PRISONERS' RIGHTS

Prisoners' Legal Rights Bulletin No 68

Autumn 2014

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 PLRB is free to serving prisoners.

The costs of printing this edition of the Prisoners Legal Rights Bulletin have generously been covered through the pro bono support of PAS by Herbert Smith Freehills; we are most grateful for their important support.

HERBERT SMITH FREEHILLS

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CASE REPORTS

DISABILITY DESCRIMINATION

C v MOJ, unreported (Summary from Benjamin Burrows of Leigh Day solicitors)

The claimant was a 70-year-old woman with mobility problems, which required the constant use of a wheelchair. Upon her imprisonment she was imprisoned at HMP Bronzefield, a closed prison in Middlesex; however, after a year's imprisonment, she was then assessed as suitable for open conditions.

However, despite this, neither of the two open women's prison, HMP Askham Grange, in Yorkshire, or HMP East Sutton Park, in Kent, would accept the claimant. She was told that neither prison could accept wheelchair-using prisoners. As a result, she remained at HMP Bronzefield for another year and a half until her sentence ended.

A review of the HM Chief Inspectorate of Prisons' reports for both HMP Askham Grange and HMP East Sutton Park confirmed that the claimant's experience was not an isolated example. The most recent of those inspection reports for HMP East Sutton Park, published in November 2011, found that:

> *'The lack of facilities for wheelchair users together with a similar issue at HMP Askham Grange meant that the Prison Service was unable to provide a place for open conditions for women with severe mobility difficulties who would otherwise meet the criteria'.*

The claimant brought a County Court claim alleging that the failure to allocate her to an open prison amounted to unlawful discrimination under the Equality Act 2010 on the grounds of both her age and her disabilities. She sought compensation for injury to feelings, as well as for the restrictions placed on her residual liberty.

The claim was initially was defended on the basis that, contrary to what the claimant was told and what the Inspectorate reports found, there was in fact one wheelchair-accessible cell at HMP Askham Grange, but that, at the time of the claimant's imprisonment, that cell had already been allocated to another prisoner.

The defendant argued that it had not been reasonable to adapt another cell at either HMP Askham Grange or HMP East Sutton Park given the costs and practicalities of doing so. Nonetheless, the defendant also argued that the claimant had had access to the same benefits and freedoms in HMP Bronzefield as she would have had had she been allocated to an open prison.

The position adopted by the defendant appeared to misunderstand their obligations towards the claimant specifically (and to disabled prisoners generally). Therefore, following requests for information from the claimant relating to those obligations, the defendant subsequently agreed to enter into settlement negotiations.

Those negotiations were successful and resulted in a payment of compensation and costs to the claimant in settlement of her claim.

SEGREGATION

Shahid v Scottish Ministers [2014] CSIH 18A

In 2006, the petitioner was convicted of a racially motivated murder of a white, 15-year old boy. The court described the crime as 'brutal and sadistic' and

stated that it raised strong feelings at the time and subsequently. From his time on remand in 2005, he was continuously segregated until August 2010. He claimed that the segregation was contrary to Prisons and Young Offenders Institutions (Scotland) Rules 2006, and contrary to Article 3 and Article 8 of the ECHR.

During his detention, the prison authorities received intelligence that there was bad feeling towards the petitioner in the prison population and that his safety could not be guaranteed. Intelligence also indicated that there was a potential for disruption of the prison regime if the prisoner was not segregated. His segregation, therefore, was justified by the prison authorities as protecting him from serious injury or worse and to maintain good order and discipline in the prison. The petitioner complained, however, that time limits specified in prison rules were not abided by and that the fact that he was reintegrated from 2010 showed there had been no good or sufficient reason for the previous measures.

The Lord Ordinary gave an opinion in which he rejected all of the petitioner's arguments challenging his segregation.

HELD**:** The Court of Session agreed with the Lord Ordinary's decision. The judges held that association with other prisoners is a privilege and that prisoners may be segregated for their own protection and/or to maintain good discipline. In this case, it was held that the threats against the petitioner were serious, the intelligence was frequent and reliable and that segregation was the only reliable means of securing the petitioner's safety. Following case law, the failure to observe time limits by a small margin did not invalidate his continued segregation.

With regard to the ECHR, the judges held that solitary confinement for a period of four years and eight months was not of itself sufficient to violate Article 3. It was further held that the segregation was proportionate given that there was a proper purpose in the segregation, procedural safeguards existed to review the segregation and ensure it was still justified, reasons were given for the continued segregation, and the petitioner was not subjected to total isolation. For similar reasons, the judges held that segregation was proportionate in light of Article 8 as well.

