PRISONERS' RIGHTS

Prisoners' Legal Rights Group Bulletin No 67

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PRISONERS' ADVICE SERVICE
JUSTICE BEHIND BARS

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

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HERBERT SMITH FREEHILLS

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CASE REPORTS

DETENTION FOR PUBLIC PROTECTION

R v Venables [2014] EWCA Crim 659

The appellant made an out of time appeal against the imposition of a sentence of detention for public protection (DPP) on the grounds that the trial judge ought to have imposed an extended sentence.

The appellant was aged 17 when he was convicted of charges of robbery, assault and grievous bodily harm that took place over the period of one day. He had a considerably poor criminal record and asked for one offence of robbery and one offence of attempted robbery to be taken into consideration. The judge imposed concurrent sentences of DPP in respect of the GBH and robbery charges. The judge said that the notional determinate sentence for each of these three offences was 5 years, therefore he specified a minimum term of 30 months less 190 days spent in custody on remand. In relation to the offence of assault the judge imposed an extended sentence of 3 years detention comprising a custodial period of 1 year and an extension period of 2 years.

In August 2013, the appellant applied for and was given leave to appeal out of time against his sentence. The judge's finding of dangerousness was not disputed by the appellant neither was the notional 5 year determinate sentence. The crux of the appeal lies in the judge's discretion to impose either an extended sentence or detention for public protection. The option of an extended sentence was not brought to the judge's attention and the general view when referring to the judicial sentencing remarks is that the judge, after a finding of dangerousness, moved to the imposition of detention for public protection without considering that at the time of his offending the appellant was aged under 18 and the judge had a discretion. There was no evidence of this discretion being considered in the judicial sentencing remarks.

Accordingly, the merits of this appeal lay in the contention that the Court of Appeal should now consider the issue afresh and it was submitted that if the court deemed the matter anew an extended sentence ought to be imposed. The matter was adjourned to obtain assistance from the probation service to ensure that public safety could be protected and proper provisions could be made in the event that the appeal succeeded.

The court concluded that the appeal should be allowed as the proper sentence in this case was an extended sentence of 10 years, comprising a five-year custodial term and a five-year extension period.

EDUCATION

Velev v Bulgaria (Application no. 16032/07)

This case concerned access to education for a remand prisoner.

The applicant, Velyo Velev, is a Bulgarian national who was arrested in October 2004 on suspicion of unlawful possession of firearms and detained on remand in Stara Zagora Prison for the next 29 months. His multiple requests to be allowed to attend the school operating inside the prison so that he could complete his secondary education were refused, by the prison authorities and Supreme Administrative Court in 2006.

The national authorities justified

refusing to enroll Mr Velev in the school by stating, among other reasons, the fact that it was not allowed to mix prisoners who had no prior convictions with those who had, like Mr Velev, and the right to education was only applicable to those deprived of their liberty as a result of a final conviction and not to those detained on remand.

The court found a violation of Article 2, Protocol No. 1. In doing so, the court stated that '*although Article 2 of Protocol No. 1 does not impose a positive obligation to provide education in prison in all circumstances, where such a possibility is available it should not be subject to arbitrary and unreasonable restrictions.*'

The court considered that there was a lack of clarity in the relevant legislative framework concerning whether remand prisoners were entitled to inclusion in educational programmes on the same footing as convicted prisoners. According to the court, in the absence of clear rules to the contrary, the provisions regarding convicted prisoners were to apply equally to remand prisoners.

The court rejected the reasons given by the authorities to justify the refusal as being unsubstantiated. The court found no evidence that remand prisoners had to be excluded from education in prison in order to protect them from harm inflicted by convicted prisoners. The court also considered that the fact that the ultimate length of pre-trial detention is uncertain at the start should not be used as a justification for depriving remand prisoners from access to educational facilities, save perhaps in cases where it is somehow clear that the detention will be of short duration. In addition, the court noted that the argument that the applicant should be kept separately from other prisoners because of the risk that he would be sentenced as a recidivist, is considered incompatible with the presumption of innocence.

