

PRISONERS' RIGHTS

Prisoners' Legal Rights Group Bulletin No 65

Winter 2013

PRISONERS'

ADVICE

SERVICE

JUSTICE BEHIND BARS

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.

PAS would like to thank Garden Court Chambers for hosting and funding our 2013 AGM

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Contents

Editorial	2
Case reports	2
Updates on Prison Service Instructions	10
Ombudsman Cases	11
Other News	14

EDITORIAL

As readers of the PLRG Bulletin will be aware, on 2 December 2013 legal aid for most prison law advice and assistance cases ceased to be available. Shortly before this date many prisoners received a copy of a Ministry of Justice information sheet, detailing all the things a lawyer can no longer get funding to advise on. From what we are being told by callers to PAS, some prison officers and governors seem to be openly interpreting the lack of free legal advice as equalling the removal of legal rights, and seeing the cut as a licence to be less accountable. This needs to be countered by prisoners and prison law advisers.

Although the loss of legal aid is of course a massive blow, the existence of the actual legal rights which prisoners and their supporters have fought to establish over the past 45 years are not dependent on the existence of funding, and have not been removed by its loss.

PAS will continue to provide telephone and written information and advice on all aspects of prison law. Some solicitors' firms will continue to provide existing clients with a limited amount of advice and assistance for free, while others are bringing in fee-paying schemes, which keep the fees at a low level, equivalent to the fixed fee which has just been cut. Others are still able to take on cases under public law contracts or other arrangements not yet affected by the cuts. At the same time, it is now more important than ever that prisoners educate themselves on the law, in order to be able to take their own cases to the courts where needed. We hope that the case reports and updates on PSIs and Ombudsman's reports in the PLRG Bulletin will be a useful tool for those doing so, and are always keen to have any feedback from our readers

on how we can make this Bulletin more useful to you.

CASE REPORTS

SENTENCE CALCULATION- REPATRIATED PRISONERS

Steven Bristow v SSJ, NOMS [2013] EWHC 3094 (Admin)

The applicant was sentenced in 2004 to 26 years and six months in a Thai court for the equivalent offences of possession of illegal drugs with intent to supply. In 2011 he consented to his transfer to a British prison pursuant to the Repatriation of Prisoners Act 1984 (RPA), which entitles him to be released after he has served half of the balance of the sentence to be served after the date of his return. He complained that he was discriminated against in breach of Article 14 read in conjunction with his freedom of liberty guaranteed by Article 5, as he could not apply for parole at the halfway point of his sentence like those who were convicted abroad of having committed sexual or violent offences.

As the domestic early release provisions have changed, so has their application to repatriated prisoners through amendments to the Schedule to the RPA. On 4 April 2005 the CJA 2003 discontinued parole eligibility in relation to determinate sentences, other than those for sexual or violent offences, and introduced automatic release halfway through the sentences for offences committed prior to 4 April 2005. On 9 June 2008 the Criminal Justice and Immigration Act 2008 (CJIA) harmonised the early release provisions for non-violent and non-sexual offences committed before 4 April 2005 who would be eligible for release at the halfway point of their sentence. But this provision was qualified in the case of

repatriated prisoners who had committed offences before 4 April 2005 and consented to transfer before 9 June 2008 (when the harmonised regime of the CJIA came into force). This category of prisoners sought transfer on the basis of parole eligibility after half the *total sentence* had elapsed. To compensate such prisoners for their loss of parole eligibility they were granted automatic release after half of the *total sentence* had been served. For prisoners whose offences were committed prior to 4 April 2005 and who sought transfer after the introduction of the CJIA, transfer took place on the basis of parole eligibility having been removed by the CJIA unless the offences were for sexual or violent offences. The applicant in this case had sought, and then declined, repatriation when parole eligibility would have been available to him (one of the reasons for this delay was his hope to be pardoned by the King of Thailand, who did reduce his sentence). The applicant sought repatriation in December 2010, when release was calculated on the basis of half of the sentence which remained to be served after his transfer.

The court dismissed the application. Whilst Article 5 was engaged the applicant has no 'other status' within the meaning of Article 14 so the claim must fail. There was no dispute about the provisions: he has no justifiable complaint if a change in domestic legislation causes his position to be worse than if he had applied earlier. It was not accepted that he was in an analogous position to a sexual or violent offender, but that he is in the same position as domestic prisoners who are unable to claim parole.

