PRISONERS' RIGHTS

Prisoners' Legal Rights Group Bulletin No 60

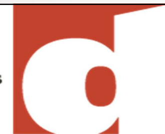
Autumn 2012

PAS PRISONERS' ADVICE SERVICE

The Prisoners' Advice Service (PAS) is a charity that provides free legal advice and information to people in prison in England and Wales. We produce this bulletin, setting out case law, Ombudsman's decisions and legislative and policy changes relevant to people in prison. The PLRG is free to serving prisoners.

Sponsored by

doughty street chambers



Crime

Civil

Administrative & Public

International

Human Rights

True Experts in Prison Law & Prisoners' Rights

Representing clients before the Parole Board, Adjudications, the High Court and beyond, Doughty Street has always been the home of prison law. Our members have been involved in many of the leading House of Lords and Supreme Court cases over the last two decades, bringing important advances in prisoners' rights and developing key principles in human rights and administrative law.

54 Doughty Street, London, WC1N 2LS Tel: 020 7404 1313
Pall Mall Court, 61 – 67 King Street, Manchester, M2 4PD Tel: 0161 618 1066
Broad Quay House, Prince Street, Bristol, BS1 4DJ Tel: 0117 905 618 8717

Contents

Case reports 2
Updates on Prison Service Instructions 12
Ombudsman Cases 13

CASE REPORTS

INDETERMINATE SENTENCES FOR PUBLIC PROTECTION (IPP)

James, Wells and Lee v United Kingdom (ECHR, 18.09.12)

These prisoners received IPPs in 2005 with tariffs of two years (Brett James), 12 months (Nicholas Wells) and nine months (Jeffrey Lee).

The European Court of Human Rights (ECtHR) held unanimously that the failure to make appropriate provision for rehabilitation services resulted in breaches of Article 5(1) of the ECHR (European Convention on Human Rights), which protects the individual from arbitrary detention. They also held by six to one that there had been no violation of Article 5(4) (the right to have the legality of detention decided quickly by the court). The court has awarded the three IPP prisoners who took their cases to the court substantial compensation of between 15,000 and 20,000 euros (between £12,000 and £16,000).

The Applicants had asserted the main issue in their cases to be the alleged arbitrariness of the post-tariff detention. They maintained that once the punitive element of the sentence had passed (tariff expiry), then where the individual was detained solely on the basis of risk such detention was capable of becoming arbitrary and unjustifiable under Article 5 (1) in the absence of means to reduce or demonstrate reduction of risk, where the failure was for a considerable period of time, and in light of the significance of the risk posed by the prisoner.

The government contended that the purpose of the IPP was public protection, and that the Parole Board should start from a stance that detention should continue until satisfied that detention was no longer necessary for the protection of the public. The causal link between conviction and detention would only be broken where the grounds of the continuing detention became inconsistent with the public protection objective of the original sentence.

In considering Article 5(1) the ECtHR stressed that compliance with national law alone did not keep detention lawful: deprivation of liberty should be in line with keeping the individual protected from arbitrariness, which would vary depending on the type of detention involved. Whilst this list was not exhaustive, the following elements were capable of rendering detention as arbitrary. First where there was bad faith or deception on the part of the authorities in bringing an application into custody. Second the order to detain and the execution of the detention must genuinely conform with the purpose of the restrictions permitted by Article 5. Third there must exist a relationship between the grounds of permitted deprivation of liberty and the place and conditions of detention. This was demonstrated by reference to two cases (M v Germany ECHR 2009, Grosskopf v Germany 21/10/10) where concerns arose regarding individuals who, having served the punitive element of their sentence, were in detention solely because of risk to the public but not given meaningful access to special measures to reduce the danger they present and thus limit their detention. Finally there needs to be a relationship of proportionality between the grounds of detention relied upon and the detention in question; the scope of the proportionality test needs to be applied on a case by case basis.

In this case the ECtHR focused on the importance of access to rehabilitation if prisoners were going to be locked up in order to protect the public. The Court acknowledged that by virtue of s.142 of

the 2003 Act rehabilitation was not an express objective of the IPP sentence but they looked at the previous judgments and the statements made by then Minister of State at the Home Office, Baroness Scotland, during the parliamentary debate concerning the original legislation regarding indeterminate sentences. They noted that '*a real opportunity for rehabilitation was a necessary element of any part of the detention which was to be justified solely by reference to public protection*.' Despite the introduction of the IPP scheme being premised upon rehabilitation services being made available to prisoners, the Court observed that there had been considerable delays and that the Applicants "had no realistic chance of making objective progress" towards parole. It considered that this had been the result of "lack of resources, planning and realistic consideration of the impact of the sentencing scheme".

