PRISONERS' RIGHTS

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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 PLRB is free to serving prisoners.

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HERBERT SMITH FREEHILLS

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CASE REPORTS

LIFERS - OPEN CONDITIONS

R (Bewley) v SSJ [2014] EWHC 4215 (Admin)

The claimant was convicted of murder in 1979 and ordered to serve a life sentence with a minimum term of 12 years. Between 1991 and 2001 he absconded twice. On the second occasion he was at large for nine years.

In April 2014, the Parole Board recommended the claimant for open conditions and, in a letter dated 8 May, the National Offender Management Service (NOMS) agreed. This was then rescinded following a NOMS memorandum issued on 21 May 2014, which changed the system in relation to transfer of indeterminate sentenced prisoners to open conditions. The memorandum specified that any prisoner who had absconded during his current sentence was ineligible for transfer to open conditions save in exceptional circumstances.

The claimant issued judicial review proceedings, arguing that, among others, the decision and letter of 8 May created a legitimate expectation, NOMS had breached its duty to progress indeterminate prisoners towards release and NOMS had acted unlawfully by applying an inflexible policy. Permission for judicial review was first considered on paper and rejected. It was held that the Consolidated Interim Instructions issued in August 2014 satisfied the defendant's duty to progress indeterminate sentence prisoners. It was also held that the new policy was not unlawfully inflexible because it made provision for prisoners to be transferred in exceptional circumstances.

At the oral renewal of the application, the claimant amended his grounds of claim and did not argue that the policy was unlawful. Instead, he argued that he was not progressing in his sentence because NOMS had decided he did not meet the 'exceptional circumstances' test and this was a breach of the defendant's public law duty and the claimant's Article 5 rights.

HELD: Permission was refused as the public law and/or Article 5 requirement only required the defendant to provide a lawful mechanism for sentence progression and that the exceptional circumstances test and new progression regime satisfied this. The duty did not require the defendant to provide a particular outcome. Therefore, the fact that the claimant did not meet the necessary criteria for 'exceptional circumstances' and may suffer some delay because of the new policy did not amount to a breach of the defendant's public law duty.

The court did go on to state that, 'if it could be shown that the exceptional circumstances test was impossible to meet or that the new progression regime did not exist or was so deficient that significant numbers of prisoners could not engage with it even if they were suitable, the claimant might have an arguable case.' However, this was not found to be the position in this case.

In relation to legitimate expectation, the court held that this only arises if the change of policy is unfair or an abuse of power. The court found that neither applied in this case. Therefore, the most the claimant could legitimately expect was that his case would be examined individually in the light of the new policy and the court found it had been.

RELEASE

R (Hovenden) v Parole Board [2014] EWHC 3738 (Admin)

The claimant is convicted of serial sex offences, and has a number of other convictions for crimes of dishonesty. He maintains his innocence of all but one incident. He was released on licence in March 2009 and recalled in September 2009. In January 2014 the Parole Board decided that his continued confinement in prison was necessary for the purposes of public protection. The claimant challenged that decision.

The test to be applied is contained within section 225C(3) of the CJA 2003, which provides that 'the Secretary of State must not release the prisoner … unless [he/she] is satisfied that it is not necessary for the protection of the public that the prisoner should remain in prison'. The claimant's submission relied on the allegation that the wrong test was used by the Parole Board in this instance.

HELD: The claim was dismissed. The court noted that the Parole Board took into consideration the circumstances of the case, together with the fact that the claimant had a preference for children, which indicated a disordered thinking around sexual relationships, the fact that the claimant had no sexual boundaries, his manipulative behaviour, and his lack of general consequential thinking skills. Moreover, during his release on licence, the claimant associated with a vulnerable female despite being told to desist. The claimant was also assessed as unsuitable for the Sexual Offender Treatment Programme. The Parole Board came to the conclusion that, given the circumstances of the case, the very vulnerable nature of the claimant's previous victims and the escalating nature of his sexual offending, the risks were such that his continued confinement remained necessary for public protection.

The court concluded that while the language of the Parole Board was perhaps 'infelicitous', it must be remembered this decision was addressed directly to the claimant and not designed for lawyers. In its opinion, the decision embraced a number of legitimate factual matters that may be considered under the public protection test and that, when reaching a conclusion, it was plain the Parole Board had the correct public protection test in mind.

PUBLIC PROTECTION

R (Hart) v Governor of HMP Whitemoor, SSJ [2014] EWHC 3913 (Admin)

In December 1999 the claimant was sentenced to life imprisonment for murder, two attempted murders, two robberies, and three offences of the possession of firearms and offensive weapons. In 1998 he killed a woman in the presence of her husband and her two small children. Less than a month later, he killed a man in the presence of his young child.