PRISONERS' VOTING

R (Chester) v SSJ, McGeoch (AP) v The Lord President of the Council

and another (Scotland) [2013] UKSC 63

The central issue in these appeals was whether the UK's ban on prisoners voting infringed prisoners' rights.

The appellants in both cases were prisoners serving life sentences for murder.

There currently exists in UK law a general prohibition on prisoners voting. In the cases of *Hirst (No. 2) v UK*, *Green v UK* and *Scoppola v Italy*, the ECtHR held that such a blanket prohibition constitutes an indiscriminate restriction on a vitally important right. Accordingly, it is incompatible with Article 3 of Protocol No. 1 ECHR, the duty to hold free and fair elections.

The claimants' cases

Chester issued a claim for judicial review in December 2008. His claim concerned his inability to vote in UK and European parliamentary elections. He relied on A3P1, incorporated into domestic law by the HRA 1998. He also relied on EU law. McGeoch's claim for judicial review was issued later, in February 2011, and relied solely on EU law.

In Chester's case, the High Court and the Court of Appeal held that it was not their job to sanction the government for its delay in implementing the decision of *Hirst (No. 2)*, or to advise the government in devising a voting regime that was compatible with A3P1 of the Convention. They further concluded that EU law did not raise a separate issue.

In McGeoch's case, the Inner House dismissed the claim, holding that EU law only conferred a right to vote in local elections on EU citizens who resided in member states of which they were not nationals.

The Legal Issues

The issues before the court were as follows: (a) whether they should apply the principles in *Hirst (No. 2)*; (b) whether, if the principles were applied, the current ban would be incompatible with A3P1 and a further declaration of incompatibility under the HRA should be made; (c) whether EU law recognises an individual right to vote which parallels that of A3P1; and (d) what consequences would follow if EU law were to recognise an individual right to vote of this nature – in particular, what relief would be available to the appellants.

Regarding the principles in *Hirst (No. 2)*, the court declined the Attorney-General's invitation not to apply those principles, but it also declined to make a further declaration, under the HRA, that the ban on voting was incompatible with A3P1.

The court declined to follow the Attorney-General's invitation because the UK's prohibition on prisoner voting has been considered by the Grand Chamber of the ECtHR twice, and was found on both occasions to be incompatible with A3P1. In those circumstances, it would only be appropriate for the court to refuse to follow the Grand Chamber's decision if that decision involved a fundamental principle of UK law or the most egregious misunderstanding of it. The ban on prisoners voting is not a fundamental principle, and the Grand Chamber's decisions do not appear to manifest egregious misunderstandings.

However, the court also declined to make a further declaration of incompatibility because a declaration is a discretionary remedy, and the ban on prisoners voting is already subject to such a declaration (following the case of *Smith v Scott*). Indeed, the ban on prisoner voting is now under review by Parliament. In light of that, the court held

there would be no point in making yet another declaration.

Claims under EU law

The court examined the relevant EU treaties and concluded that their central concern is to safeguard freedom of movement within the EU by ensuring equal treatment between EU citizens residing in member states other than that of their nationality. Because that is the central concern of the applicable EU treaties, they do not contain a right to vote which parallels that of A3P1.

The court went on to explore what the consequences might have been if, contrary to these conclusions, it had regarded EU law as conferring a right to vote on Chester and McGeoch. The court explained that in such circumstances it could not have interpreted the blanket ban as compatible with EU law, and nor could it have devised a new, EU-compatible voting scheme; that would be for Parliament. The only appropriate relief, therefore, would have been a declaration that UK law was incompatible with EU law, but in the instant case that would not have been appropriate.

ACCESS TO OFFENDING BEHAVIOUR COURSES

R (Faisal Kaiyam) v The SSJ [2013] EWHC 1340 (Admin)

This was two joined cases. The appellants were Mr Haney and Mr Kaiyam. Mr Haney was serving a life sentence for robbery and his tariff expired on 13 November 2012. He claimed damages and a declaration that the respondent violated his rights under Article 5(1) and 14 of the ECHR as a result of the delay in transferring him to open conditions. Mr Kaiyam was serving an IPP sentence with a minimum term of two years

and 257 days. His tariff expired in April 2009. He complained of the respondent's delay in providing him with a suitable course to undertake to demonstrate a reduction in risk of reoffending.

The court commented that the precedent was, in light of the case of *Kay and others v Lambeth London Borough Council [2006] UKHL 10* the lower courts were bound to follow this House of Lords judgment that obliged them to dismiss the Convention claims. The case for consideration was whether they should allow an appeal to the Supreme Court and whether they should review the arguments and express their views on them.