PUBLIC PROECTION

R (Smith) v SSJ [2014] EWHC 4485 (Admin)

Mr Smith is serving a life sentence for murder. In June 2011, the Public Protection Operational Team (PPOT) decided that he should be subject to Safeguarding Children Measures. This was based on a conviction for an offence of indecent assault Mr Smith committed in 1998 against a 13-year-old boy when he himself was also aged 13. Mr Smith sought to judicially review this decision.

The Public Protection Manual states that the 'assessment of risk posed by an individual needs to take into account a wide range of factors including the age of the offender, the circumstances of the offence and an assessment of the offender's behaviour, both past and present'. The guidance also provides a list of 'trigger' offences that are used to identify those who present a risk or potential risk to children.

The claimant argued that the decision was wrong on two grounds. First, he submitted that his offence should not, on proper analysis of the policy, have been treated as a trigger offence within the meaning of the relevant policy. Alternatively, he submitted that, having

concluded that he was guilty of a trigger offence, it was either disproportionate or irrational to conclude, as a result of the trigger offence and all the other circumstances, that he presented a continued risk to children.

HELD: In relation to the first ground the court held that when deciding if an offence falls within the list of 'trigger' offences in the guidance, the only factor which should lead to the exclusion of the offender from the policy is if the offence is not against a child. Therefore, the relevant offence was rightfully included. Stage 2 of the evaluative process under the policy then deals with whether or not the offender presents a *continuing risk* to children. On this ground, the court held that on the material presented there was no reasonable, rational or proportionate basis for concluding that the claimant presented a continuing risk to children.

ACCESS TO JUSTICE—COMPUTERS

R (Jackley) v SSJ [2014] EWHC 407 (Admin)

The applicant was representing himself in cases at the ECtHR, the CCRC, and the County Court. The essence of the complaint concerned the application of the defendant's policy on access to computers and legal materials for litigation purposes. The claimant had submitted multiple unsuccessful applications for access to a computer in order to prepare and print legal documents. He had been turned down on several occasions, once for using the wrong form, and once because there was no spare A2J computer.

The defendant was under a duty to afford prisoners a right of access to justice, to be balanced against security risks of introducing computers into prisons. The defendant's policy specified that 'A2J' laptops were to be provided to prisoners who demonstrated a real need. The policy listed factors that may lead to the provision of IT, as well as applications could be considered frivolous.

The court approved *R (Kenyon) v Governor of HMP Wakefield and Another [2012] EWHC 1259 (Admin),* a case concerning the same policy, in which it was held that every case has to be decided on its own facts, that Article 6 requires access to be reasonable, that a party seeking self-representation must have an equal and reasonable opportunity to present his case, and that the burden of proof falls upon the prisoner to show that he needs a laptop.

The court found that in 'document heavy' cases the dictates of fairness would render it more likely that a computer with a search facility be provided. Mere inconvenience is not sufficient to show an infringement of Article 6.

HELD: The court decided that the applicant had not provided specific reasons as to why a word processor was particularly required. The applicant had clear and legible handwriting, and had produced many handwritten documents for the court in the present application. The court criticised the four month delay in making the decision as 'really not good enough'. If somebody in prison wanted access to a computer for the purpose of conducting legal proceedings and says that there are stringent time limits, then that application should be considered as quickly as possible. The policy did not prevent printing in appropriate cases. Charging prisoners by the page for printing could negatively impact on their access to justice in some cases, but in this case there had not been blanket application of the policy of charging 10p per page. Determination of the impact of printing and pho-

tocopying on the applicant's access to justice was a matter for each individual case.

The applicant further argued that the requirement that he work full time in prison prevented him accessing the library beyond two 20-minute sessions per week. The judge rejected the argument that this breached Article 6, pointing out that people outside of prison faced the same problem. A prisoner could ask for a 'movement slip' releasing him from work, with each case considered on its merits, and could make a ROTL application to visit a local library, and the court could not therefore fault the overall policy. Most of the applicant's legitimate concerns had been addressed in a pragmatic fashion by the prison governor.

CATEGORY A HIGH RISK

R (Downes) v SSJ and Director of High Security Prisons [2014] EWHC 581 (Admin)

The applicant prisoner sought to challenge two decisions to maintain his escape risk classification as exceptional. He had been sentenced in 2012 to two terms of discretionary life imprisonment with a minimum term of 22 years. The claimant had organised a significant part of the offences from his prison cell. During the course of the trial, the applicant escaped from an armed escort and successfully fled abroad. The decision to categorise him as an exceptional escape risk referred to his assistance by others who had been armed, and to the fact that he had a firearm when apprehended abroad.

