PRISONERS' RIGHTS

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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.

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PAROLE BOARD

R (on the application of Boylan) v The Parole Board [2012] EHWC Civ 1233 (Admin)

This case is one in a long line of challenges in respect of the refusal by the Parole Board to convene an oral hearing.

The Claimant had been recalled following a breach of a licence condition not to enter any licensed premises or a registered club without the approval of his probation officer. The case was dealt with on the papers by the Parole Board and, despite the Offender Manager supporting re-release, the Board declined to re-release. The Claimant's solicitor submitted written representations requesting an oral hearing but this application was refused.

The Judge made clear, and this was not in dispute, that he (the Judge) effectively sat as an appellate court and therefore had to exercise his own primary judgment as to the fairness of the decision to refuse an oral hearing, rather than whether the decision fell within Wednesbury unreasonableness or a broad range of discretion by the Board. It was also not disputed that the two leading authorities remained *R (Osborn & Booth) v The Parole Board* [2010] EWCA Civ 1409 and *R(Smith & West) v The Parole Board* [2005] 1 WLR 350.

In looking at the facts the Judge said the issue was whether there was the need for live evidence to enable the Parole Board to properly assess the risk in this case. The Claimant's representations had said that he had 'turned the corner' in terms of his behaviour, thinking and motivation to lead a law-abiding life. However, the Parole Board panel in its written reasons had concluded that the breach showed that the Claimant had continuing poor consequential thinking skills and needed to further address these cognitive deficits in closed conditions.

The Judge concluded that these reasons, rather than any issue over the Claimant's motivation to change, formed the substance of the panel's decision. He concluded that an oral hearing would have added nothing to the assessment of risk in this case. The Judge did comment that, had the Board's original decision been based around the Claimant's perceived lack of motivation to turn a corner etc, then the credibility of these claims would have merited exploration via live evidence and an oral hearing to assess risk. However, as this was not the real issue in this case, it was entirely fair for the matter to have been dealt with on the papers and the claim was dismissed.

R (on the application of Gregory McGetrick) v The Parole Board [2012] EHWC 882 (Admin)

These proceedings looked at the question of whether and in what circumstances a Parole Board, when deciding whether to release a prisoner on licence, is entitled to take into account material provided by the Secretary of State (SS) containing factual allegations about a prisoner's pre-trial conduct, which formed part of the original prosecution case against him but for which he was never convicted ('untried material').

The Claimant was serving an extended sentence and had been recalled. At a hearing before the Board various pieces of 'untried material' were included in the dossier and were referred to by the Claimant's Offender Manager in her report as showing a 'heightened risk'. This untried material consisted of a number of serious allegations and witness state-

ments from the police in respect of allegations which had never been formally pursued and none of which had resulted in any conviction or even charge.

An independent psychology report commissioned by the Claimant specifically referred to the Offender Manager's report, raising ethical and professional concerns around using material not tested by the Courts. The Claimant's solicitor also made representations as to why untried material should not be included in a dossier, making explicit reference to PSO 6000 concerning pre-trial prosecution evidence. The SS in turn contended that PSO 6000 was specific to determinate sentenced prisoners and dossiers compiled for pre-release parole reviews on paper. In respect of recall oral hearings, all documents relevant to risk were, he argued, able to be included, and it was for the panel to decide what weight to place on any evidence. The Parole Board secretariat essentially agreed with this, and said that the material could be put before the panel. It was this decision that was challenged by way of judicial review.

The Claimant submitted that the Parole Board was a judicial body, had inherent power to control its own procedure and therefore had a power to exclude untried material. He argued that the submission of untried material was in breach of PSO 6000 and the identical provision in Chapter 8, Appendix Q (Guidance on Dossier Collation for Extended Sentence Cases) and that for the Board to take into account untried material would be procedurally unfair. By contrast, the Board and SS argued that although the Board is a judicial body, section 239(3) of the Criminal Justice Act 2003 mandates it to consider documents given to it by the SS when making its recommendations.

The case boiled down to the interpretation of what was meant by 'dealing with cases' in section 239(3). When considering and making its substantive recommendation on the question of the early release or recall of prisoners on licence following a reference to it by the SSJ, the Parole Board was, according to the Judge, 'dealing with the case' within the meaning of section 239(3) of the 2003 Act. It was therefore required to consider all the documents given to it by the SS. PSO 6000 (and Chapter 8, Annex Q) did not apply to untried material, but rather was meant to exclude pre-trial prosecution evidence either relating to offences giving rise to the sentence, or to which he had pleaded guilty to. The SS was entitled to require the Board to consider evidence, including witness statements, of matters where the facts had not been established in court. This was consistent with the requirement that the Board should have before it all information that might have some bearing of risk and release (see *R (Roberts) v Parole Board* [2005] UKHL 45). Finally, it was for the parole panel to assess what weight it gave the various allegations. Simply considering this evidence did not give rise to issues of unfairness or a breach of natural justice.