In finding in favour of the applicant, the court stated that, '*on the other side of the balance must be set the applicant's undoubted interest in completing his secondary education. The value of providing education in prison, both in respect of the individual prisoner and the prison environment and society as a whole has been recognised by the Committee of Ministers of the Council of Europe in its recommendations on education in prison and on the European Prison Rules.*'

Ultimately, the court found that the refusal to enroll Mr Velev in the Stara Zagora Prison School had not been sufficiently foreseeable, had not pursued a legitimate aim and had not been proportionate to that aim. There had therefore been a violation of Article 2 of Protocol No. 1 in this case. Under Article 41, the court also held that Bulgaria was to pay Mr Velev 2,000 euros in respect of non-pecuniary damage.

MOTHER AND BABY UNIT

R. (WB) v Secretary of State for Justice [2014] EWHC 1696 (Admin)

This case concerned the admission into a mother and baby unit of a remand prisoner.

The first claimant (B) applied for permission for judicial review of the defendant secretary of state's decision upholding a prison director's refusal to admit her to a mother and baby unit (MBU). She was a 26 year-old remand prisoner from Poland. She applied for a temporary place at an MBU pending the outcome of the trial. Her application was heard by a prison board. The hearing had procedural difficulties, and the board

decided, based on the council's submissions, that it was not in the best interests of the unborn child for it to recommend a place in the MBU.

She was told that the prison director would have the final decision and that she had a right of appeal. The director agreed with the board's recommendation and due to the issues raised by social services and the nature of the offence it was decided that it would be in the best interests of the child not to recommend a place in the MBU. She appealed to the secretary of state who upheld the decision.

She had since the original decision given birth to a baby boy (W - the second claimant) who was removed from her two days after his birth. She submitted that the decision-making process was procedurally unfair in the context of domestic legal requirements and/or in breach of the procedural right enshrined in Article 8.

The court found in favour of the applicant. In doing so, the court considered that Article 8 required an assessment of the best interests of the child and to evaluate the possible effects on the child. Therefore, *'a key, if not the key, question here is whether the first claimant was fit to look after the second claimant. No assessment of this had been done, although the prison authorities had known since August that the first claimant was in their care, was pregnant and wanted to be admitted to the MBU with her baby when it was born.'*

The judge also considered that *'it was not only in the first claimant's interests that such a (parenting) assessment should be carried out. It was also an essential step to discovering what W's best interests were.'* The court found that on the facts, the local authority had not adequately represented W's interests, had not gathered the necessary information, and that the board had misdirected itself in considering the outcome of the trial.

The court also expressed difficulty with the procedure in the instant case because the first claimant had limited opportunities to look at her case with an interpreter and she was not told that she could have a friend or someone to represent her at the hearing. The judge found that the procedure in this case did not comply with Article 8, the public law duty in accordance with Secretary of State for Education and Science v Tameside MBC [1977] A.C. 1014, or with the duty under section 11 of the Children Act 2011.

Ultimately, the court found there had been a breach of the procedural rights under Article 8 in the refusal of the secretary of state for justice and a prison director to grant an application for a place in a mother and baby unit in a prison to a pregnant mother on remand. Permission to apply for judicial review was granted, and the application for judicial review of the decisions of the director and secretary of state were granted.

DAMAGES CLAIM: RISK ASSESSMENT

Houchin v Lincolnshire Probation Trust [2014] EWCA Civ 823

Mr Houchin is a 76-year-old prisoner serving a life sentence for murder. Mr Houchin brought civil proceedings against the Lincolnshire Probation Trust for the misfeasance in public office of one of its employees, the then Lifer Manager at HMP North Sea Camp, Mr Gilbert. It was alleged that Mr Gilbert acted maliciously in recommending and

getting Mr Houchin returned to closed conditions and that the Trust was vicariously liable for his actions. Mr Houchin argued that: (a) Mr Gilbert created a false and exaggerated case in a LISP4 Report without regard to Mr Houchin's actual risk to the public; and (b) that Mr Gilbert acted beyond his powers knowing that the report would injure Mr Houchin by restricting his liberty. Part of the evidence relied on was a Parole Board hearing in April 2008 in which it was found that Mr Gilbert had not carried out an objectively reliable risk assessment and that the decision to return Mr Houchin to closed conditions was "flawed, unreasonable, ill-motivated and invalid in a public law sense". The Secretary of State did not accept the Parole Board's recommendation to return Mr Houchin to open conditions and Mr Houchin successfully challenged that decision in judicial review proceedings.