HELD: The court referred to the serious consequences attendant on exceptional escape risk classification. The court set out concerns about custodial behaviour, including alleged abuses of the provisions under Prison Rules 1999 SI No 728 R39 regarding legal correspondence and alleged misuse of the PIN phone system. The court held that there was valid intelligence to justify the decision. The court rejected the applicant's argument that 'recent' intelligence was required, noting that a heavy reliance on past behaviour could be sufficient justification. The court noted that the policy changed brought about by PSI 08/2013 makes provision for prisoners to be given the gist of the material relied on six weeks before a decision is made so that representations can be submitted.

STRIP SEARCHES

R (on the application of LD and others) v SSJ (2014) [2014] EWHC 3517 (Admin), [2014] WLR(D) 333

The applicants sought judicial review of the lawfulness of strip searches carried out on women prisoners and of the SSJ's policy on strip searches contained in PSI 67/2011. The searches were conducted following indications from a sniffer dog outside the applicants' cells, and in the knowledge that a prison officer had smuggled drugs into the prison. All three applicants were subjected to a level two strip search, requiring them to remove all of their clothing and underwear. Two of the applicants were vulnerable owing to their mental health, and all three had been emotionally affected by the searches. The applicants sought an order that the SSJ be disbarred from defending the claim in light of the failure by the SSJ to comply with various orders made in relation to service of evidence and acknowledgement of service.

The court held that debarring could apply in public law cases involving individuals unlawfully treated by a public body, but that it would be exceedingly

rare to debar when the case involved an attack on a policy and that decision would have a wide effect. Despite failures by the respondent in this case to comply with court orders, the applicants had not been thereby prejudiced. On the question of the policy itself, the court held that the PSI, when sensibly construed, required that the prisoner be told why the search was being carried out. To say the search was targeted or that it was based on intelligence was insufficient. The policy did not fail to require the officers to consider prisoners' vulnerability, and nothing in the instructions could lead to a breach of Article 3 or 8 ECHR, unless abusively or wrongly applied. The searches in this case were declared unlawful, but the attack on the policy failed.

Jaeger v Estonia [2014] ECHR 1574/13

The applicant was strip searched by guards who cited their suspicion that he was smuggling tobacco into the prison. The search took place in a stairwell, and required the applicant to lower his trousers and underpants and to lift his sexual organ. The applicant alleged that the search had been visible to other detainees through rectangular windows on either side of the stairwell. The applicant alleged that the search contravened Articles 3 and 8.

The applicant accepted the need for searches, but argued that they needed to be conducted in a manner that did not cause suffering and humiliation, and that was proportionate to legitimate aims. He argued that suspicion of carrying tobacco was not sufficient to justify a strip search and that the question of whether someone had actually seen him was not decisive.

The respondent government argued that the distress caused to the applicant by the strip search did not reach the minimum severity prohibited by Article 3, and that there had been no debasing elements that significantly aggravated the inevitable humiliation of the procedure. The government produced video evidence in support of the contention that it was impossible for the search to have been viewed by third parties. Regarding Article 8, the government argued that the search was proportionate, that it was carried out in pursuit of the legitimate aim of preventing disorder and crime and that even if Article 8 was engaged it was not breached.

HELD: In finding no violation of Article 3, the court noted that: the purpose had not been to degrade the applicant; the search was performed by officers of the same sex as the applicant; the applicant's sexual organs were not touched by the officers; no verbal abuse took place; the applicant was not searched in front of other detainees; the search took place on one occasion, unlike in other Article 3 strip search cases. Although vulnerable, the applicant was not in a particularly helpless situation. The court, noting that the legitimate aim pursued by the search was not in dispute, turned to address the question of whether the search was proportionate under Article 8(2). The court held that the location of the strip search was not by itself sufficient to breach Article 8, and that the prison authorities' need to search prisoners as they entered the building could be acceptable provided prisoners' privacy was respected. The court held that the question of whether any fellow prisoner actually observed the applicant's search was not of decisive importance. A person's perception that he was exposed undressed to the view of others could create in him a strong sensation that his privacy had been disrespected regardless of whether someone in fact saw him. Mindful of the transparent windows on

the doors to the stairwell, the court concluded that the strip search was a disproportionate interference with the applicant's Article 8 right, and a violation of the ECHR.

