PRISONERS' RIGHTS

Prisoners' Legal Rights Group Bulletin No 55

Summer 2011

PAS PRISONERS' ADVICE SERVICE

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

Camilla Pandolfini joined PAS in July as locum Women Prisoners' Caseworker, replacing Deborah Russo while she is on maternity leave. Camilla will be available to respond to telephone queries on our advice line (020 7253 3323) on Wednesdays and Fridays.

****

PAS was elected Best Legal Aid Firm at the recent 2011 Legal Aid Lawyer of the Year Awards. We are hopeful that this will lead to increased public recognition of the value of providing legal advice and representation to prisoners.

Contents

CASE REPORTS

CONDITIONS

Sokolov v Russia (Application no. 31242/05) ECHR

The Applicant (a Russian national) alleged that whilst in a police car following his arrest he was punched in the head and body by police officers. He said he was subjected to further beatings later in the police station in an attempt to force him to confess to the murder of a woman. Officers poured water over him when he fainted and he eventually self harmed and was taken to hospital, where he was treated by a doctor for his wounds. However, upon his return to the cell the beatings continued, and he was sexually assaulted and threats made. He eventually signed a confession statement and told the investigator that he had been beaten by a group of people in the street the day before. He asked to see a doctor who noted large bruises all over his upper body and head and broken ribs.

The Applicant later complained to the prosecutor that the confession statement had been forged. Despite medical and witness evidence the investigator, the same person who had dealt with the confessions treatment, decided not to open criminal proceedings into allegations of ill-treatment. He based the decision on the police officers' submissions that the Applicant had been beaten by unknown people in the street. The Applicant was later convicted of murder with the court specifically refusing to look at whether the confession had been extracted under duress. The sentence was upheld on appeal.

Relying on Articles 3 and 5 of the European Convention on Human Rights (EHRC), the Applicant complained about having been ill-treated in police custody. In addition he complained about the absence of an effective investigation into his complaints.

HELD: In respect of Article 3, the Court said the evidence was that the Applicant had been in police custody at the time when his injuries had occurred, and that the Russian Government had not plausibly explained those injuries. The Court found that he had been ill-treated by police officers in detention and having regard to the physical pain and suffering which the Applicant had endured that he had been the victim of torture, in violation of Article 3.

The Court said that the Russian authorities had never opened a criminal case into the allegations of ill-treatment, so he could not take part effectively in the investigation process. There had been an inquiry into his complaint. However, the most fundamental investigative measures had never been carried out such as the inspection of the scene where he had allegedly been or collection of material evidence. In addition, the inquiry had not been independent, as the investigator in charge of the murder case against the Applicant had also investigated his complaints of ill-treatment against the police officers. Consequently, there had been a violation of Article 3 for failure to carry out an effective criminal investigation. There was an absence of an arrest record relevant to the actual time of the Applicants arrest and detention. It had been the Court's constant position in its case law that unrecorded detention was a complete negation of the fundamental guarantees of Article 5. There had, therefore, been a violation of Article 5 and under Article 41 (just satisfaction) of the ECHR the Court held that Russia was to pay the Applicant non-pecuniary damages of 50,000 Euros.

FOREIGN NATIONALS

R (Omoregbee) v Secretary of State for Justice [2011] EWCA Civ 559

The Appellant, a Nigerian national (O), appealed against a decision dismissing his claim for judicial review of his prisoner categorisation. O had been convicted of three offences of obtaining property by deception, and was sentenced to three years' imprisonment. He was liable to automatic deportation, but had not yet been served with notice of intention to deport. He had been assessed as presenting a low risk of reoffending. The second Defendant, the Deputy Prison Governor, decided that O should remain as a category C prisoner rather than be classified as a category D prisoner because his deportation status meant that there was a potential for absconding.

Paragraph 14.4 of the Prison Service Order (PSO) 4630 stated, in relation to the classification of foreign nationals as category D prisoners, that 'each case must be individually considered on its merits, but that the need to protect the public and ensure the intention to deport was not frustrated was paramount. Category D will only be appropriate where it [was] clear that the risk [was] very low'. A judge held that paragraph 14 did no more than emphasise that the risk of absconding was a consideration relevant to every categorisation decision, but that it had a heightened importance when the prisoner was liable to deportation, and that in such cases the risk had to be examined with particular care. O's contention was that the word 'paramount' in paragraph 14.4 withdrew any discretion or individual consideration as to whether an individual prisoner subject to deportation should be made a category D prisoner. On this basis his immigration status effectively superseded any other consideration.

HELD: Appeal dismissed. The word 'paramount' in its context did not remove individual consideration of the classification of prisoners such as O. Immigration status was obviously relevant to the risk that the prisoner posed. The court said that by the very fact of their immigration status prisoners such as O were of a 'different class' to other prisoners and this additional point had to be taken into consideration in an assessment of the appropriateness of their being made category D prisoners.

