

PRISONERS' RIGHTS

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LEGAL AID JUDICIAL REVIEW

PAS and the Howard League for Penal Reform have reluctantly issued judicial review proceedings against the Ministry of Justice following their decision to remove legal aid for a small number of important parole board cases without consultation. These cases are known as 'pre-tariff reviews' and affect prisoners on indeterminate sentences who could be moved to open conditions following a Parole Board hearing. The proposal to remove funding to represent prisoners in pre-tariff reviews was not in the government's original consultation, but announced in the government's response to the consultation on 5 September 2013. As far as we are aware, nobody, including the Parole Board, was in a position to alert the government to the risks of removing funding for this work before the decision was made. We have taken this step as a last resort, having done everything possible to engage with the government on this issue.

BBC RADIO 4 APPEAL

The Prisoners' Advice Service will be the subject of the BBC Radio 4 Appeal on Sunday January 5th 2014. The Appeal, read by Edwina Grosvenor, will be broadcast twice on the day, at 07:55 and at 21:26. It will then be repeated on Thursday January 9th at 15:27. Please tune in if you can.

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CASE REPORTS

LIFERS

***R (Weddle) v SSJ* [2013] EWHC 2323 (Admin)**

The issue in the case was whether the SSJ had breached his public law duty by failing to provide a life sentence prisoner with the means to demonstrate his reduced risk so that he could progress to a lower security category.

The claimant ('W') maintained that he could not recall the circumstances of the offence but he did accept responsibility for his actions. His minimum term was set at 25 years' imprisonment. This is due to expire in March 2018.

W has completed various rehabilitative courses whilst in prison but has remained Category A. He has been assessed as unsuitable for various rehabilitative programmes – partly due to his lack of previous violent offences and partly due to his inability to recollect his index offence. In 2010, the Parole Board noted that his failure to recollect his index offence prevented him from fully engaging in rehabilitative work. In 2011, the Category A team refused to downgrade his category and explained that certain courses could reduce the risk he posed 'should [his] remembrance of [his] offending change'. And in January 2013, the Category A team again refused recategorisation, stating that although W's behaviour was generally acceptable, his failure to recall his index offence prevented him from addressing his use of extreme violence.

W submitted that the SSJ was under a duty to provide indeterminate sentenced prisoners, including lifers, with a way of showing that their risk has reduced sufficiently to facilitate their release. Following Lord Hope's speech in *Walker v*

SSJ [2009] UKHL 22 this was a general public law duty to provide the 'systems and resources' required to demonstrate risk reduction to the Parole Board. It was also submitted, in the alternative, that the SSJ was in breach of a narrower public law duty not to act irrationally by requiring a prisoner to undertake work without providing a means for him to do so.

The SSJ submitted that the duty referred to in *Walker* did not apply to lifers, such as W, for whom 'systems and resources' were already in place. Moreover, the duty in *Walker* relates to the availability of 'systems and resources' rather than the way in which a particular prisoner is treated, and a breach of that duty must be 'systematic' in nature. No such breach was alleged here. The relevant question was therefore whether the SSJ had acted rationally within the limits of the available resources (*Cawser v SSHD* [2003] EWCA Civ 1522 followed). It was submitted that he had done so, both in allocating resources and in his decisions relating to W.

The court derived the following propositions from the authorities. (1) The SSJ is under a public law duty to provide indeterminate sentence prisoners with the means by which they could demonstrate that their risk had reduced sufficiently to enable their release. That duty applies equally to IPP and life prisoners. (2) That duty is breached when there is a failure to provide the appropriate 'systems and resources' covering matters such as reports and courses. This failure may be described as 'systematic', but proving a systematic breach is not required to establish a breach of duty. (3) Breach of that duty does not confer on a particular prisoner a right to a remedy in his particular case, but the upshot of a breach may be an improvement in his conditions.

(4) The SSJ is also under a separate and well-accepted duty to act rationally and with regard to relevant factors, whilst disregarding irrelevant ones. This duty applies to the allocation of resources for rehabilitative programmes: eg it would be irrational to make release dependent upon a course without providing for that course. (5) This separate duty also applies to the treatment of a particular prisoner. The threshold of irrationality is high, but the duty would be breached if a prisoner were required to demonstrate a type of progress towards risk reduction which was impossible for him to perform.

