

PRISONERS' RIGHTS

Prisoners' Legal Rights Group Bulletin No 62

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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.

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Our Prison Law Team has a long history of challenging the infringement of prisoners' rights and privileges, representing prisoners in a wide range of judicial review challenges.

We provide specialist advice and representation to prisoners in the context of statutory rights and support once released, as well as in relation to compensation claims for unlawful detention or wrongful recall as a result of sentence miscalculation or negligence.

Our expertise also encompasses criminal appeals, CCRC referrals, statutory compensation for miscarriages of justice and inquests.



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IMPENDING CUTS TO LEGAL AID FUNDING FOR PRISON LAW

The MOJ Consultation Paper on 'Transforming Legal Aid' (CP14/2013) was published on 9 April 2013. It is available on-line at: <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid> and PAS can send the relevant sections on prison law to prisoners on request. The consultation period runs to 4 June.

The rationale for the proposal is described in the Executive Summary as 'proposals for improving public confidence in the legal aid scheme', including 'reforms to prison law to ensure that legal aid is not available for matters that do not justify the use of public funds'.

It is envisaged that the changes, which will have a considerable impact on prisoners, will be implemented by way of statutory instrument amending the Legal Aid Agency contract, and therefore requiring no legislative change, and therefore no wider parliamentary debate or vote.

As readers of the PLRG will be aware, legal aid for prison law was already massively reduced under the previous government; since July 2010 there have been fixed fees for all cases and funding for so-called 'treatment issues' has been so restricted as to become virtually non-existent.

The current proposals take this even further and cut prison law legal aid to the point where there will be no funding for:

- any disciplinary hearings which do not either involve an Independent Adjudicator or meet the Tarrant criteria;
- any categorisation cases (including Category A reviews and challenges to removal from open conditions);

- resettlement and licence conditions cases;
- referrals and assessments to Close Supervision Centres and Dangerous and Severe Personality Disorder units.

Changes are also proposed in respect of judicial review designed to make it harder to bring challenges. There are changes proposed to "Eligibility, Scope and Merits" (Chapter 3), described in the Executive Summary as "a residence test for civil legal aid claimants; reforms to reduce the use of legal aid to fund weak judicial reviews; and amendments to the civil merits test to prevent the funding of any cases with less than a 50% chance of success." (para 1.5, p.5).

In respect of the **residence test**, the person bringing the claim must have been lawfully resident for at least a year to qualify. This will potentially restrict access to justice – as the burden will be on the Solicitor acting for the Claimant to obtain/retain evidence that the client was lawfully resident and had previously been lawfully resident for 12 months; Another proposed change is in respect of the payment for **permission work in judicial review cases**: providers will not be paid for judicial review profit costs pre-permission unless permission granted; This could pose severe restrictions on access to justice as solicitors won't take the financial risk for poorer clients and may prevent legitimate challenge of state decisions; this is particularly concerning in the JR context where so many claimants are disadvantaged and challenging decisions that affect their social welfare; they are also likely to reduce use of Barristers at an early stage as they will require solicitors to incur liability or expect counsel to work at risk of not getting paid at all; it will also mean that expertise in public law in the legal sector will be eroded as people will no longer be full-time public lawyers. They also want to remove legal aid for **borderline** cases. This may well

restrict access to justice in complex cases where it is often difficult to assess the chances of success due to an absence of disclosure/response from the Defendant.

Prisoners are encouraged to respond to the consultation, giving their own examples of why the above issues are important and any concerns they have with how the complaints system operates in prison, including their dealings with the IMB and the Prison and Probation Ombudsman. Finally any examples of where someone has been successfully assisted by a lawyer to challenge an unfair or unreasonable decision would also be helpful.

You can respond directly to the consultation by writing to Annette Cowell, Ministry of Justice, 102 Petty France, London, SW1H 9AJ by 4 June 2013.

You can also contact the APL c/o Office 7, 19 Greenwood Place, London NW5 1LB. The website address is www.associationofprisonlawyers.co.uk. They are organising a response to the consultation and looking for examples of where legal advice has had a positive impact.

CASE REPORTS

CONDITIONS

Torreggiani and Others v Italy (application no. 43517/09) ECHR 007 (2013)

This was a 'pilot judgment' concerning overcrowding in Italian prisons and the extent to which that breached Article 3 of the ECHR.

'Pilot judgments' are the means by which the European Court of Human Rights deals with large groups of cases deriving from the same issues. When the Court receives a number of applica-

tions stemming from a single underlying problem, it prioritises a small number of them and aims at a solution that extends to all those that are similar. In this way, a large number of applicants obtain redress quicker than if their cases were heard individually.

This case concerned seven prisoners, including the applicant, serving sentences in Busto Arsizio and Piacenza prisons in Italy. They complained that their cramped conditions, combined with a lack of hot water and, in some cases, inadequate lighting, constituted 'inhuman and degrading treatment', thus breaching the prohibition contained in Article 3.