It was clear from the opening words of paragraph 14.4 that the classification in each case had to be individually considered on its merits so that the immigration status of a prisoner could not in itself be determinative of the matter. The fact that prisoners who might be subject to deportation might be refused category D status, but yet be granted bail on release from prison, did not mean that the classification policy was irrational, because it was not a matter for the Prison Service what the Secretary of State decided to do after a prisoner was released.

LICENCE / RECALLS

R (Jorgenson) v Secretary of State for Justice [2011] EWHC 977 (Admin)

The Claimant (A) challenged the decision of the Secretary of State for Justice to recall him to custody for using cannabis, which was said to be in breach of his licence conditions. A was sentenced to 8 years' imprisonment for firearm offences, false imprisonment, blackmail and kidnapping. The offences were related to A's association with drugs and drug dealing. A was released on parole licence on 2 June 2010. A condition of A's parole licence was that: '[A]'s alcohol and drug use...be closely monitored and should

there be a problem he will be referred to a specialist agency immediately'. A provided a positive drug test on 10 July 2010 and was recalled to prison 2 days later. He had complied with all other licence conditions. A admitted the breach and that it was deliberate due to his emotional state after visiting his mother's grave. The Request for Recall report stated that A was a high risk of harm to the public (based on a June 2010 OASys conducted on him after release) particularly when misusing illegal substances.

A challenged the decision to recall, on the basis that the decision was based on false or flawed premises; namely that a previous OASys report in prison had placed him at medium, not high risk; the decision was disproportionate failing as it did to consider alternatives to recall and his explanation for the breach; and the decision breached his legitimate expectation that alcohol or drug misuse would be met with a referral to a specialist agency.

HELD: Application dismissed. As the decision to recall a prisoner raises important questions relevant to the liberty of an individual any decision to recall must be proportionate and as regards avoiding risk to the public. The risk assessments varied because the June 2010 assessment was made when A was in the community, and so the decision makers were entitled to rely on this report rather than previous ones when considering his recall.

Emergency recall was the only proper remedy in light of the risk to the public posed by A, and A himself should have known or had a reasonable expectation, based on his licence conditions, that if he misused drugs he would be liable for recall.

R (Webb) v Swindon Crown Court Divisional Court, 19 April 2011: Unreported

The Claimant (W) applied for judicial review of Swindon Crown Court and the Secretary of State's decision not to clarify the sentencing judge's remarks prior to issuing a warrant for imprisonment. W committed a burglary while on licence. The judge, in sentencing W, directed that W serve the remainder of his sentence for the previous offence, but did not specify the length of the term. W assumed that the remainder of his sentence ran from when he had been sentenced on the burglary, which resulted in a sentence of 232 days, which he successfully appealed in the Court of Appeal. The prison authority later informed W that his sentence ran from when the burglary was committed, resulting in a sentence of 533 days.

W attempted unsuccessfully to seek clarification from the sentencing judge, to appeal to the Court of Appeal and applied to the Criminal Cases Review Commission, which whilst acknowledging the ambiguity accepted the longer term was appropriate.

HELD: The Application was granted. Where there is ambiguity in a sentencing judge's order, the order should be construed in favour of a Claimant so that the shorter of the two possible sentences is served.

LIFERS

R (Sobers) v Secretary of State for Justice [2011] EWHC 817 (Admin)

The Claimant (S) judicially reviewed of the Secretary of State's failure to provide him with a reasonable opportunity to demonstrate that his risk no longer justified continued detention. S was

serving a life sentence for murder. At a pre-tariff expiry review the cognitive self-change programme was identified as being suitable for him to complete and that this should take place in time to enable him to have a further review before his tariff date expired. An assessment for the programme was started but never completed because of funding reasons.

Applications were made for S to be transferred to other prisons where the programme was offered, and he was placed on a waiting list for four years. Ten months before his minimum tariff period was due to expire, nothing had happened. S argued that the Parole Board would not release him without the course being completed, and submitted that, on the basis of *R (Wells) v Parole Board [2009] UKHL 22, [2010] 1 A.C. 553,* a declaration should be made that the Secretary of State had failed to provide the resources necessary for prisoners to progress towards release. S further argued that because the public law duty in *Walker* only applied where prisoners were sentenced to imprisonment for public protection that this breached article 14 of the ECHR, as it treated prisoners differently depending on the sentence imposed.

HELD: The claim was dismissed. There could be no breach of Article 5 of the ECHR because S had not reached the end of his tariff period. As Article 5 was not engaged, there could be no question of article 14 being engaged either (*Clift v United Kingdom (7205/07) Times, July 21, 2010* considered). Further, the Secretary of State's denial that that public law duty applied in the instant case was not a denial of any obligation owed to other life sentence prisoners.

However, even assuming that such a duty did exist to all life prisoners, it could not be inferred from the facts of the instant case that there had been any systemic breach of duty.