TEMPORARY RELEASE

R (McManus) v [2014] NIQB

The applicant sought judicial review of a decision by the prison authorities not to grant him compassionate temporary release to attend his uncle's funeral. The applicant asserted that his uncle had acted as his father, and that the Prison Service's policy recognised the possibility of emotional attachment *in loco parentis* to a non-biological father. The applicant further asserted that the Prison Service had failed to take into account the rights of the applicants' parents, who wished to be consoled by their son. Judge Stephens, in assessing the factual question of whether the applicant's uncle had acted as his father, adopted Lady Hale's three ways in which a person may be or become a natural parent of a child outlined in *Re G (Children) [2006] 2 FLR 629.*

HELD: The application was dismissed. The court found insufficient evidence that the applicant's uncle was his social or psychological parent. He reached this conclusion based on factors including: conflicts between what the applicant told his general practitioner and what he told the court, reference in the pre-sentence report to the applicant's 'settled and stable upbringing' and the absence of reference to the applicant's childhood being disrupted in the way alleged by the applicant.

On the question of the need to take into account the applicant's parents, Judge Stephens asserted that one would wish to facilitate the applicant's attendance at the funeral insofar as possible, but that this was a decision to be taken by the Prison Service considering the application in context. The decision had to balance the applicant and his family with legitimate aims in a democratic society, and in particular, the need to demonstrate to the relatives of this particular victim and to victims of other similar crimes that their grief and enduring loss are taken extremely seriously. The role of the court was minimal next to that of the Prison Service in deciding on the correct balance, in particular where the element of compassion had been taken into account by the Prison Service, as in this case.

LICENCE CONDITIONS

R (Bentham) v Governor of HMP USK and Prescoed, SSJ, [2014] EWHC 2469 (admin)

The applicant, a prisoner convicted of causing death by dangerous driving and subsequently released on licence, sought judicial review of the inclusion within the terms of his licence of an exclusion zone. The applicant's family home, which was inhabited by his mother and his ailing maternal grandparents, was within the exclusion zone. The family of the victim killed by the applicant's driving, who were interested parties in the case, lived in the same town of Monmouth, around which the exclusion zone was drawn.

The applicant alleged interference with his rights (and those of his family) under Article 8 caused by his exclusion from the family home. He also sought to have the licence declared irrational. Counsel for the victim's family conceded that the applicant's rights had been interfered with, and that Article 8 was engaged, but maintained the interference was necessary and proportionate to the aim of avoiding chance encounters between the applicant and the

victim's family.

The judge referred to *R (Craven) v SSHD [2001] EWHC Admin 850*, where it was asserted that there were two aspects linked to the distress suffered by families of the victims of crime. Firstly, there is the knowledge of a risk of an accidental encounter. Secondly, there is the risk of such an encounter itself. The Parole Board and SSHD were held in that case to be entitled to take both aspects into consideration. The rights and freedoms of others were not limited to ECHR rights, and a restriction on movement resulting from fear and anxiety may be just as real as on resulting from a legally enforceable prohibition. He also cited *R (George O'Dowd) v National Probation Service London [2009] EWHC 3415 (Admin)* in finding that the licence period is part of the punishment, and that public perception was a legitimate element of penal policy.

HELD: The court found that the prospects of a chance encounter were non-existent. The court held that the exclusion zone was a disproportionate interference with the applicant's right under Article 8, insofar as it prevented the applicant from visiting his family home. In reaching this conclusion, the judge expressly followed Lord Bingham's approach laid out in *R (Razgar) v SSHD [2004] 2 AC 368* with regard to 'broad considerations of a public character,' including the possibility of unwanted contact, the likely public reaction, the continuing punishment of the applicant and the maintenance of the exclusion zone until the end of the licence. The judge found no difficulties in enforcing an exclusion zone which does not prevent the applicant from visiting his family home. The judge concluded that it would not be disproportionate to prevent the applicant residing at (as opposed to merely visiting) his family home unless it was demonstrated, unequivocally, that he would not be able to assist properly with family care without also living in the home.

TRANSFERS

Vintman v Ukraine - 28403/05 - [2014] ECHR 1136

In 2000, the applicant was convicted of several counts of robbery and a murder and was sentenced to life imprisonment. In 2001, the applicant was transferred to Vinnytsya Prison, located approximately 12 to 16 hours train journey from Zaporizhzhya, where he had lived before his detention and where his mother lived. The applicant's mother was over 60 when he was convicted and had been officially certified medium disabled. She found it very difficult to visit the applicant and had doctor's advice not to travel outside the Zaporizhzhya region.

The applicant and his mother made numerous requests for transfer to a closer prison. However, these requests were rejected on the basis that the legislation in force stated that 'convicted persons must serve their entire sentence in the same prison'. In later rejections, the Prison Department cited other reasons including the lack of places available and the fact that he was convicted of aggravated murder.