The court held that the first of the above duties (that outlined in *Walker*) did not arise because it relates to the availability of systems and resources and it had not been argued that the SSJ's failure was of that type. Rather, what was argued in this case was that the SSJ was in breach of his duty to act rationally in providing a prisoner with a means for demonstrating risk reduction. The reality in this case was that it was impossible for W to demonstrate that reduction. His failure to recall his index offence and the fact that it was his only use of violence rendered him 'unsuitable' for various rehabilitative programmes, and the SSJ had failed to provide an alternative means for him to demonstrate risk reduction. Thus the SSJ placed the means of demonstrating progress beyond W and yet demanded such a demonstration as a condition of recategorisation. In doing so, the SSJ had acted irrationally and in breach of his public law duty.

Finally, the court dismissed the SSJ's submission that W's claim is premature because his minimum term of imprisonment is not due to expire until 2018. The court explained that, following PSO 4700, progress from Category A is gradual. Typically, it takes several years.

Therefore it must begin in time for a prisoner to demonstrate the requisite risk reduction at or shortly after the tariff period.

R (Massey) v SSJ [2013] EWHC 1950 (Admin)

The claimant, who is a tariff expired IPP prisoner, complained that the SSJ had failed to provide him with the opportunity to complete rehabilitative courses.

The claimant argued raised two complaints of unlawful discrimination against him contrary to Article 14 (protection against discrimination), read with Article 5 (right to liberty) or 7 (no punishment without law), of the ECHR. His first complaint relates to the Tariff Expired Removal Scheme (TERS) brought into force through the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). He argues that under TERS a foreign national indeterminate sentenced prisoner is not required to satisfy the Parole Board that he is no longer a risk to the public before release from imprisonment whereas the burden continues to be imposed on those, like him, who cannot be removed.

The claimant's second argument is that LASPO abolished IPP sentences for all persons convicted after 3 December 2012 and instead introduced Extended Determinate Sentences (EDS) which have an extended licence period that entitles a prisoner to automatic release. These sentences are triggered by the date of conviction, and not the date of the offence. The claimant complains that a prisoner convicted of the same type of offence as him, even if it were committed at the same time, but convicted after 3 December 2013, would only be liable to a determinate sentence.

The court accepted that Article 5 was engaged. In relation to the claimant's comparison with an indeterminate foreign national prisoner, LJ Moses did not think the claimant was in an analogous situation hence Article 14 did not apply. He relied on a series of cases relating to determinate sentenced prisoners (*Brookes v SSJ* [2009] EWHC 1396 (Admin), *Francis v SSJ* [2012] EWCA Civ 1200 and *Serrano v SSJ & SSHD* [2-12] EWHC 3216) to make the point that serious offenders who are foreign nationals liable to summary removal are not in an analogous situation to serious offenders who are not so liable because the different sentencing regimes are in place not because of differences in nationality, but because one class of prisoner is liable to removal and the other is not.

LJ Moses considered the case of *Cliff v Home Secretary* [2007] AC 484 as that concerned foreign and national long term prisoners who were in an analogous situation as regards their early release which was determined by the Parole Board, who must consider risk both here and abroad. It was decided in *Cliff* that foreign prisoners were discriminated against on the grounds of their nationality as the Board's assessment of risk was the same irrespective of removal. However he distinguished it from the claimant's case because he took the view that the claimant's case did not involve eligibility for parole but the defendant's power to focus limited resources on those who are to be released into the UK community, so in that context those liable to removal and those not so liable are not in the same position as those liable to removal who can be taken out of the prison estate without risk to the UK public. Whilst the Parole Board must assess risk whether it arises here or abroad such a remit is irrelevant in the context of the defendant's consideration of its limited re-

sources. LJ Moses did not accept that any suggestion that TERS undermines the original purpose of an IPP was anything to do with Article 14, so it did not help the claimant whose first complaint must fail. Furthermore he did not consider that TERS discriminates on the grounds of nationality as the criteria for removal turned on liability to deportation, on notification of a refusal of leave to enter, being an illegal entrant or an overstayer, so a foreign national may well not be liable to removal. Whilst immigration status might confer "other status" for the purposes of Article 14, he reiterated that it was not a foreign national prisoner's nationality which is relevant but his liability to removal.

The claimant's second complaint was also dismissed on the grounds that prisoners being sentenced under different regimes according to date of conviction has no application to the claimant's case whatsoever. The claimant could not compare himself to someone sentenced under a different regime to the one applicable to him. The difference in the treatment which the claimant alleges to be discriminatory is only attributable to the fact that he was sentenced when a sentence of IPP was available and a sentence of EDS was not so this could not be deemed to be "status" within the meaning of Article 14. Further, the claimant is not in an analogous situation to a prisoner sentenced to an EDS as it is a different type of sentence and there is no room for analogy with the claimant who is detained during a post-tariff indefinite period. The claimant cannot complain that Parliament has abolished IPPs and introduced a different sentencing regime. The UK government is under no obligation to reopen historical sentences and re-sentence them merely because it has introduced a new sentencing regime.