CATEGORISATION/ HOME DETENTION CURFEW (HDC)

R (on the application of Young) v Governor of Highdown Prison [2011] EWHC 867 (Admin)

The Claimant (Y) applied for judicial review of a decision by the Governor of HMP Highdown to refuse Home Detention Curfew (HDC). Y was charged and convicted of two separate offences; robbery and possession of a sharp bladed instrument, namely a knife. He was sentenced on 21 December 2009 to two years' imprisonment.

Despite a number of mitigating factors and good behaviour throughout his sentence, Y was refused HDC on the grounds that he was unsuitable because of the offence of possession of a sharp bladed instrument. An appeal based on exceptional circumstances was considered and rejected on the papers by a senior grade Governor.

The HDC Scheme is provided for by sections 246 and 253 of the Criminal Justice Act 2003. PSI 31/2003 provides that 'certain types of offences will render prisoners unsuitable for consideration for release on HDC unless there are exceptional reasons to grant release'. PSI 31/2006 refers to PSI 31/2003 and sets out further features that would also amount to an example of exceptional circumstances.

The Claimant's judicial review was based on two grounds. The first ground was that the treatment of the Claimant was irrational and/or in violation of Article 8 of the ECHR, and/or in violation of Article 14 in conjunction with Articles 5

and/or Article 8 of the ECHR. This was on the basis that the policy applied creates starkly differential treatment between prisoners with a sentence comprising a separate offensive weapon conviction, and a comparator group consisting of other prisoners convicted of equally serious offences involving weapons but who happen not to have been charged separately with the weapons offence.

The second ground of claim related to the procedure of the decisions made, and the fact that Y did not have the opportunity of an oral hearing.

HELD: The claim was dismissed. The Crown Prosecutor Code recommended the laying of separate weapons offences. If this policy has been applied, then the claimed comparator group will not exist. PSI 31/2003 is a clear and workable policy on which kinds of prisoner should generally not be allowed out on HDC, as Governors look at the offence of which the prisoner has been convicted. This is a fairer methodology than an attempt to determine facts on the basis of what may be incomplete material. The procedure relating to the decision making was also fair.

R. (McLuckie) v Secretary of State for Justice and DM v SSJ [2011] EWCA Civ 522

The case concerned the Secretary of State's appeal of a decision ([*2010] EWHC 2013 (Admin)*) allowing an application for judicial review by the respondent prisoner (D). D had been convicted of murdering a prostitute and sentenced to life imprisonment with a tariff of 20 years. He was held in Category A conditions. 20 years later, a Parole Board concluded that a move to a Category B training prison might be constructive despite stating that there had been no significant reduction in D's level of risk.

An application by D for an oral hearing to consider his categorisation before the Category A Review Team (CART) was rejected by the Secretary of State, who said D should remain Category A. D challenged this decision in the High Court, and a judge quashed the Secretary of State's decision finding that an oral hearing should have been granted in light of the Parole Board's conclusions. After the judgment, CART carried out a further review but without an oral hearing, and concluded that D should remain a Category A prisoner. The Secretary of State submitted that the judge had failed to have regard to the Parole Board's decision as a whole, as it had not recommended re-categorisation and an oral hearing were therefore unnecessary.

HELD: Appeal allowed. The judge's decision rested on a single observation in the Parole Board report that a move to a Category B training prison 'may be constructive'. However, the Parole Board's decision taken as a whole was clear: there had been no significant reduction in D's level of risk. The isolated comment as to the benefits of downgrading D's security categorisation did not provide sufficient foundation for concluding that an oral hearing was required, *R. (on the application of Williams) v Secretary of State for the Home Department [2002] EWCA Civ 498, [2002] 1 W.L.R. 2264* and *R. (on the application of H) v Secretary of State for Justice [2008] EWHC 2590 (Admin), [2009] Prison L.R. 205* considered. When the Parole Board's decision was considered as a whole, it was difficult to discern any significant inconsistency with CART's decision.

Insofar as there was any inconsistency, it went no further than that inherent

in their different spheres of interest; the Parole Board focused on controlled, conditional release and the measures necessary to achieve it, while CART concentrated upon the risk posed by the prisoner in the event of an escape from custody. There was nothing in the Parole Board's decision which should have prompted CART to convene an oral hearing and the judge had therefore erred in law.

PAROLE BOARD - GENERAL

R (Faulkner) v Secretary of State for Justice [2011] EWCA Civ 349

The Claimant had already succeeded in establishing that delays in his Parole Board hearing of approximately ten months amounted to a breach of ECHR Article 5(4) (see Spring 2011 PLRG Bulletin). The issue for the Court to determine was an assessment as to the appropriate level of damages for this breach. The Claimant sought £32,000, while the Respondents argued that damages should be no more than £3,500.

HELD: Section 8(1) of the Human Rights Act (HRA) allows the courts to award damages when necessary to provide 'just satisfaction'. A declaration that an individual's rights have been breached may be sufficient for 'just satisfaction', but given the common law places a high value on personal liberty an award of damages was necessary in this case.