R (on the application of Paul Rowe) v The Parole Board [2012] EHWC 1272 (Admin)

This, like the previous case, concerned issues around disclosure. In this particular case, the challenge was by an IPP-sentenced prisoner, and related to a victim's personal statement, which went beyond describing the impact of the offences on her and alleged further allegations of violence by the prisoner.

Rule 6 of the Parole Board rules sets out the procedure to be adopted around disclosure and when information or reports should be withheld from a prisoner. The Parole Board has also issued

a guidance document: 'Victims and Families Practice Guide'. The victim's statement had been given to the panel on the day of the hearing, and marked 'Not for disclosure'. The panel agreed it should not be disclosed to the prisoner under Rule 6(2), though it was given to the legal representative after he gave an undertaking not to disclose it or any of its contents to the prisoner himself. The panel refused release or a move to open conditions and indicated that it had taken account of the victim statement in making this decision.

The Judge criticised the late disclosure and the Board accepted that the timing and the content of the statement were not properly dealt with. In appropriate cases a panel can withhold material from a prisoner and even his legal representative (again see *R (Roberts) v Parole Board* [2005] UKHL 45). However the appropriateness of withholding material in a particular case is fact specific and depends on whether the effect of non-disclosure and the injustice it might cause can be mitigated to any degree. In this case the panel, having decided the statement could not be disclosed, ought to have considered whether non-disclosure could have been mitigated by disclosing parts of the statement or the gist of the statement; or whether the hearing could be dealt with justly without taking that statement into account at all. There was no evidence that the panel had performed that exercise, or any part of it, and the claim was therefore upheld.

R (Sturnham) v Parole Board & SSJ [2012] EWHC 452 (Court of Appeal Civil Division)

The Claimant applied for judicial review of the Parole Board's refusal to release him, arguing that firstly they had applied the wrong test for release to him as an IPP prisoner, and that secondly his rights under Article 5(4) of the ECHR had been breached by delay of the Parole Board. His first argument was rejected, which gave rise to the current appeal. His second argument was accepted, and he was awarded £300 damages.

The Claimant argued that as an IPP prisoner Section 28(6)(b) of the Crime Sentences Act 1997 should not have applied. This section stipulates that that the Parole Board should not direct release of a prisoner unless it 'is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined'. He argued that this test is only met if the court is satisfied that he poses the same risk as had to be shown in order to justify the imposition of the IPP sentence in the first place, namely 'a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences'.

The Court of Appeal rejected this argument, stating it would introduce incoherence into the statutory scheme and test for release if it were to be applied differently to IPP prisoners and other lifers. The Board's role was as an expert body: it was better placed to evaluate risk than a sentencing court, and this justified its being able to authorise detention on the basis of a lower level of risk than the sentencing court. An argument that the Board had relied on unlawful and unamended directions (see *R (Girling) v SS for the Home Department and the Parole Board* [2006] EWCA Civ 1779) was also rejected as there was nothing legally objectionable in the formulation of the test for release in the directions (which referred to the need for more than a minimal risk to life and limb to justify detention).

Finally, there was also an appeal by the SS against the award £300 damages to

the Claimant in accordance with section 8 of the Human Rights Act 1998 (HRA). This order was made on account of the distress and frustration caused to the prisoner by a six-month delay in his being provided with a parole review, such delay having violated his Article 5(4) right to a 'speedy' review of his detention. This was the first time such an award of damages had been made by the High Court to a prisoner who: (a) would not have been released at the delayed parole review and (b) had not suffered any physical injury as a consequence of the delay.

The decision plainly would have had significant consequences for future damages awards in HRA claims brought by prisoners against either the SS or the Parole Board, in circumstances where a parole review was delayed. However the SS successfully appealed against the award of damages, and the Court of Appeal held, following analysis of both domestic and Strasbourg case law, that awards of damages under the HRA are not recoverable by a prisoner simply producing a statement around the anxiety and distress the delay had caused him/her. Instead, the frustration and distress must be significant and of such intensity as to justify compensation for non-pecuniary damages. In this case the Claimant had received 'just satisfaction' in the declaration granted by the court alone and therefore damages were not necessary. However, delay and damages where the detention has been extended by a breach of Article 5(4) is to be looked at shortly by the Supreme Court in the case of *Faulkner*.