In respect of Piacenza prison, the applicants complained that they shared cells measuring nine square metres with two other inmates, meaning that each inmate had only three square metres of living space. The Italian government disputed this, claiming that there were two men to a cell, and that the cells measured 11 square metres. However, in the absence of any evidence provided by the government, the Court had no reason to doubt the applicants' allegations. Those applicants based in Busto Arsizio were also found to have only three square metres of living space.

The Court reiterated the fundamental principle that imprisonment did not entail the loss of those rights guaranteed by the Convention. Further, it found that the applicants' living space did not conform to the standards deemed acceptable under the Court's own case-law. Notably, the Committee for the Prevention of Torture recommends a minimum living space of four square metres per person. The Court determined that the applicants' shortage of living space had been exacerbated by a lack of hot water, and, in Piacenza prison, inadequate lighting and ventilation. In themselves, these were not inhuman or degrading, but they added to the inmates' suffering.

The Court said that whilst there was nothing to indicate that the relevant authorities had intended to humiliate or debase the applicants and also accepted that a degree of suffering is unavoidable and inherent in any custodial sentence, that the prison conditions in these particular cases had imposed a level of suffering which exceeded the inherent and unavoidable. Therefore Article 3 had been breached and the prisons' conditions were inhuman and degrading.

The Court's judgment is not final, since the respondent State has three months in which to request that the case be referred to the Grand Chamber. However, the Court concluded that Italy's Government must implement, within one year of this judgment becoming final, an effective domestic scheme which would address the problem of overcrowding in prisons and thereby remove the problem at issue. Pending such a domestic remedy, the Court adjourned all similar applications, as is standard in pilot judgments. Regarding remedies, the Court explained that where an applicant's rights were presently being violated in breach of Article 3, that violation should rapidly be remedied. For those whose rights had previously been violated but no longer were, compensation would be appropriate.

RIGHT TO PRIVATE AND FAMILY LIFE

R (on the application of T) v Chief Constable of Greater Manchester [2013] EWCA Civ 25

The central issue in this case was whether the disclosure provisions of the Police Act 1997 and the Rehabilitation of Offenders Act 1947 (Exceptions) Order 1975 were compatible with Article 8 of the ECHR, ensuring respect for private and family life.

The case was brought by two appellants, T and B. T had received two police warnings at the age of 11, relating to stolen bicycles. Those warnings were revealed by an Enhanced Criminal Record Certificate (ECRC) when he applied for a job at the age of 17, and again when he applied for university at the age of 19. B, in her forties, had accepted a police caution after she left a shop without paying for an item. When an ECRC later revealed that caution, she was refused employment. Both sought judicial review of the statutory scheme, arguing that it breached their Article 8 right to private and family life. The High Court had been sympathetic to the applications but ultimately refused them and so they had appealed to the Court of Appeal. A separate but linked claim was made by W who had taken part in a 'car-jacking' at the age of 16. She received concurrent sentences of five and four years' detention (for manslaughter and robbery respectively) but now wished to serve in the army. She too sought a judicial review of the statutory scheme, specifically, s.5(1)(b) of the Rehabilitation of Offenders Act 1974 (ROA), arguing that the effect of this section was that her convictions would never be spent. She claimed this was incompatible with Article 8. She was refused permission and renewed her application for permission.

Under the ROA statutory scheme, convictions, cautions, warnings, and reprimands for certain offences are 'spent' after a specified period of time. Once an individual's caution (for example) is spent, s/he should be treated as if s/he had never committed the offence in question. This meant they did need not to refer to it in any question which might otherwise require them to do so. However, the Rehabilitation of Offenders Act 1974 (Exceptions) Order (ROA Order) negated this in certain cases. It provided that convictions and cautions which are spent do need to be revealed when an individual is asked what is termed an 'exempted question': defined as a ques-

tion concerning their suitability for employment in a specified position (Articles 3 and 4 of the Order). Finally, sections 113A and 113B of the Police Act 1997 provide for the issuing of Criminal Record Certificates and Enhanced Criminal Record Certificates. This interacts with the ROA Order in that certificates can only be issued in relation to 'exempted questions': those employment-related questions which require an individual to reveal spent convictions and cautions. In short, the ROA Order requires spent convictions and cautions to be revealed in response to certain employment-related questions, and the 1997 Act states that Criminal Record Certificates (ie CRB checks) can only be made in those circumstances.