In August 2012 HMP Whitemoor decided the claimant should be subject to Safeguarding Children Measures (SCMs), imposing restrictions upon any contact with children, whether his own or not.

In his OASys report, the claimant was identified as high risk to the public and known adults and medium risk to children if in the community; he was assessed as low risk to children while in custody.

The prison's reasoning for the imposition of SCMs was as follows: the claimant was assessed as a medium risk of serious harm to children in his OASys because of the physical and emotional harm directly caused by him to children in his offences. The prison concluded

that the risk of serious harm to children in this case is directly linked to the claimant's overall high risk of serious harm to the public. Therefore, until the claimant has reduced his overall risk of violence, he remains a risk to children.

The claimant challenged the decision by reliance on three submissions: (i) the imposition of SCMs has a significant impact on the rights of any prisoner; (ii) the denial of right must be proportionate to the risk of harm it is intended to prevent, and; (iii) the risk must exist in reality. He therefore submitted that whatever risk he presents to children if released, he presents no such risk whilst incarcerated.

HELD: The claim succeeded and the decision was quashed. The court concluded that while the claimant's offences could trigger consideration of imposition of SCMs, the purpose of the rules is to ensure that the prison authorities take all necessary steps to avoid the risk of harm to children from inmates whilst in the custody of the prison. Whilst in custody, the claimant is, as his OASys assessment makes clear, a low risk to children. This decision was thus not a proper decision on the facts of the case and it was neither appropriate nor necessary to impose SCMs.

ACCESS TO REHABILITATION

R (Haney, Kaiyam, Massey and Robinson) v SSJ [2014] UKSC 66

The applicants were all indeterminate sentence prisoners (ISPs), who argued that they had not been given a reasonable opportunity to progress through their sentence and make themselves safe for release. Kaiyam, Massey and Robinson had been sentenced to Imprisonment for Public Protection (IPP), while Haney had been given an automatic life sentence.

Haney's minimum specified term expired in November 2012; he complained that he was only transferred to open conditions in mid-July 2012, too close to the expiry date to allow release immediate upon expiry of his tariff.

Robinson and Massey complained that systematic failings meant that they were unable to commence an extended SOTP until over nine months and three years respectively after their tariff periods had expired.

Kaiyam, whose minimum term expired in April 2009, complained that various decisions and delays affected him individually and prevented him from accessing various courses between 2010 and 2013.

The Supreme Court referred to the decision of the House of Lords in *R (James, Lee and Wells) v SSJ*, in which it was held that no breach of Article 5(1) was involved in a failure to properly progress prisoners towards post-tariff release. The ECtHR took a different view, holding in *James v the UK*, that 'a real opportunity for rehabilitation [is] a necessary element of any part of the detention which is to be justified solely by reference to public protection.' The Supreme Court also discussed the ruling of the ECtHR that, for detention to be legal under Article 5(1) it must be genuinely for one of the permitted purposes, meaning that it must retain a sufficient causal connection with the original conviction. In the context of an IPP sentence, there must be a causal connection based on the danger to the public.

The Supreme Court followed the ECtHR decision in *James* to the extent that it agreed the purpose of the sentence should include rehabilitation. It then considered what the state's duties were

under Article 5 in relation to preparing prisoners for release, stating that the authorities are under an obligation to ensure that prisoners have a reasonable opportunity to rehabilitate themselves and therefore demonstrate that they no longer present an unacceptable danger to society. The court went on to state that the 'duty to facilitate release [could] readily be implied as part of the overall scheme of Article 5'.

This duty was said to exist throughout the sentence, and was intended to ensure that the prisoner is able to establish himself as safe for release. If such reasonable opportunities are not provided before the expiry of a tariff and this deprives a prisoner of an opportunity which he should have had, this may constitute a violation of Article 5. However, the obligation is only for the state to provide what is 'reasonable in the circumstances', rather than a general obligation to maximise the prisoner's opportunities.

The Supreme Court considered that this duty should not be linked to the overall arbitrariness of the detention, as it could lead to detention fluctuating between legitimacy and illegitimacy, depending on whether the prisoner was progressing through his sentence at that particular time. Instead, the appropriate approach is to allow a prisoner to complain and seek mandatory orders if and when there is a breach of duty, and to claim damages in respect of any period of extended detention or other loss which s/he can establish to have flowed from failure properly to progress him or her towards rehabilitation.