In 2009, however, the applicant was transferred to a maximum-security prison in the Lviv region, about 19 to 23 hours from Zaporizhzhya. The applicant's mother made further complaints and requests for transfer but these were not upheld on the basis that prisoners could only be transferred to a lower security prison if they are manifesting good behaviour. The applicant had multiple disciplinaries on his record.

HELD: The court decided there had

been a violation of Article 8 of the ECHR. There was an interference with his Article 8 rights on the basis that the applicant had not seen his mother for almost ten years and that given her advanced age and poor health, as well as the distances involved, she was unfit to travel for visits. Although the court found that this interference was lawful and in pursuance of certain legitimate aims (e.g. prevention of prison overcrowding and ensuring adequate discipline in prisons), it was found to be disproportionate to the aims pursued. There was no evidence that the domestic authorities had considered placing him in any regions closer to his mother or that his interest in maintaining family ties had been assessed in reaching their decisions to reject the transfer requests.

PRISONERS' VOTES—SCOTLAND

Moohan and Another v The Lord Advocate [2014] CSIH 56

The case was brought in the Inner House, Court of Sessions by two Scottish prisoners who were to be unable to vote in the referendum on Scottish independence, owing to provisions of the Scottish Independence Referendum (Franchise) Act 2013 and the Representation of the People Act 1983. The prisoners sought: a declaration that the statutory provisions preventing them from voting were 'not law' by virtue of their incompatibility with the ECHR (specifically, the right to free elections under Article 3 of Protocol 1 and the right to freedom of expression under Article 10), the common law, and/or EU law; a declaration that the statutory provisions contravened the prisoners' legitimate expectation that Scottish legislation will conform to the UK's public international law obligations (and Article 25 ICCPR in particular); and that the statutory provisions be reduced.

HELD: The court rejected the petitioners' argument, observing that there was no clear and constant jurisprudence emerging from the ECtHR on the issue of prisoners' voting or determining that A3P1 applied to referenda.

The court cited *X v Netherlands (application no 6573/74)* among other cases in support of their conclusion that Article 10 did not guarantee a right to vote. Additionally, the court cited *Hirst v UK (No 2) (2006) 42 EHRR 41* in which a breach of A3P1 had been found to raise no separate issue under Article 10.

The court was not persuaded of the existence of a clearly identifiable common law fundamental right to vote, and certainly not such a right to vote in a referendum. Previous UK cases such as *Watkins v SSHD [2006] 2 AC 395* that mentioned a 'fundamental' or 'constitutional' right to vote may have been referring to a statutory, not a common law, right to vote. The court, citing paragraph 64 of Lord Rodger's judgment in *Watkins,* held that the HRA 1998 had virtually superseded the courts' attempts to rely on 'constitutional rights' and the principle of legality.

The court concluded that eligibility to vote was statute-based, and not common law based, and that the courts' duty to develop the common law did not arise in the absence of a common law fundamental right to vote. While the court had the power to construe domestic legislation in a manner consistent with international obligations, the legislation could not be construed in any way other than that serving prisoners will not be eligible to vote in the referendum. The court rejected the petitioners' submission that there was anything in the Scotland Act 1998 that supported the opposite position. It found that the proc-

ess by which the referendum was being put in place had no direct impact on the question of EU membership or EU citizenship.

PRISON CONDITIONS

Mihăilescu v Romania [2014] ECHR 46546/12

The applicant complained of a violation of his Article 3 ECHR rights resulting from the material conditions of his detention, including the lack of separation between smokers and non-smokers, in the Bacău police department's detention facility and Bacău prison. He alleged that: the detention facility had been overcrowded, squalid and unhygienic; the sanitary facilities had been defective; the noise made by the other detainees had prevented him from sleeping; the food was of poor quality and insufficient; there had been insufficient opportunities to take outdoor exercise; the cells had lacked ventilation, beds, cutlery, furniture at which to take meals, blankets, pillows and bed linen; and he had had to share the cell with smokers.

HELD: The court found that there had been a violation of Article 3 in relation to part of the complaint relating to the poor detention conditions. The court noted that the applicant's living space seemed to have been regularly below 4m sq and sometime even as low as 1.8m sq, which fell short of ECtHR case-law (citing *Orchowski v Poland [2009] ECHR 17885/04, para 122*). The court pointed out that these figures were even lower once furniture was taken into account.

The court noted that, according to the available evidence, the police cells had no furniture except beds and that the government did not clarify whether the applicant had been given cutlery. It found that leaking water pipes in the prison ceiling were not repaired until August 2012. Consequently, the court concluded that during his detention the applicant was unable to take his meals adequately on account of the absence of furniture and cutlery, and that some of the cells were damp or flooded.