The Court held that the disclosure of T's warnings on an ECRC did interfere with his Article 8 rights because it concerned sensitive personal information which affected his ability to obtain employment and form relationships with others. Further, the blanket nature of the regime, which required disclosing all convictions and cautions in respect of recordable offences, meant it was disproportionate to the legitimate aims of (1) protecting employers and vulnerable individuals in their care, and (2) enabling employers to assess the suitability of candidates. The regime as it currently operated went beyond what was necessary to achieve its two legitimate aims. Accordingly the provisions of both the 1997 Act and the ROA Order were incompatible with Article 8. T was entitled to a declaration of incompatibility regarding the 1997 Act (under Section 4 of the Human Rights Act 1998) and a declaration that the ROA Order was ultra vires. The Court held that these arguments concerning the 1997 Act applied equally to B, and that she too was entitled to a declaration of incompatibility regarding that Act.

However the seriousness of W's offence and the severity of the sentence received made her case different from

those of the other two appellants. Although W was a child when she was convicted the Court held that Parliament was entitled to view some offences as so serious that they should never be regarded as spent. Importantly, the Court said this was not a blanket policy: as the statutory scheme clearly distinguished between serious and less serious offences. Thus the ROA's policy of excluding certain offences from ever being spent was not disproportionate, and W's application for permission to appeal was refused.

The judgment has two consequences:

- The Rehabilitation of Offenders Act 1974 now applies in all cases without modification;
- There has been no lawful basis for seeking CRB checks.

The fact that the 1974 Act applies without modification is also of some legal and practical significance. To use the example of cautions, the requirements and limitation relating to what questions can be asked of someone, what needs to be disclosed, and the consequences for not disclosing, are now as set out in paragraph 3 of schedule 2 to the 1974 Act (similar provisions also apply to spent convictions under section 4 of the 1974 Act). Under these provisions:

- No employer should ask about a spent conviction or caution;
- No employer should discipline a person for failing to disclose a spent conviction or caution;
- Nobody should be refused a job on the basis of a spent conviction or caution;
- Nobody should be prosecuted for failing to reveal a spent conviction or caution.

The fact that the ROA Order is unlawful also has implications for the CRB check. A CRB check is only lawful where it is sought for the purposes of an exempted question, defined as something to which the ROA Order applies. As the ROA Order has now been declared unlawful there are conversely no

lawful exempted questions. There would therefore appear to be no lawful basis for conducting CRB checks.

The publication of the judgement was delayed from December 2012 in order for the Home Office to look at its and to avoid plunging the criminal records checks into chaos. However nothing appears to have been done with Lord Justice Dyson remarking that this was unacceptable describing the government's slothfulness as 'extraordinary' and that it needed 'to pull its finger out and introduce legislation'.

PAROLE BOARDS

Parratt v SSJ and another [2013] EWHC 17 (Admin)

Mr Parratt sought damages from the SSJ, claiming that a four-month delay in holding a Parole Board post-tariff review and then a decision by the SSJ to set a period of 15 months between Parole Board review hearings violated his right under Article 5(4).

The Parole Board had already admitted that the four-month delay was in breach of Article 5(4) of the ECHR and had assumed full responsibility for the breach. In light of this the Court held that further pursuit of the same claim against the SSJ was 'a waste of public money such that the claim would not be entertained'. The admission by the Parole Board was apparently considered as sufficient.

Regarding the 15-month period, the Court held that the SSJ did not order the extended period arbitrarily. The decision to leave 15 months between reviews was made in order to 'enable the claimant to have the best prospect of persuading the Parole Board that his release was justified' [40]. Because of this, the Court was held to have acted lawfully and no breach of Article 5(4) arose.

As far as damages are concerned, the Court found that Mr Parratt was not entitled to claim anything beyond a declaration from the Parole Board. For monetary compensation to have been available the claimant would have had to demonstrate that 'the delay in holding the post tariff hearing caused a delay in his eventual release' [47]. In this case, such a conclusion could not, on the evidence, be borne out on the balance of probabilities. Even if the Parole Board may have very well recommended Mr Parratt be transferred to open conditions on an earlier date, the SSJ was not obliged to accept that recommendation, and any transfer may not have taken place any earlier.

R (on the application of M) v The Parole Board [2013] EWHC 141 (Admin)

The claimant sought judicial review on the basis that in reaching its conclusion to deny him a transfer to open conditions, the Parole Board had acted in breach of the rules of natural justice given that in reaching its decision it had taken into account issues, around certain personal information and relationships, which had not been addressed directly during the hearings and which therefore the claimant had not had a chance to reply to or correct.

The application was dismissed. Although the Court acknowledged the danger of excessive hindsight, it agreed with the defendants that the risk associated with the ability of the claimant to maintain, in this case relationships as a pertinent issue. And that throughout the hearings, there had plainly been material which should have made the claimant and his counsel aware of the importance of this issue.

The Court asserted that 'no general rule' could be devised as to the extent to which a Parole Board panel should articulate its concerns and much would depend on the circumstances. The pan-

el was not automatically bound, during the course oral hearings, to warn a prisoner that his or her response to a question was unsatisfactory and the Court agreed with the defendant that the issue of the claimant's interpersonal relationships 'should have been understood as a live issue'. In the Court's judgment the panel acted lawfully in drawing conclusions from the incompleteness of the replies of the defendant to questioning.