This important judgment shows that the lawfulness of indeterminate sentences based on a prisoners' risk to the public must depend upon the extent to which that risk is addressed in detention. Strasbourg's approach differed from that of the domestic courts when confronted by the Applicants' Catch 22 predicament: they complained that they could not show that they were rehabilitated and therefore suitable for release because of the failure to ensure that they had access to the courses that would progress their rehabilitation. The Court of Appeal (*Secretary of State for Justice v Walker* [2008] EWCA Civ 30) and House of Lords (*Secretary of State for Justice v James* [2009] UKHL 22) had been united in their criticism of the Secretary of State's failure to provide adequate resources with which to meet his public law duty, yet each had fallen short of finding the detention to be unlawful in and of itself. Despite noting the SSJ's "deplorable" failure to meet his public law duty, the House of Lords had found no rupture in the causal connection between the ground of detention and the detention itself. In the Court of Appeal in James, Lord Phillips' starting point had been that the primary object of the IPP sentence was to protect the public, not to rehabilitate. For him, concerns from an Article 5 perspective only arose when the stage was reached that detention was no longer necessary for protection of the public, or where so long had elapsed without a meaningful detention review that detention had to be considered arbitrary.

By contrast, the ECtHR essentially viewed protecting the public and rehabilitation as two sides of the same coin. A real opportunity for rehabilitation was "*a necessary element of any part of the detention which is to be justified solely by reference to public protection*." Detention for public protection could not be allowed to "*open the door to arbitrary detention*." Reasonable provision of rehabilitative services was all that was required. Yes, persons could be detained indefinitely on the grounds of public protection from the risk they posed, but the system had to provide for those risks to be reduced through rehabilitation. As the courts below recognised, this was the basis upon which the Secretary of State had laid the enabling statutory provision before Parliament. It was, for Laws LJ in the Divisional Court in Wells, "inherent" in the way the legislation was intended to work in practice. It appears that for the ECtHR, however, it was also inherent to the question of lawfulness.

Finally in the House of Lords, Lord Judge had insisted that an IPP sentence did not render prisoners "confined to penal oblivion" on the contrary, "common humanity, if nothing else, must allow for the possibility of rehabilitation." Yet, whatever the level of "humanity" involved, it is now clear that

proper resources and planning are required in order to ensure that a prisoner progressed along the continuum between sentence and release, within which rehabilitative courses are seen as an accepted vital stage otherwise short-tariff prisoners like the Applicants might well find themselves in a position that feels very much like 'penal oblivion'.

The government says it intends to appeal, though given the clear reasoning and unanimous decision it is difficult to see the Grand Chamber giving much consideration to any appeal. What the ECtHR has not ruled is that the whole concept of indefinite preventive detention after a prisoner has completed the punitive part of his sentence (tariff) is in breach of the human rights convention. Also IPP sentences are still being handed down even though parliament has passed a law (as part of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act given royal assent on 1/5/10) that includes abolition of future IPP sentences, because that part of the Act comes into effect only on a date to be fixed by the Justice Secretary, and no such date has yet been fixed.

However this judgment does give some definition to arbitrary detention and may be useful in other contexts such as whole life sentences. It will also hopefully put pressure on the government to bring into force the repeal of IPP sentences and to work out how to rapidly reduce the existing ones. There are also likely to be immediate practical consequences in terms of potential damages claims brought on behalf of those 3,000 plus prisoners currently over tariff, as well as other IPP prisoners who have been released but were arbitrarily deprived of their liberty as a result of the systemic failings noted by the Court. These could be brought under Section 8 of the HRA 1998 though any HRA claims would be limited to relatively low awards reflecting "just satisfaction" within the meaning of Article 41 ECHR (the Applicants received only a few thousand euros each). Additionally only those who can show that their release has been significantly delayed by an absence of specific available courses, specifically prescribed as conditions for consideration for release, are likely to have a case for compensation. IPP prisoners who have yet to complete their tariffs are unlikely to qualify for compensation.

PAROLE - DETERMINATE SENTENCED PRISONERS

R (Caron Foley) v (1) Parole Board, (2) SSJ [2012] EWHC 2184 (Admin)

The Claimant is serving an 18 year determinate sentence for committing arson with intent to endanger life and manslaughter. At about the half way stage of her sentence she applied unsuccessfully for early release. She challenged the Parole Board's refusal on the basis that the test applied to her as a long term determinate sentenced prisoner (risk to the public of a further offence being committed at a time when the prisoner would otherwise be in prison) is more onerous that that applied to a life sentenced prisoner (the life and limb test). She claimed this represented a violation of Article 14 of the ECHR which prohibits discrimination on specified grounds including "other status".

It is recognised that Article 14 is capable of being invoked in circumstances where the early release provisions engage Article 5 and where alleged discriminatory provisions as to such release exist. In order for the Claimant to succeed in her claim, she would have to establish that she falls into the "other status" provision of Article 14, and that

there is no objective justification for the difference in the release tests to be applied as between lifers or other indeterminate prisoners and those serving determinate sentences.