Vinter and Others v UK
(Applications nos 66069/09, 130/10
and 3896/10)

This case concerned the imposition of whole life terms and whether such sentences amounted to ill-treatment contrary to Articles 3,4 and 5 of the ECtHR

All three applicants have been convicted of murder and were serving mandatory sentences of life imprisonment. The first applicant (Vickers) was given this order under the Schedule 21 to the CJA 2003; whilst the second and the third were sentenced and convicted prior to the entry into force of the 2003 Act.

The Grand Chamber found that a grossly disproportionate sentence would violate Article 3 but emphasised earlier court rulings that this test will only be met in rare and unique occasions. The applicants themselves did not attempt to argue their whole life orders were grossly disproportionate, and so the court looked at whether whole life orders violated Article 3 on other grounds.

The court reiterated that it was established case law that it was for individual states to make a choice about their criminal justice system, including sentence review and release arrangements. States are at liberty to impose life sentences for especially serious crimes such as murder, and the imposition of such a sentence is not itself prohibited or incompatible with Article 3 or any other Article of the Convention, particularly when imposed by an independent judge after they have considered all mitigating and aggravating factors in any given case. However, following on from *Kafkiras*, an irreducible (impossible to reduce) life sentence imposed on an adult may raise an issue under Article 3 given that a prisoner cannot be detained unless there are legitimate and continuing grounds for that detention.

Further imposing a whole sentence, without any prospect of release and without the possibility of having the sentence reviewed, meant the prisoner could not show any rehabilitative effect of prison such as atoning for the offence.

The court considered that in the context of life sentences Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows domestic authorities to consider changes in the prisoner's behaviour that are relevant to their rehabilitation such as whether continued detention can continue to be justified. It followed that a whole life tariff prisoner was entitled to know, at the outset of their sentence, what they must do to be considered for release and under what conditions.

The court felt UK law lacked clarity in respect of when prisoners subject to whole life terms might be considered for release. Despite previous judgments, the SSJ had failed to clarify when he might be prepared to exercise his right to release on compassionate grounds under section 30(1) of the Crime (Sentences) Act 1997. The court doubted whether compassionate release for the terminally ill or physically incapacitated could be considered release at all. Moreover, the relevant Prison Service guidance did not include qualifying explanations as to the effect of the HRA and of Article 3 on the exercise of these section 30 powers.

The court felt that the three applicants' life sentences could not therefore be regarded as reducible for the purposes of Article 3 of the Convention. However, it emphasized that this finding did not give the applicants the prospect of imminent release as they could continue being detained on grounds of dangerousness.

PAROLE BOARD

Osborn, Booth and Reilly v Parole Board (UKSC 2011/0146, 2011/0147 and 2011/0221)

These cases involved three linked appeals to the Supreme Court. The appellants were prisoners who had all been refused oral hearings: Osborn concerned the case of a recalled determinate sentence prisoner; Booth and Reilly concerned indeterminate sentence prisoners who had served their minimum term or ‘tariff’.

The lower courts had dismissed these claims because they took the view that the explanations and arguments that the appellants wished to advance at an oral hearing would “ultimately” not have affected the board’s decision on release or transfer, nor would it have ‘assisted’ the board’s decision-making. The Supreme Court, however, adopted a very different approach

The court said that the purpose of an oral hearing was not only to assist [the decision-maker] in its decision-making, but also to reflect the prisoner’s legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute. The question whether fairness requires a prisoner to be given an oral hearing is different from the question whether he has a particular likelihood of being released or transferred to open conditions, and cannot be answered by assessing that likelihood. This was supported by the ECtHR case law and also failed to reflect the board’s own recognition that oral hearings have the potential to make a difference.

The court gave a summary of the circumstances in which an oral hearing may be required; these included an assessment of the prisoner’s character;

where a prisoner was post-tariff and therefore an assessment of continuing dangerousness needed to be made; where representations have raised issues which place in question anything in the provisional decision which may in practice have a significant impact on the prisoner’s future management in prison or on his future reviews, such as reports of poor behaviour or recommendations that particular courses should be undertaken to reduce risk; and disputes about facts, explanation or mitigation

This judgment will have far-reaching consequences for fairness in decision-making, and so affects a much wider group than prisoners alone. The argument that an applicant need show a particular chance of success in order to have a fair procedure has been rejected by the Supreme Court.