R (on the application of Gregory McGetrick) v Parole Board, SSJ [2013] EWCA Civ 182 Court of Appeal (Civil Division)

This is an appeal of the McGetrick case reported in our summer 2012 bulletin. In the initial case, the Divisional Court decided that the SSJ was entitled to require the Board to consider evidence, including witness statements, which had not been previously established as fact in court, under section 239(3) of the CJA 2003). The court found that this was consistent with the requirement that the Board should have before it all information that might have some bearing of risk and release. In any event, it was for the Parole Board to decide what weight should be applied to such information in each instance.

The issue in the appeal is whether the Board has the power to exclude untried material. The appellant submitted that to construe section 239(3) as preventing the Parole Board panel from excluding unfair and prejudicial material would interfere with the Board's function as a court. He further stated that there is nothing in section 239 to prevent the Board from considering whether documents given to it by the SSJ at an interlocutory stage should be excluded from the final substantive stage, when a particular panel of the Board decides on the recommendation for release. The Board argued against such a two-stage procedure on the basis that it was incompatible with section 239(3), as well as un-

necessary and cumbersome. It was furthermore submitted that panel members, who are entitled to attach no weight to material they consider unfair or unhelpful, do not need the intervention of an interlocutor.

The Court of Appeal decided that section 239(3) does not require the panel deciding the case to consider all documents supplied to the Board by the SSJ. The Board has judicial responsibilities and the Executive must not be permitted to interfere with its functions as a court. In a rare case where it may be necessary that documents given to the Parole Board by the SSJ should be withheld from a Parole Board panel determining release, in the interests of fairness say, then section 239(3) of the 2003 Act should be construed as affording the Board the power to do so.

R (Faulkner) v Parole Board and R (Sturnham) v Secretary of State and the Parole Board [2013] UKSC 23.

The Supreme Court very recently handed down judgment in these appeals about the correct approach to damages where there has been a breach of Article 5(4) of the Convention. In both cases, there had been delays in arranging a speedy Parole Board review. Mr Faulkner's Parole Board review was delayed by 10 months due to delays on the part of the Secretary of State for Justice. The Court of Appeal held that, on the balance of probabilities, he would have been released 10 months earlier, but for the delays. The Court of Appeal awarded Mr Faulkner £10,000 in damages for the loss of liberty that he suffered ([2011] EWCA Civ 349). Mr Sturnham's Parole Board review was delayed for 6 months. When the Parole Board considered his hearing, it did not direct his release, but rather recommended his transfer to open conditions. As a result, his claim was for damages for anxiety and distress alone. Although

Mitting J. awarded him damages of £300 ([2011]

EWHC 938 (Admin)), the Court of Appeal quashed this finding ([2012] 3 WLR 476). In summary the Court held:

1. Mr Faulkner's damages should be reduced to £6,500.

2. Mr Sturnham's damages award of £300 was reasonable in the circumstances of the case.

3. A prisoner whose detention is prolonged as the result of a delay in the consideration of his case by the Parole Board in violation of Article 5(4) is not the victim of false imprisonment.

4. Such a prisoner is not ordinarily a victim of a violation of Article 5(1) of the Convention. Such a violation would only arise in exceptional circumstances warranting the conclusion that the prisoner's continued detention had become arbitrary (paragraphs 13(2) and 18).

5. When assessing quantum under s.8 Human Rights Act 1998, courts should be guided primarily by any clear and consistent practice of the European Court of Human Rights.

6. In particular, quantum under s.8 Human Rights Act 1998 should broadly reflect the level of awards made by the European Court of Human Rights in comparable cases brought by applicants from the UK or other countries with a similar cost of living. It is necessary for our courts to do their best in the light of such guidance as can be gleaned from Strasbourg decisions on the facts of individual cases.

7. Courts should resolve disputed issues of fact in the usual way, even though the European Court of Human Rights would not do so.

8. Where it is established, on a balance of probabilities, that a violation of Article 5(4) has resulted in the detention of a prisoner beyond the date on which he would otherwise have been released, damages should ordinarily be awarded as compensation for the resultant detention.

9. Such damages will be significantly above awards for anxiety and frustration alone, but well below the awards for a

loss of unrestricted liberty or for breach of Article 5(1) leading to unlawful detention. That is because there are important differences between conditional release and complete freedom. The freedom enjoyed by a life prisoner released on licence is more circumscribed in law and more precarious than the freedom enjoyed by the ordinary citizen.

10. Pecuniary losses proved to have been caused by the prolongation of detention should be compensated in full.

11. It will not normally be appropriate as a matter of course to take into account, as a factor mitigating the harm suffered, that the claimant was recalled to prison following his eventual release. The court cannot reduce the damages it would otherwise have awarded on the basis of speculation. In some circumstances, such as where it can be shown that the claimant was recalled after committing an offence which he had been planning prior to his release and which would probably have been committed earlier if he had been released earlier, a reduction may be appropriate.