In the current civil proceedings, the Trust applied for summary judgment in April 2013 on the basis that the claim had no real prospect of success. Although the judge accepted the LISP4 report contained inaccuracies, he concluded that there was insufficient evidence to support the allegation that Mr Gilbert acted dishonestly or in bad faith and the claim was dismissed. Mr Houchin appealed against the summary judgment.

The Court of Appeal allowed the appeal holding that the test to be applied in granting summary judgment is a high one and that Mr Houchin's claim was not an appropriate case for summary judgment because the court did not have enough evidence available to resolve the issues of fact. The question for the judge was whether there was a real prospect that the LISP4 reports were a deliberate distortion or exaggeration. As it was a case of *untargeted* malice, the judge's focus on bad faith or improper motive was unjustified.

LICENCE CONDITIONS

R (Tabbakh) v The Staffordshire and West Midlands Probation Trust and SSJ [2013] EWHC 2492 (Admin)

This test case concerned a challenge to the policy under which additional licence conditions were imposed under the Criminal Justice (Sentencing) (Licence Conditions) Order 2005, 2005 SI No 648. The claimant was serving the non-custodial part of a seven year sentence imposed in 2008.The claimant contended that he had no meaningful opportunity to participate in the process by which his licence conditions were determined and that this constituted a breach of the procedural guarantees under Article 8 ECHR.

The court outlined the three bases on which it could conclude that a government policy is unlawful. The first basis concerned policies which, if followed, would lead to unlawful acts or decisions, or which permit or encourage such acts (Gillick v West Norfolk and Wisbech AHA [1986] AC 112.)

The second basis, laid down in R (Munjaz) v Mersey Care NHS Trust [2005] UKHL 58; [2006] 2 A.C. 148, concerns Article 3 ECHR cases. The test in such cases is whether a policy exposes a person to a significant risk of the treatment prohibited by Article 3 ECHR.

The third basis was laid down in R (Refugee Legal Centre) v SSHD [2004] EWCA Civ 1481; [2005] 1 WLR 2219. In giving the court's judgment in that case, Sedley LJ said that potential unfairness was susceptible to judicial intervention 'to obviate in advance a proven risk of injustice which goes beyond aberrant

interviews or decisions and inherent in the system itself.' In that case, unacceptable risks of unfairness arising under the impugned policy could be avoided if it was operated flexibly, and a written flexibility would provide the necessary assurance.

The court in the present case identified two different tests with respect to this third basis for challenging the lawfulness of government policy. The first test was whether there was an unacceptable risk of unfairness. The second was a wider test which resulted from application of the first test to the facts of R (Medical Justice) v SSHD [2010] EWHC 1925 (Admin). According to this wider test, there was a lower threshold above which a policy would be held to entail an unacceptable risk of unfairness.

In rejecting the wider test in this case, the Court held that the policy must entail a proven risk of unlawfulness, going beyond the merely aberrant and inherent in the system itself. The court further held that the disparate impact of policies mandated against lowering the risk threshold in non-Article 3 ECHR cases.

The court reiterated the position of the ECtHR, which has held that there are procedural rights implicit in the provisions of Article 8. The court accepted as a matter of principle that the procedural rights contained in Article 8 ECHR could be engaged in fixing an offender's licence conditions. The court held that each individual case necessitated an individual examination of whether Article 8 procedural rights had been engaged in respect of the nature and practical effect of the particular licence conditions under challenge.

In holding that the claimant's Article 8 ECHR procedural rights had been satisfied in the present case, the court referred to several features of the process by which the licence conditions were determined, including: the fact that the imposition of conditions was not set in stone; that the MAPPA process was a continuing process, beginning well before the claimant's release and involving some sixteen meetings over a twenty-one month period that the claimant's solicitor had made a considerable number of representations regarding the licence conditions on the claimant's behalf; so that the licence conditions were varied over time that the claimant's reporting and curfew requirements were relaxed; that the electronic tag attached to the claimant was removed; and that by 29 October 2012 the licence conditions were varied so that the claimant could visit his preferred doctor in London.

Having thus outlined the procedure by which licencing conditions were imposed and reviewed, the court held that they were 'miles away' from the high threshold required to render the policy unlawful on Article 8 procedural grounds.