In applying this to the individual cases, the court allowed the appeals of Haney and Massey as systematic failures had led to unreasonable delays, which prevented them being able to display that they were safe for release upon their tariff expiry. Kaiyam and Robinson's appeals were dismissed, as despite some system failures both had been given a reasonable opportunity to rehabilitate themselves.

R (On the Application of Brian Dilks) v SSJ [2015] EWHC 11 (Admin)

The claimant was life sentence prisoner, who completed his tariff in 2010. He contended that he had not been recategorised to Category D (open conditions) or been able to access Release on Temporary Licence (ROTL), within a reasonable period, breaching his Article 5 and 8 rights as the defendant failed to make reasonable provisions to enable prisoners serving indeterminate sentences to demonstrate they no longer present an unacceptable risk to the public. Further, the claimant argued that he was a victim of discrimination under Article 14 on the ground that indeterminate sentence prisoners (ISPs) are treated disadvantageously compared with prisoners serving determinate sentences. Although by the time of the judicial review the claimant had been afforded both open conditions and ROTL, he argued that the delay had caused a knock-on effect such that his ultimate release date had been delayed.

HELD: The court dismissed the claim that the SSJ had failed to make reasonable provision to enable indeterminate sentence prisoners to demonstrate that they no longer present an unacceptable risk to the public. The court rejected both arguments presented by the claimant and applied the Supreme Court guidance in *R (Haney and others)* – see above.

The court found that the delay in transferring the claimant to open conditions did not interfere with his Article 8 rights, as the decision to grant ROTL was the subject of separate consideration and,

on the facts, the delay ultimately brought forward his eligibility for ROTL. The court also found that there was no breach of the ancillary duty under Article 5 as the delay did not adversely affect the claimant's progress toward release; it simply meant that he had to spend a little more time in closed, rather than open, conditions. The court stated that whilst in some instances such a delay might found a claim, the period of delay here was only two and a half months, and thus any breach would be so minor as not to warrant damages.

The court found that the delay in granting ROTL did not engage Article 8, and even if it had, there was no arguable interference with the claimant's Article 8 rights. It was justifiable for the SSJ to ensure that ROTL was granted only once a prisoner had appropriate premises in which to stay, and the delay in granting ROTL was reasonable and proportionate in the context of the claimant's index offence, his risk assessment and the difficulties which arose in finding suitable accommodation.

The court found there was no basis for finding discrimination between ISPs and determinate sentence prisoners, because there is 'an obvious relevant difference between the categories', namely that ISPs are released once their risks have been sufficiently reduced, whereas determinate sentence prisoners are released immediately upon expiry of their term.

R (Fletcher & others) v Governor HMP Whatton, SSJ [2014] EWHC 3586 (Admin)

These cases raise the issue of the extent to which the public law duty on the SSJ can be modified or affected by the level of resources available.

The claimants were all post-tariff and had waited at least two years to undertake a 'Healthy Sex Programme (HSP)'. The earliest any of claimants was predicted to access the course was 6-18 months after the date of the judgment, with the latest date predicted as between 24 and 36 months' time, meaning in all they had waited up to 6½ years from recommendation to actually undertaking the course. The judge noted that all the claimants were required to undertake the HSP in order to stand any reasonable chance of the Parole Board recommending they moved to open conditions or directing their release

The claimants complained that the SSJ was acting in breach of his public law duty, while the defendant contended that, having regard to the available resources, the duty had been discharged.

The court concluded that the SSJ had not made a reasonable provision of systems and resources for the purpose of providing the claimants a reasonable opportunity to demonstrate that they are not dangerous. Indeed, delays of at least two years at the moment of the judgement, with further delays of at least 18 months, show a clear, continuing and systemic breach of the duty to provide the systems and resources that the claimants need to demonstrate to the Parole Board that they should not remain in post-tariff detention. The fact that there was an increase in number of places on the course did not demonstrate that the level of resources being provided for HSP at that time was reasonable: the claimants would continue to wait for an excessive amount of time, particularly in light of past delays, for access to the course.

On the duty to act rationally in allocating resources, the judge considered this issue tied with the failure of the SSJ to discharge the public law duty in *R*

(James, Lee and Wells): if the first one was discharged, there would be no negative consequences on the second one.

The claimants also claimed an infringement of Article 5(1) and the third claimant an infringement of Article 5(4). The judge concluded that there were no infringements of Article 5. The failure to provide courses was not of the magnitude which might be considered sufficient to establish liability. Indeed, in *R (James, Lee and Wells)*, it was recognised that only in certain very limited circumstance would a breach of Article 5(1) be arguable, for example 'where the system which the statutes have laid down breaks down entirely, with the result that the Parole Board is unable to perform its function at all' or where there was 'a very lengthy period without an effective review of the case'. So far as Article 5(4) is concerned 'if the system which the statutes have laid down breaks down entirely because the Parole Board is denied the information it needs for such a long period that continued detention has become arbitrary' there would be violation. However, the court granted permission to appeal so that if the Supreme Court took a different approach to Article 5 in the cases then before it (see above), the claimants would not be disadvantaged.