CATEGORY A

R (on the application of Bourke) v SSJ (QB Division (Administrative Court) 1 June 2012)

The Claimant applied for judicial review of the refusal to grant him an oral hearing of his Category A review. The refusal was based on the fact that, by maintaining his innocence, the prisoner could not undertake courses to tackle offending behaviour and so could not demonstrate a significant reduction in his risk of reoffending.

The Claimant argued that fairness necessitated an oral hearing. Firstly, his denial of guilt meant he was at an impasse as he was unable to demonstrate a reduction in risk in the usual way. Secondly, he had demonstrated exceptional good behaviour in custody. Thirdly, there were issues in dispute regarding the nature and seriousness of his risk of reoffending which could only be resolved in an oral hearing. Fourthly, without an oral hearing, his risk would not be properly assessed until his first parole review, by which time he would have spent 25 years in Category A.

The Court refused the application. The Director of High Security had to accept the jury's guilty verdict as his starting point. The impasse arising out of denial of guilt was a factor in favour of an oral hearing, but did not by itself constitute a reason to abandon the normal process of conducting such reviews on paper. The prisoner's good behaviour was not, on its own, evidence of a reduction in risk, and an oral hearing would not have added anything more than what was already in his written representations. The standard of fairness depended in part on whether the prisoner's tariff has expired. However, in this case the prisoner was still serving his minimum term. Finally, cost and efficiency considera-

tion meant it was not normally justifiable to hold an oral hearing in the absence of a compelling reason to do so.

ADJUDICATIONS

R (on the application of Smith) v Independent Adjudicator (1) & SSJ [2011] EWHC 3981 (Admin)

The prisoner applied for judicial review of his conviction in disciplinary proceedings in prison. He had been convicted of assaulting a prison officer and using threatening, abusive or insulting language. The prisoner's defence to the first charge was that the prison officer and two others entered his cell and assaulted him.

In looking at whether there was a fair hearing the court found a number of procedural flaws in the hearing. Firstly, the prisoner had not been informed of the names of additional witnesses prior to the hearing, despite requesting this information. This was in violation of paragraph 2.20 of the Prison Discipline Manual. Secondly, a request for an adjournment to contact these witnesses after the prisoner's solicitor found out about them had been refused. No reasons were given for this decision. The procedure was therefore fatally flawed: the prisoner was deprived of the opportunity to consider the evidence of the other witnesses and to call them if appropriate, and the decision to do so was not supported by any properly recorded reasoning by the adjudicator. The court also confirmed that the hearing was a criminal procedure for the purposes of Article 6(3) of the convention and both the conviction and sentence for both charges were quashed.

INCENTIVES AND EARNED PRIVILEGES SCHEME (IEPS)

R (on the application of Ian Shutt and John Tetley) v SSJ [2012] EWHC 851 (Admin)

This was a challenge brought by two prisoners refused enhanced status under the IEPS on the basis that, by maintaining their innocence in respect of the relevant offences, they could not undertake a Sexual Offences Training Programme (SOTP).

Neither had been assessed as regards their 'readiness' for the SOTP (though they had been assessed as 'suitable') and they argued that the prison operated a local policy which unlawfully imposed a blanket ban on attaining Enhanced Status for sex offenders who were suitable for SOTP, but unready solely because of denial of guilt.

Annex G of PSI 11/2011 sets out the national policy on IEP and sentence planning for prisoners who deny their offence. It states:

> 'where the unreadiness [for SOTP] is due to denial and no other objectives are more relevant, the SOTP target should remain. In this case, the prisoner's refusal to undertake SOTP ***could*** bar him from obtaining Enhanced regime status.'

In the court's view this was interpreted as meaning that a bar should not be automatic. The local policy at HMP Albany was points based and one of the categories required a prisoner to comply with his OASys plan. Under the scheme a prisoner who has SOTP listed on his sentence plan, but who denies his offence and was not currently appealing his conviction only scored one point and could never achieve

enough points overall to obtain Enhanced status.

On this basis the court concluded that the local policy was therefore unlawful because it removed any discretion from the IEP process, and failed to consider whether there were any other relevant circumstances to be taken into account. However on the facts of the case, neither prisoner had actually been wronged by the unlawful policy, because completion of SOTP was the only progress now available for them in relation to their sentence plans.

