise meaningfully their right to smoke might create the perverse incentive for other prisoners to take up

[98]Ibid.
[99]Institut National De Santé Publique Du Québec, above n 96, vii–viii.
[100]Lasnier et al, above n 97, at 250.
[101]*McCann*, above n 79, at [12].

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smoking, not to mention that it would be a raise an issue of discrimination between smoking and non-smoking prisoners.

The various challenges associated with the implementation of an indoor smoking ban do not necessarily mean that such a ban can never work and will always raise insurmountable problems. The conclusion from the study conducted in respect of the enforcement of the indoor smoking ban in Quebec was not that similar bans are doomed to fail, but rather that the Quebec indoor smoking ban needs to be considered in its particular context where a complete smoking ban was suddenly reduced to an indoor ban. The study also stated that in general it is important to consider organisational and environmental factors when planning the implementation of an indoor smoking ban in correctional facilities.[102]

Moreover, while it may seem that implementing an indoor smoking ban comes with a myriad of requirements and budgetary investments, implementing total smoking bans is not necessarily any easier. They require adequate preparation and planning, the provision of alternative activities for prisoners, smoking cessation programmes, clear communication and consultation with both staff and prisoners, and comprehensive staff and training support.[103] More importantly, apart from the negation of smoking prisoners' autonomy, implementing total smoking bans also comes with a range of unintended side-effects. One of the risks is riots and increased violence between prisoners and towards staff,[104] as the announcement of the UK government's plan to make all prisons smoke-free has illustrated.[105] Another risk of total bans is that the prison will not become totally tobacco-free but that smoking will go underground and black markets will start to develop.[106] This creates a range of associated problems such as trading sex for tobacco, smuggling, and prison staff having to police another illegal substance.[107] An additional related risk is that when people continue to smoke in defiance of the ban, it becomes even harder for non-smoking prisoners to report this and request a transfer to a different cell. Reporting smoking could mean that the prisoner who violated the prohibition may face even harsher disciplinary sanctions. This is contrary to the wide-spread prison cultural norm that you do not 'rat on' fellow inmates. Reporting smoking could lead to retaliation in the form of physical violence.[108] Finally, there are indications that a total prohibition on tobacco smoking will lead to an increased use of other illegal substances. Recent HM Inspectorate of Prisons (HMIP) reports mention the exponential rise of new psychoactive substances (NPS) in English prisons.[109] NPS are illegal substances designed to mimic the effects of traditional drugs.

[102]Lasnier et al, above n 97, at 252.

[103]The Offender Health Research Network, above n 4, p 28; A Mackay 'The human rights implications of smoking bans in closed environments: what Australia may learn from the international experience' (2016) 46 International Journal of Law, Crime and Justice 13 at 25–26.

[104]Mackay, above n 103, at 25.

[105]See for example Metro *Inmates are Rioting over a New Smoking Ban in Prisons* (16 July 2017), available at http://metro.co.uk/2017/07/16/inmates-are-rioting-over-a-new-smoking-ban-in-prisons-6770389/; BBC News *Smoking Ban and Short Staffing 'Sparked Prison Riot'* (30 January 2018), available at http://www.bbc.co.uk/news/uk-england-wiltshire-42877647; BBC News, *HMP Haverigg Prison Riot Linked to Smoking Ban* (27 February 2018), available at http://www.bbc.co.uk/news/uk-england-cumbria-43209010. On the representation of smoking in prisons and smoke-free prisons in the media see A Robinson, H Sweeting and K Hunt 'UK news media representations of smoking, smoking policies and tobacco bans in prisons' (2018) 27 Tobacco Control 622.

[106]HM Inspectorate of Prisons *Changing Patterns of Substance Misuse in Adult Prisons and Service Responses: A Thematic Review by HM Inspectorate of Prisons* (2015) para 3.15, p 31, available at https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2015/12/Substance-misuse-web-2015.pdf.

[107]Butler et al, above n 7, at 291.

[108]Mackay, above n 103, at 18.

[109]HM Chief Inspector of Prisons for England and Wales *Annual Report 2013–2014* (2014) pp 30–31, available at https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2014/10/HMIP-AR_2013-14.pdf; HM Chief Inspector of Prisons for England and Wales *Annual Report 2014–2015* (2015) pp 10, 34, 37–38, available at https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2015/07/HMIP-AR_2014-15_TSO_Final1.pdf; *Changing Patterns of Substance Misuse in Adult Prisons and Service Responses*, above n 106; HM Chief Inspector of Prisons for England and Wales *Annual Report 2015–2016* (2016) pp 8, 26–27, available at https://www.justiceinspectorates.gov.uk/

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The largest category of NPS are synthetic cannabinoids. A popular brand of synthetic cannabinoids in English prisons is 'Spice'.[110] The Psychoactive Substances Act 2016 criminalises the production, supply, possession with intent to supply, import or export of a psychoactive substance if it produces a psychoactive effect.[111] Possession of a psychoactive substance is not illegal, except in a custodial institution, punishable with a maximum sentence of two years' imprisonment and a fine.[112] It is conceivable that when prisoners are denied all access to tobacco, they will turn to an alternative such as Spice, which is widely available in prison and costs half as much as tobacco.[113] HMIP reported that a complete smoking ban may result in a higher prevalence of certain NPS. It cautioned that '[t]he ban will need to be managed carefully, to ensure that it does not lead to an increased illicit market for other harmful substances, with the associated adverse effects on safety and security'.[114] In HMP Erlestoke many prisoners said that the availability of drugs, coupled with the recent smoking ban, had fostered 'a widespread sense of hopelessness, and that it was difficult to maintain recovery [from drug and alcohol addiction] in an atmosphere where so many other prisoners were regularly under the influence of Spice'.[115] While a complete tobacco smoking ban is certainly not the sole cause of the Spice epidemic, it is likely to be a contributing factor.