The common law aspects of the cases were examined and long delays were experienced in providing offending behaviour work, despite the appellants' willingness to undertake this. It was confirmed that there is a public law duty to provide systems and resources necessary to afford to prisoners a reasonable opportunity to demonstrate that they are no longer dangerous. These must be provided in a rational way and the prison must act in accordance with its own policy. The delays were regrettable but not unlawful.

It was commented that this area of law is in an unsatisfactory state and an appeal was allowed to the Supreme Court.

R (Robinson) v governor of Whatton Prison, SSJ and R (Massey) v Secretary of SSJ [2013] EWHC 3777 (Admin)

Two post-tariff prisoners serving IPP sentences made claims for judicial review complaining that they had experienced delays in accessing prison courses which denied them the opportunity to demonstrate to the Parole Board

that they were safe to be released.

Mr Robinson was required to complete the Extended SOTP further to a pre-tariff review by the Parole Board in 2010 which concluded also that he was unsuitable for open conditions. By late 2011 Mr Robinson had still not commenced the ESOTP; he was advised that the prison had long waiting lists for those courses and assessments so prioritisation took place according to both tariff expiry and release dates. At the time Mr Robinson's tariff expiry was still over a year away and was advised that if found suitable, he would be offered a place on the ESOTP in 2013 at the earliest. His second tariff review took place on 2 November 2012, just before his tariff expiry period when again the Parole Board decided that they could not direct his release. Mr Robinson's next review was expected to take place in May 2014 which would make him 16 months post tariff by that date.

Mr Massey's tariff expired in 2010. He was required to complete a PCL-R assessment, the ESOTP, the Better Lives Booster course including post-programme testing period. After much delay and being on the waiting list, in 2012 the Parole Board declined to direct release or recommend open conditions; neither did it recommend an oral hearing. The SSJ set the review period to commence in June 2013. The letter added that Mr Massey could not be guaranteed a place on the recommended courses as availability and resources were limited, and also that some of these interventions had entry requirements and may not be appropriate for him following assessments, therefore in these circumstances, other offending behaviour courses/interventions may be considered.

Mr Massey was considered a priority for the May 2013 ESOTP course held at

HMP Whatton. Should Mr Massey commence the course in May 2013 and complete it in September 2013, this would be 34 months after the need for him to complete the course was first indicated, and a little over three years after his tariff period had expired.

In dismissing both claims, the court considered several substantive issues.

The court found that although both claimants had completed the ESOTP courses at the time of the judgement, they were satisfied that the SSJ continually failed to make reasonable provisions of systems and resources, specifically the reasonable provision of ESOTP courses, for the purposes of allowing IPP prisoners a reasonable opportunity to demonstrate to the Parole Board, by the time of their tariffs expiration or reasonably soon after, that they are safe to be released. Establishing this breach no longer affected the claimants at the time of the judgement so they declined to make a declaration.

The court ruled that on both the claimants' cases, a lot was done to progress them through the system and to provide them with access to appropriate rehabilitative courses. The one real failure was in providing the claimants timely access to ESOTP, whilst an important failure it was the court's judgments that it was insufficient to render the claimants' detention arbitrary.

The court did not think it right that Article 8 is engaged where there is delay in giving a prisoner access to a rehabilitative even if the delay is unjustified and the course important. They concluded that the link between access to a particular course and release or transfer to open conditions is not sufficiently strong to bring the situation within the scope of Article 8.

With regard's to Mr Massey's contention that a gap of 21 months between reviews amounted to a breach of article 5 (4), the court ruled that the period was close to the statutory 24 month maximum but they were not persuaded that it was excessive and in breach of article 5(4). They deemed the various elements making up the 21 months to be realistic and that there was a real risk that the setting of an overall shorter period would have led to a further review at a time when Mr Massey would not be sufficiently prepared to demonstrate safety for release or readiness for a move to open conditions, all of which would have been counter productive.

SEGREGATION (SCOTLAND)

Shahid v The Scottish Ministers **[2014] CSIH 18**

The applicant is serving a life sentence for the racially motivated murder of a teenager. Following threats to his life by other prisoners, he was placed in segregation to ensure his safety. He remained continuously segregated from 10 October 2005 until 13 August 2010.