In making an award, domestic courts were required under HRA section 8(4) to 'take into account' principles applied by the European Court of Human Rights, but it was common ground that in these case there had been no articulated principles by which the European Court had set awards. The Court of Appeal was therefore conscious that its award "may well set the tone in related and similar cases". A breach of Article 5(4) was not the same thing as false imprisonment, as it involved the loss of the opportunity to be granted conditional liberty, which was not the same thing as the loss of an innocent person's freedom. However, once it has been found probable that parole would have been granted had there not been a breach of Article 5(4), it would have been inappropriate for the Court to adjust an award by reference to the degree of probability of release.

As a general rule, no separate sum should be awarded for distress and anxiety, but this did not exclude the possibility that unlawful detention may cause special damage which could be pecuniary, psychiatric or physical. Exemplary damages may also be awarded in certain circumstances, but these did not arise here. In the present case, the Claimant was awarded £10,000 to reflect the loss of 10 months of conditional liberty. Whilst the Court did not arrive at this figure by applying a multiplier to a monthly sum, it stated that 'it can no doubt be disaggregated in that way'.

PAROLE BOARD –ORAL HEARINGS

R (Calero) v Parole Board [2011] EWHC 863 (Admin)

The Claimant, C, challenged by judicial review the refusal to grant an oral hearing at the end of her IPP tariff. C was convicted of manslaughter and had been located in a Therapeutic Community (TC) for 12 months but had left by the time of the Parole decision. No recommendation for release or open conditions was contained in the dossier. A further ground of challenge related to a confidential document which had not been disclosed to C.

HELD: Claim dismissed. Once a paper decision is made refusing an oral hearing a prisoner is entitled to make a further application for an oral hearing. The second decision is however neither an appeal nor a review of the first decision rather it is an opportunity for the prisoner to displace the provisional decision to not grant an oral hearing. The second decision may take into account the first decision as well as any further information that has come to light. However, the mere passage of time since the first decision is unlikely to be a reason for displacing it and there must usually be a dispute over relevant facts which an oral hearing may resolve.

An oral hearing is required in two circumstances: (i) when a move to open or release is a 'realistic possibility' and in the present case there was no real chance of even a move to open conditions given the lack of any support for such a move from report writers or (ii) when the assessment of risk requires live evidence. (*Osborn and Booth [2010] EWCA Civ 1409*). This would usually involve either: (a) a dispute on facts which needed resolving before a conclusion could be reached; (b) a dispute between professionals on progress and whether release was appropriate; or (c) where there was some risk factor which needed to be assessed before a proper decision could be made and where oral evidence was necessary to make the assessment. None of these factors applied in this case.

In respect of disclosure, the standard procedure would be to disclose a document on a confidential basis to C's legal advisor. That this had not been followed was reprehensible. However, the document related to provisions for C's eventual release and not to the assessment of risk and therefore the failure to disclose did not affect the decision made.

R (Chester) v Parole Board [2011] EWHC 800 (Admin)

The Claimant, C, challenged the Parole Board's refusal to grant an oral hearing in his parole review. C was 13 years over his 20 year tariff on a life sentence for the rape and murder of his seven year old niece. During his sentence, C had a patchy history of engaging with offending behaviour work and for many years he had refused to complete further work including the extended SOTP course and anger management courses. None of the reports in the parole dossier recommended a move to open or release.

C requested an oral hearing on the basis that it was necessary to properly consider risk factors and progress given the current assessment focussed exclusively on completion of courses. He also said he had material to present to the Board in the form of statements etc., although the nature of what these were had not been disclosed.

HELD: The claim was granted. Following *Osborn and Booth [EWCA] Civ 1409,* an oral hearing would only be required if there is a realistic prospect of release/open or, exceptionally, in certain other circumstances. In this case C relied on the fact that he had not been assessed properly for some time due to his refusal to cooperate, and that the professional reports all relied on historic risk assessments. He also relied on the impasse regarding his progress which was identified in the reports and which was in real danger of continuing indefinitely. Whilst this was not an easy case, the Court felt an oral hearing may break the impasse with C's progress and therefore be of real value. Moreover it would allow an assessment of C's risk in light of his oral evidence.

R (Hindawi) v SSJ [2011] EWHC 830

The Claimant, C, was a Jordanian national who was serving a 45 year sentence for attempting to bomb an aircraft in 1986 when acting as an agent of the Syrian government. C was to be deported to Jordan on release. C became eligible for parole in 2001 and his automatic release date was in 2016. In 2009 the Parole Board recommended C's release, but the SSJ refused to follow this recommendation rejecting the findings that C was genuinely remorseful and that C's low risk could be managed through surveillance in Jordan. The SSJ relied on a document prepared by officials in the MOJ which set out the reasons why the Parole Board's decision should be rejected but which did not set out any reasons for accepting it. C argued that reliance on this document made the decision unfair.