HELD: The SSJ was in breach of the public law duty to provide resources to enable the claimants to show that they are fit for release. The court also found the SSJ in breach of the public law duty to comply with his own policies in relation to the placement of the third claimant on the list of those waiting for HSP. Finally the court dismissed the claims of infringement of Articles 5(1) and 5(4) of the ECHR.

IEPS: BOOKS

R (Barbara Gordon-Jones) v SSJ and Governor of HMP Send [2014] EWHC 3997 (Admin)

The case was an application for judicial review challenging the lawfulness of PSI 30/2013, which amended the Incentives and Earned Privileges Scheme (IEPS) to restrict prisoners' ability to receive books by post.

Paragraph 10.4 of PSI 30/2013 creates a general presumption of not sending items to prisoners, whether by parcel or brought by visitors, unless there are exceptional circumstances. Exceptional circumstances are determined by the exercise of the governor's discretion. Annex F contains a Generic Facility List, which includes a maximum of 12 books. PSI 12/2011 deals with the limit on the overall amount of property which a prisoner can have in his or her cell. Excess property, including educational material, can be held in storage but this is discouraged. Following approval, educational material including books may be exceptionally admitted.

Paragraph 33 of the Prison Rules 1999 provides that every prison shall have a library, and every prisoner shall be able to possess and exchange its books. HMP Send had two libraries, and the requests made by the claimant for books through the library had all been met, but the same could not be said of all prison libraries.

The lawfulness of the policy in relation to restrictions turned on whether access through the library and the ability to purchase books subject to the weekly IEP limits was sufficient to avoid the conclusion that the restrictions amount to an effective ban on reasonable possession of books.

HELD: The failure to exercise discretion by the governor of HMP Send was not unlawful; the policy of the SSJ was unlawful. The PSI's effect was contrary to what the SSJ had stated as his intention. There was no good reason in light of the importance of books to restrict prisoners' possession of books beyond what is required by volumetric control and reasonable measures relating to frequency of parcels and security considerations. The policy, insofar as it includes books in IEP schemes, was unlawful because its effect was contrary to the expressed intention and objectives that it was supposed to promote. Library services were not sufficient. The judge observed that possession of certain books can matter as much as access, and that a book may not be available because another prisoner has borrowed it.

EFFECT OF IPP APPEAL

Lee Bayliss v Parole Board and SSJ [2014] EWCA Civ 1631

In 2006 the appellant pleaded guilty to offences of aggravated vehicle taking, causing death by dangerous driving, and driving while disqualified. He had appeared before the criminal courts on at least 19 occasions since 1992 for offences relating to motor vehicles. He had also been disqualified from driving on 16 occasions and previously been sentenced to imprisonment for dangerous driving in the course of a police chase. The judge at Oxford Crown Court observed dangerous driving was qualified as a serious offence, and thus concluded that there was a significant risk to members of the public of serious harm if he was to commit further specified offences. The appellant was therefore sentenced to imprisonment for public protection: a minimum term of 2 years less time spent on remand.

The minimum term expired in April 2008. Previous Parole Board refusals to release in July 2008 and October 2010 were the object of judicial review applications which were both dismissed. The present application was made in response to the Parole Board once again rejecting an application for release in December 2011. In light of 'his drug misuse, poor thinking skills, and risk-taking behaviour' in custody, the Parole Board argued that the appellant still posed a significant risk to the public. In the meantime, the appellant sought to appeal to the Court of Appeal the imposition of the sentence, six years out of time. In November 2012, the Court of Appeal allowed his appeal, quashed the order of imprisonment for public protection and substituted a determinate sentence of four years' imprisonment.

The appellant then applied for judicial review of the December 2011 decision not to release him on the grounds that the decision was incompatible with Article 5. The appellant submitted that his sentence had become so long compared with the original tariff that there was no longer a causal link between the offence and the risk from which the public was being protected, rendering the detention arbitrary and unlawful. He added that, considering the Court of Appeal decision to quash the sentence, the detention was unlawful because the criteria for the term imprisonment for public protection were not met.