WHOLE LIFE TARIFF

László Magyar v. Hungary (application no. 73593/10)

The case before the ECtHR mainly concerned a prisoner's complaint that his imprisonment for life without eligibility for parole amounted to inhuman and degrading treatment as it was irreducible. Chamber judgment in this case , which is not final, held unanimously that there had been: a violation of Article 3 (prohibition of inhuman or degrading treatments) of the ECHR as concerned Mr Magyar's life sentence without eligibility for parole, and a violation of Article 6 § 1 (right to a fair trial within a reasonable time) as concerned the

excessive length of the criminal proceedings brought against Mr Magyar.

The Court was not persuaded that Hungarian law allowed life prisoners to know what they had to do to be considered for release and under what conditions. Moreover, the law did not guarantee a proper consideration of the changes in the life of prisoners and their progress towards rehabilitation. Therefore, the Court concluded that the sentence of Mr Magyar could not be regarded as reducible, which amounted to a violation of Article 3. However, the Court noted that the finding of a violation could not be understood as giving Mr Magyar the prospect of imminent release; it had not been even argued in the case that there were no longer any grounds for his detention. The finding of a violation in this instant case constitutes sufficient just satisfaction in respect of the violation of Article 3.

Moreover, the Court held that this case disclosed a systemic problem which could give rise to similar applications. Therefore, for the proper implementation of this judgment, Hungary would be required to put in place a reform of the system of review of whole life sentences to guarantee the examination in every case of whether continued detention is justified on legitimate grounds and to enable whole life prisoners to foresee what they must do to be considered for release and under what conditions.

PAROLE BOARD AND DELAY

R (LV) v Secretary of State for Justice and The Parole Board [2014] EWHC 1495 (Admin)

The Claimant was given an IPP sentence. She had a long history of mental health problems and was transferred to hospital under s.47/49 of the Mental Health Act 1983. In May 2011, the Claimant applied to the Mental Health Review Tribunal to be released. In December 2011, the Tribunal decided that the Claimant met the criteria for conditional discharge and a parole review was instigated in January 2012.

Following numerous administrative delays and the wrong application of a timetable policy by the Secretary of State, a decision by the Parole Board was finally made on 21 March 2013. The Claimant sought judicial review of the Secretary of State and Parole Board's decision in taking over 22 months to review her detention. She claimed the delays amounted to a breach of Article 5(4), which requires the legality of a detention to be decided "speedily" by a court. Though it was accepted that the "two courts" system of the Tribunal and the Parole Board does not constitute a breach in principle, the state does have a legal obligation to ensure expedition throughout the overall process. The Claimant argued that this right had been breached during: (a) the period before the Parole Board received the dossier from the Tribunal, when no judicial body (only the Secretary of State) was responsible for supervising her progress and the potentiality for release; and (b) the subsequent long period until the Parole Board met.

The application was dismissed. The High Court held that: (a) the delays were not disproportionate considering the complexity of the case and the need for further work, including a risk assessment from a residential hospital before discharge could have been achieved; (b) that a number of the delays were not attributable to the Defendants; and (c) even if things had moved more expeditiously and the correct policy for timetable had been applied, the outcome would have been the same.

SPENT CONVICTIONS

R (T and another) v Secretary of State for the Home Department and another [2014] UKSC 35

At common law if an employer asks a prospective employee about any past convictions the individual is obliged to answer truthfully. If he or she is found to have lied, the employer is entitled to terminate their employment. However, the Rehabilitation of Offenders Act (ROA) 1974 changed this. The 1974 Act provides that individuals do not need to disclose any spent convictions (which are either cautions or warnings) and employers cannot dismiss or exclude the individual from employment because of this.

The law was changed again by the ROA Exceptions Order 1975 which created exceptions to this rule, stating that spent convictions must be declared in certain situations, for example, when applying for employment with children. Part V of the Police Act 1997 compliments this in that it states that where a criminal record check (CRC) or enhanced criminal record check (ECRC) is required, spent convictions will be disclosed.

This case was an appeal to the Supreme Court by the Secretary of State for the Home Department. The respondents were JB and T. JB had received a caution for shop lifting a packet of false nails aged 41. When she took an ECRC years later for a job in the care sector, the caution was disclosed and she was denied employment. T received two warnings at age 11 for theft of bicycles. These were disclosed in ECRCs when he applied for employment and university later on in life. Neither JB nor T had any other spent or criminal convictions.