HELD: The claim was granted. Following the decision in *Clift v UK (7205.07)* and the passing of the Coroners and Justice Act 2009, the SSJ was now bound to follow any decision of the Parole Board regarding release made since August 2010. This case was therefore largely of historic interest only. The central issue was C's credibility, which had been assessed at an oral hearing, and very good reasons were needed to depart from such a decision. There was no transcript of C's evidence at the oral hearing and the documentary evidence was considerable. Fairness therefore required that officials put issues to the SSJ in a balanced way so that he could arrive at a rational decision without having to read all the evidence himself. The rejection of C's credibility had no rational basis and the procedural flaws vitiated the SSJ's decision.

PRISON SERVICE INSTRUCTIONS

PSI 10/2011 sets out a new framework for Residential Services. This covers a wide range of aspects of prison life, and the PSI contains both positive and negative developments for prisoners. The requirement for prisons to adhere to the 'standard core day' is removed, and there are changes in relation to exercise and access to phone calls. The provision of outdoor exercise is governed by Prison Rule 30. Prison Service Order 4275 on Time in the Open Air (which is now cancelled) was issued in 1998, following a change to Rule 30 which reversed the previous mandatory requirement that all prisoners be provided with an hour's exercise every day.

This PSO distinguished between prisoners in the general population who were to 'be given the opportunity to spend time in the open air at least once every day, for such period as may be reasonable in the circumstances', and those in segregation or otherwise subjected to a 'severely restricted regime', who would be 'provided with the opportunity to spend a minimum of one hour in the open air each day'. PSI 10/2011 introduces a mandatory requirement for all prisoners to be provided with a minimum of 30 minutes per day in the open air, and for those on restricted regimes to have a further 30 minutes out of their cells, but not necessarily in the open air. In relation to phone calls, the PSI provides welcome written guidance to the effect that prisoners must be afforded access to a telephone (including during the evening) in order to maintain contact with family, friends and legal advisers. The PSI also introduces a new applications process**,** incorporating this within the provision of Residential Services, as opposed to within PSO 2510 which deals with the Complaints Proce-

dure. Prisoners should be cautious of the applications procedure as, although it can certainly be useful in relation to many day-to-day aspects of the prison regime, it is not a stage in the complaints procedure and so will not assist in the furtherance of any complaint which needs to progress towards a response from the number one governor/ director in order to then begin judicial review proceedings, or to take the matter to the Prison and Probation Ombudsman.

PSI 11/2011 on **Incentives and Earned Privileges (IEP)** cancels PSO 4000 and restates the IEP scheme within the context of 'Residential Services'. Equality considerations are emphasised: for example, the PSI states that: '*Managers designing local schemes must ensure that they offer a range of earnable privileges so that all prisoners can receive equal benefit in return for good behaviour. For example, if additional gym sessions are offered as an earnable privilege, there must be an alternative for prisoners who are physically unable to benefit. The design of the scheme must also ensure equitable treatment for prisoners located in particular units, for example for their own protection, or as part of a residential programme such as RAPT.'* The PSI states that there must be a system of written warnings, and that these must not be used to discourage prisoners from making complaints. Games consoles are officially brought within the IEP, and only made available to prisoners on Enhanced. There is also detailed guidance on the relation of the IEP scheme to prisoners who maintain innocence, and who consequently to varying degrees do not comply with sentence planning.

PSI 12/2011 on **Prisoners' Property** replaces PSO 1250. The guidance is broadly similar, although more detailed, but there are amendments following the case of Coleman, which determined that the destruction of a confiscated mobile phone was unlawful, and in relation to the amount of property that can be stored at Branston.

PSIs 13/2011 and **14/2011** deal with **Control of Internal Movement**: the first in relation to Management and Security of Communication/Control Rooms and Internal Prisoner Movements, and the second on Management and Security of Gate Services.

PSIs 15/2011 and **16/2011** give detailed guidance on **Prison Visits**: the first PSI being about security around visits and arrangements for closed visits; the second dealing with general visiting arrangements. This PSI replaces PSO 4410 which was the previous guidance. Of note is the guidance on visits from large families which states that up to 3 adults, together with any accompanying children, should normally be allowed at each visit and that a child is defined as any person under the age of 18. This should mean an end to local policies which have designated anyone aged 10 years or over as a child, thus making it difficult for prisoners with large families to receive visits. The imposition of such a rule at HMP Long Lartin was cited as one of the causes of a protest at the prison in January this year.

PSI 19/2011 on **Searching of Prisoners' Stored Property** follows a 'Specification, Benchmarking and Costing Programme' review conducted by the Security Policy Unit in NOMS. As a result of the review, this PSI determines that prisons outside the high security estate no longer need to conduct mandatory routine searches of prisoners' stored property, and instead must conduct a risk assessment to determine how frequently such searches should be carried out.