The Parole Board submitted that responsibility in law for a prisoner and his detention falls ultimately to the SSJ. The Parole Board has no power to review the lawfulness of the sentence. The court held that the Parole Board's responsibility was to review detention post-tariff with a view to public safety, and not to review the order itself. The case against the Parole Board was therefore misconceived and should

have been abandoned.

The appellant further submitted that as a consequence of the Court of Appeal decision to quash the IPP sentence, his post-tariff detention was unlawful. Alternatively, he argued that it was arbitrary within the meaning of Article 5 as, in light of the Court of Appeal's decision, there could not be a causal link between the offence and the risk posed by him.

HELD: The appeal was dismissed. Firstly, the Crown Court did act within its jurisdiction. Indeed, causing death by dangerous driving is a specified offence and the judge was required to reach a judgment on the issue of dangerousness. The court further declared that, considering the circumstances of the case, although the Court of Appeal disagreed, it was at least understandable that the judge considered the appellant to pose a significant risk of being involved in a further episode of speedy dangerous driving leading to loss of life. The Crown Court had thus not exceeded its powers when imposing that sentence. Moreover, the appellant's argument was not supported by ECHR jurisprudence in which lawfulness refers to detention rather than conviction, and will, in principle, be lawful if imposed pursuant to a court order. Thus, an appeal decision quashing a sentence does not render detention pursuant to that sentence unlawful within Article 5(1).

Secondly, at all times detention was justified by reference to the objectives of the sentence which the appellant was then serving and the requisite causal link was present. Indeed, that objective was concerned with the risk identified by the trial judge: that the Court of Appeal decided that the criteria of dangerousness were not met did not mean there was no risk to the safety of the public and neither did it retrospectively affect the compatibility of the detention with Article 5. The court added that there was no basis for distinguishing this case from any other in which the Court of Appeal reduces a custodial sentence below that which the prisoner has then served.

DELAY – ORAL HEARING

R (Guntrip) v Parole Board and SSJ [2014] EWHC 4180 (Admin)

The claimant was given an indeterminate sentence in 2005 with a minimum two year tariff for street robbery. When the tariff expired in 2007, his subsequent parole review hearings were subject to numerous and miscellaneous delays so that there was no hearing until July 2009. His challenge to the defendants was that these delays and his continued detention amounted to a violation of his human right to liberty and security under Article 5. He had partial success and was awarded damages of £1,200; however the judge found the Parole Board's decision not to release him lawful.

The target date for the next hearing was set for February 2011, however a hearing did not take place until August 2012. This was due partly to his solicitor's request for an adjournment and psychiatric evaluation. Also when the claimant was transferred to a mental health facility in July 2011, the SSJ cancelled the upcoming parole review and did not refer the case again until November 2011, four months after the claimant was back in prison. When the Parole Board set another hearing date of April 2012, it was again delayed at the request of the claimant's solicitors. When finally in August 2012 a single Parole Board member conducted a paper review of the detention, no written representations had been made by the claimant's solicitor. The Board's decision was that the

claimant was unsuitable for release. The claimant's challenge to have an oral hearing was refused and the SSJ set the next review in two years' time. In 2013 the Supreme Court ruled in the case of *Osborn*, stating that the Parole Board's decision making in granting oral hearings was flawed. The claimant included a challenge on the basis that the refusal to an oral hearing was unlawful in light of *Osborn*.

HELD: The judge found that the refusal of an oral hearing was fair. The court also rejected the notion that the claimant's detention was arbitrary and unlawful, expressing faith in the Parole Board's judgment generally in deciding cases. The judge noted however that this was precisely why regular hearings must take place at the shortest intervals compatible with sentencing aims, to instil in the claimant confidence that the Board is properly addressing his concerns.

As to the excessive intervals between hearings, the court found an effective period of delay of twelve months. This was in large part due to the SSJ's decision to cancel the July 2011 review and the Board's administrative inefficiencies in case management. Also key was the fact that the case entailed a history of delays, which understandably would cause the claimant frustration and anxiety. The defendants therefore should have dealt with the claimant's case in a timelier manner. In awarding damages the court cited *Sturnham*, which stated that three months is the point at which some modest award should be made. The claimant was awarded £2,500 by way of further damages, with 30% to be borne by the Parole Board and 70% by the SSJ.

UPDATES ON PRISON SERVICE INSTRUCTIONS

PSI 39/2014 Vetting Function: Security Vetting – Using Offenders as Mentors in the Community and in Custody

This instruction contains guidance on the security vetting of prisoners and former prisoners identified for potential mentoring roles in prison or community settings. Prison establishments and providers of probation services must have a process for considering individuals for 'Standard Plus' security vetting clearance to enable them to undertake mentoring roles. The policy aims to provide mentoring opportunities for those who would not be successful under normal security vetting procedures due to their current or past convictions.