The court rejected the submission that the applicant's loss of eyesight resulted from lack of adequate medical treatment, and reduced his claim for damages accordingly. The court rejected as manifestly ill-founded the part of the application relating to the lack of separation between smokers and non-smokers. The court also rejected the applicant's claim for costs and expenses owing to the absence of any proof submitted by the applicant in support of his claim. They awarded him 3,300 Euros in respect of non-pecuniary damages.

UPDATES ON PRISON SERVICE INSTRUCTIONS

PSI 36/2014 Polygraph Examinations: Instructions for Imposing Licence Conditions for the Polygraph on Sexual Offenders

Following piloting of polygraph testing as a licence condition for certain prisoners convicted of sexual offences, this PSI introduces the arrangement on a national scale. Its statutory basis can be found in the Offender Management Act 2007.

Depending on the seriousness of the conviction, a 'polygraph condition' may be put in the release licence of those convicted of certain sexual offences. This requires the individual, on release, to take part in regular 'polygraph sessions'. To be subject to such a condition, an individual must have received a sentence of at least one year for a

specified sexual offence and be assessed as presenting a high/very high risk of serious harm/sexual reoffending.
A polygraph test measures certain physiological responses to questioning, such as heart rate, which are thought to indicate whether the subject is lying. Prior to a polygraph examination, the examiner will ensure that the subject understands how the test works and that responses will be provided to the Offender Manager. Enforcement proceedings may follow if disclosures which would constitute a breach of licence are made before, during or after a polygraph test.

PSI 37/2014 Eligibility for Open Conditions and for ROTL of Prisoners Subject to Deportation Proceedings

This PSI amends Prison Rules 7 and 9 and sets out a new process concerning the eligibility and risk assessment for Category D/open conditions and for release on temporary licence (ROTL) of prisoners subject to deportation proceedings.
Prisoners who have a deportation order made against them and have either exhausted their appeal rights in Britain or whose appeal rights must be exercised from abroad are prohibited from being classified as suitable for open conditions and must not be categorised or allocated to Category D/Open conditions.
Prisoners who have not exhausted their appeal rights in Britain but who are liable for deportation must have their categorisation considered on an individual basis subject to assessment against a strengthened risk assessment, details of which are provided in an annex to the PSI. As with previous procedures relating to consideration of foreign national prisoners' recategorisation or ROTL applications, the strengthened risk assessment means that Home Office Immigration Enforcement will be asked for information about any issue which might affect the prisoner's likelihood to abscond. This information must be considered as part of a wider risk assessment. The new guidance states that prisoners subject to deportation will be considered suitable for ROTL or open conditions 'only where there is a very low risk of their seeking to frustrate the intention to deport/remove by absconding.'
Foreign national prisoners who are not liable for deportation, either because they do not fit the criteria or because their cases have been determined to the effect that they may remain in Britain, should be considered for open conditions/ROTL in the same way as other prisoners.

Release on Temporary Licence (ROTL) Consolidated Interim Instructions

The MOJ is currently revising the guidance on ROTL with the aim of reducing eligibility and tightening up risk assessment procedures. Contrary to popular conception, this review did not commence in May 2014, in response to the high profile abscond that month, since when there have been widespread restrictions on ROTL in place. Instead it had been underway since the previous summer. On 10 March Chris Grayling told parliament that changes, including more strenuous risk assessment and electronic tagging of all prisoners on ROTL, would be brought in by the autumn.
As this issue of the PLRG Bulletin goes to press, there is still no sign of the new finalised new guidance on ROTL; however, in August NOMS issued new consolidated, interim guidance. A link to this guidance can be found on the justice.gov website embedded in the front page of PSO 6300. Crucially the instruction does not only concern ROTL but also eligibility to return to open conditions for those, including indeterminate sentenced prisoners, who have previously absconded from open condi-

tions or breached ROTL conditions.
Main points of the interim instruction include:

- Exclusion from transfer to open conditions/ROTL for any prisoner with a history of absconds, escape or serious ROTL failure during the current sentence. This includes indeterminate sentence prisoners unless they can make out a case for exceptional circumstances.
- All ROTL must have a clear, recorded link to an objective identified in the individual prisoner's sentence plan and/or resettlement goals; the time allowed for the release must reflect the time required to conduct these activities, including travel time; the activity must be one which cannot be met within the prison, unless it is specified why release is required in the individual case; eg that conducting the activity in the community will help to test the prisoner's decision-making or other need identified in the particular case.
- Town leave or town visits have been abolished and the phrases must cease to be used and must be removed from local policies and forms

OMBUDSMAN CASES

LEGAL PRIVILEGE

J Michael 53562/2012

Mr Michael complained that a legal document, entitled 'Background Proof of Evidence', produced by his criminal solicitors during his trial, had been improperly obtained and included in his records.