12. Damages should not be awarded merely for the loss of a chance of earlier release. Nor should damages be adjusted according to the degree of probability of release if the violation of Article 5(4) had not occurred.

13. The general practice of the European Court of Human Rights is to presume anxiety and distress without direct proof where there has been a failure to decide the lawfulness of detention speedily (paragraph 53). This is a strong, but not irrefutable, presumption. There is no rule that an award of damages will only be made if the violation of Article 5(4) has resulted in the deprivation of liberty (paragraph 54). Where feelings of anxiety and distress can be presumed or shown to have been suffered, an award of damages should be made, in addition to a finding of violation.

14. Such damages should be on a modest scale.

15. Although it is impossible to lay down absolute rules, the stress and anxiety inferred from a delay of a duration of less than three months are unlikely to be of sufficient severity to justify an award of damages. Where there is a particular reason for anxiety, or where there is mental illness, even a relatively short delay may occasion acute mental suffering. One judge was minded to hold that the minimum period of delay leading to damages should be six months, he did not dissent from the judge (Lord Reed) who gave the lead opinion of a three-month threshold. Lord Reed also suggested the following approach to quantum hearings in domestic courts:

1. The parties should agree a *Scott* schedule, that is to say a table setting out the following relevant information about each of the authorities

(a). The name and citation of the case, and its location in the bundle of authorities;

(b) The violations of the Convention which were established, with references to the paragraphs of the judgment where the findings were made;

(c.) The damages awarded, if any. It is helpful to agree their sterling equivalent at present values;

(d) A brief summary of the claimant's contentions in relation to the case, with references to the key paragraphs in the judgment;

(e.) A brief summary of the respondent's contentions in relation to the case, again with references to the key paragraphs.

2. The parties should also provide the court with a list of the authorities in chronological order;

3. The submissions should focus on the principles which counsel maintain can be derived from the authorities, and how the authorities support those principles

CATEGORY A ORAL HEARINGS

R (Bourke) v SSJ [2012] Admin, 1 June (unreported)

The claimant was serving a mandatory life sentence for two murders by shooting, with a 25-year tariff. His tariff had not yet expired. He denied his offences. The claimant argued that fairness required that the Director of High Security Prisons should hold an oral hearing to determine whether he should remain Category A because:

- His denial of guilt meant that there was an impasse as he could not attend offending behaviour programmes which could demonstrate a reduction in risk;
- his behaviour in custody was exceptionally good and demonstrated no link to risk factors;
- an oral hearing could assist in resolving disputes over facts and the assessment of risk;
- in the absence of an oral hearing, his risk would not be reviewed properly until the Parole Board first considered his case which would result in 25 years as a Category A prisoner.

The judge rejected the claim on the now well-known principles set out in *DM v SSJ [2011] EWCA Civ 522*. While the existence of an impasse was a relevant matter, it did not on its own justify an oral hearing, and the Director had to proceed on the basis that the prisoner was convicted correctly.

In relation to his behaviour, the prisoner had not been prevented from advancing written representations on this point and the judge did not consider that an oral hearing would have enabled him to put his case more effectively. There was no dispute over his prison conduct. In the absence of any information over participation in programmes designed to address risk and any recommendation for downgrading from the prison, an oral

hearing would not have assisted the director.

The judge also took into account the facts that claimant was still at a relatively early stage of his tariff and so any consideration of his release was still several years away, and that DM permits consideration of cost and efficiency to be examined when determining the procedure to be adopted.

VOTING RIGHTS

Scoppola v Italy (No3) ECtHR App No 126/05, May 2012

The issue of prisoners' voting rights was re-examined in this application. The applicant had lost a right to vote following his criminal convictions for murder and wounding. The ECtHR confirmed its judgment in *Hirst v UK (No 2) App No 74025/01*, October 2005, that general, automatic and indiscriminate disenfranchisement of all serving prisoners, irrespective of the nature or gravity of their offences, is incompatible with Article 3 of Protocol No 1 (the right to free elections).

The UK government was given leave to make submissions as a third party intervener. The government highlighted the need for states to be afforded a wide margin of appreciation in respect of the right to vote. It was argued that, contrary to the ECtHR's findings in *Hirst*, a system which stripped all convicted serving prisoners of the right to vote was not 'a blunt instrument' (para 76). Instead, the measure pursued the legitimate aim of enhancing civic responsibility and respect for the rule of law and encouraging citizen-like conduct. The necessary correlation between the offence committed and the aim pursued was established because only those guilty of offences serious enough to warrant imprisonment were deprived of the right to vote. Thus, the measure falls within the state's margin of appreci-

ation. The UK government argued that the ECtHR's findings in *Hirst* were wrong. It referred to the House of Commons' debate on 10 February 2011, where parliament voted 234 to 22 against changes to the current regime in the UK: *Representation of the People Act 1983 s3*.