PSI 49/2014 Mother and Baby Units (MBUs)

This PSI updates earlier guidance on MBUs. All MBUs should be available to accommodate babies up until the age of 18 months. The governor must ensure that procedures are in place to ask prisoners at the earliest opportunity whether they are pregnant or have children under the age of 18 months. Wherever possible all applications should be made not less than three months before the expected date of delivery. All eligible women who wish to apply for a place for their child on a prison MBU must be referred to the nominated Mother and Baby Liaison Officer. A Separation Plan, which is a condition of admission to a MBU, must be agreed for each mother and child when they arrive on the Unit. There may be exceptional circumstances where the child should remain in the MBU beyond 18 months which will need the approval of the Head of the Women's Team. The

mother retains parental responsibility for her child whilst in the MBU. Mothers must agree to remain illicit drug free whilst on the unit. However, if a mother is being prescribed a Methadone or Subutex withdrawal or maintenance programme she must not be excluded from a place on a Unit solely for that reason. Babies and mothers must not be locked in their rooms. If a mother is required to remain in her room the doors must not be locked. All MBUs should be managed in a fair and open way and all documents relating to children must be made available and disclosed to the mother. After the birth of a baby the mother is entitled not to attend work or classes for a period of six weeks. If you a mother is deemed medically fit but requests an extension to the six-week period, this must be referred to the governor/director for a final decision. There is a right to appeal a decision not to allocate a place on an MBU and should use the Prisoner Complaints system PSI 02/2012 in the first instance.

PSI 44/2014 The Data Protection Act 1998, The Freedom of Information Act 2000 Environmental Information Regulations 2004

The essential principle of the Freedom of Information Act (FOIA) is that there should be a general right of access to information held by public authorities consistent with the public interest, the right to privacy and effective public administration. The Act is designed to allow greater public access to information. Everyone is able to make a request regardless of who the individual is or why they would request particular information. The Environmental Information Regulations (EIRs) 2004 are based on the European Union Directive 2003/4/EC. They give everyone access rights to environmental information held by a public authority in response to requests. The Data Protection Act (DPA) 1998 regulates the processing of information in relation to living individuals. Any request for recorded information received by a public authority has to be answered in accordance with the FOIA or the Environmental Information Regulations 2004. The only exception will be an individual's request for their own personal data which must be dealt with under the Data Protection Act 1998. This Instruction is issued to update and replace Prison Service Order (PSO) 9020 and sets out the process and rules of responding to requests of certain categories of information under these pieces of legislation.

PSI 01/2015 The allocation of prisoners liable to deportation or removal from the United Kingdom

This instruction updates the policy on as set out in PSI 40/2011 and brings together the allocation of both male and female foreign nationals within one instruction. All sentenced adult prisoners subject to immigration proceedings and categorised C for males or 'closed' for females are expected to be considered for allocation to one of the prisons listed in this instruction (except local hubs) at the earliest opportunity.

The general agreed criteria for prisoners subject to consideration for allocation to a foreign national only, 'hub' or 'spoke' prison is that they are sentenced male and female adults, aged 21 or over, who: have been previously identified by the Home Office as meeting deportation criteria and have more than three months to their conditional release date and categorised as Cat C for male or closed for female.

If a prisoner has specific medical requirements that cannot be met at a hub or spoke prison they should initially be allocated to an appropriate establish-

ment that can meet the relevant needs. Individual requirements relating to disability, age, gender identity and any other protected characteristics must be taken into consideration.

For all prisoners identified for potential allocation into foreign national only, 'hub' or 'spoke' prisons, when assessing suitability for transfer, due consideration must be given to individuals with young children or close local family ties. The best interest of the child should be taken into account but there are likely to be other relevant factors. Female prisoners already in an MBU are generally not considered in scope for allocation to the hubs and spokes estate until separation is deemed appropriate, (see PSI 49/2014 Mother & Baby Units). Foreign nationals who the Home Office have indicated they have no interest in removing may be allocated to any appropriate prison according to their offending behaviour and resettlement for release needs. The allocation of young people remains the responsibility of the Youth Justice Board (YJB).

OMBUDSMAN CASES

FAILURE TO PROVIDE BREAKFAST

Mr A complained that he was not provided with a weekly breakfast pack at HMP Rochester. He raised the problem with wing staff at the earliest opportunity but went without breakfast for a full week before the issue was addressed.