Mr Shahid claimed that his segregation was contrary to the Prisons and Young Offenders Institutions (Scotland) Rules 2006 PYOIR, and, separately, contrary to Articles 3 and 8 of the ECHR.

Rule 94 of the PYOIR provides for prisoners' segregation up to one month for the purpose of maintaining good order and discipline or to ensure the safety of any prisoner. However, the orders must be reviewed regularly and renewal must be authorised by the Scottish Ministers for further periods of one month. Mr Shahid argued that these time limits were not complied with and therefore his segregation was unlawful because orders were made up to 66 hours late.

The court has held that time delays should not invalidate a segregation order where the delays are short in relation to the duration of the segregation permitted, the authorities carry out regular reviews of the order and there is a valid and significant reason for segregation. In this case, the court found that the authorities had carried out regular reviews, the time delays were not substantial in the circumstances and there were real threats to the prisoner's safety. The segregation was thus a proportionate response in light of the authorities' duty to safeguard him and the time delays did not cause any prejudice. Mr Shahid argued that his continued segregation (in excess of four years) amounted to inhuman and degrading treatment in breach of Article 3. The court held, however, that solitary confinement for duration of over four years is not, in itself, sufficient to violate the article. In this case the court held that:

- there was a proper purpose for the segregation (to protect Mr Shahid from threats of violence by other prisoners) supported by intelligence reports;
- procedural safeguards existed to review Mr Shahid's segregation to ensure it was still justified and those reviews took place regularly at monthly intervals with Mr Shahid having an opportunity to comment;
- reasons were given for the continued segregation; and
- Mr Shahid was not subjected to total isolation (he had access to telephones, was entitled to receive regular visits, was able to use exercise facilities, and his health was

monitored regularly).

Mr Shahid's last claim was on the basis of his right to private life under Article 8. He argued that the Executive Committee for the Management of Difficult Prisoners (ECMDP) which had responsibility for monitoring segregation orders had no basis in the prison rules, that the continued segregation was not proportionate and amounted to more than minimal interference with the right, that domestic law did not provide enough protection against arbitrariness, and that little thought was given to the continued segregation and suggestions for bringing it to an end.

Dismissing these arguments, the court held that the appropriate procedures were followed by the prison authorities and the Scottish Ministers in renewing the segregation orders and the ECMDP's role was essentially advisory. Further, the court held that domestic law provided for procedural safeguards where regular reviews were carried out, Mr Shahid was kept fully informed, his health was monitored and he remained entitled to visits. Lastly the court restated that the segregation was proportionate in light of the threats to personal violence and maintaining order within the prison.

TRANSFERS

R (Odigie) v Serco Ltd and SSJ [2013] EWHC 3795 (Admin)

The claimant was an IPP prisoner, seeking an order to quash the decision to transfer him from the private prison HMP Lowdham Grange to the NOMS operated prison HMP Full Sutton on 9 November 2012. He also wanted an order to return him to HMP Lowdham Grange.

Odigie was convicted of the joint enterprise manslaughter caused by the use of firearms. He had only been at HMP Lowdham Grange prior to the last disputed transfer for approximately 5 months. A cell search yielded a home-made weapon. His IEP status was reduced and he was charged with breaching the prison rules. He did not deny possession of the articles providing reasons for them. He was then segregated. There had been recent violence within the prison and the claimant was linked by intelligence to a serious assault. Before the adjudication hearing was resumed he was transferred to HMP Full Sutton. The explanation he was given for the transfer was *“because of the threats you pose to good order and discipline of the establishment in relation to threats to other prisoners and the manufacture of weapons.”*

He complained of being segregated on racial and religious grounds as another prisoner who was not black or a Muslim was also found to be in possession of a weapon received different treatment. He complained about the downgrade of his IEP status and about the transfer to a high security prison. The prison’s reasons for this were that *“due to [his] custodial behaviour at HMP Lowdham Grange [the prison] believed that [he] should be transferred to a high security establishment ... You were moved due to intelligence that strongly linked you to weapons and gang activity. You were therefore deemed unsuitable for category B location.”*

The claimant further complained asking HMP Full Sutton for an investigation of the evidence disclosure of the allegations against him. The response he received was, *“Your intelligence information indicates that you are appropriately located in the high security estate.”*

The claimant submitted that the security

intelligence summarised for the proceedings did not fit the criteria of “reliable security information” which the judge agreed to however he did point out that there was a consistent pattern of information pointing to pressure being put on other prisoners to convert to Islam, and the use of threats for those who failed to comply. The cell search was also prompted by intelligence.