SEGREGATION

Ben King (1) v SSJ, Kamel Bourgass (2) and Tanvir Hussain (3) v SSJ [2012] EWCA Civ 376

This was a challenge by three prisoners against decisions to place and/or keep them in cellular confinement or segregation. They argued that the decisions made were unlawful and contrary to Article 3, 6 and 8 of the ECHR. Bourgass and Hussain also raised challenges about procedural fairness and Hussain claimed his access to legal advice by telephone was denied whilst he was segregated.

All three were segregated and/or subject to cellular confinement following disciplinary charges or for reasons of GOAD. The Court of Appeal dismissed all three appeals said that in determining whether Article 6 was engaged the courts had to consider whether the decisions to impose segregation/cellular confinement engaged the determination of civil rights and obligations, and if so whether the procedures deployed were Article 6 compliant. The prisoners had argued that the Governor and segregation review board (SRB) were not an 'independent and impartial tribunal' and in such a scenario the availability of judicial review was not sufficient to satisfy the need for an independent and impartial tribunal.

The Court of Appeal held that Article 6 was not engaged at the stage of the administrative decision to segregate or to continue segregation. Neither domestic nor European jurisprudence expressly conferred a 'civil right' of association with other prisoners that is limited if a prisoner is removed from association. Governors have to make urgent administrative decisions about segregation in the interests of the security of the whole prison. As such these decisions were not susceptible to a judicialisation process and such reviews were best left to those with the necessary experience and expertise, with built-in safeguards, albeit falling short of Article 6 standards. The amenability of such decisions to judicial review was of itself an appropriate protection.

Article 3 was not engaged in the court's view. In the case of Bourgass and Hussain's their segregation probably did engage Article 8 at some stage but the decision to segregate was justified under Article 8(2). Although the Governor and SRBs were obliged to ensure their decision did not breach the convention this did not mean that every time a public authority took a decision which might engage a convention right that the process leading to the decision would engage Article 6.

Arguments that the procedure was defective because there was no adequate disclosure of the material relied on and therefore no meaningful opportunity to challenge or make representations before the initial decision to segregate were also rejected. Factual disputes did not erode the protection of subjecting internal decisions to judicial review. Prisoners did not have the right (under

convention or common law see *ex parte Hague* [1992] 1 AC 58) to be given reasons for their segregation in all cases or to see the security and intelligence material that informed the decision to segregate and to continue to segregate. The prisoner's solution to this alleged unfairness, namely the introduction of special advocates, was held to be unworkable in the prison context. The Court of Appeal accepted the routine prison argument that decisions to segregate (and similar types of decision) were evaluative judgments best made by those (ie them) with ongoing expert knowledge about the running of High Security Prisons. This was deemed a satisfactory decision making process given the safeguard of judicial review.

Finally the argument around access to legal advice by telephone being restricted whilst segregated was not accepted, as PSO 1700 did not require that segregated prisoners should have exactly the same access to telephones as long as they has some 'reasonable and sufficient' access.

SENTENCE CALCULATION

Elam v SSJ [2012] EWCA Civ 29

The Court of Appeal was once again called on to interpret the transitional arrangements for sentence calculation contained in the CJA 2003 (Commencement No 8 and Transitional and Saving Provisions) order 2005 and involving sentences imposed under both the CJA 1991 and CJA 2003. The SS considered that these sentences (18 months under the CJA 1991 and a consecutive sentence of 42 months under the CJA 2003) should be aggregated to a total of 7 years under the CJA 2003 s264(3) and calculated the prisoner's release and licence dates accordingly.

The Appellant argued that the CJA 1991 sentence remained governed by this Act and that as his licence period for this sentence expired at the ¾ point rather than at the very end that this meant he would commence serving the later sentence then. This he argued meant his release date was just over 4 months earlier than that calculated by the SS.

The court rejected the claim. The commencement order did not contain any clear transitional arrangements for the expiry of the licence periods. CJA 2003 s264 was the only provision in place for offences committed on or after 4 April 2005 and as such this meant that all of the consecutive sentences were to be aggregated. s264(3) determined the licence expiry date in every case where a prisoner was serving a consecutive term otherwise the requirements contained in that section would not be followed and the resulting licence expiry period would not be prescribed. The s.264 regime will therefore apply in every case save the obvious exception which is where all the offences were committed before the 4 April 2005 cut off date. In these cases the licence expiry date would continue to be calculated by reference to CJA 1991 s37(1).