The respondents brought an action for judicial review and argued that the disclosure of such spent conditions was a breach of their Article 8 right to private and family life under the HRA 1998. Their claim was successful in the Court of Appeal and the government subsequently issued the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) Order 2013 which re-established the protection of the 1974 Act by creating protected cautions and convictions. Convictions or cautions are protected if they are not one of 14 offences listed in the Act and if six years have passed since the date it was issued.

The Secretary of State appealed the CoA's decision to the Supreme Court, where it was upheld.

Article 8 is a qualified right which means the state can interfere with it if justified. The court will firstly decide whether an interference has been made. If so, it will go on to consider whether that interference is prescribed by law, pursuant of a legitimate aim, and necessary in a democratic society (proportionate). The Supreme Court decided that disclosing spent convictions was an interference with an individual's Article 8 right as it takes place in private, is sensitive and is likely to be of embarrassment to that person.

The court decided that Part V of the Police Act 1997 was not in accordance with the law, as it allows spent convictions to be disclosed regardless of the nature of the offence, the time that has elapsed and the fact that there is no mechanism to independently review the disclosure. The Act was therefore declared incompatible with the HRA.

The 1975 Act, although lawful, did not pass the proportionality test as there is no rational connection between the disclosure of minor dishonesty as a child

and the assessment of suitability as an adult for contact with young children. Lord Wilson stated that:

> 'The disclosure of their cautions, obviously that of T but also in my view, in the light of the triviality of her one and only offence, that of JB, went further than was necessary to accomplish the statutory objective and failed to strike a fair balance between their rights and the interests of the community; and so it violated their rights under Article 8'.

However, because the Order itself was not found to be unlawful and the respondents' situations had already been remedied, the 1975 Order has been left entirely unaffected. This means it is now uncertain whether disciplinary action can be taken by an employer against a person for failure to disclose previous convictions where it was the 1975 Order that required disclosure of those convictions. It is also unclear whether a person can be prosecuted on the basis of a failure to disclose previous convictions where it was the 1975 Order that required disclosure of those convictions.

RECALL AND ORAL HEARINGS

R (Whiston) v Secretary of State of Justice [2014] UKSC 39

The appellant Stuart Whiston was sentenced to prison for 18 months for robbery in 2010. He was released on licence under HDC which was later revoked on the basis that his whereabouts could no longer be monitored in the community. This recall decision was not subject to any statutory judicial control or review.

The Secretary of State may revoke a licence (whether under s 244 or 246 CJA 2003) at any time before the end of the determinate sentence under s 254, but if that power conferred by s 254 is used the recall must be confirmed by the Parole Board. However, there is a specific power to revoke a s 246 licence under s 255, but only while the curfew condition is in place. The use of the s 255 power is not reviewed by the Parole Board. The licence in the case of this appellant was revoked under s 255.

The issue in this case before the Supreme Court was whether the s 255 power, which provides no right of review by the Parole Board or any other judicial body, is compatible with Article 5(4), which reads:

"*Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."*

The appellant contends that he regained his liberty as a result of HDC that was accorded to him before the requisite custodial period, making his recall to prison a breach of his liberty in that it infringed Article 5(4) ECHR because, having been effected under s 255 pursuant to a decision of the Secretary of State, its "lawfulness" was neither decided "speedily", nor decided "by a court". The appellant relied on domestic authority, and notably on the House of Lords decision in *R (Smith and West) v Parole Board [2005] 1 WLR 350* which concerned the recall of a prisoner who had been released as of right after the custodial element of their sentence: the recall was a new deprivation of liberty and so not covered by the original sentencing decision thus found to engage Article 5 (4).

The Secretary of State argues that the requirements of Article 5(4) are satisfied

by the original sentence lawfully passed by the court and at any rate the prisoner has been recalled during the requisite custodial period. The Secretary of State relied on the jurisprudence of the Strasbourg court pertaining to Article 5(4), notably on the case *De Wilde, Ooms and Versyp v Belgium (No 1) (1971)* – in which a distinction was made between a decision depriving a person of his liberty taken by an administrative body (in which case Article 5(4) obliges the Contracting States to make available to the person detained a right of recourse to a court) and when such a decision is taken by a court at the close of judicial proceedings (in which case the supervision required by Article 5(4) is incorporated in the decision). This reasoning differs for prisoners with indeterminate sentences (*X v United Kingdom (1982*) where public risk is the focal point, giving binding power to the ruling of the Parole Board to whom the decision is referred.