R (McIntyre) v Parole Board [2013] EWHC 1969 (Admin)

The issue raised by the claimant was the extent of the Parole Board’s obligation to make, maintain and make available notes taken of the evidence in oral Parole Board hearings.

A Parole Board panel decided that the claimant, an IPP prisoner, should be transferred to open conditions. This decision was not challenged, however the Parole Board decision letter made reference to a change in the claimant’s account of the circumstances of his offence. The claimant’s solicitor disputed the accuracy of what the claimant was recorded by the panel to have said, and was concerned the new alleged account might be used to his disadvantage at the next hearing. The claimant’s solicitor asked the Parole Board for a copy of the panel’s notes of evidence so that the factual dispute could be resolved.

The Parole Board refused to supply the notes, stating the Board has no control over what notes panel members take or how they are recorded. The notes were not considered by the Board to be part of their official record of a case or filed with the Parole Board's files.

Permission was sought by the claimant to review the Parole Board's failure to have a policy or practice regarding the disclosure of notes of evidence of Parole Board hearings, and their refusal to disclose such notes.

It subsequently emerged that the notes made by the panel in question had been destroyed in compliance with guidance issued to them by the Parole Board to do so within nine months of a review.

Guidance contained in the Parole Board's Oral Hearings Guide (2012), states that it is part of the panel chair's job to take 'as good a note as possible' of the proceedings.

The court concluded that it is the duty of the Board to ensure that a proper record is made of each hearing and in particular the evidence given at it, and that the notes of the panel chair constitute this record of the proceedings. In a case where there is a dispute as to what a witness has said, the chair should try to resolve the dispute by looking at their note in light of the observations of the claimant's solicitor. If the notes cannot be reconciled and the chair considers their notes to be accurate, the notes of the chair as the record would prevail and be made available, if necessary, as the record for use in further proceedings. The claimant's solicitor was entitled to have the point on the accuracy of the summary in the decision letter considered and it should have been resolved in this way. In the absence of such a dispute, there is no general obligation for notes by way of

record to be transcribed and/or made available after every hearing.

The court further concluded that the Parole Board's policy of destroying notes after 9 months was unlawful. The Board informed the court it has begun a review of its record retention and disposal policy.

HDC & RECALL

R (Foster) v SSJ [2013] EWHC 1951 (Admin)

The claimant challenged the decision of the SSJ to refuse to grant him an oral hearing as part of his appeal against recall to prison after he had been released on Home Detention Curfew (HDC). The court held that, unlike recall to custody after a prisoner's Conditional Release Date (CRD), Article 5(4) is not engaged by the revocation of an HDC licence. Release at CRD is a statutory right, whereas release on HDC is an administrative decision taken by a governor on behalf of the SSJ. In the latter case the decision maker has a wide area of discretionary judgment, given HDC does not confer a right to liberty, but is instead a scheme that provides for an alternative to compulsory detention. For this reason, a prisoner on HDC may be recalled if it becomes impossible to continue monitoring the curfew or for strict breaches of the HDC licence conditions. There does not need to be any concerns about risk to the public such as would be necessary to justify recall after CRD. Finally whilst the SSJ has a discretion to allow an oral hearing when fairness dictates, the court held that in the claimant's case it was not required.

CATEGORISATION

R (Geoffrey Manning) v SSJ [2013] EWHC 1821 (Admin)

The claimant (GM) challenged the decision to recategorise him to Category C and to retain him in that category. GM was convicted with three co-defendants and each received a confiscation order. GM breached the confiscation order by failing to make any payments. The governor, who had approved a re-categorisation recommendation to move GM to Category D conditions, reversed this after he was made aware that GM was subject to a confiscation order and that a further custodial term had been imposed for breach of that order.

The application for judicial review was dismissed. The initial decision to recategorise GM as Category D was wrong. It had been decided without consideration of the confiscation order, with the assessment of risk being confined to an evaluation of GM's conduct while in prison, rather than including the risk of absconding. In reviewing the earlier decision, the governor had had regard to all material considerations, including factors weighing in GM's favour; he had not treated the confiscation order as an absolute bar to re-categorisation but had concluded, on balance, that the risk of GM's move to open conditions was not acceptable in the light of the confiscation order. The court rehearsed the well-worn line around decision making by public bodies, in that the Governor was not obliged to recite all the reasons for the decision and that it was sufficient for him to simply explain that the existence of the confiscation order was decisive against re-categorisation. Finally it was emphasized by the court that categorisation decisions are individual risk assessments and that a case is not helped by pointing to other prisoners, including co-defendants, with a view to

suggesting that the same considerations or security categorisation should apply.