The Court accepted the Defendants' argument that they were bound by the House of Lords' decision in *(R)Clift v Secretary of State [2007]* that the classification of a prisoner serving a long determinate sentence of 15 years or more, as opposed to a life sentence or a shorter determinate sentence, did not constitute "other status" for the purposes of Article 14 and the case was not of such an "extreme character" to justify departure from this precedent. The claim therefore necessarily failed. However the Court also considered the other issue raised, and in its view there was no objective justification for the imposition of more stringent conditions of early release for those serving fixed term sentences than for those serving life or indeterminate sentences. The two classes of fixed and indeterminate sentenced prisoners are sufficiently analogous, despite clear differences, in the context of early release provisions to justify comparison where it is the risk of future offending in both instances that is under consideration. It relied again on the case of *Clift*, where the Court said that there was no objective justification for the SSJ to retain the final say in relation to those serving fixed sentences of 15 years. The Parole Board should be able to make the final decision in such cases given that already assessed the suitability of the release of prisoners serving less than 15 but more than four years of a fixed term sentence or those sentenced to life.

PAROLE - LIFERS

R (Oletunde Adetoro) v SSJ and the Parole Board [2012] EWHC 2576 (Admin)

This case concerned the unusual situation of a Category A lifer at HMP Long Lartin having been recommended for open conditions by his Parole Board. A judicial review challenge was made after the SSJ initially agreed to the recommendation and approved the move to open conditions but then went back on that decision because of perceived 'omissions and serious flaws' in the Parole Board's reasoning. In between the two decisions, the SSJ had received representations from the MOJ and NOMS Directorate of High Security after concerns had been raised by HMP Long Lartin about the decision. These representations had been made privately with the Claimant not being aware of them or invited to respond.

The Court said that both the Parole Board, when considering the making of a recommendation, and the SSJ, in deciding whether to accept, it must have regard to the directions issued under section 32(6) of the CJA 1991. The SSJ retained ultimate power to decide whether a prisoner should be placed in a different category and that whilst he must give weight to the panel's recommendations, he is not prevented from disagreeing with the panel should he choose to do so. However, if he chose to depart from the Board's recommendation, he had to do so fairly and properly and give adequate reasons (see *R (Hindawi) v SSJ* [2011] EWHC 830). The Court regarded as inconsistent with the statutory and process context that the SSJ could issue a different decision within the same process, absent any change in circumstances or any new evidence, without first inviting submissions from those affected. The Court did not come to any decision as to whether the SSJ had the power to withdraw a decision and substitute it for another in a case such as this, where the first decision was lawful and there had been no change in circumstances, nor any new

evidence. This was because the court found that the second decision letter was of itself unlawful, given that the reasons given as to the change of mind by the SSJ were irrational and inadequate, as were his reasons for refusing to transfer the Claimant to open conditions. The Parole Board had all the material before it to make a decision, had dealt with the issues of risk and behaviour, and applied the correct test for a move to open conditions. They had considered all of this within the context of what were very serious offences.

The Court therefore quashed the decision. It was then up to the SSJ as to how he wanted to proceed thereafter, and one option was that he could reconsider whether to accept the Parole Board recommendation. However he must then invite the Claimant to make representations and then deal with the Parole Board recommendations and reasoning in a way that addressed them appropriately.

CATEGORY A ORAL HEARING

R (Michael Fox) v Secretary of State for Justice [2012] EWHC 2411 (Admin)

This is another in a long line of challenges around Category A and the requirement of an oral hearing in the interest of fairness. Like the vast majority the case was dependant on its own particular facts.

The Claimant had been sentenced to a discretionary life sentence whose minimum term expired in 2004. After conviction and initial designation as a Category A prisoner he had been transferred to hospital under the Mental Health Act before being returned to prison and Cat A status some five years after his minimum term expired. In a 2010 Category A review the Claimant had obtained two independent reports, including one by a clinical psychologist: both asserted that there was a sufficient reduction in risk for the Claimant to be managed in less secure conditions, however the Defendant maintained its assessment of the Claimant as a Category A prisoner.

Prior to the 2011 review the Claimant requested an oral hearing, and enclosed the clinical psychologists report from 2010 which had included a PCL-R (psychopathy checklist assessment used by the Prison Service) suggesting the Claimant did not meet the criteria for a diagnosis of psychopathy or antisocial personality disorder. However the Defendant refused an oral hearing and did not consider or address this report, instead relying on a PCL-R assessment from 2009. The Court reiterated that whether an oral hearing is required in an individual case will be fact specific. Given the rationale of procedural fairness there is no requirement that ‘exceptional circumstances’ should be demonstrated but rather whether it is wrong to refuse an oral hearing. In the circumstances of the present case the 2011 decision ought to be quashed and an oral hearing convened because of the failure to consider the findings of the 2010 report or to explain why the 2009 report was preferred given their very differing conclusions.

RELEASE ON TEMPORARY LICENCE

Boulis v Luxembourg (App No 3757/04, 3 April 2012)

The Applicant was serving a 15-year prison sentence, during which his requests for temporary release for family and professional purposes were refused. The Applicant argued that by so doing the prison authorities has violated his Article 6 rights, on the basis that temporary release amounted to a ‘civil

right' because it would assist with his reintegration into society.

In its judgement of 14 December 2010, a Chamber of the Second Section of the ECtHR upheld the Applicant's arguments and found that he had suffered a violation of his Article 6(1) rights. The case was referred on appeal to the Grand Chamber which in contrast held that the Applicant did not have a 'civil right' to temporary release which was recognised in either human rights convention law or Luxembourg law, rather that it was a privilege. Temporary release was granted only at the discretion of the prison authorities, which had to take various factors into account. The Grand Chamber also referred to the lack of consensus between member states about the status of prison leave and the arrangements for granting it.