Earlier, the Court of Appeal did however find that there was a critical distinction between the decision to recall in *West* and that in *Whiston.* In the view of Elias LJ the release to HDC is much more closely integrated to the original sentence than release as of right once the custodial period is completed. Release to HDC was, in his view, a modified way of performing the original sentence imposed by the judge; the recall simply restores the primary way in which it was assumed that the sentence would be served. The conditions of Article 5(4) will therefore be satisfied by the original sentencing decision.

The Supreme Court unanimously dismissed the appeal. It reasoned that according to Article 5(1), the detention must be lawful – in accordance with domestic law and not arbitrary – and the review under 5(4) ECHR must be wide enough to bear the conditions which are essential for a determination of this issue. Under Strasbourg jurisprudence a lawful sentence passed after conviction by a competent court cannot be described as arbitrary. Where a person is lawfully sentenced to a determinate term of imprisonment by a competent court, the deprivation of his liberty adheres to Article 5 (1) (a) thus Article 5 (4) could not be invoked. Consequently the House of Lords in *Smith* were incorrect to hold that Article 5 (4) was engaged in relation to the revocation of a mandatory licence, and the observations of Lord Brown in *R (Black) v Secretary of State for Justice [2009] 1 AC 949* are wrong in so far as they suggest that the law of the United Kingdom differs from that of the ECtHR.

Further, once a prisoner has passed the point of mandatory release on licence, the basis for any later recall and detention is the risk of reoffending rather than the original order of the court, and so in those circumstances Article 5(4) applies.

UPDATES ON PRISON SERVICE INSTRUCTIONS

PSI 06/2014 Use of Force – Implementation of Minimising and Managing Physical Restraint

- This PSI introduces amendments to PSO 1600 – Use of Force and applies to establishments and young people's units where Minimising and Managing Physical Restraint (MMPR) has been fully implemented. The MMPR system provides for de-escalation and distraction techniques and allows staff to use physical restraint techniques where reasonable, necessary and proportionate.

In all cases where restraint is used, the instruction requires a Use of Force Form to be completed and staff must be able to demonstrate that they:

- Wherever possible attempted to manage the behaviour by persuasion and reasoning before resorting to the use of restraint;
- Applied the lowest level of restraint for the shortest amount of time necessary;
- Acted in the best interests of the young person or others; and have made a clear statement within their report regarding their understanding of the risk to themselves or others.

The instruction states that restraint must not be used as a punishment or to provoke a young person and it must be proportionate to the risk of harm. Further, pain-inducing techniques will only be lawful where it is necessary to protect a young person or others from "an immediate risk of serious physical harm and where there is no other viable means of achieving this".

PSI 18/2014 Licences, Licence Conditions and Polygraph Examinations

PSI 20/2014 Permanent Resettlement Outside England and Wales of Offenders on Licence

A licence may remain enforceable following a transfer to jurisdictions of the UK and Islands; however, it would not remain enforceable outside of them.

The instruction lists the following criteria to be considered for resettlement *outside* the UK and Islands:

- Does the offender have close family or residential ties in the resettlement place, including compassionate reasons? (If no, application should be refused);
- Is the index offence connected or potentially connected with the resettlement country or generally connected with overseas activities? (If yes, application should be refused);
- Would the resettlement undermine the protection of the public, reduction in the risk of reoffending and rehabilitation of the offender? (If yes, application should be refused).

The instruction makes clear that if an offender were resettled outside the UK and Islands, but returned to the UK and Islands before his/her UK licence expired, he/she would still be subject to its conditions within the UK and Islands.

For resettlement *within* the UK and Islands, only the first and third criterions above are relevant. A transfer within the UK and Islands may be made on a restricted (provisions in England and Wales may be applicable) or unrestricted (offender is subject only to the authorities of the resettlement jurisdic-

tion) basis dependent on type of sentence and level of supervision expected in the resettlement jurisdiction.

Transfers may also be made from another jurisdiction in the UK and Islands to England and Wales.