PRISONERS' EARNINGS

S(1) KF(2) v SSJ [2012] EWHC 1810 (Admin)

Two prisoners sought to challenge part of the new policy which allows governors to make deductions from their earnings to pay into a victims' support fund under PSI 48/2011 and 76/2011 (Prisoners' Earnings Act 1996). The Claimants contended that the deduction out of prisoners' earnings, subject only to allowing relief in exceptional cases, and the payment to victim support in-

volved breaches of their Convention rights. They invoked the right to peaceful enjoyment of possessions under Article 1 Protocol 1 and in the case of KF, a female prisoner, the right to enjoy Convention rights without discrimination; Article 14 was said to be engaged because the levy had a disproportionate effect on women's ability to earn an income. It was also argued that the rules violate Article 7 because they have the effect of imposing a heavier penalty than the one applicable at the time the criminal offence was committed.

The challenge was dismissed on all grounds. The court found that the deductions from prisoners' enhanced earnings were analogous to a tax to be levied on them, and reflect social and economic judgments by Parliament and the SS that reparation payments should be made by prisoners. As such, there was a wide margin of appreciation which the European Court applies in such cases under Article 1 Protocol 1. That court will only find that the state has acted in violation of this if it proceeds on the basis of a judgment in relation to action taken to promote a legitimate public interest which was 'manifestly without reasonable foundation':

In this case, in light of the wide margin of appreciation which is applicable, the judge considered that there was 'a reasonable relationship of proportionality between the means employed and the aim sought to be realised and that a fair balance is struck between the general interests of the community and the requirements of the protection of the individual prisoners' fundamental rights'. The judge rejected the submission that the court was not entitled in domestic proceedings to take the benefit of the margin of appreciation which would be afforded by the ECtHR to the UK as an ECHR contracting state. This judicial review should apply the same margin of appreciation in favour of the SS (and in favour of prison governors who follow the guidance given by SS) when assessing the lawfulness of the PSIs as the ECtHR would apply if assessing their lawfulness in proceedings in Strasbourg.

The argument based on the prohibition of retrospective penalties under Article 7 was also rejected. There was no 'requisite connection' between the offence committed by a prisoner and the application of the deductions regime; nor does the deductions regime have elements which indicate that it is punitive, in relation to the offence committed by the prisoner.

The challenge with regard to discrimination between male and female prisoners also failed. The judge found that female prisoners are not in a significantly different position from male prisoners for the purposes of assessment under Article 14 in light of the objective of the deductions scheme.

PRISON SERVICE INSTRUCTIONS

PSI 01/2012 Manage Prisoner Finance

This PSI replaces and adds minor changes to PSO 4465, Prisoners Personal Financial Affairs and PSI 30/2008 Prisoners' Private Cash. It deals with prisoners' access to funds, including the way in which money is credited to their private spends accounts and the amount permitted in these accounts as per the IEP Scheme. It also covers the impact that things such as transfers or disciplinary proceedings may have upon prisoners' access to funds.

PSI 02/2012 Prisoner Complaints

Changes to the Prisoner Complaints system are effective from 1 April 2012,

after which date PSO 2510 Prisoners' Request and Complaints Procedures (as amended by PSI 75/2011 Residential Services) is cancelled.

This PSI amends the previous complaints system in that:

- There are now only two stages to the internal complaints process

The three day target for replies is abolished in favour of a flexible target that reflects the urgency of the individual case (however, an interim or full response is to be provided within five working days)

The following matters, formerly included in PSO 2510 on Complaints, are no longer to be included within the scope of PSI 02/2012:

- The applications system (refer to PSI 75/2011)
- Serious incidents arising out of the complaints system (refer to PSO 1300)
- Reviews against Governor adjudications and Independent adjudications (refer to PSI 47/2011)

Healthcare complaints

PSI 03/2012 Activity Allocation

This PSI covers the allocation of prisoners to various activities, including (but not limited to): Learning and skills, Gymnasium, Offending Behaviour Programmes, Rehabilitation Services and Prison Industries and other areas of prisoner employment.

The PSI specifies that all activity places are agreed in accordance with the SLA/ Contract and that both prisoners and staff are aware of the agreed activity places and allocation criteria. A prisoners' risk, need, and suitability must be confirmed and taken into account when allocating activities

Systems must be in place to ensure the efficient management of allocating prisoners to activities and should include the publishing of timetables of various activities, the number of places available, the criteria required for acceptance onto the activity, and how to apply for a place.

Priority access to activities/interventions is given in accordance with the sentence plan, and should not be allocated according to race, age, religion etc. Where necessary, appropriate adjustments must be made for prisoners with disabilities.