In a joint dissenting opinion, two judges agreed with the Claimant's argument that temporary release did fall within the sphere of civil rights protected under Article 6, arguing that Article 6 and the determination of a civil right had begun to be applied more widely to prison disputes, including disputes over security measures and placements in a high security cell or high supervision unit (*Ganci v Italy* App No 41576/98, 30/1/03), and disciplinary proceedings (*Gulmez v Turkey* App No 16330/02, 20/508). Moreover, the judges did not accept that the entitlement to temporary release was a privilege rather than a right, pointing out that criminal law now recognised that prison leave was not a concession or favour, but rather a necessary measure to allow prisoners to prepare for their release. Moreover, the ECtHR has recognised that Article 6(1) extends to disputes over civil rights which are recognised under domestic law irrespective of whether or not they are protected under human rights convention (*Enea v Italy* App No 74912/01, 17/909). In the Applicant's case there was a clear dispute over a civil right and, accordingly, the two dissenting judges felt he should have been entitled to have his case heard by tribunal which complied with the requirements of Article 6(1). This was not the case here given the lack of independence and the absence of any effective review of the decisions made by the prison authorities. This case bears similarities to *R (King) v SSJ [2012]; R (Bourgass and Hussain) v SSJ* [2012] and illustrates the lack of consensus over the scope of civil rights within the prison context.

FOREIGN NATIONAL PRISONERS

Rangelov v Germany (App No 5123/07, 22 March 2012)

Mr Rangelov was a Bulgarian national serving eight-and-a-half years in Germany for a number of burglaries. The sentencing court also imposed a preventive detention order on the basis of his danger to the public.

Mr Rangelov remained in detention for four and a half years after completing his sentence on 19 June 2003, before which he was given no access to rehabilitative treatment or relaxed conditions of detention primarily because he was a foreign national. The lack of therapy and conditions of lesser security was relied on by the domestic courts in deciding that he was so dangerous that preventive detention was necessary.

The ECtHR agreed with Mr Rangelov's submissions that his rights under Article 5, in conjunction with the prohibition of discrimination in Article 14, were breached by the decision that he should remain in preventive detention. He had been denied a chance to fulfil essential preconditions which would allow the German courts to conclude that he could be released from preventive

detention. Nor had the German authorities, as an alternative, returned him to his country of origin for the period of detention in question. Germany argued that, because of the prisoner's persistent refusal to take responsibility for his offences, there was no suitable therapy to offer him, but the court, relying on *M v Germany* App No 19359/04, 17/12/09, stated '*persons in preventive detention require an individualised therapy if the standard therapies available in the institution do not have prospects of success*'.

Though this decision relates to a slightly different prison regime than the UK's it does provide a potential basis for challenges in regards to a refusal to allocate FNPs to open prisons where the justification is their nationality and where such refusal impacts on their ability to demonstrate reduction in risk. It also confirms the obligation of states to provide meaningful rehabilitative treatment where preventive detention is imposed.

RECALL

Haynes v SSJ [2012] EWHC 2481 (QB)

This case looks at whether or not the Claimant's human rights were breached as a result of procedure surrounding his recall. The Claimant had been sentenced in April 2008 to an extended sentence of imprisonment under s85 Powers of the Criminal Courts (Sentencing) Act 2000, consisting of a 24 month custodial term and a 36 month extended licence period.

On 9 April 2009, the Claimant was released half way through his custodial term on licence, but on 26 June his licence was revoked for alleged breaches of licence conditions. He was arrested on 27 June 2009 and detained in police custody until 30 June when he was transferred to HMP Belmarsh. There was then a delay in his being notified of the reasons for recall and his receiving the parole dossier. The representations pack was sent to HMP Belmarsh on 3 July but was not disclosed to the Claimant until 15 July due to an 'administrative error'. As 3 July was a Friday and is treated as a working day, the Claimant should have received it no later than 6 July. The Claimant on receiving the pack immediately signed that he wished to make representations and to do so via a legal representative. The Parole Board considered the Claimant's re-release on 21 July 2009 without having received any representations and decided he should be re-released on licence on 28 August with some changes to his licence conditions.

The Court noted that recall is governed by s253 of the CJA 2003 which provides that when a person is recalled to prison, he/she can make written representations and if he/she is returned to prison, *must* be informed of the reasons for the recall and the right to make representations. S256 (as amended by the CJIA 2008) deals with reviews by the Parole Board. It states that if immediate release on licence is not recommended, the Board must either fix a date for the person's release on licence or determine the date for reference. Furthermore, any date fixed for release must not be later than the first anniversary of the date on which the decision is taken and the SSJ is duty bound to release him/her on licence on that date. The procedure which governs recall is dealt with in chapter 7 of PSO 6000. Article 5 (2) of the ECHR also makes clear that everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest, and of any charge against him.