The PPO investigation found that there was a problem with breakfast packs being stolen by other prisoners. It found that the fact that prison staff did not resolve the issue of the missing breakfast pack meant it was in breach of paragraph 3.1 PSI 44/2010 'Catering – Meals for Prisoners', which states: 'Prisoners will be provided with 3 meals per day. As a minimum this provision will include breakfast, lunch and evening meal.'

The PPO recommended that the governor issue an apology to Mr A, but found that the provision of financial compensation or replacement breakfast packs was not necessary.

IEP PROCESS IN RELATION TO BEHAVIOUR WARNINGS

Mr B complained that he had received an IEP behaviour warning at HMP Full Sutton, and the following day an IEP review was conducted where he submitted representations, but he heard nothing further about the warning issued. He appealed, seeking clarification on the appeal process for an IEP behaviour warning as he believed the appeal process had failed to consider his representations.

The PPO investigation found that while HMP Full Sutton's local policy was consistent with PSI 30/2013 which covers the IEP system, it was inconsistent with some other prisons' approach to appeals of IEP behaviour warnings. The absence of any clear guidance to prisoners and staff regarding a formal route of appeal in relation to IEP behaviour warnings in the local policy was not satisfactory, and as Mr B was unable to adequately challenge his warning via an appeals system, his complaint was upheld.

The PPO was satisfied with HMP Full Sutton's agreement to instigate a review of their local IEP policy, to include a section on behaviour warning forms, clearly advising prisoners of the right to formally appeal IEP warnings and the process by which to do so. Since Mr B was no longer at HMP Full Sutton and the IEP review had no impact on his IEP level, the PPO did not find it appro-

priate to ask HMP Full Sutton to revisit the circumstances of the warning.

LEGAL PAPERS IN POSSESSION IN CELL

Mr C complained that he had not been able to hold in his possession a quantity of legal papers which were taken from his cell by staff at HMP Full Sutton. He was a litigant in person and had asked the prison whether he could hold additional papers in possession as they were needed for his ongoing court cases. The paperwork was removed from Mr C's cell and he was held in the segregation unit. He was not allowed to collect the documents he needed before they were sent to reception. After his return to the wing from segregation, Mr C was informed that his papers had been removed as they breached the Health and Safety Policy.

The PPO investigation found that HMP Full Sutton had not been adhering to the advice provided by NOMS, that the removal of any papers should be witnessed by the prisoners, the papers should be boxed, sealed and tagged in the presence of the prisoner so that they are satisfied none have been tampered with.

The PPO requested the governor at HMP Full Sutton to ask that staff are told of the procedure to be followed when legal papers are removed from a prisoner's possession.

The PPO were satisfied with HMP Full Sutton agreeing to undertake a Health and Safety Risk assessment to set a standard for the amount of legal papers allowed in cell, and did not view this as unreasonable in the circumstances.

INVESTIGATING RACIST COMPLAINTS

Mr D complained to the PPO about racism from other prisoners, staff in general and one particular member of staff at HMP Woodhill. This complaint included a number of complaints made by Mr D via Confidential Access and DIRFs between March 2012 and May 2013.

While the PPO was satisfied with the Governor's genuine commitment to addressing racism and saw some evidence of good complaint handling during the course of their investigation, they considered that the handling of many of the complaints fell short of the required standard.

The PPO recommended that the governor of HMP Woodhill, with the support of NOMS equality and diversity policy staff, conduct a detailed analysis of all complaints submitted in July and August 2014 marked as having a racial aspect to ensure that they had been rigorously addressed. If it transpired they had not been sufficiently addressed, the governor would be required to take action to bring about improvement.

CHILD PROTECTION

Mr E complained that his risk levels with regard to children in custody and staff were raised to medium at HMP Whitemoor with no justification and was concerned this would have a negative effect on his progress. There had been no incidents relating to children or members of staff in custody during the period in question, or at all during his sentence, which could justify such a change to his risk level.

In respect of posing a medium risk to children in custody, the PPO considered that while Mr E was subject to Public

Protection restrictions due to the circumstances surrounding the commission of his index offence, there was no justification for Mr E to be considered to pose a risk to children in custody simply by virtue of this. There was no scope for the details of his offence to be replicated in custody and therefore the assessment of medium risk was not appropriate.

In respect of posing a medium risk to staff in custody, the PPO found that the assessment appeared to have been based on a finding of guilt for using threatening, abusive or insulting words or behaviour. Mr E did not attack a member of staff, nor did he make a specific threat to do so. This was not an overly serious incident, and it was unlikely to have any far reaching implications, thereby providing no justification for the risk assessment of medium.

The PPO considered the classification of Mr E's risk as medium to be disproportionate to the reasons provided. They recommended that, within two weeks of their issuing of the report, Mr E's risk levels in relation to children and staff in custody would be reassessed and a copy of the report be placed with his sentence planning documents for reference.