The ECtHR accepted the UK government's arguments that states enjoy a wide margin of appreciation on how to regulate bans on voting. Accordingly, it is for the individual state to decide on the type of offences that would lead to a loss of the vote and whether disenfranchisement should be ordered by a judge on a case-by-case basis or should result from the general application of a law.

In the case of *Scoppola*, the ECtHR found that there was no violation of Article 3 or Protocol No 1. This was because, under Italian law, only prisoners convicted of certain offences against the state or judicial system, or those sentenced to at least three years' imprisonment, lose the right to vote. Therefore, there was no general, automatic and indiscriminate measure similar to that imposed in the UK and examined in the case of *Hirst*.

The UK government was granted six months from the date of the judgment in *Scoppola* to introduce proposals to amend the electoral law. It remains to be seen how the UK government will respond to this requirement in light of David Cameron's subsequent announcement that prisoners would not get the vote under his administration.

FREEDOM OF EXPRESSION

Schweizerische Radio- und Fernsehgesellschaft SRG v Switzerland ECtHR App No 34124/06, September 2012

A refusal by the Swiss authorities to allow a filmed interview to take place with a prisoner whose case had attracted a great deal of media interest was held to be in breach of Article 10 (freedom of expression) by the ECtHR.

The Court accepted that the interference with the Article 10 right was provided for in law. However, it considered that, as freedom of expression in the context of a television broadcast devoted to a subject of particular public interest was in issue, the margin of appreciation open to the Swiss authorities in determining whether or not the offending measure met a 'pressing social need' was narrow. Neither the domestic authorities nor the government had made the case satisfactorily that prison security was threatened, as the television company had offered to film in very restricted conditions.

Importantly, the Court stated that Article 10 protected not only the substance of the ideas and information expressed but also the means by which they were conveyed. The media were, therefore, entitled to a great deal of deference concerning what technique of reporting journalists should adopt. The fact that a telephone interview with the prisoner had been broadcast by the applicant company in a programme which was available on its website was not relevant: different means and techniques had been used to interview, it had not had such a direct impact on viewers and had been broadcast in the framework of another programme. Accordingly, broadcasting the interview had not in any way remedied the interference caused by the refusal of permission to film in the prison.

The principles set out in this case are similar to those that were established in the case of the BBC and Casciani v SSJ and Ahmed (interested party) in 2012. In both cases there seemed to be an effective ban on all televised interviews with prisoners. The judgments

confirm that Article 10 rights encompass not just the content of the information, but also need to take into account the manner in which such information is conveyed and show a degree of deference to the broadcaster in determining the appropriate and most effective medium.

UPDATES ON PRISON SERVICE INSTRUCTIONS

PSI 41/2012 – Sentence Planning

This PSI sets out guidance and mandatory expectations for prison staff relating to sentence planning, particularly as it pertains to prisoners subject to indeterminate sentences or the new extended determinate sentence introduced by the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act.

The PSI emphasises the need for sentence plans to be realistic and attainable. If someone is not motivated to change then it may only be possible to set limited outcomes and actions and where release is at the discretion of the Parole Board, then such prisoners should have explained the likely consequences of not engaging with the sentence plan in terms of how the Board will view their suitability for release.

PSI 43/2012 - The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 – Home Detention Curfew (HDC)

This PSI replaces PSI 8/2008 and PSI 55/2010 and provides a unified policy approach to legislation amendments in LASPO (s112) relating to release on HDC.

Any prisoner released on or after 3 December 2012 is now subject to the changes in the PSI without any distinction between those released under the CJA 2003 and CJA 1991. LASPO has

amended the CJA 2003 so that the following categories of prisoners are now statutorily excluded from HDC:

- Those serving four years or more;
- Those who have previously breached the curfew condition of HDC;
- Those who have previously been 'returned' to prison under s40 CJA 1991 or s116 of the Powers of Criminal Courts (Sentencing) Act 2000

The minimum period to be served in custody before release on HDC is now 28 days, and the minimum sentence on which HDC may be considered is now 12 weeks, in all cases. The longer periods formerly applicable under the CJA 1991 scheme no longer apply.

As part of the move to a single HDC scheme, the guidance on determining the impact of 'presumed unsuitable' offences where multiple sentences are being served has been amended. A prisoner is presumed unsuitable for HDC if any sentence forming part of the overall sentence being served is a presumed unsuitable offence. [The list of presumed unsuitable offences](#) has also been updated to include specified offences motivated by hatred on the grounds of religion or sexual orientation.

PSI 01/2013 - Resettlement outside England and Wales on License

This PSI replaces PC 52/1997. It issues guidance to enable staff to accurately access applications from prisoners who wish to be relocated outside England and Wales on a permanent basis.