The Claimant was not promptly provided with precise formal reasons for

his arrest. The Defendant issued an apology to the Claimant on the late delivery of the representations pack which included detailed reasons for his arrest on 10 July. This apology was repeated in Court. The issue here was therefore whether this apology amounted to 'just satisfaction'. The Court noted that the ECtHR cases (*Van Der Leer v The Netherlands (1990 12 EHRR 567, Waite v United Kingdom (2001) 31 EHRR and Tsfayo v United Kingdom (2009 48 EHRR 18*) awarded damages for hurt to feelings due to a breach of Article 5 and was prepared to note that the Claimant felt distressed. Therefore, the apology was not 'just satisfaction', and £1,500 damages awarded.

In respect of Article 5(4) and the lawfulness of detention the Claimant's arrest was lawful but the Claimant alleged that the procedure was not fair as he had effectively been stopped him making representations to the Board who had considered his case without his input and without looking at whether or not an oral hearing was needed. The Claimant alleged that that had he been able to do so, the Board may have ordered him to be released immediately. The Court looked at the Parole Board's role under the CJA 2003 and PSO 6000. Although the Board made a decision on 21 July, the Claimant could have sought a further referral to the Board and the SSJ could still have referred the case to the Board. However, the Judge did not believe that the outcome would have been any different. Therefore it was declared there was a breach of Article 5(4) but did not deem any damages to flow from the breach. As recall was found to have been lawful there was subsequently no breach of Article 6(1). *R (West) v Parole Board and R (Smith) v Parole Board (No2) [2005] UKHL 1* had held that decisions as to recall are not within the meaning of Article 6. The Claimant did not have the right to liberty and his recall did not involve a determination of his civil rights. This was because as long as a prisoner's recall is deemed to be lawful, his rights are limited to the right to be informed of the reasons for it and to make representations to the Board. If the Board acted unfairly, then the prisoner would have recourse to judicial review.

Finally the Claimant alleged that Article 8 was engaged on the basis that he had an additional six months added to his licence conditions as a result of the recall. The Court held that PSO 6000 achieves a fair balance between the interests of society and the prisoner, that the facts in each case vary and that the conditions imposed in this instance were justified. The extension of the licence period was not found per se to give rise to a breach of Article 8 and was therefore rejected.

TRANSFER UNDER TRANSFER OF SENTENCED PRISONERS ACT 1995 & 1997

Butcher v Minister for Justice and Equality [2012] IEHC 347

The Applicant, a British national, was sentenced in Ireland in April 2010 to six and a half years imprisonment for manslaughter, to date from December 2008. In September 2010, he sought a transfer to the UK under the Transfer of the Sentenced Prisoners Act 1995 and 1997 (which aims to implement the Council of Europe Convention on the Transfer of Sentenced Prisoners) in order to receive visits from his elderly mother and his family.

The UK agreed to the transfer in February 2011 on the understanding that the Applicant would automatically be released on licence at the half-way point of the balance that remained of the sentence at date of transfer. The UK

could not guarantee however that the prisoner would be located close to his family. The Irish authorities argued that the Applicant would ultimately serve a shorter sentence if he were transferred back to the UK and did not believe that Article 8 was a relevant concern given the UK could not make any guarantees on location.

This case confirmed that there is no automatic right to be transferred even where the prisoner applying for the transfer meets the criteria under the Act. Any prisoner wishing to be transferred to another country under this Act must apply in writing, must agree in writing to the transfer, and must be a national of the country that he wants to be transferred to. In addition, the sentence he has been given must be final, and there must be at least six months of the sentence left to serve when the application is made, or the sentence should be indeterminate. Finally, it needs to be shown that the crime committed by the prisoner is also a crime in the country he wants to transfer to, and that the country he wants to transfer to agrees to the transfer. All of these conditions were satisfied on the facts of this particular case

However the Court held that the Irish authorities had not made any enquiries into the Applicant's index offence, his personal or family circumstances or his progress in custody. Although there is no automatic right to transfer, the Irish Authorities should have explained why it was more important for the prisoner to complete his full sentence, instead of allowing him the transfer to the UK where he would be released earlier, but would benefit from his Article 8 rights whilst in prison by seeing his family. The Court quashed the decision of the Irish authorities on the basis of the failure to take into account the Applicant's family life before the final decision was made. Article 8 considerations are therefore likely to be fundamental to any decision as to whether or not prisoners can be transferred back to their own country to serve the remainder of their sentence.

HANDCUFFING

FGP v SERCO PLC and SSJ [2012] EWHC 1804 (Admin)

This case concerned a judicial review of (i) the SSJ's policy (DSO 08/2008) on handcuffing detainees when they are escorted outside detention centres (eg for medical treatment), (ii) Serco PLC's policy on the same issue (it runs a number of detention centres in the UK), and (iii) the application of handcuffs to a person in immigration detention – known in the proceedings as FGP – on four occasions in 2010 when he attended hospital for investigations, consultations and treatment.