PSI 23/2011 deals with **Licences for DVD/Video Films, Music and Television** in prisons. It replaces PSI 01/2010, and confirms that unless a prison has purchased a licence it cannot show films in a communal setting for entertainment, although they may be shown for educational purposes and under some other circumstances. Likewise, music cannot be played in workshops, kitchens or recreational areas but can be played in residential areas and gyms, for religious worship. Music can also be played in education classrooms, provided it relates to the course and is not background music.

PSI 28/2011 on **Accommodation Fabric Checks** also follows the 'Specification, Benchmarking and Costing Programme' review and states that outside the high security estate, prisons are no longer required to carry out daily fabric checks, and instead must undertake a risk assessment to determine local arrangements.

PSI 30/2011 gives prisons Instructions on **Handling Mobile Phones and SIM Card Seizures.** Each prison must appoint one or more 'Authorising Officers' to deal with such seizures, and to take decisions on whether phones and SIMs seized should be sent to the National Dog and Technical Support Group (NDTSG) for interrogation, and whether to refer matters to the police for investigation of whether a criminal offence under the Offender Management Act 2007 has been committed. In most instances phones/SIMs will be sent to NDTSG. If phones/SIMs seized from visitors or staffs are sent for interrogation, the visitor/staff member must give written consent. If consent is not given, the phone/SIM will not be sent for interrogation but the visitor can be put on closed visits, staff member made subject to disciplinary procedures etc. Prisoners found in possession of phones do not need to give consent. If a prisoner is found with a phone s/he can be placed on report, and the adjudication adjourned pending the outcome of any police investigation. A photo should be taken of the phone, and can be used in the adjudication process in lieu of the phone itself. Intelligence from the mobile phone or SIM card interrogation report provided by NDTSG may be used to support adjudications. However, before any intelligence from a NDTSG report is used as evidence in an adjudication, consideration must be given to the risks of disclosing that information to the prisoner and their legal adviser. If it is considered not appropriate to disclose the information in the NDTSG report to the prisoner and their lawyer for security or operational reasons, then it cannot be used as evidence in an adjudication.

PSI 32/2011 Ensuring Equality is introduced following the coming into force of the Equality Act 2010. It sets out a uniform framework for the management of anti-discrimination policies relating to eight 'protected characteristics': age, disability, gender reassignment, marriage/civil partnership, pregnancy/maternity, race, religion/belief, sex and sexual orientation. It also introduces a duty on NOMS to take positive steps to eliminate unlawful discrimination in these areas. Previous anti-discrimination policies which dealt with separate areas of discrimination are cancelled, including: PSO 2800 (Race); PSO 2855 and PSI 2008/31 (Disability) and PSI 2009/35 (Impact Assessments). Overall, the PSI gives greater discretion to governors in tackling anti-discrimination issues.

A single Discrimination Incident Reporting Form (DIRF) is introduced, along with a generic investigation procedure. This replaces the old RIRF forms, and the DIRF may be used to complain against discrimination relating to any

protected characteristic. Forms are to be available in all areas of a prison with envelopes to ensure privacy. All DIRF complaints must be logged and copies retained of completed forms. Discrimination issues raised using standard complaints forms should also be logged on a DIRF. Serious complaints should be referred for investigation under PSO 1300, and the prisoner should be informed of this and of any outcome relevant to them. DIRFs concerning other matters should be handled by a manager who should interview the prisoner, address the issue and provide a written response to the prisoner. As a general principle, the timescales for DIRF complaints should match those for standard complaints. Where serious matters are deferred for investigation, an interim response should be provided. The mandatory 28-day investigation timescale for racist incidents is therefore removed. Prisoners may appeal against the outcome of a DIRF complaint using a Stage 2 complaint. There is a general requirement to monitor DIRF complaints, but again the specific provisions requiring a set proportion of racist incident complaints to be reviewed are removed. Every prison must have a functional head for equalities issues. There is no longer a requirement for there to be Race Equality Officers (REOs) or Disability Liaison Officers (DLOs). The roles of REOs and DLOs may be preserved within the new system or the work can be distributed amongst other staff.

The PSI makes specific provision for 'reasonable adjustments' which must be made for prisoners with disabilities which include physical adjustments to prison buildings. It provides guidance on what is considered reasonable with particular reference to the costs involved. Importantly it is the funds of NOMS as a whole that are to be considered and not simply those of an individual department or unit. Prisoners with disabilities should not normally be located in healthcare wings unless specific medical care is required. Prisoners with learning disabilities may need to be located where staff can provide greater monitoring. Disabled prisoners may need to be transferred to other prisons if it is not possible to make reasonable adjustments in their current location. Where the receiving prison has appropriate facilities a transfer of a disabled prisoner must not be delayed because of their disability. Access surveys are recommended to be carried out and guidance sought from specialist organisation over what reasonable adjustments may be needed. Specific guidance is made relating to IEP schemes and employment to ensure that the privileges available are accessible by all prisoners.