Usually there is a requirement to spend a suitable period of time in the community in the UK and Islands before someone can be considered for resettlement overseas. This is to allow a period of assessment of the risk of reoffending in

individual cases and the likely compliance with licence requirements on the community. Exceptionally, immediate resettlement overseas may be considered suitable where:

- Prisoners have been released on compassionate grounds;
- The Parole Board has approved this as part of the resettlement plan
- The person has no ties to the UK and immediate resettlement to their home country would reduce risk of reoffending and harm to the public.

An application to resettle outside the UK and Islands should be refused where the applicant has no close ties to the proposed location and/or if the index offence is connected or potentially connected to that location. The application may also be refused if such resettlement will either undermine the protection of the public or the rehabilitation of the applicant.

The policy should make it easier for people with dual nationalities to apply for overseas resettlement.

PSI 03/2013 – Medical Emergency Response Codes

This PSI seeks to introduce a standard approach to how medical emergencies are responded to in prisons. Local procedures must ensure that staff understand they should not delay summoning emergency assistance. For example, it must not be a requirement for a member of the prison healthcare team or a duty manager to attend the scene before emergency services are called. An ambulance should be called when there are signs of chest pain, difficulty in breathing, unconsciousness, severe loss of blood, severe burns or scalds, choking, fitting or concussion, severe allergic reactions or a suspected stroke. This brings prison policy in line with how

the NHS operates on the outside.

PSI 04/2013 - The Early Removal Scheme and Release of Foreign National Prisoners

This PSI replaces guidance on the mandatory Early Removal Scheme (ERS) for foreign national prisoners which was contained in Chapter 9 of PSO 6000, PSIs 19/2008, 45/2008, 14/2009 and 59/2011. It harmonises changes that have occurred since the introduction of ERS by the CJA 2003.

ERS allows foreign national prisoners (FNPs), who are confirmed by the United Kingdom Border Agency (UKBA) as liable to removal from the UK, to be removed from prison and the country up to a maximum of 270 days before the half-way point of the sentence. This applies to sentences of three years or longer as there is a requirement for prisoners to serve a quarter of their sentence as a minimum before removal. The ERS for shorter sentences is proportionately less.

There are now no longer exclusions to the ERS, and all ineligibility categories having been removed on 3 November 2008 by effect of the Criminal Justice and Immigration Act 2008. The only people now excluded are prisoners serving a life sentence or an IPP who are not eligible for ERS but must instead be considered for the Tariff Expired Removal Scheme (TERS) in line with PSI 18/2012.

The ERS process has been integrated with the Immigration, Repatriation and Removal Services PSI 52/2011 and all FNPs will initially be referred to Criminal Casework Directorate (CCD) or the relevant Local Immigration Team (LIT) within five days of sentence using the CCD Referral Form. The bottom line is a desire for early referral to take place so that there can be an increased number of removals within the ERS period.

OMBUDSMAN CASES

ADJUDICATIONS

Mr A was charged with using threatening, abusive or insulting words or behaviour. The adjudicator found the charge proven and Mr A received a punishment of seven days cellular confinement. Mr A complained that the adjudicator had refused to call his witnesses. The investigation established that the adjudicator had indeed refused to call Mr A's witnesses. The PPO said 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, they could not be satisfied that the adjudicator had made sufficient inquiries into Mr A's defence to find the charge proved beyond reasonable doubt. The PPO, therefore, upheld Mr A's complaint and recommended that the finding of guilt be quashed.

PROPERTY

Mr B complained that several items of clothing had gone missing in the laundry. The prison had refused to compensate him on the grounds that he had signed a disclaimer saying that he held property in his possession at his own risk. However, following a previous Ombudsman's case, Prison Service policy makes it quite clear that it is not reasonable to expect a prisoner to bear responsibility for any loss or damage to items that have been handed over to the prison laundry. The PPO therefore, upheld Mr B's complaint and recommended that he be paid £100 in compensation.

SENTENCE PLAN

Mr C had been convicted of serious sexual offences, which he denied. He

complained that he was downgraded to standard because he was not undertaking any offending behaviour work. The PPO was concerned to find that, although Mr C had been in custody for two years, he did not have an OASys risk assessment or a sentence plan (apparently due to a disagreement about which probation trust had responsibility for him). As a result, although he had been told that he needed to do the SOTP, he had never been assessed to determine whether he was suitable for it. The PPO did not consider that it was reasonable to penalise Mr C for not undertaking a programme for which he had never been assessed. The PPO therefore, upheld Mr C's complaint and recommended that his enhanced status be restored. The report was also copied to the Chief Officer of the relevant probation trust so that a sentence plan could be put in place for him.

RELIGION

A Muslim prisoner, Mr D, complained that his religious items were not exempt from the volumetric controls on property. Prison Service policy provides that prisoners must be allowed to have items that are essential to the practice of their religion. However, because these items were not exempt from the volumetric controls, Mr D said he was being obliged to choose between his religious items and other items (such as food and cooking utensils). The PPO considered this was unfair and upheld Mr D's complaint in so far as it related to essential religious items.