The judge ruled that both the undisputed facts and the background were sufficient to justify action being taken before waiting for the results of the adjudication. The perceived threats and finding of the weapon were sufficiently serious and any judgement about the reliability of the security information did not undermine the decision for the prison to act.

In conclusion the judge ruled that the claimant could have made a complaint to the PPO who would have been able to see the whole of the Security Intelligence Reports, although not disclosed to the claimant and then made an informed decision as to whether the decision to transfer him was strictly necessary. Any findings by the PPO would have been relevant to his sentence planning, including any future transfers and would have had a bearing on future decisions of the Parole Board on whether he could be safely released on licence or not. The claimant had at that time made a complaint to the PPO regarding his IEP downgrade but no decision had been taken yet. The judicial review failed on all grounds.

TRANSGENDER RIGHTS

R (Green) v SSJ [2013] EWHC 3491 (Admin)

The claimant is a transgender prisoner at HMP Frankland who is seeking to

transition from the male to female gender, and is therefore referred to as a woman.

The claimant claimed that the governor: (i) had prevented her from obtaining items she required in order to live in her acquired gender, including prosthetic breasts and vaginas, wigs and tights, and (ii) in doing so, had breached the policy outlined in PSI 07/2011 The Care and Management of Transsexual Prisoners; and (iii) because the prohibition on these items prevented her from living in her acquired gender for the required period of two years, it left her unable to apply for a Gender Recognition Certificate under the 2004 Act, a crucial step in transitioning to the female gender. She also argued that the prohibition on these items breached the Equality Act 2010, since she was being treated less favourably than female prisoners.

PSI 07/2011 provides that any inmate who considers him or herself to be transgender, and who wishes to commence gender reassignment, must be permitted to live in their acquired gender role. It states that living permanently in an acquired gender includes being allowed to dress in clothes appropriate to that gender, and access to items to assist with their presentation in their acquired gender, such as padded bras. The PSI states that such items, 'may only be prohibited when it can be demonstrated that they present a security risk which cannot reasonably be mitigated'.

The governor's defence rested on the requirements of security, good order and discipline. He relied on the security provision in PSI 07/2011 above, and on the Prison Rules 1999, which require him to maintain good order and discipline. He argued that the claimant was able to access female items from the canteen and cosmetics, but some

items, including wigs, prosthetics, and tights, presented security concerns and would not be permitted. The claimant could not order outside women's clothing because the retailer selling such items only had an online catalogue and the claimant was not permitted to access the internet.

The court held that the governor had acted lawfully and dismissed the claim for judicial review. The judge referred to the need for a longer term solution to be found with respect to the prison's refusal to provide the claimant with a wig and access to outside women's clothing. However, in the context of the claimant being in prison the judge found that the governor's security concerns justified the current prohibition on items listed in the claim.

The judge also dismissed the claimant's claim under the Equality Act 2010, holding that the correct comparator was a male prisoner as opposed to a female prisoner. He expressed the view that such complaints would be better addressed to the Prisons and Probation Ombudsman than the Administrative Court.

WOMENS' APPROVED PREMISES

R (Griffiths) v Secretary SSJ [2013] EWHC 4077 (Admin)

The claimants challenged what they said is the continuing failure of the SSJ to make adequate provision for women's approved premises. There are only six women's approved premises in England, none in London, and none in Wales. By contrast there are some 94 men's approved premises spread throughout England and Wales. As a consequence, women are more likely than men to be in approved premises many miles from their homes

and families with detrimental effects on their rehabilitation and reintegration into the community.

The claimants argued that this state of affairs is unlawful in that it treats women less favourably than men because of their sex; it subjects women to particular disadvantage by comparison with men; it particularly disadvantages Welsh women; and it constitutes a breach of the public sector equality duty by failing to give due regard to the adverse effects on women of the current provision.

The court dismissed the claim of direct and indirect discrimination. Direct discrimination requires a comparison of like with like and the judge held that there are many significant differences in the population of women offenders compared with men. Proportionately more women have sentences of less than 12 months, for example, and are therefore released without licence conditions. Likewise, the judge was not convinced that the defendant is applying a provision, criterion or practice which applies to men (or the non-Welsh) and which by comparison puts women (or the Welsh) at a particular disadvantage. Furthermore, the judge held that even if the defendant was applying such a provision, criterion or practice, it was a proportionate means of achieving a legitimate aim due to factors such as the cost of approved premises, and local community opposition to the establishment of new approved premises.