PSI 29/2014 Release on Licence for Foreign National Prisoners Pending Deportation

This PSI is intended to ensure that relevant staff understand the process for applying licences where Foreign National Prisoners (FNPs) pending deportation are released.

If a FNP is further detained under immigration powers, they are then referred to as Foreign National Offenders (FNOs) and may be released within the UK by the Criminal Casework Directorate of the Home Office or by a decision of the First Tier of the Asylum & Immigration Tribunal (AIT). There is no restriction on the number of applications an FNO can make for Immigration Bail.

The instruction stipulates that a licence for a determinate sentenced FNP must be created irrespective of whether they will actually be released into the community. The FNP must be made aware that the licence conditions will come into force if they are released from prison custody either into an Immigration Removal Centre or the community.

There is no possibility of an indeterminate sentenced offender being released into the community, thus no licence has to be prepared.

PSI 30/2014 Recall Review & Re-Release of Recall Offenders

This instruction replaces PI 07/2013 - AI 09/2013 – PSI 17/2013 and sets out the process for recall, review and re-release.

The instruction sets out the test for recall of determinate sentence offenders (DSOs) as where there is “an increased risk of serious harm to the public or an imminent risk of further offences being committed”.

Depending on the risk of serious harm, the offender may be given a fixed term recall (FTR), which requires them to be re-released automatically at the end of 28 days, or a standard recall. Standard recall requires an offender’s case to be referred to the Parole Board within 28 days and reviewed by the Board annually. There must also be an ongoing review by the PPCS case manager beginning within 3 weeks of the first Board review and the offender should be re-released as soon as it is safe to do so. FTR offenders may make representations and have their case referred to the Board before the end of the 28 days. The instruction specifies that if the Board directs the DSOs release, the SoS is obliged to give effect to that direction.

Extended sentence for public protection (EPP) and extended determinate sentence (EDS) prisoners can only be recalled if they present an increased risk of serious harm. Indeterminate sentence prisoners (ISP) may be recalled where there is an increased risk of harm to the public.

The instruction states that all prisoners must be notified of the reasons for their recall and right to make representations within 24 hours of the PPCS being notified.

PSI 32/2014 Drug Appointment and Drug Testing for Licence Conditions and Post-Sentence Supervision Requirements

This PSI introduces two new licence conditions and supervision requirements available to offender managers. The stated purpose of the PSI is to support those with substance misuse issues to achieve recovery and to ensure continuity of treatment and/or support on entering the community.

The Drug Appointment condition/ requirement makes attendance at a treatment service mandatory but engagement with any treatment is voluntary. The appointment is also not restricted by class of drug and can apply to any kind of drug problem. The instruction makes clear that this appointment is different to appointments under a Drug Rehabilitation Requirement. The instruction also makes clear that a Drug Appointment is only to be used where the offender's drug problem is associated with dependence not recreational use.

The Drug Testing condition also requires an association with dependence, but is restricted to the specified Class A and B drugs and may be random, suspicion-based or risk-based. For both a Drug Appointment and Drug Testing condition, there "must be reason to believe the misuse of illegal drugs is linked to previous or potential future offending".

OMBUDSMAN CASES

SMOKING IN CELLS

L Carew A3280 AG
58948/2013

This case involved an investigation into a no smoking policy introduced in the Separation and Reassessment Unit (SARU) at HMP Nottingham, which provided that prisoners in the unit could not smoke anywhere including their cells. Mr Carew complained about this and maintained the policy was unlawful and against PSI 09/2007 which set out that prisoners over the age of 18 were allowed to smoke in their cells.

The PPO decided in favour of Mr Carew on the basis that the governor at HMP Nottingham did not act in accordance with the settled national guidelines. The governor was advised that the prison was not operating within the parameters set out in the procedures by the Business Development Group.

Mr Carew received a copy of the record of investigation explaining how the conclusion had been reached. Further to this, to assist interested parties in understanding the decision process, a copy of the PPO decision letter and record of investigation were sent to the Parliamentary and Health Service Ombudsman, HMP Nottingham, Ms Dymond White, the HR Directorate and Mr Payne of the Business Development Group.