OMBUDSMAN CASES

SECURITY INFORMATION

Mr D complained that inaccurate entries in his security record had been instrumental in the prison's refusal to allow him to attend his father's funeral. Mr D was concerned that the entries could affect his future progress and asked for them to be removed. The investigation established that the entries were initially recorded on the front-page summary of Mr D's intelligence record more than 15 years ago, when he was first sentenced to life imprisonment. The information said that Mr D would try to escape given any opportunity and that he was likely to feign illness to get to an outside hospital. However, the investigation found no evidence in security information or elsewhere to justify the comments. It was discovered that, although the practice had now ceased, some prisons had previously classified all potential category

A prisoners as likely to escape if given the opportunity, due to their level of risk. In Mr D's case, the information had been passed from establishment to establishment without verification or further investigation. The PPO investigation found that the decision to refuse Mr D permission to attend his father's funeral was reasonable and justified. However, his complaint highlighted the potential for serious errors when information likely to have a significant impact on the lives of prisoners is not properly processed and kept up to date. The prison agreed to remove the inaccurate comments from Mr D's record with immediate effect.

INCENTIVES AND EARNED PRIVILEGES (IEPS)

Mr J complained about being bullied by his offender supervisor, after he had been told by him that unless he signed up and took part in the Sex Offender Treatment Programme (SOTP) and Thinking Skills (TSP) he would not achieve enhanced level on the Incentives and Earned Privileges (IEPS) scheme as he was not co-operating with his sentence plan. Mr J said SOTP was not on his sentence plan - he maintained his innocence and that it was therefore inappropriate to expect him to attend SOTP. Mr J referred to section 5.4 of PSO 2050, which advised that no target was to be set that was unachievable. Mr J also complained that he had been co-operating with psychology around TSP. The Offender Supervisor said SOTP was a future target, and was achievable as Mr J simply had to accept he had been convicted of a sexual offence and give an open and honest account of his offence. If such 'disclosures' were not made, then he was deemed to be non-complaint with sentence planning and not eligible for IEPS Enhanced. In February 2008, the Interventions Group at Prison Service HQ issued a policy document on the issue of sex offenders who deny their offence, sentence planning and IEPS guidance. The key points were:

- A distinction is drawn between sex offenders who deny their guilt and are appealing, and those who deny their guilt and are not appealing (including those who have had an appeal refused);
- In order to prove you are an Appellant for this purpose, you must be able to produce evidence ,usually in the form of a criminal appeal number from the Criminal Appeals Office;
- A prisoner does not become an Appellant by the Criminal Cases Review Commission (CCRC) examining his case, as they have no power to overturn or modify any conviction;
- All sex offenders, 'with the exception of Appellants', should be set an initial sentence plan target 'to be assessed for SOTP, and if suitable, to undertake the recommended programme';
- A distinction is drawn between a prisoner's 'suitability' and 'readiness' for SOTP. A convicted prisoner who denies his offence is technically suitable for SOTP but is not ready for SOTP. This is because SOTP requires analysis of the lead up to offences;
- Where a prisoner's 'unreadiness' to attend SOTP is due to denial and no other objectives are relevant, then a prisoner's refusal to undertake SOTP could bar him from obtaining enhanced regime status.

The Ombudsman referred to the case of *Potters and others v The Secretary of State (2001)* which said that, once convicted, a prisoner was not entitled to rely merely on an assertion of innocence 'to excuse himself from confronting his offences'. PSO 4000 provides guidance on IEPS, and requires each prison to devise its own scheme whose aim is to encourage 'sentenced prison-

ers to engage in OASys and sentence planning and benefit from activities designed to reduce re-offending'. However, the Ombudsman said there was still confusion over the issue of maintaining innocence, and different prisons adopted different approaches. The Ombudsman obtained further clarification of the guidance from the SOTP lead in NOMS and that:

- A prisoner with a registered appeal against conviction should not be set assessment or attendance on SOTP as a sentence plan target until any appeal has failed;
- If a prisoner's appeal is unsuccessful or if he decides not to appeal against conviction despite maintaining innocence he should be set an initial target plan and to be assessed for SOTP and if suitable undertake the recommended programme;
- A prisoner who continues to maintain his innocence can have the sentence planning target to undertake SOTP re-set as a future objective, but only if the Treatment Manager and Offender Supervisor decide together to set interim objectives to help him or her overcome their denial;
- If the prisoner is not ready to undertake SOTP for reasons other than denial (e.g. insufficient competence with English language), then interim objectives can be set to help prepare a prisoner for the programme, in which case SOTP can be re-set as a future objective whilst these are achieved;
- Where a prisoner's unreadiness is due to denial and no other objectives are more relevant, then the SOTP target should remain on the sentence pan and a refusal to undertake the SOTP course could bar him from obtaining enhanced regime status.