The judge did hold that the public sector equality duty had not been satisfied with regard to women's approved premises, and concluded that the defendant needs to undertake the analysis necessary to fulfil his duty under the Equality Act 2010.

UPDATES ON PRISON SERVICE INSTRUCTIONS

PSI 31/2013 – RECOVERY OF MONIES FOR DAMAGE TO PRISONS AND PRISON PROPERTY

This PSI, which was effective from 1 November 2013, provides guidelines and mandatory actions for adjudicators and operational staff regarding the recovery of monies from prisoners for damage or destruction to prisons and prison property. It reflects a recent change in the Prison Rules, whereby:

- New Prison Rule 55AB and Young Offender Institution Rule 60AB, have been introduced to require adjudicators to impose a requirement for prisoners to pay for destroying or damaging any part of a prison or any other property belonging to a prison.
- New Prison Rule 61A and Young Offender Rule 64A have been introduced to provide governors with the power to take money directly from prisoners' prison accounts to pay such compensation requirements imposed in relation to damage caused to prison property.
- Prison Rule 55B and YOI Rule 60B have been amended to allow for the appeal part of the process to encompass the new award for recovery of monies for the destruction or damage caused.

Where a prisoner is found guilty of an offence under Prison Rule 51(17) or 51(17A)/ YOI Rule 55(18) or 55(19), which took place on or after 1 November 2013, the adjudication process will determine whether that prisoner should pay for the damage and, if so, the amount to be recovered.

The guidance states that there should

not be a punitive element to the sum the prisoner is required to pay; the intention is for the prisoner to 'put right' the damage caused. The compensation requirement can be made up to 100% of the damage caused but must not exceed it. The presumption will be that the fine will be equivalent to 100% of the damage, unless there are compelling reasons to award a lesser punishment, such as where the prisoner has acted completely out of character and in response to distressing personal circumstances. The sum can include labour costs of repairs. In total it should not exceed £2,000.

Any outstanding debt for compensation will be in force up until two years after the imposition of the punishment, or until the Sentence Expiry Date (SED), whichever is shorter. Recovery will cease on release from custody; however release prior to the two year mark/ SED will not expunge the debt and it will continue to be levied if the prisoner is recalled or remanded in custody, having been released on bail.

With respect to deductions, prisoners must be left with a minimum amount of not less than £5 per week to purchase necessary items and remain in contact with family and friends.

PSI 35/2013 – PAROLE BOARD AND PRISON SERVICE ORAL HEARING STANDARDS

This instruction sets out standards to be adhered to by prison staff involved in the provision and facilitation of Parole Board oral hearings.

The instruction is described as aiming to ensure that governors have a clear understanding of:

a) What facilities and services are

required by the Parole Board when an oral hearing is convened within their prison;

- b) The behaviour and conduct of staff towards Parole Board members when they visit the prison;
- c) What levels of cooperation they should expect from Parole Board members whilst in the prison;
- d) The reporting and escalation process should these standards, on the part of either party, not be met.

Of specific interest to lawyers attending oral hearings are the following points:

- Prison staff must ensure the prisoner is available to consult with his legal representative for at least half an hour before the scheduled hearing start time.
- It will not usually be necessary for a member of prison staff to be present in the hearing room, unless required to do so by the governor
- Parole Board members, legal representatives and witnesses to have access to an outside telephone line for confidential business use.

OMBUDSMAN CASES

ADJUDICATIONS

Mr D appealed two findings of guilt. The first one concerned an assault charge. The PPO's concerns included the fact that the first adjudicator referred only to the evidence clearly showing 'a prisoner' assaulting another prisoner not specifically identifying Mr D. The second adjudicator either did not view the CCTV footage himself or could not be certain from it that Mr D was indeed the perpetrator. The PPO concluded that as a result of the above facts the charge could not be proven beyond reasonable doubt.

The PPO however was further concerned in this case about the fact that Mr D asked to have a *Mckenzie* friend and to call witnesses at the second hearing and that both of his requests were rejected. It was noted that PSI 47/2011 requires adjudicators to consider requests for *McKenzie* friends in light of the *Tarrant* criteria. Whatever the adjudicator believed Mr D's motives were, he should still have afforded proper consideration to his request for a *Mckenzie* friend. In respect of his request for witnesses, the PPO noted that there was no evidence to suggest that Mr D had tried to disrupt or delay proceedings in any way. The PPO was of the view that the refusal to call witnesses was unreasonable. Its final conclusion was that the charge was not proven beyond reasonable doubt and that the proceedings were fundamentally flawed as a result of the failure to consider Mr D's request for a *McKenzie* friend and by the refusal to allow witnesses.