The document was an annotated copy that he had kept in his cell while in segregation at HMP Belmarsh. Therefore, he believed it had been obtained via a cell search, but there were no complete record of this. In 2012, Mr Michael discovered that this document had been placed in his prison records. In two separate complaints, he asked for it to be destroyed and for information from it to be redacted from other reports. In response, he was provided with a copy of the document. Although one member of staff responded later confirming it would be destroyed, another told Mr Michael the document would be retained and that she would read it to identify what had been included in his reports before sending it to his solicitor to confirm it was privileged.

Mr Michael had three complaints: (1) the way the document had been obtained at HMP Belmarsh; (2) how it was handled by staff at HMP Woodhill; (3) the use and misrepresentation of information from the document in prison reports and records. He asked for the complete redaction of psychology reports that had used information from the document.

The PPO upheld Mr Michael's complaints. During its investigation, a manager in the High Security Prisons Group at Woodhill defended the staff members' handling of the document and retaining the report despite having reason to believe it was privileged. The PPO disagreed, stating that the document should have been sealed in an envelope and referred to the governor to decide how it should be handled, in line with PSO 49/2011 Prisoner Communication Services.

The PPO did not reach a definitive view on how the document had been obtained, but stressed that the removal of any document during a cell search should be properly recorded. It recom-

mended the Belmarsh governor arrange for search teams to be reminded of correct procedures for handling documents that might be legally privileged.

The PPO also recommended that a copy of its report be placed with Mr Michael's psychology records and any other significant physical records. The PPO did not support the complete redaction of his psychology reports. Instead, it was suggested that Mr Michael challenge specific pieces of data to determine their source.

In its consideration, the PPO asked the ICO about the duty to 'forget' information that might have been obtained improperly. The ICO informed the PPO that there are exemptions from the Data Protection Act and that NOMS *may* be able to continue to use information if it is in the interests of public safety and the prevention of crime.

ADJUDICATION

R West 60989/2014

This case involved an adjudication for being 'disrespectful' to an officer at HMP Bure. In a private letter to a friend, Mr West had complained about those working in the Correspondence department and used the word 'cunt'. An officer who worked in Correspondence read the letter and charged him with disrespect. He was found guilty at adjudication and appealed unsuccessfully.

On further appeal to the PPO, Mr West's complaint was upheld and it was recommended that the finding of guilt be quashed. The PPO stated that the monitoring of prisoners' mail, although expressly allowed, must be balanced with the right to privacy. In particular:, 'if [the content of the mail] does not infringe one of the restrictions for which monitoring is allowed, a prisoner must be allowed to write whatever he likes and its content must be wholly disregarded by staff'.

The issue in Mr West's case was whether he had 'intended to cause distress' to any other person, in breach of PSI 49/2011. In deciding that he had not, the PPO held that the adjudicator had not established that Mr West *knew* his mail would be opened, making the finding of intent questionable.

COMPLAINTS SYSTEM

B Foster 61006/2014

This case involved an investigation into the complaints system at HMP Whatton. Mr Foster complained that he was not receiving responses to complaints that he had submitted within the timescales set out in PSI 02/2012 Prisoner Complaints, and in some instances he had not received a response at all.

The PPO found that: Mr Foster's complaints were going missing and/or were not being logged on the day (or next working day) that they were being placed in the complaints box; complaints to other establishments were not being chased up effectively, or at all; the Complaints Clerk was not handling complaints or responses received from other establishments in a timely or effective manner. HMP Whatton had also given both Mr Foster and the PPO investigator misinformation regarding his complaints.

The PPO upheld Mr Foster's complaint and stated that the system at HMP Whatton was not working effectively. The PPO also made the following observations and recommendations:

- The procedure for sending interim replies should be executed if complaints are not substantively responded to within the set timescales.
- If complaints to other establishments are sent via email, the sending establishment should ensure that the email address being used is valid and use read receipts and follow-up calls if the emails are not read within a reasonable time period.
- Establishments must ensure that information provided to prisoners and the PPO is accurate.
- HMP Whatton must address the fact that complaints have gone missing from the sealed complaints boxes. The PPO stated that the introduction of the local policy (presented for ratification at HMP Whatton on 20 August) may assist with this, but that regular audits should be carried out.