Prisoners are able to apply for changes to their activity allocation and should be given reasons for decisions. If they are on a waiting list for a particular activity, they are to be advised of their position on that waiting list and an approximate time they may have to wait before they are allocated a place.

PSI 04/2012 Enablers Of Health, Library, Education And Jobcentre Plus Services In Prisons

This instruction enacts and supports the Enablers of Health, Library, Education and Jobcentre Plus Services in Prisons and the delivery of over £1bn of non-NOMS funded services in prisons. The PSI identifies the non-NOMS funded services which are to be faciltated:

- Health;
- Drug Interventions, including IDTS for prisons in England;
- Library;
- Offender Learning & Skills Services (OLASS) funded education provision;
- Careers Information and Advice Services (CIAS - will become National Careers Service from 2012); and

Jobcentre Plus.

The instruction aims to ensure that:

- Providers of Health, Library, Education and Jobcentre Plus services are encouraged and supported to deliver services in prisons and in order to maxi-

mise the benefits and outcomes for prisoners

- Information is exchanged between prisons and providers
- Prisoners have the opportunity to address their health, education, and work & benefit needs whilst in custody and in order to prepare them for release
- Prisoners are only moved, searched and supervised in accordance with risk

Threats to security, order and control of the establishment are identified and managed

PSI 06/2012 Prisoner Employment, Training And Skills

This PSI replaces PSO 4200 and 4205. It endeavours to ensure that activities on a prisoner's Individual learning Plan (ILP) are linked to sentence plan targets. Moreover, it is envisaged that teaching and qualifications are recognised by relevant industries.

Prisoners should be assessed on entry to custody and prisons should provide access to resources. Importantly upon transfer, the receiving prison should consult a prisoner's record so that assessments are not repeated. The PSI places a greater onus on prisons to consider individual learning needs. This includes sufficient time being made available on the induction timetable for group sessions.

The National Careers Service will work with prisons and prisoners, providing a unique learner number (ULN) and liaising with external agencies such as Job Centre Plus, careers advisers and employers. Early months should be focused on literacy and numeracy whereas the last months of a sentence should focus on vocational skills relevant to the labour market.

PSI 10/2012 Conveyance and Possession of Prohibited Items and Other Related Offences

This replaces PSO1100 and takes into account section 45 of the Crime and Security Act 2010. This amends the Prison Act and makes the possession of a device (or any component part designed or adapted for use with such a device) capable of transmitting or receiving images, sounds or information by electronic communication a criminal offence It outlines new possession offences, and gives guidance on police referrals and how IT equipment necessary for legal visits fits within this PSI as an authorised item.

The PSI contains guidance on measures that Governors and Directors of contracted out prisons must take to implement the provision of both sections from the Offender Management Act and Crime and Security Act. Sections 21-24 of The Offender Management Act 2007 grade items into A, B and C lists with the conveyance of section A items being the most serious.

List A - drugs, explosives, firearms or ammunition and any other offensive weapon carries a **maximum penalty 10 years and/or an unlimited fine.**

List B - alcohol, mobile telephones, cameras, sound recording devices (or any constituent part of the latter three items) carries a **maximum penalty 2 years and/or an unlimited fine.**

List C - tobacco, money, clothing, food, drink, letters, paper, books, tools, information technology equipment carries a **maximum penalty £1,000 fine**

PSI 14/2012 Implementation of the Service Specification for 'Manage the Sentence: Pre and Post Release from Custody' (transitional version)

This PSI extends the 'Offender Management model (OMM)' to all prisoners serving a sentence of 12 months or more. The OMM involves liaison be-

tween Offender Supervisors in prison and Offender Managers outside prison. It also brings in a system whereby instead of clerks/managers being responsible for specific processes, such as sentence calculation, HDC, ROTL etc, there are Case Administrators, who are allegedly going to be versed in all these and other processes, and who will now manage all aspects of an individual prisoners case.

PSI 17/2012 Certified Prisoner Accommodation

This PSI replaces PSO 1900 Certified Normal Accommodation. It requires prisoner accommodation and capacities to be certified in accordance with defined standards and is to ensure that agreed minimum standards of accommodation are provided for all prisoners and that these standards are applied consistently across the estate. This PSI also clarifies reporting requirements for the management of accommodation.

There are no significant changes to the certification and control processes, although there are changes to the forms used and the new guidance also makes available cell certificate schedules and summary sheets.

The PSI includes provisions on the use of maximum capacity, safer cells and gated cells in annex B. Annex C sets out the necessity for adequate heating lighting ventilation privacy, use of the toilet. Annex G provides visual diagrams of typical dimensions of cell layout and furniture.