If a prisoner is a registered Appellant then he should submit an application requesting SOTP be removed from their sentence plan, and make an application for enhanced status. However, if the prisoner is not a registered Appellant, then the Prison Service is entitled to consider non-compliance in assessing IEPS status under PSO 2205 and 4000.

CONDITIONS

Mr H complained that he did not have a mattress for seven days whilst in the segregation unit, whereas even prisoners on dirty protest were still entitled to a mattress. The prison said that he did have a mattress during this period, and that he had been placed in special accommodation because of violent and unpredictable behaviour. PSO 1700 says that special accommodation is to be in a dedicated cell or improvised accommodation with any one or more of the following items removed in the interests of safety: furniture, bedding, sanitation. The Ombudsman reviewed the segregation history sheets, and it was clear that the issue of not having a mattress was raised on more than one occasion with staff, the Independent Monitoring Board and the Chaplaincy over a number of days. It was therefore concluded that Mr H had been without a mattress for a number of days and the complaint was upheld. A recommendation was made to ensure that replacement mattresses should be made more accessible on the segregation unit.

FOOD REFUSAL

Mr A began refusing food shortly after moving prisons. The prison immediately opened an ACCT form, setting out the support and monitoring they could provide for him. Mr A was assessed on a daily basis, and staff attempted to persuade him to reconsider. However, Mr A continued to fast and drew up an advance directive with his solicitor, refusing further medical treatment. All staff

and carers who had contact with Mr A were made aware of the terms of the directive and what it allowed them to do for him. Mr A's condition gradually worsened, and he was admitted to hospital where he reaffirmed to hospital staff that he did not want to be resuscitated. Two days after he was admitted, some four months after first refusing food, Mr A died in his sleep. No recommendations were made as a result of this investigation, as Mr A was deemed to have been cared for both professionally and compassionately. However, the Ombudsman endorsed a recommendation from the clinical reviewer that more prison staff should be trained to provide end-of-life care.

RELEASE ON TEMPORARY LICENCE (ROTL)

Mr B complained that his Release on Temporary Licence (ROTL) had been delayed by a late response from his Offender Manager in the Community, with whom he had had only minimal contact. Mr B said he had sent numerous letters to his Offender Manager but received only one response. The investigation showed that Mr B had applied for home leave some two months in advance of the date required. The prison faxed the relevant paperwork to the Probation Office within days, but six weeks later had received no response. When the Offender Manager said he had not received the paperwork, it was re-sent. A week later, the Offender Manager told the prison that the two possible addresses submitted by Mr B were unsuitable. Mr B then offered a third address that had previously been found suitable for ROTL and a revised application was sent to the probation office on the same day. However, prison staff were unable to contact the Offender Manager to ask him to expedite the application and, as a consequence, Mr B was obliged to defer his proposed ROTL dates. On three consecutive days prior to the revised ROTL date, the prison attempted to contact the offender manager, but he did not return the calls. When the prison finally managed to contact the Offender Manager the day before Mr B's ROTL, he said he had not received the revised application. Because approval for the address had not been received, Mr B again deferred his ROTL dates.

The evidence in this case indicated that the Offender Manager acted promptly to deal with the ROTL application once he was aware of it. However, there was a delay of some seven weeks after the prison forwarded the request. The Probation Area could offer no explanation for the delay, and the assumption was that the request was mislaid within the probation office after it was received by fax. As there had been an administrative delay within the Probation Area, this aspect of Mr B's complaint was upheld and the Probation Area agreed to apologise to Mr B. So far as the lack of contact was concerned, the Probation Area agreed that not responding to Mr B's letters meant that they had failed to keep him informed of progress. However, although the NOMS National Standards for the Management of Offenders require continuity of offender management to be maintained, the minimum requirement for frequency of contact with prisoners is annually. In addition, the NOMS Offender Management Model states that during the middle stages of a custodial sentence the role of Offender Supervisors (probation staff seconded to prisons) becomes central, while the involvement of Offender Managers in the community may be reduced to a minimum. Although there was no evidence that Mr B suffered any detriment through the lack of contact, the Probation Area apologised for failing to keep him informed about the management of his case.

PRISONERS' LEGAL RIGHTS GROUP MEMBERSHIP APPLICATION FORM

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

PAS PRISONERS' ADVICE SERVICE

Name: _____

Company: _____

Address: _____

_____ Postcode: _____

Telephone: _____ Fax: _____

Email: _____ Website: _____

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

PLEASE TICK THE TYPE OF MEMBERSHIP REQUIRED:

( ) Prisoners	Free	
( ) Professionals/Other	£50pa	(please make cheques payable to
( ) Voluntary Organisations	£30pa	'Prisoners' Advice Service')
( ) Academic Institutions	£50pa	
( ) Prison Libraries	£30pa	
( ) Solicitors and Barristers	£50pa	
( ) Back Copies	£5.00 each	
( ) Ex-prisoners	£10pa	

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

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

_____

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