LICENCE CONDITIONS

R (on the application of Hassan Tabakh) v Staffordshire and West Midlands Probation Trust & Another [2013] EWHC 2492 (Admin)

The claimant was serving seven years for preparing a terrorist act. When he was automatically released on licence at the half way point of his sentence, additional licence conditions were attached to his licence, including residing at a [hostel] in Birmingham and wearing an electronic tag.

The claimant argued that under Article 8 of the ECHR, and prior to any decision about additional licence conditions, that his views should have been sought and that he should have been given an opportunity to make representations prior to the decision being made as to what licence conditions were needed or appropriate.

The judicial review claim was dismissed. Article 8 confers the basic procedural right for an offender to make meaningful representations about the additional conditions of a licence. In the circumstances of this case it was held that the procedural requirements were met. The claimant's concerns about the additional licence conditions, including the impact of the conditions on his mental health and his ability to access effective treatment, were well known and had been discussed at MAPPA meetings and also raised by his Offender Manager. The process by which the licence conditions were discussed and organised was deemed to be fair as 16 MAPPA meetings were held in total. The claimant was aware that these

meetings were taking place as were his MAPPA panel about his concerns. Not only did the claimant's Offender Manager attend the meetings and give the claimant's perspective, but the claimant himself was able to make representations. The executive summaries of the meetings showed that his concerns were considered. Finally, taking into consideration the severity of the claimant's offence, the additional licence conditions were proportionate.

SENTENCE CALCULATION

R (E) v Governor of HMP Hatfield [2013] EWHC 775 (Admin)

The claimant received a 12 year sentence and a default term of four years, to run consecutively, in relation to a confiscation order. Following part-payment, the claimant's default term was reduced by 139 days and began when the half way point of the original, 12 year sentence had been reached.

On appeal, the original sentence was reduced to nine years, and he made submissions that the default term should now be calculated to have started at the half way point of the reduced sentence, bringing forward his release date by six months.

The court rejected this submission on the basis that there is no power to back-date a warrant (such as the one attached to the claimant's default). The warrant in this case was to be calculated by reference to the date of the original enforcement proceedings.

The issue is that a successful appeal against conviction or sentence cannot render detention prior to the appeal unlawful; such detention does not breach Article 5(1) ECHR. However, it is not clear whether default terms could be

calculated to run from the end of the original term, rather than from a specific date. Ordinarily, default terms are *specified* to commence at the end of the original sentence, rather than from a particular date; however, whether sentence *calculation* (such as when an appeal against sentence has been successful) could also decide the date a default term commences is not yet clear.

CHILDREN AND YOUNG PEOPLE

R (T (by his mother and litigation friend)) v SSJ & Birmingham Magistrates' Court [2013] EWHC 1119 (Admin)

The claimant had learning difficulties, autism, and attention deficit hyperactivity disorder (ADHD). Aged 13, he was detained at Birmingham Magistrates' Court having breached his bail conditions. Whilst travelling between his cell in the custody suite and an interview room to see his solicitor, he passed two adult detainees, causing him great distress.

It was argued his detention was in breach of the Children and Young Persons Act 1933 (CYPA) s31, which requires that children are protected from 'associating' with adult prisoners (unless they are co-defendants or relatives) whilst in custody at the police station, whilst moving to or from any criminal court, and before and after attendance at the criminal court.

The court held that the level of interaction experienced by the claimant did constitute 'association' and was therefore in breach of CYPA. The moral risk to the claimant, even from transitory contact or physical proximity, was sufficient to engage s.31.

The court did not accept that the claimant's Article 8 rights had been breached, although it was agreed that they were engaged by the three hour detention. Nor did the court accept the MOJ was in breach of its duties under s.149 of the Equality Act (failing to have due regard to the need to take steps to meet the needs of children). Standard operating procedures are in place regarding children, along with service specifications set out in contracts between the MOJ and private contractors. Due regard had thereby been given to s.149.

R (Children's Rights Alliance for England) v SSJ and (1) G4S Care and Justice Services (UK) Limited (2) Serco Plc (Interested parties) and Equality and Human Rights Commission (Intervenor) [2013] EWCA Civ 34

The appellant argued that the SSJ was required by law to enable children detained in secure training centres (STCs) to discover whether they were subject to illegal restraint techniques. This was necessary to allow the affected children to realise their consequential legal rights. Any refusal to disclose such information would be irrational and would violate the detainees' rights under ECHR.

The judge presiding over the original hearing had concluded that there was widespread use of unlawful bodily restraint techniques on children and young people within STCs, possibly as recently as July 2010. There had been a mistaken belief that restraint techniques could be used for the purposes of keeping 'good order and discipline', but the Secure Training Centre Rules 1998 SI No 472 did not allow for the use of physical restraints for this reason.