The PPO also requested that Mr Foster receive a formal apology from the prison and that the local complaints policy be issued by 30 September 2014.

PHOTOGRAPHS

S Kidd 60799/2014

This complaint relates to Mr Kidd not being able to send out photographs from HMP Gartree. He complained that the policy had changed four times in 18 months and that he had previously been able to send photos to his children and friends. The PPO undertook an investigation of the national policy changes, the reasons for those changes, and the related notices at HMP Gartree.

In May 2013 prisoners were restricted from taking and sending out photographs due to media criticism following a prisoner's photograph being posted on Facebook. At HMP Gartree this policy was reflected in PIN 30/2013.

In July 2013, the position was refined due to issues arising about copyright, storage and retention of data, with directions on lifting the temporary suspension. The restrictions were finally lifted and new national guidelines published in September 2013. Local procedure was then published in PIN 63/2013. In line with the new national guidelines, PIN 63/2013 did not allow photographs to be sent out; however, the Prisoners' Council published inaccurate information stating that photographs taken within the establishment could be sent out. This led to the re-issue of PIN 63/2013 in February 2014, clarifying that photographs could *not* be sent out.

The PPO held that HMP Gartree had done no more than follow national instructions and it considered the national policy itself appropriate in the circumstances. Accordingly, Mr Kidd's complaint was not upheld.

DISMISSAL FROM WORK

D Johnson 46054/2011

Mr Johnson was dismissed from the Prisoner Information Communication Technology Academy (PICTA) workshop at HMP Frankland. He was dismissed on the basis that he had not complied with the attendance requirement despite his absences being authorised. Mr Johnson complained that HMP Frankland's local policy on authorised absences was unlawful, that he should have received a warning, or been shown to have broken 'rules or regulations or lawful orders' before being dismissed and that he had been informed of his dismissal by a fellow prisoner, in breach of Prison Rules.

Following an initial investigation which

dismissed Mr Johnson's complaints, the PPO carried out a further investigation report (at the request of the PHSO) in which it partially upheld Mr Johnson's complaint. The PPO held that the proper process had not been followed in his dismissal and found failures in the way it had been communicated. Mr Johnson should have been formally warned and given the opportunity to improve and any warning or mutual agreement on dismissal should have been documented. Further, Mr Johnson should have been made aware of attendance requirements prior to starting PICTA.

The PPO did not, however, uphold Mr Johnson's complaint that Frankland's local policy of requiring attendance was unlawful if the absences are authorised and for legitimate reasons (including education, remedial gym and library). The PPO also did not uphold Mr Johnson's complaint that he had been dismissed by a fellow prisoner as they did not feel they had enough independent evidence to reach a definitive view.

In its conclusions, the PPO recommended that the prison apologise to Mr Johnson for the dismissal and reimburse him wages for the CISCO unit of PICTA (26 weeks). He was not entitled to reimbursement for the two year period following his dismissal as that could not be directly attributed to his dismissal. The PPO also recommended that the prison issue a notice to staff on communication with prisoners about performance or attendance concerns.

Mr Johnson made a further complaint to the PHSO about the PPO's handling of his complaint, but this was not upheld on the basis that the PPO's comprehensive further investigation and apology to Mr Johnson were appropriate remedies for any shortcomings of the initial investigation.

FAILURE TO PROVIDE HAIRCUTS

Mr B submitted a general application to HMP Rochester requesting a haircut but received it back within a few days without any response. He submitted a complaint form explaining that he was concerned about how he could get his hair cut at HMP Rochester and asking whether, if the prison could provide him with a haircut, staff could confirm the haircutter's qualifications and their adherence to health and safety practices.

The Wing Manager replied that HMP Rochester did not facilitate a hairdresser service, but that prisoners were allowed to purchase hair clippers for their own use and to use these to cut each other's hair at their own risk. The Wing Manager added there was no need for health and safety checks or qualifications in this regard. The prisoner appealed saying this did not provide a solution. The Head of Safer Prisons and Equality replied that there was nothing he could add to the Wing Manager's response.

The PPO investigation found that haircutting is a basic necessity for a prisoner's self respect, hygiene and decency. Its report said haircuts should be provided under Prison Rule 28 on hygiene as they are necessary for 'health and cleanliness,' particularly in a communal environment. The PPO said there were various ways adequate haircutting provision could be achieved at HMP Rochester, including employing an external barber, providing clippers for communal use, or providing individual clippers, and it should be left to the prison to determine the most appropriate system. It therefore upheld Mr B's complaint and recommended that within three months HMP Rochester should establish a system to provide prisoners with free haircuts.

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