SEGREGATION

L Carew A3280 AG
60957/2014

The facts of this complaint relate to Mr Carew's contention that he was segregated under Prison Rule 45; for his own

interests (OI) rather than for good order or discipline (GOOD). Mr Carew submitted a complaint stating that he did not fit the criteria for Rule 45 segregation OI outlined in PSO 1700.

Mr Carew contended that he discussed his situation with the segregation governor and she admitted that a mistake had occurred. This was part of a Rule 45 board review with the result being that Mr Carew would be transferred from the high security estate.

A response was received saying that there was no concern relating to GOOD and that the assumption was Mr Carew was segregated for his own interests due to there being no reasons for him refusing to locate.

Mr Carew disagreed and submitted an appeal on 28 January contending that his refusal to locate satisfied the criteria for segregation under GOOD. His refusal was because he did not believe that he should be located on the high security estate and that his mother would be unable to visit him at HMP Long Lartin due to health reasons. Mr Carew was therefore refusing to locate until transferred back to a category B prison.

The reply from the segregation manager reiterated that the decision to be segregated was Mr Carew's own and was therefore in his own interests. He further stressed that GOOD or own interests simply represented the closest reasons for segregation.

PSO 1700 was considered which sets out that a prisoner is to be segregated under GOOD only when there are reasonable grounds for believing that the prisoner's behaviour is likely to be so disruptive that keeping him on ordinary location is unsafe, whereas a prisoner is to be segregated for his own interests when his safety and well-being cannot be assured by any other means.

Having considered all arguments and PSO 1700, the PPO found that Mr Carew's segregation was for his own interests. Further to this it was held that Mr Carew suffered no detriment by being segregated for his own interests rather than for GOOD.

Accordingly, the complaint was not upheld.

FRFI

Mr P Simms A9782AA
60279/2014

This complaint involved the withholding of the publication Fight racism, Fight Imperialism at HMP Full Sutton. This was completed on behalf of Mr Simms by Larkin publications.

The complaint surrounded the removal of the publication from Mr Simms without explanation from staff as to why it had been removed. The initial investigation was conducted by a Mrs Dunn who had been given the authority to do so by the governor. The head of operations stated that it had been removed due to one specific article. The decision not to distribute the paper had been approved by the governor.

The investigation took into account the contents of section 2.19 of PSI 12/2011 and it was decided that the governor's decision had not been unreasonable. Larkin Publications contested this and contacted the PPO claiming that there had not been an independent investigation and that the withheld publication had not been reviewed by the investigator. The argument being that without doing so the reasonableness of the decision could not be accurately or fairly

decided.

In view of that, a copy of the October/ November 2013 issue was made available to the PPO along with correspondence from Larkin Publications to the governor and security governor at HMP Full Sutton. In addition, a letter to the deputy director of high security prisons and a copy of the PPOs investigation into a historic complaint (Tierney 10622/02) was submitted.

Subsequently the governor reviewed the copy and found that no article was responsible for the removal and that no section was particularly offensive. The PPO also reviewed this and concurred with the governor although he did describe some of the material as tendentious.

The PPO however accepted that the decision was taken in good faith and remarked that what is offensive or not is based on opinion and interpretation. He did however state that the lack of reasons given was poor practice. Consequently, Full Sutton agreed to provide Mr Simms with a full copy of the publication from October/November 2013.

The PPO concluded that governors can use their discretion under PSI 12/2011 when considering the appropriateness of magazines and other publications. He continued to say that where an inappropriate article exists, the offending part should be removed with the prisoner receiving the remainder of the paper. An explanation should be given to the prisoner setting out why the article is deemed inappropriate. This will then be open to appeal. The PPO copied the decision to the governor of Full Sutton outlining future expectations in like cases.

OTHER NEWS

PAS JR APPEAL ALLOWED

The Court of Appeal notified the Prisoners' Advice Service and the Howard League for Penal Reform on 1st July 2014 of its decision to allow an appeal of the High Court's decision to refuse the charities permission to judicially review the Lord Chancellors' savage cuts to legal aid for prisoners. The original challenge was dismissed by the High Court on 17 March 2014, on the basis that the claim was not arguable. The Court of Appeal has granted the appeal on the basis that there are sufficient prospects of success.

The challenges concern the decision to cut most aspects of prison law from legal aid funding, leaving even young and mentally ill prisoners without legal protection and, in some cases, facing parole board reviews alone.

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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