FGP was taken to hospital from an immigration removal centre four times between July and September 2010. On each occasion a risk assessment was carried out which concluded that the use of restraints (handcuffs or closet chains) at all times was necessary. This was due to FGP's history of violent offences, risk of self-harm and likelihood of absconding, and the low level of security at the hospital. Three out of the four visits were completed within a day but one resulted in an eight day in-patient stay. During that time FGP could not leave his bed without being handcuffed to an officer, including when he needed to relieve himself, shower or undress. He claimed Serco had failed to consider the question of restraints properly and had breached his Article 3 and 8 rights. FGP joined the SSJ as a Defendant stating that the guidance on the use of restraints during hospital visits was imprecise, leading to an unaccept-

able risk that a breach of his human rights would occur.

In the Court's view neither of the policies contained an unacceptable risk of a breach of either Article 3 or 8. The Court also dismissed the claim insofar as it concerned the handcuffing on three of the four visits to hospital, which were for relatively short periods of time, where the handcuffing was deemed necessary given FGP's history and previous convictions. On the issue of the SSJ's policy the Court held that the policy could not be expected to go into great detail and in any case Serco plc was primarily responsible for safeguarding the human rights of individuals under its control. Whilst the Court found that the policy could be criticised for not identifying clearly that there should be a presumption against restraints during treatment or consultation that did not render the policy unlawful.

However the Court did uphold FGP's claim in respect of the longer eight day visit, as there had been no separate consideration by Serco as to the need for continual restraint, specifically whether FGP should be restrained during treatment, whether it was necessary to handcuff him to the bed while he slept and whether the presence of officers in the room was needed instead of stationing them outside the door. Other practical measures could have been taken to prevent him from escaping or from causing harm to himself others. The Court reaffirmed the presumption that restraints will not be applied during medical treatment and that there should be no attendance within earshot of consultation unless it is decided on proper grounds that such restraints or attendance are necessary. It was not correct policy to simply continue to use restraints and attendance unless medical staff themselves requested otherwise. By failing to consider these issues and continuing to apply restraints when they were not necessary Serco had breached FGP's human rights during this longer stay.

Finally in respect of NHS bodies and staff, the Court said that they should not allow those responsible for the security of prisoners and other detained persons to argue that the burden of deciding whether restraint is necessary falls on the NHS. Staff should remember that consultations and treatment are confidential and there is a presumption against restraint or security staff being in earshot at these times. If staff are concerned that restraint is disproportionate or is impacting adversely on a patient's care, they should raise it with the NHS Trust management.

CORRESPONDENCE

Chester v MOJ and Governor of HMP Long Lartin (Appeal)

In PLRG 57 (Winter 2011) we wrote about the unreported case of Chester v MOJ and Governor of HMP Long Lartin in Evesham County Court. Mr Chester had applied for compensation on the basis of a breach of his Article 8(2) rights by HMP Long Lartin. The claim concerned a consideration of whether letters to and from the Treasury Solicitors should be subject to the protection of Rule 39.

District Judge Savage held that Article 8 (2) had been breached on the basis that (1) there was a delay in Mr Chester sending and receiving his correspondence; and (2) two of Mr Chester's letters from the Treasury Solicitors had been opened. He awarded him £250 non-pecuniary damages, plus £750 damages in respect of the temporary withholding of Rule 39 material.

This case was then appealed and similar cases were stayed pending the appeal with the Prison Service in the interim continuing to rely on the case of Francis v SSHD [2006] EWHC 3021 (QB) in which the court held that correspondence from the Treasury Solicitors was not covered by Rule 39 or confidential access and there was no breach of Article 8 in relation to the opening of such mail.

The appeal was heard on 3 August 2012 at Leeds County Court. Judge Gosnell allowed the Prison Service's appeal in relation to the Treasury Solicitors' letters, although he dismissed the parts in relation to the withholding of Rule 39 mail sent in by Mr Chester's solicitor and refused applications by the Prison Service's lawyers to appeal further and for cost of over £20,000.

PRISON SERVICE INSTRUCTIONS

PSI 18/2012 Tariff expired removal scheme (TERS)

There is a new Tariff Expired Removal Scheme (TERS) for indeterminate sentence foreign national prisoners (IFNPs). IFNPs who are confirmed by the United Kingdom Border Agency (UKBA) as liable for removal, will be removed from the country upon or on any date after the expiry of their tariff without reference to the Parole Board. If IFNPs cannot be removed after expiry of their tariff they must undergo the normal generic parole process and cannot be released on licence without having been granted parole by the Parole Board.

TERS is mandatory but IFNPs must not be removed before their tariff has expired or without Public Protection Casework Section (PPCS) authorisation. PPCS will normally refuse removal under TERS if:

- The prisoner is subject to confiscation order proceedings.
- Any outstanding criminal proceedings or police investigations have yet to be concluded.
- There is clear evidence that the prisoner is planning further criminal offences, including plans to evade immigration control and return to the UK unlawfully.

PPCS will consider, in consultation with the NOMS Extremism Unit, whether TERS should be refused to IFNPs serving sentences for a terrorism-related offence.

Where possible, UKBA will take the prisoner directly to the port of departure from the prison; if this is not possible, the prisoner may need to be held overnight in an Immigration Removal Centre.