However, the Secure Training Centre Rules had been quashed in *R (C (A mi-*

nor)) v SSJ for Justice [2008] EWCA Civ 882. The original judge agreed that very few of the detainees appreciated that such use of restraint had been unlawful at the time.

The Court of Appeal did not accept that the SSJ had taken active steps to prevent the exposure of detainees to concerns regarding the use of restraints. Additionally, the duty not to impede access to justice could not be translated into a positive duty to provide potential claimants with the legal elements of their case. Much information regarding the lawful use of restraint was now in the public domain and detainees therefore were not unduly inhibited from advancing their claim.

Under the ECHR, national courts must keep pace with Strasbourg jurisprudence, but do no more than that. The findings of the original judge were correct, and Article 6 imposes no positive duty of disclosure to facilitate a claimant's case.

ARTICLE 3: PROHIBITION ON TORTURE, INHUMAN OR DEGRADING TREATMENT

Hall v R [2013] EWCA Crim 82

R (Hall) v University College London Hospitals NHS Foundation Trust & SSJ for Justice [2013] EWHC 198 (Admin)

The appellant suffered from extremely grave and long-term medical conditions impacting upon almost all his bodily functions, and necessitating 24-hour care. Following a conviction for importing cocaine, he was sentenced to three years' imprisonment.

At HMP Wormwood Scrubs, he was diagnosed with thyrotoxicosis, arising as

a side-effect of a drug prescribed prior to his imprisonment. He was admitted to hospital where he received critical care.

In the appeal against sentence, it was argued that (1) his custodial term was wrong in principle (in violation of his Article 3 rights), and (2) his sentence was manifestly excessive in light of his condition.

The Court of Appeal accepted the second of these arguments, whereby the adequacy of medical provisions available in prison automatically exposed him to a potential violation of his Article 3 rights. The sentencing judge was required to consider the adequacy of arrangements for medical care in prison only where the mere fact of imprisonment would expose the prisoner to potentially inhuman and degrading treatment. Additionally, the sentencing judge was entitled to consider extant medical conditions as mitigating circumstances when arriving at sentence.

The Court of Appeal, however, also found that the sentencing judge had complied with both of these requirements, including a consideration of medical reports from several specialists, none of whom suggested Mr. Hall should not be given a custodial term. The prison had accommodated the appellant's complex needs, but the subsequent deterioration of his condition indicated a reduction in sentence would be appropriate. The court decided the 18 months already served would represent the entirety of the term.

In a separate claim for judicial review, the applicant argued his detention in prison put his life at risk, in breach of Article 2 ECHR, and that the prison had failed, by keeping him as a Category C prisoner in a Category B establishment, to make reasonable adjustments in

compliance with their duty not to discriminate against him under the Equality Act 2010.

These arguments failed, with the court finding that the applicant's health complaints and deterioration could not be attributed to his time in custody. With regard to any possible breach of Article 3, the court stressed that it was not necessary to decide whether the conditions had been 'optimal', but only whether they had failed to meet the necessary threshold (normally assumed to be very high). Given the applicant's extremely serious health complaints, the Court of Appeal's decision makes it difficult to imagine a situation in which a period of imprisonment is found to be automatically in breach of Article 3 due to the prisoner's existing medical conditions.

UPDATES ON PRISON SERVICE INSTRUCTIONS

PSI 18/2013 - DETERMINATE SENTENCED PRISONERS TRANSFERRED UNDER THE MENTAL HEALTH ACT 1983

This instruction replaces Chapter 11 of PSO 6000 (Parole Release and Recall) and sets out in detail the arrangements for processing parole and other release arrangements for determinate sentence prisoners who are transferred to hospital during their sentences.

PSI 19/2013 - GENERIC PAROLE PROCESS FOR DETERMINATE SENTENCE PRISONERS

This PSI replaces Chapter 5 of PSO 6000. It sets out a new Generic Parole Process-Determinate (GPP-D) for determinate sentence prisoners who are eligible to be released on parole licence

by the Parole Board. Prisoners cannot opt out of this parole process.

Where a confiscation order has been made but not enforced, the Parole Board does not take the default term into account when considering the parole application, unless it considers that the default term might have an adverse effect upon the prisoner's behaviour whilst subject to supervision. If parole is agreed before the default term is enforced, the prisoner must be released under the same procedures as any other. If the term in default is subsequently enforced, the term will begin from the date that the prisoner is returned to custody.