PSI 76/2011 Prisoners' Earnings Act

This PSI replaces PSI 48/2011 Prisoners' Earnings Act and came into effect on 1 January 2012. The PSI provides greater detail on the exceptions to the prison policy which enacts the Prisoners' Earnings Act.

The PSI provides that all prisoners earning over £20 working outside the prison in paid employment will have 40% of their earnings in excess of £20 deducted, to be paid to the charity Victim Support.

The new PSI is similar to PSI 48/2011. The significant difference is as to the discretion of governors. It makes it clear that it is within governors' discretion to make a reduction in the levy as well as waiver of it. Also, if you are making payments towards a confiscation order the net amount on which the levy can be imposed must be reduced by the amount of the payment.

Annex B provides amended guidance as to the exercise of the discretion. The PSI sets out that cases are to be considered on their individual merits and that it is anticipated that exemptions or reductions will be infrequent, to be granted only in exceptional circumstances. For example, if you can show that the imposition of the levy at the rate at which it is being imposed would lead to you or your family suffering severe financial hardship, then this may constitute an exceptional circumstance leading to reduction or non-imposition of the levy. You may be asked to show proof of the financial hardship suffered.

OMBUDSMAN CASES

Property

Mr A complained that a Hi-Fi system bought at a previous prison was not allowed when he was transferred to a different establishment because it had a removable I-Pod docking station. Mr A complained that the docking station was entirely separate, that the MOJ had agreed that if a lifer had a stereo in possession in one prison he was entitled to

keep it in-possession in the next prison, that Play Station 2s were allowed despite then having USB ports as standard, and finally that the new establishment had assured him that he would be allowed to keep the stereo in-possession.

The Prison argued that an internal Governor's Notice had been issued in 2010 after concerns were expressed by the national IT Security Policy Group in 2005 around the risks associated with USB ports in computers, ordering their locking or secure barring. This order was superseded in 2008 when nationally the Security Group issued a further order not to allow the use of stereo/HI-Fi with USB/SD memory card ports unless they were security disabled or locked. The prison said that they could not be disabled without permanently damaging the items and invalidating warranties hence they refused to issue stereos that were USB enabled. The only exception was PS2 game consoles that were permitted prior to the restrictions being implemented. The Prison accepted that some establishments 'whether intentionally or accidentally' did allow USB enabled items but that they did not.

The PPO considered PSI 12/2011 on Prisoner Property. Section 2.3 explains that prisoners may retain in-possession authorised property appropriate to their privilege level under the locally operating IEP scheme or facilities list and subject to the limits of volumetric control. It also says that Governors have the discretion to compile their own facilities/ possessions list and which reflects the regime of their particular prison. Section 2.39 explains that where prisoners are transferred from one prison to another with items (like a large stereo) which were permitted in their previous prison but are not allowed at the receiving prison then governors must consider these items on a case by case basis. Unless the item is considered a risk to good order, discipline, security, safety and/or exceed volumetric control limits then the prisoner should normally be allowed to retain it in possession. The fact that an item was allowed on this basis did not give the prisoner any right to replace it 'like for like'. Any replacement had to comply with the local facility list.

The PPO concluded that given the ability of prisons to draw up their own lists of in-possession property allowed; the discretion that the prison retained to disallow items that posed a risk to security etc; the directive from the Prison Service Security Group not to allow the use of stereos or Hi-Fis with USB/SD memory card ports unless securely disabled or locked; and the impossibility of doing this without permanently damaging the item, meant it was not unreasonable for the prison to refuse to issue stereos that were USB enabled.

Adjudications

Mr B was found guilty of possession of an unauthorised item (two cartons of banana milkshake) and being present at a place he was not authorised to be (the kitchen). It was also alleged he gave a false name when challenged.

None of the boxes relating to the preparation for the hearing were completed and no plea was recorded for the second charge. Mr B complained that it was inappropriate to have brought disciplinary charges and that it should have been dealt with via the IEP system as it potentially affected his chances of parole. He felt he had been given insufficient time to prepare, that the punishment should have been a caution and that his defence had not been properly considered.

The PPO said that given that both behaviours by Mr B constituted potential offences it could not be said that it was wrong to lay charges. Nor was it for the adjudicator to offer guidance on the likely impact of any guilty finding on parole. IEP warnings also potentially impact on parole and at least adjudications provided him with the opportunity to defend himself in that any charge had to be proved beyond reasonable doubt. The charge was issued at 7.35am and the hearing began at 10.10am thus satisfying the 'at least 2 hour rule'. Finally the giving of a false name was a factor that should be taken into account in any punishment. Although the PPO was concerned about the failure to record a plea to the second charge Mr B did not offer any evidence that his presence in the kitchen was authorised; therefore the finding of guilt was not unreasonable.