PSI 21/2012 Release on temporary licence (ROTL)

This PSI amends the guidance on ROTL including by allowing for:
Governors to exceptionally consider applications for ROTL from Indeterminate Sentence Prisoners (ISPs) who have been approved for transfer to open conditions but remain in closed conditions.

Previously there was a strict ban on ISPs who had been recategorised to Category D but had not yet moved to open prisons from being assessed for temporary release. This amendment followed judicial review proceedings lodged by PAS in February 2012 regarding a pre-tariff lifer in HMP Lindholme. The MOJ accepted the rationale that the resettlement process should not be prevented from beginning as result of delays in transferring prisoners to open prisons.

Prisoners with consecutive terms of imprisonment in default of payment to have their eligibility dates recalculated on the basis of the overall term of imprisonment. Previously, prisoners with consecutive default confiscation order terms were considered for ROTL purely on the default term. Following a High Court challenge by PAS, this policy has now been amended.

The instruction also offers interim guidance on Childcare Resettlement Licence, pending further review. In a case brought by PAS, in February 2012 the High Court handed down judgment stating that consideration must be given to the rights of the child and their views when determining whether prisoners can be refused CRL. The case reaffirmed that the right to family life that is not lost simply by being in prison.

PSI 22/2012: Intelligence – Regulation of Investigatory Powers Act: Covert Surveillance

This PSI replaces PSO 1000 – National Security Framework Function 4 regarding covert surveillance. It outlines how the power to use covert surveillance, under the Regulation of Investigatory Powers Act (RIPA) 2000 is to be implemented. It covers covert surveillance by public authorities (directed surveillance) and covert surveillance in a dwelling (includes a cell) or private vehicle (intrusive surveillance).

The stated desired outcome is to make covert surveillance an 'integral part of the intelligence gathering system within prisons'. In addition to a general mandatory duty to only exercise these powers within the constraints of the law, the use of overt CCTV cameras for 'pre planned target use' against specific prisoners their visitors is not allowed, unless 'supported by an appropriate RIPA authorisation'.

The information in this public PSI is not in great detail, as a separate, restricted instruction is being issued to governors, who 'must only share that PSI with staff engaged or likely to be engaged in the use of covert surveillance'.

OMBUDSMAN CASES

Transgender

Ms A, a transsexual prisoner complained that she was not being allowed to live as a woman. The prison accepted that they had refused to allow Ms A to wear female clothes, as she did not yet have a diagnosis of gender dysphoria and was a vulnerable individual who would be at risk of sexual exploitation if allowed to live and dress as a woman. The PPO investigation found that Ms A's medical diagnosis was extremely complex and that in refusing to allow Ms A to live and dress as a woman, the prison believed that they were acting in her best interests. However, the Prison Service's own policy on the care and management of transsexual prisoners (set out in PSI 07/2011) says that a formal diagnosis of gender dysphoria is not required and that establishments must permit prisoners, who consider they are transsexual, to live permanently in their acquired gender. This will include allowing prisoners to dress in clothes appropriate to the acquired gender. The policy makes it clear that any risk to and from a transsexual prisoner must be identified and managed. Prisons have to manage many prisoners whose offence, sexuality, personality or behaviour puts them at particular risk. The risks of dressing as a woman must be managed in the same way as any other 'vulnerability'. Ms A's complaint was therefore upheld. The PPO recommended that the prison put in place plans to manage transsexual prisoners in line with the PSI

07/2011 and that the Prison Service take account of the PPO report in their training for staff on the care and management of transsexual prisoners.

Property
Mr B complained that a number of items had been wrongly confiscated from him. The investigation found that the items probably belonged to Mr B and the governor subsequently agreed to send them on to Mr B at his current prison. However when his property arrived there they had been destroyed. The prison accepted that it had destroyed the property, but said it had done so, in line with local policy, because they had been told that the items had been confiscated at Mr B's previous prison. The PPO upheld Mr B's compliant. Since March 2010, Prison Service policy has reflected the Coleman ruling which established that governors may confiscate a prisoner's property temporarily, but have no power to destroy it or deprive them of it permanently. The prison's local policy was, therefore, not in line with national policy – or the law. They recommended that Mr B be paid £100 in compensation.

Adjudications
Mr C was charged with using threatening, abusive or insulting words or behaviour. The adjudicator found the charge proven and Mr C received a punishment of seven days cellular confinement. Mr C complained that the adjudicator had refused to call his witnesses. The investigation established that the adjudicator had indeed refused to call Mr C's witnesses. He may or may not have had justifiable grounds for doing so, but it was impossible to know because he had not recorded his reasons, beyond saying, 'I do not propose to have a parade of prisoner witnesses who will all tell me the same thing'. As a result, the PPO could not be satisfied that the adjudicator had made sufficient inquiries into Mr C's defence to find the charge proved beyond reasonable doubt. The PPO upheld Mr C's complaint and recommended that the finding of guilt be quashed. This was the second poorly conducted adjudication in a short space of time from the same prison (HMP Long Lartin) and when the PPO investigated a third very poor adjudication from the same prison making the same errors, they recommended that adjudicators at the prison were given refresher training.