All DCR prisoners are now released under the provisions of the CJA 2003. In DCR and EPP cases, the licences must be signed and issued by the governor or controller. The conditions must be explained to the prisoner and given for them to sign. If the prisoner refuses to sign the licence, this must be noted. However the prisoner must still abide by the licence conditions.

In cases where the prisoner has been refused release on parole, the case can only be re-referred to the Parole Board by the SSJ, and only if there has been a significant change in circumstances, or new material has come to light which, had the Parole Board been made aware of at the time of the review might have resulted in a different outcome, or the SSJ considers that the original decision was flawed in some way.

Prisoners whose applications for parole are underway can only be transferred before their parole dossier has been completed, in exceptional circumstances.

PSI 23/2013 - PRISONER RETAIL

This PSI endorses and supports the

Prisoner Retail Specification in order to provide a retail ordering service, catalogue items, and newspapers/periodicals to prisoners. It states that its aims are to meet the diverse needs of the local population, have transparent prices, not compromise control or security, and have standardised products, prices, and operational procedures.

It introduces the policy of allowing more frequent price changes; reflecting the reality of retail increases and decreases experienced by the general public.

The contractor for prisoner retail product supply and service is DHL/Booker.

Upon arrival prisoners should be offered reception packs as soon as practicable, taking into account safety, security, and local processes, but no later than 24 hours after arrival.

Specialist products including music CDs, DVDs, an extended range of products suitable for vegans, an extended range of religious items, electronic games, electronic equipment, clothing, footwear, books, mother and baby requirements, and cosmetics may, at the discretion of the establishment and subject to the Incentives and Earned Privileges Scheme, be purchased by prisoners for their own use, through catalogue suppliers. Transsexual prisoners must be allowed access to catalogues and specialist products including clothing and cosmetics.

Prisoners must be issued with a retail order form in advance of the agreed collection date for the completed forms. Prisoners must be given a reasonable opportunity to inspect the products being sold to them before acceptance. Prisoners may reject products according to their statutory rights. Proof of acceptance must be gained from the prisoner and the prisoner issued with a re-

ceipt clearly itemising the products that have been sold to them, the unit price paid, and the total amount charged to them

PSI 25/2013 - ACCOMMODATION AND SUPPORT SERVICE FOR BAIL AND HDC

This instruction replaces PSI 34/2010 and Probation Instruction 09/2010. The Bail Accommodation and Support Service (BASS), which commenced in June 2007 and implemented by NOMS on 1 April 2011, is specifically for defendants who can be bailed and prisoners who can be released on HDC or who are subject to an intensive community order with a Residence Requirement, and would otherwise be kept in prison.

To decrease the use of remands for women, referrals to BASS for bail and HDC should be prioritised.

For HDC referrals a decision will be made within three days and a bed may be reserved for up to one week prior to release. For bail referrals from prison, an offer or decision will be made within two days of receipt of the completed referral form.

- BASS is not available to sex offenders.
- Those convicted for arson within the last 10 years or have been charged with arson, will not be automatically eligible but will be assessed on a case by case basis.
- Those deemed to be high/very high risk of harm on their OASys are ineligible.
- Those unable to pay rent through their own means or Housing Benefit may only be accepted on a temporary basis.
- Foreign nationals are not excluded,

provided that they meet the criteria above and are not in breach of immigration laws other than through overstaying an approved period of leave to enter or remain.

- Anyone under 18 is ineligible.

PSI 30/2013 - INCENTIVES AND EARNED PRIVILEGES

This PSI introduces a new version of the IEP scheme which has been brought in following a ministerial announcement earlier this year about 'toughening up' the earned privileges system. The main points in the PSI are:

- The introduction of a new 'Entry level' between Basic and Standard level. This will be applied to all prisoners received into custody on or after 1 November 2013, to unconvicted prisoners in prison custody who are subsequently convicted on or after 1 November 2013 and recalled prisoners who are received into custody on or after 1 November 2013.
- Male convicted prisoners on Entry level will be required to wear prison issue clothing;
- Prisoners on Entry level will not be permitted access to higher paid work;
- Prisoners on Entry level will have a level of private cash allowance above Basic level but lower than Standard level;
- Prisoners will not be allowed to watch TV when they should be at work, in education, engaged in activities to reduce their reoffending or other activities as directed (see paragraph 9.9 and Annex E for further details);
- Subscription TV channels have been removed;
- There will be a standardised facilities list which applies to all prisons.
- Save for where there is a medical need, only prisoners on Standard and

Enhanced levels will have access to the gym above the requirement for physical exercise in the Prison Rules.