The PPO recommended that the finding of guilt be quashed. It further noted that the HMP Whitemoor should consider requests for a *McKenzie* friend in light of the *Tarrant* criteria as well as give proper consideration to request for witnesses.

Mr D's second appeal related to a charge of disobeying a lawful order. The PPO concluded that the necessary elements of the charge were not established. In this particular case the adjudicator had not questioned the reporting officer beyond suggesting to him that he had restrained Mr D because he had not complied with the reporting officer's request. As a result it would not have been possible to establish what exactly the reporting officer had said to Mr D to be able to determine whether an order had been given.

The PPO's final conclusion was that the finding of guilt was unsafe because of the failure to properly enquire into the charge and establish all the necessary elements. The PPO therefore recommended that it should be quashed.

RELEASE ON TEMPORARY LICENCE

Mr L complained that ROTL facilities were withdrawn and that he was recategorised to C and transferred to a closed prison. It was found that during a placement check carried out by a member of the Community Resettlement Team, Mr L had not been at his place of work when contacted by phone. It was then an excessive amount of time before he responded to the officer and gave his whereabouts.

The PPO referred to PSI 40/2011, which provides that the recategorisation process should be an open one. It noted that the process hadn't been in this case. No details of the suspected breach had been set out in the RC1 form and this was not in line with the requirement in the PSI that all relevant issues should be addressed and explanations for the decision given. This meant that Mr L was unable to challenge the decision effectively. Further, when he did, the complaint was answered by the same person who had signed off the recategorisation decision. This meant there was no *de novo* consideration of the decision and this too was a breach of the specific requirements of the PSI. The PPO concluded that the decision to recategorise Mr L was reasonable in light of the Community Resettlement Team's report. However it was also concluded that the decision making lacked transparency. Mr L's complaint was therefore partly upheld.

The PPO recommendation was that within two weeks of the issue of the report, the governor of HMP Ford should remind managers of the requirement for transparency in the recategorisation process and that appeals must be considered by a manager senior to the decision maker.

VISITORS TO CATEGORY A PRISONERS

The complaint related to the refusal of a visitor, Ms B, to visit Mr T on the basis that Ms B was an author and potentially linked to journalism. Ms B had corresponded with Mr T for two years prior to his request for a visit. Further, Ms B had been a volunteer at the Newbridge Foundation for 10 years. The Newbridge Foundation was a resettlement project that supported prisoners in custody ready for release.

The PPO considered that there were four aspects to Mr T's complaint:

- Whether the initial decision to reject the application for a visit was reasonable;
- Whether the time taken to process the application was justified;
- Whether all the parties who should have been informed were;
- Whether any errors by the prison comprised abuse of the system or targeted bullying.

In respect of the above, the PPO found as follows:

- The first aspect of Mr T's complaint was upheld on the basis that the description of Ms B as an author was not in itself sufficient to decline the application.
- The second aspect of Mr T's complaint was also upheld as Mr T was unaware of the outcome of his application after waiting months for the application itself to

be processed.

- The third element of Mr T's complaint was also upheld on the basis that such a lengthy delay between application and decision was not acceptable.
- The fourth element of Mr T's complaint was not upheld as the PPO could see no persuasive evidence of abuse of the system or targeted bullying.

The PPO therefore mostly upheld Mr T's complaint and recommended that within one month of the date of the report the governor of Woodhill should:

1. Ensure that Mr T received a letter of apology for the poor handling of his visitor application;
2. Issue a notice to staff dealing with Approved Visitor applications emphasising that:

- There must be solid evidence to reject an application based on follow up enquiries if there are initial concerns
- Prisoners must be informed of the outcome of an application in writing and within reasonable time, retaining a copy letter on file
- A pro-active approach should be taken to chasing up the police if they have not responded to an application in reasonable time.