Mr C was placed on report after returning to prison late following a day's resettlement release. He was found in possession of a train ticket for a journey which breached the restrictions on his ROTL. The charge was proved but prior to the case being finalised he was recategorised and moved from open to closed conditions. The reasons included the events that had led to the adjudication charge in addition to SIRs linking him to the use of a mobile phone, negative entries in the NOMS record, and lack of engagement with any processes since his arrival in open conditions.

Mr C appealed the categorisation decision. He complained that the loss of ROTL would have a huge impact on his family, the incident that led to the adjudication was minor and that he had been willing to engage with education and other vocational courses, his behaviour was good and he was due for release within 12 months. He was told by the open prison that the appeal would now be dealt with by the closed establishment to which he had been transferred. They in turn however said that the open prison's decision was reasonable and they were not willing to review it again until the next scheduled review.

By the time the PPO looked at the complaint the adjudication had been quashed on technical grounds. However the PPO concluded that the decision to initiate a review of the security category was not unreasonable. Although the adjudication had been quashed it was accepted by Mr C that he had travelled outside of the location allowed by his licence conditions. There were also concerns around general behaviour as well as SIRs linking him to the use of a mobile phone. PSI 39/2011 made it clear that each of these would by themselves have been grounds for a categorisation review. However the PPO was concerned about how the appeal had been handled. Although the PSI was unclear about who was responsible for undertaking appeal reviews, NOMS had indicated that generally it should fall to the prisoner's current establishment to respond as they hold all the relevant information. However the previous establishment should also work with the new establishment to ensure a prisoner's right of appeal is responded to properly. Accordingly the PPO made a recommendation that Para 3.6 of PSI 39/2011 be amended to make clear who is responsible for considering appeals against recategorisation decisions.

OTHER NEWS

PAS legal challenges to policy on temporary release

On 25 June the Ministry of Justice issued **PSI 21/2012 Release on Temporary Licence (ROTL) – Amendments to PSO 6300**. The new guidance brings in various changes to ROTL procedures, several of which result from legal challenges brought by PAS.

Indeterminate sentence prisoners
Previously, although determinate sentence prisoners who had been recategorised to Category D but not yet moved to open prisons could be assessed for temporary release as if they were already in a Category D establishment, there was a strict ban on similar provisions being applied to those serving indeterminate sentences. With increasing numbers of prisoners remaining for a long period in Category C following their suitability for open conditions having been determined, this began to seriously impede their progress and chances of release on tariff.

In February 2012 PAS lodged judicial review proceedings for a pre-tariff lifer in HMP Lindholme, who had been accepted as suitable for open conditions since August 2011, but who had no immediate prospect of transfer. We argued he should be assessed for temporary release within the Category C estate.

This challenge was then stayed behind the cases of *Smith and Talbot* which relate to delay in lifer transfers to open, and which were settled in the claimants' favour. Our case was then also settled by consent as the MOJ accepted the rationale that if they could not put these prisoners in open prisons, this should not prevent the resettlement process from beginning.

Prisoners with confiscation orders
Prisoners with consecutive default terms for confiscation orders were under PSO 6300 deemed ineligible for ROTL on the original sentence, and instead considered purely on the default confiscation order term. Following a High Court challenge by PAS this policy has now been amended.

The ROTL eligibility criteria for prisoners with consecutive terms of imprisonment in default of payment is now to be based on the overall term of imprisonment as opposed to purely on the default term. This means ROTL eligibility dates will be re-calculated and in practice brought forward in all cases.

Childcare resettlement leave
In February 2012 the High Court handed down judgment in a case concerning Childcare Resettlement Leave (CRL) - a form of temporary release on licence which assists prisoners to maintain family ties. It is available to prisoners who can demonstrate they have sole caring responsibility for children under 16, subject to an assessment of risk and suitability.

The claimants were refused CRL predominantly due to their sentence length and the fact that they were not in open conditions. PAS challenged this; the court found that the decisions were unlawful and confirmed that the right to family life is not lost simply by being in prison.

Under the new policy primary consideration must be given to the rights of the child and the views of the child should be ascertained. There is also now no minimum eligibility date for CRL, although governors are able to weigh up whether release would be likely to undermine public confidence.

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?:

_____

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