Religion
Mr D complained that he was unable to take part in the SOTP programme because, as a Muslim, he could not discuss his sins with others. He wanted the SOTP removed from his sentence plan. The PPO sought advice from the Muslim Adviser to NOMS who said that some Muslim scholars took the view that individuals cannot divulge their sins to anyone, while others took the view that it was acceptable to divulge sins to others in certain contexts (for example, court hearings, therapy, when seeking spiritual guidance) where the intention was to overcome the sin. The adviser went on to say that there was, therefore, a legitimate Islamic opinion that would enable Mr D to participate in the SOTP if he chose to. The PPO therefore did not uphold Mr D's complaint.

Mr E complained after being been told by an officer at Full Sutton that Rastafarianism, was not a recognised religion. He said this was discrimination. The PPO upheld his complaint. The Equality Act applies to all public bodies, including prisons. A key provision of the Act is the public sector Equality Duty (which came into effect on 5 April 2011). This requires public bodies to consider the *needs of all individuals* when shaping policy and delivering services. It does not require them to treat everyone the same or to treat all

religions as equal: however it lists nine protected characteristics, one of which is 'religion or belief'. Both Home Office and Equality and Human Rights Commission guidance now state that Rastafarianism is deemed to be a 'religion or belief' and hence a protected characteristic. However the NOMS Chaplaincy lead told the PPO investigators that a previous Home Secretary had determined that Rastafarianism and a number of other beliefs should not be treated as recognised religions, that this decision was still in force and could only be overturned by a new ministerial decision. This was wrong. The NOMS Equalities lead agreed that the current policy on Rastafarianism was at odds with the Act, and that the Act overrode any previous ministerial decision. A guidance document 'Ensuring Equality' issued to all prisons on 14 April 2011 as an appendix to PSI 32/2011 included Rastafarianism (along with amongst others Christianity, Judaism, Islam and Buddhism) as a 'religion or belief'. HMP Full Sutton (and the PPO felt other prison establishments were likely to be as well) were relying on an outdated policy rather than taking into account the PSI. NOMS say they are in the process of issuing new instructions to ensure compliance with the Equality Act, but pending the issue of these new instructions the PPO said that all prisons needed to ensure they were compliant with the Act.

Treatment
Mr F complained that the PPO had failed to carry out an adequate investigation of his complaint about an alleged assault at HMP Woodhill. Unusually the Parliamentary Commissioner upheld the complaint and found the PPO handling of Mr F's complaint was maladministrative (the relevant test). The facts of the complaint were that Mr F said that, after making a complaint about prison staff bullying, staff entered his cell to issue him with an IEP warning and then assaulted him. Prison staff said he behaved aggressively and had to be restrained. Mr F reported the assault to the police who decided not to investigate and complained about the assault to health care staff and through the COMP 1 system. There was considerable delay in the prison investigation and Mr F finally complained to the PPO about the alleged assault before he had appealed the outcome of the investigation because he said the prison were refusing to investigate the allegation. The PPO gave him ambiguous information about what they were investigating, the assault and/or the delay, when in fact they were only ever investigating the delay (because they deemed the complaint about the assault to be ineligible due to what they perceived a failure to go through the internal complaints procedure). The Parliamentary Ombudsman found that the PPO had not made this clear or indeed why they could not investigate the assault allegation, despite Mr F himself making it clear that this is what he wanted them to investigate. Indeed they had positively misled him and gave him every indication that they were going to investigate the assault. Overall the PPO investigation took 9 months. The Parliamentary Ombudsman said that whilst this might not be a long time for a complicated investigation it was too long for a report that did not even cover the central matter that Mr F had wanted investigated. These failings had caused Mr F an injustice. The PPO was asked to write to Mr F to apologise. Although an investigation into the assault was now likely to be inconclusive, given the passage of time and the lack of physical or CCTV evidence now, in the circumstances the PPO was asked to investigate the allegations as they would have done in 2009.

PRISONERS' LEGAL RIGHTS GROUP MEMBERSHIP APPLICATION FORM

Please complete this form in block capitals and send it to PAS at the address below:

PRISONERS' ADVICE SERVICE

Name: ____________________

Company: ____________________

Address: ____________________

____________________ Postcode: __________

Telephone: __________ Fax: __________

Email: __________ Website: __________

IS THIS A RENEWAL? (Please circle) Yes / No

PLEASE TICK THE TYPE OF MEMBERSHIP REQUIRED:

( ) Prisoners Free

( ) Professionals/Other £50pa (please make cheques payable to

( ) Voluntary Organisations £30pa 'Prisoners' Advice Service')

( ) Academic Institutions £50pa

( ) Prison Libraries £30pa

( ) Solicitors and Barristers £50pa

( ) Back Copies £5.00 each

( ) Ex-prisoners £10pa

( ) I would like to sponsor a prisoner PLRG member for one year £10

What issues/themes would you like to see covered in future issues?:

____

PRISONERS' ADVICE SERVICE
PO BOX 46199 LONDON EC1M 4XA
Local Cost Call 0845 430 8923
Tel: 020 7253 3323 / Fax: 020 7253 8067