TRANSFER

Mr E complained that prison staff would not support a move to a prison closer to his family. He said that it was very difficult for his wife and young children to visit him as they lived 250 miles away. The investigation established that Mr E was a category A prisoner who was

serving a life sentence for serious sexual offences. He had, therefore, been allocated to a high security prison that specialises in providing the SOTP and other suitable offending behaviour programmes. He had not participated in these programmes because he was maintaining his innocence. He had not, therefore, demonstrated any reduction in risk. The PPO was satisfied that Mr E's allocation was the most appropriate one for him given his security needs and the nature of his offence. It was also established that he had been transferred to a prison nearer his home for a period to enable him to receive accumulated visits from his family, and that it was open to him to apply for this again. For these reasons, the PPO did not uphold Mr E's complaint. However, the investigation also found that the financial assistance available to Mr E's family, through the assisted prison visits scheme, did not adequately cover the cost of petrol for the trip as the mileage rate had not been increased since 2005 and petrol prices have risen by 60% since then. The assisted visits scheme is not intended to cover all costs, however the value of the mileage allowance has been eroded significantly since it was last increased in 2005, and this does make it more difficult for families to visit. The PPO therefore recommended that the mileage rate should be increased. The recommendation was not accepted, however, on the grounds that it would cost too much.

LICENCE CONDITIONS

Ms F complained about the licence conditions that her offender manager proposed to impose following her release: that she would be required to live in a hostel, rather than returning home to live with her partner and her 15-year-old son, and that she would not be permitted to live with anyone under the age of 18. The PPO investigation found that Ms F had been convicted of violence in a domestic setting, including the false

imprisonment and serious, prolonged assault of a 14-year-old girl, and that she had been assessed as presenting a high risk of harm to others. She was considered to have only limited insight into her issues with drugs and alcohol (which had been a contributory factor in all her offences) and it was thought that her partner's alcohol dependency would make it difficult for her to remain abstinent. Social Services were concerned about her son's wellbeing. The PPO did not consider that the proposed licence conditions were unreasonable in the circumstances and did not uphold Ms F's complaint.

IMMIGRATION DETENTION

Ms G complained that she had been assaulted by escorting staff⁸ and left with her hands cuffed behind her back for over five hours. An investigation carried out by UKBA's Professional Standards Unit found that Ms G had been handcuffed as she described because the escorting staff had lost the key to the cuffs, and recommended that she receive an apology. It went on to find that CCTV was not working in the escort van when the alleged assault occurred, and concluded that Ms G's allegation of assault could not be substantiated. The PPO took the view that UKBA's investigation had been inadequate for such a serious complaint in that neither Ms G, nor the staff involved had been interviewed. They were extremely concerned to learn that the CCTV in the escort van did not function when the engine was turned off, since, in the nature of things, most incidents that may give rise to complaint – restraints and the application of handcuffs – will take place when the vehicle is stationary. The PPO was also critical of the failure by the escort contractors to apologise to Ms G for the fact that her hands were cuffed behind her back for five hours. They had sought to argue that, even if the escort staff had not lost the key, she would have been hand-

cuffed anyway because of her behaviour. The PPO did not accept this, not least because the evidence from the escorts themselves was that Ms G was asleep for most of the time. The PPO recommended that UKBA ensure that CCTV operates in escort vehicles for the whole time a detainee is in them and this has been accepted. They also recommended that UKBA apologise to Ms G for the shortcomings in their investigation.

IEPS

Mr H complained about the decision to demote him on the IEP scheme after a number of negative entries recorded against him. The PPO confirmed that the negative entries gave sufficient cause for concern to warrant a demotion in IEP level and could be considered a 'pattern of behaviour, performance and attitudes as required by the local (and the national PSI) IEP policy. However whilst the decision to demote could not therefore be considered unreasonable, no IEP review board paperwork could be found. The PPO confirmed that a copy of such paperwork should always be retained on a prisoner's core file. In the absence of such paperwork and given no specific mention was made on the P-Nomis case history notes of any review board taking place, the PPO concluded that it was doubtful whether such a board had actually been held and this was against prison service policy. The PPO was also concerned that the negative entries had not been done in timely manner and some had been retrospectively recorded. The Ombudsman therefore recommended that a notice be issued to staff reminding them that only an IEP Board can determine a prisoner's incentive level, that any entries on P-NOMIS case note history and that an IEP review board should now be arranged.

PRISONERS' LEGAL RIGHTS GROUP MEMBERSHIP APPLICATION FORM

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

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A | **ADVICE**
S | **SERVICE**

Name: _____

Company: _____

Address: _____

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Telephone: _____ Fax: _____

Email: _____ Website: _____

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

PLEASE TICK THE TYPE OF MEMBERSHIP REQUIRED:

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