In conclusion, from a (human) rights perspective an indoor smoking ban in prison is preferable to a complete ban. A total smoking ban in prison erodes the smoking prisoner's right to private life and autonomy in favour of health protection and non-smoking prisoners' Art 3 rights. The competition between these rights and interests is to an extent a false one. Allowing prisoners to smoke outside at designated times would preserve smoking prisoners' right to private life and autonomy, while safeguarding the health of non-smoking prisoners (and staff) and avoiding some of the implementation problems associated with a total smoking ban. However, in the current political and penal climate, it would be almost utopian to expect that the government would take seriously the suggestion to trial indoor smoking bans first before making the decision to impose a complete ban. The investment in prison staff and infrastructure necessary to make an indoor smoking ban practically feasible, would be one of the lowest budgetary priorities for the government. The government's plan to impose total smoking bans in prisons nationwide is also in step with a general trend in common law countries (see introduction). Moreover, the government's choice for a total ban is not surprising from a political viewpoint. In a country where citizens forfeit their fundamental right to vote upon incarceration,[116] it would almost be cause for disbelief if extensive provisions were made to let prisoners continue to enjoy a noxious indulgence such as smoking.

Conclusion

At present, there is no piece of legislation that imposes a uniform rule in respect of smoking for all English prisons. Prisoners are bound by the individual prison policies and regulations, some of which will still allow prisoners to smoke in their cells and outside, whereas others have banned all smoking on prison grounds. The UK government's long-term plan is to make all prisons smoke-free nationwide. While all prisoners have to abide by the individual prison regulations, the effectiveness of

hmiprisons/wp-content/uploads/sites/4/2016/07/HMIP-AR_2015-16_web.pdf; HM Chief Inspector of Prisons for England and Wales *Annual Report 2016–2017* (2017) p 26, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/629719/hmip-annual-report-2016-17.pdf.

[110]R Ralphs et al 'Adding spice to the porridge: the development of a synthetic cannabinoid market in an English prison' (2017) 40 International Journal of Drug Policy 57 at 57–58.

[111]Psychoactive Substances Act 2016, ss 4–8.

[112]Ibid, ss 9, 10(2).

[113]Ralphs et al, above n 110, at 58–59, 65; HM Chief Inspector of Prisons *Report on an Unannounced Inspection of HMP Erlestoke* (2017) para 1.54, p 7, available at https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2017/11/HMP-Erlestoke-Web-2017.pdf.

[114]*Changing Patterns of Substance Misuse in Adult Prisons and Service Responses*, above n 106, para 3.16, p 31.

[115]*Report on an Unannounced Inspection of HMP Erlestoke*, above n 113, para 1.54, p 7.

[116]See *Hirst v UK (No 2)*, above n 77; *Greens v UK* (2011) 53 EHRR 21; *Firth v UK* (2016) 63 EHRR 25.

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a prisoner's legal protection from exposure to tobacco smoke differs depending on whether a prisoner is detained in a public or private prison. Public sector prisons are not bound by the Health Act 2006, as the UK Supreme Court held in *Black*. Lady Hale found in the judgment that public sector prisons can do a lot by voluntary action. By contrast, the Health Act 2006, its exceptions under the Smoke-free (Exemptions and Vehicles) Regulations 2007, and the individual prison regulations which are adopted in accordance with them, do apply to private prisons. The absence of statutory protection puts the prisoner in a public prison in a comparatively weaker legal position than the prisoner in a private prison, who can rely on the more effective means of enforcing a complete or partial smoking ban under the Health Act 2006.

Non-smoking prisoners who are exposed to second-hand smoke in prison and suffer deteriorating health as a result are protected under Art 3 ECHR, but this only establishes a minimum level of protection. In addition, states have a positive duty under Art 8 to organise prisons in such a way that it safeguards prisoners' right to private life, but at present this does not entail an obligation to separate smoking from non-smoking prisoners.

There is no such thing as an absolute right to smoke in prison under English law, and neither can it be derived from Art 8 ECHR. While individuals have the right under Art 8 to do unhealthy or harmful things to themselves within the confines of the law, such as smoking, this right can be interfered with in a prison context in light of the protection of health and other Convention rights under the second limb of Art 8. Whether or not a complete ban on smoking in prison is justified, will ultimately depend on whether it can be considered proportionate. The UK Supreme Court already found in *McCann* that a complete ban on smoking in a psychiatric hospital was proportionate, and it is expected that the Supreme Court would adopt a similar reasoning in respect of smoking bans in prisons. It is not entirely clear how the ECtHR would respond to a complete ban. However, the existing Strasbourg jurisprudence leaves a wide margin of appreciation to the Member States on the issue of regulating smoking that does not attain the minimum level of severity required to engage Art 3 ECHR. It is expected that if Member States can demonstrate that a less intrusive measure to regulate smoking does not achieve the aforementioned aims, the ECtHR might conclude that even a complete ban is proportionate.

While a complete ban may be legal, this paper has argued that it may not be the most desirable or even necessary option to regulate smoking in prison, as it strips away rights of smoking prisoners. A better rights balance can be struck by prohibiting smoking inside prison buildings but permitting it outdoors. An indoor ban safeguards smoking prisoners' right to private life and autonomy, yet still protects non-smoking prisoners and staff's health. Implementing and enforcing such a ban presents certain challenges, but the same is true of a total smoking ban. Consequently, it is worth trialling indoor smoking bans in order to secure better human rights protection for the prison population as a whole, and only resorting to complete bans once it has been conclusively proven in each individual case that the desired aims cannot be achieved. However, it is highly unlikely that this will ever happen in England.

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