INTER-PRISON VISITS

Mr F complained about the arrangements and conditions of an inter-prison visit which took place at HMP Whitemoor with his brother. The visit took place in opposing exercise yards, contrary to PSI 16/2011. Additionally, Mr F was unable to greet his visitor at the beginning and end of the visit, and had to converse through a metal fence. He and his brother had had two previous inter-prison visits in the High Risk Visit Suite at HMP Full Sutton.

The PPO found that closed visits should only be imposed after a risk assessment, and there was no evidence that a risk assessment had been carried out on Mr F or his brother to justify a closed visit in this instance. Further, the reasons provided by HMP Whitemoor for the location of the visit were "worryingly unclear", and appeared to stem from practical difficulties which, however real, would not justify closed conditions. Even if a closed visit was justified by a risk assessment, the PPO questioned whether it would ever be appropriate to hold a visit outside in winter.

The PPO upheld the complaint and recommended, within one month of the issuing of its report, that the governor of HMP Whitemoor apologise to Mr F's brother for the unsatisfactory arrangements made for his visit, compensates Mr F and his brother with one visiting order each. Further, it was recommended that staff in the Close Supervision Centre be reminded that closed visits can only be imposed after a risk assessment.

Finally, since the PPO investigation revealed that PSI 16/2011 only covers visits between prisoners in different prisons and there is no national guidance on visits within the same prison, the PPO recommended that within three months of the issuing of its report NOMS amends PSI 16/2011 to include guidance on visits between prisoners in the same prison. It also recommended that the governor at HMP Whitemoor produce a local policy on inter-wing visits.

A STORM IN A TEA CUP

Andrew Jefferies QC, from Mansfield Chambers, considers the reasons for and the lessons from the failed prosecution of the "High Down 11" . Andrew,

together with Nicholas Doran of Amosu Robinshaw solicitors, represented one of the defendants at trial.

In September 2013, the cuts imposed upon the Prison Service by the Ministry of Justice came into effect at HMP High Down. Six weeks later, at lock up time, 11 men barricaded themselves into a cell for several hours. They were removed by the "mufti squad" using a flash bang bomb and over 30 trained C and R officers. During their hours in the cell, the men, or some of them, caused damage to the cell, abused prison officers, pretended that they had a gun and claimed they had a hostage. The latter two claims were quickly withdrawn but nonetheless were made. Importantly, throughout those hours, the men demanded to see the Governor, wrote notes indicating that their actions were as a result of the changes to the prison regime and indicated what aspect of the changes they were concerned about. All 11 were charged with prison mutiny and criminal damage.

At Blackfriars Crown Court this year, all 11 were found Not Guilty of all charges.

The Governor gave evidence at the trial. Through him it was established that the cuts were imposed by the MoJ and were "non-negotiable". The complaints system had failed to resolve issues legitimately raised; complaints were met with the comment that the regime had now changed and everyone had to accept it; access to the gym, the library, phone calls and association had all been affected.

I have seen some reports suggesting that the outcome in this case creates a 'carte blanche' to prisoners to defy authority under the guise of protest. I would suggest they are wrong. Within a prison setting, most acts of defiance, even in response to a legitimate complaint, will probably involve the commission of some offence or other against prison discipline. Protest is not easy within a prison setting. However, on *the evidence* heard in this case, the jury must have accepted that the actions of these 11 men may well have been, in fact, a legitimate protest. The acquittals of all defendants in respect of the criminal damage charge are less easy to explain by reference to the evidence. One could be forgiven for coming to the conclusion that the jury formed an overall view of the case favourable to the defendants. Having heard the Governor's aims and objectives for the future and indeed, what had been achieved in the time since the implementation of the cuts, it is highly unlikely that similar circumstances would arise again with a similar outcome. I repeat, prisoners should not view the outcome of this case as a 'carte blanche' for indiscipline.

Prison mutiny is a very serious charge – it is supposed to be reserved for the most serious of disturbances within a prison setting. In prosecuting the "High Down 11", as I have read they have become known, somebody, with the consent and agreement of the DPP (for that is required, as with many serious offences), decided that the action of these men met that very high test. The jury did not agree. It has been observed elsewhere that common sense might dictate that a barricading of a cell with the men inside, is not the most obvious way to attempt to overthrow prison authority! The jury appears to have shared that view. What should be remembered is that prison mutiny is an offence requiring an intention to overthrow; it will always be for a jury to infer from the available evidence what any particular 'protestor' intended by their actions.

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