- 18 rated (or equivalent) and unrated DVDs and games are not permitted to be received, purchased, viewed or retained in-possession;
- IEP reviews will now require only one member of staff (minimum of Band 4 for routine reviews and Band 5 for immediate reviews).

All prisoners will be required to sign a new IEP Compact. If the prisoner refuses to sign the compact the presumption will be to put them on Basic regime unless all other aspects of the individual's behaviour and performance are considered acceptable.

OMBUDSMAN CASES

USE OF FORCE

Mr B was expected to attend a hearing by video-link at HMP Frankland. Upon refusal, he was forcibly restrained and conveyed to the hearing by several officers, under the false impression the judge had ordered this. Mr B alleged that the restraint was unlawful, and that he was entitled to waive his right to attend the hearing. The manner of his conveyance also exacerbated existing spinal injuries, of which the officers involved were aware.

The PPO's investigation considered two essential points:

- Was the use of force "reasonable in the circumstances", "necessary", "no more than necessary", and "proportionate to the seriousness of the circumstances"?
- Were the actions taken by staff after the incident appropriate?

The investigator found no evidence at all that force was necessary to prevent Mr B 'injuring himself', as had been alleged in the SO's post-incident report. Equally, the reports of all other attending officers appeared to agree that Mr B had demonstrated no physical aggression prior to staff attempting to convey him to the hearing by force.

Although the officers maintained the honest impression that Mr B was to be forcibly carried to the hearing, this was a mistaken impression, and had not been ordered by the judge (who in fact gave the opposite direction, upon hearing Mr B did not wish to attend). Exceptionally, an order to physically compel a defendant to attend the hearing may be given, but only by the issue of a warrant, and not by word of mouth. The failure to recognise this constituted an error of judgement on the part of the prison governors involved. The use of force was therefore found to be illegal.

Following the incident, the Comp1 Mr B submitted included a request to see the Police Liaison Officer (PLO). The response informed him he should submit a separate application to see the PLO. This placed unnecessary bureaucratic barriers in the way of his request. The Comp1 should have been sufficient as a written request.

The PPO made additional recommendations that prison staff be reminded that refusal to obey a lawful order does not, in itself, justify the use of force.

VISITOR CLEARANCE

Mr C applied to approve an anticipated visitor, and the process was completed successfully. However, a subsequent Visiting Order, some months later, was rejected on the basis that she was not on his Approved Visitors list. This rejec-

tion was the first time Mr C had heard of any problem in relation to the visitor, and indicated a breakdown in the clearance process.

HMP Woodhill acknowledged that the visitor in question was a befriender with an external through-the-gate resettlement programme, but that she was also an author, which made her unsuitable for the Approved Visitors list within the prison's Approved Visitors guidelines. Additionally, Mr C was not approaching his tariff at the material time, and this also featured in the Head of Security's reasoning.

Mr C's visitor contacted the prison to explain that she was in fact a children's author, had volunteered with the Newbridge Foundation for many years, and had no intention of collecting journalistic material. Following a meeting with Mr C's visitor, her approval was confirmed.

The PPO considered four elements to the complaint:

- Whether the initial rejection was reasonable;
- Whether all parties who should have been informed were;
- Whether the time taken to process the application was reasonable; and
- Whether errors on the prison's part comprised bullying or abuse of the system.

The initial rejection caused the PPO concern, given that the Newbridge Foundation was recognised at HMP Woodhill and no risk was indicated by the police investigating the visitor's application. The issue of the visitor's occupation as a 'writer' was sufficient to raise a question mark, but not to result in flat rejection. This part of the complaint was upheld.

The second part of the complaint was also upheld, following National Security Framework guidance (Notice to Category A prisoners) that prisoners should be informed if applied for visitors are not approved. The third element was also upheld; despite the prison's 'efficient' handling of the application in its initial stages, prison staff had failed to chase up any response from Kent Police throughout a 5 month delay.

There was no evidence found, however, that the prison's actions comprised targeted bullying. The application had been swiftly processed throughout its initial stages, and the mistaken suspicion surrounding the visitor in question was (as she had accepted) understandable.

Pursuant recommendations were made, that staff be issued notice that Approved Visitor applications may only be rejected on the basis of solid evidence arising from follow-up enquiries, that prisoners be informed of the decision in writing, within reasonable time, and that a pro-active approach should be adopted where police have not responded in reasonable time to the prison's enquiries.

PRISONERS' LEGAL RIGHTS GROUP MEMBERSHIP APPLICATION FORM

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

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Name: _____

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

PLEASE TICK THE TYPE OF MEMBERSHIP REQUIRED:

- () Prisoners Free
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What issues/themes would you like to see covered in future issues?:

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