OTHER NEWS

New Parole Board Guidance

Guidance to members on LASPO Act 2012 – test for release (Dec 2013)

Following the cases of *King* and *Sturnham*, the Parole Board issued revised guidance on the effect of LASPO on the test for release for determinate sen-

tence prisoner in December 2013. The test for the release of determinate sentence prisoners, either when they become eligible for early release on parole, or seeking re-release following recall, is now aligned with that of indeterminate sentence prisoners as follows:

“In order to direct release, the Board should be satisfied that it is no longer necessary for the prisoner to be detained in order to protect the public from serious harm (to life and limb). It is not a requirement to balance the risk against the benefits to the public or the prisoner of release.”

Public protection must be the overriding consideration

A guide for Indeterminate Sentence Prisoners who do not have a legal representative (December 2013)

As a result of the government’s recent changes to the legal aid system, which took effect on 2 December 2013, legal aid is now only available for parole reviews where the PB has the power to direct release. Prisoners whose review is only considering a transfer to open conditions (a pre-tariff review) or a return back to open conditions (an advice case), are no longer eligible for legal aid. In response to these changes, the PB has published a guide to help prisoners prepare for their parole review if they are unable to instruct a legal representative.

Practice Guidance for referring cases to Oral Hearings (December 2013)

The Supreme Court case of *Osborn* in October 2013, held that the PB’s guidance on the circumstances in which oral hearings should be granted to indeterminate prisoners did not comply with the common law standards of procedural fairness. The judgment changed

the way in which the Board must view the concept of an oral hearing and significantly broadens the circumstances in which the law requires it to hold one.

Detailed guidance from *Osborn* on the circumstances in which a hearing will be appropriate is replicated in the new PB guidance. The primary consideration for the Board is not whether an oral hearing might make a difference to the outcome, but whether fairness to the prisoner requires one. If the PB is in any doubt as to whether there should be an oral hearing, they should grant one.

Parole Board (Amendment) Rules 2014

The requirement for judges to chair oral panels for life sentence prisoners has been removed.

Prisoners’ Use of ‘Social Networking Sites’

The Prisoners’ Advice Service recently took up the case of a prisoner ‘X’, who had been refused permission to send out content to a personal Twitter account. X was using the Twitter account to raise awareness of and support for his campaign against conviction. Friends in the community were managing the Twitter account and uploading X’s contributions: he did not have direct access to the account himself.

In refusing X permission, the prison relied on section 12.11 of PSI 49/2011 *Prisoner Communication Services*, which provides in mandatory terms that, “*Prisoners must not be permitted to access or contribute via a third party to any social networking site while in custody.*”

PAS argued that X was using Twitter as a micro-blogging platform rather than a

social networking site, and the prohibition in section 12.11 conflicted with section 11.3 (j) (iii) of PSI 49/2011, which states:

11.3 Correspondence may not contain the following:

....

In addition to restrictions on access to the media (see PSI 37/2010 Prisoners' Access to the Media), material which is intended for publication or use by radio, television or the **internet** (or which, if sent, would be likely to be published or broadcast on these media channels) if it:

...

(iii) is about the prisoner's own crime or past offences or those of others, **except where it consists of serious representations about conviction or sentence** or forms part of serious comment about crime, the criminal justice system or the penal system. [emphasis in bold added]

PAS further argued that the ban constituted a breach of X's right to freedom of expression under Article 10 ECHR:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the

reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 10 does not provide an absolute right to freedom of expression, but any restriction of this right must be justified on Article 10(2) grounds. X was willing for the content he submitted to his Twitter account to be subject to prior checking by the prison (as is routine with outgoing communications), and PAS submitted the ban was therefore neither necessary nor proportionate.

The Policy Lead at the Equality, Rights and Decency Group of NOMS, advised the prison that X could contribute material to his Twitter account for the purpose of making serious representations about his conviction, subject to the prison checking the content of his communications to ensure they did not breach the restrictions placed on the contents.

This case, and that of prisoners such as Ben Gunn, who fought for and gained permission to have a blog while in custody, illustrates that section 12.11 of PSI 49/2011 should not be read too strictly. Sites such as Facebook and Twitter, which are often characterised as social networking sites, may have other purposes. If a prisoner wishes to contribute to a web based site for the purpose of making serious representations about their conviction or sentence, or serious comment about crime, the criminal justice system, penal system – or indeed any other issue – should apply to the prison for permission to do so and seek legal advice if their request is refused.

PRISONERS' LEGAL RIGHTS GROUP MEMBERSHIP APPLICATION FORM

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

P | **PRISONERS'**
A | **A D V I C E**
S | **S E R V I C E**

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?:

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The Association of
Prison Lawyers**

