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

RECALL- ORAL HEARING

Merry v The Parole Board [2015] EWHC 1220 (Admin)

Mr Merry applied for judicial review of a Parole Board decision to refuse his application for an oral hearing, which concerned his recall to prison for breach of licence conditions. The claimant was given an extended sentence consisting of a custodial term of five years and an extended licence period of a further five years for child sex offences. He had been released on licence subject to conditions which outlined prohibited behaviour and reporting to his approved premises throughout the day. He was recalled shortly after release, after he allegedly breached conditions by reporting late to his approved premises, by engaging a mother and child in conversation in a fast-food restaurant, buying and borrowing books concerning child sexual abuse, and choosing to sit next to a young child on a bus. Mr Merry contested these, either denying or providing explanation for each, yet because his application for an oral hearing was refused he could not challenge his return to prison.

HELD: The application was granted on the grounds that disputes of fact had been raised which were important to the conclusions of the panel, regardless of whether they were likely to alter the final result. With reference to the case of *Osborn v Parole Board [2013] UKSC 61*, the court held that the Parole Board had a duty to be and to appear to be independent and impartial, not predisposed to favouring the official account of events. Mr Merry had a legitimate interest in being able to participate in the decision-making process, and he had evidence to contribute which could not simply be ignored before it was tested.

The court also emphasised that the Parole Board should not revive the delay in the claim form to refuse relief if otherwise it is justified.

ARTICLE 8- FAMILY LIFE (VISITS)

Stevenson v Governor HMP Wakefield & SSJ [2015] EWCA 1014 (Admin)

Mr Stevenson applied for judicial review of defendants' decisions that he remain in custody at HMP Wakefield on the ground that the decisions failed to pay proper regard to Mr Stevenson's Article 8 rights. Mr Stevenson was sentenced in 2005 to life imprisonment with a minimum term of 19 years for murder. He consistently maintained his innocence in custody, had no adjudications and remained a Cat B prisoner since being sentenced.

The particular focus of the judicial review was Mr Stevenson's annual sentence plan review in December 2014. At the meeting it was noted that he had met all his targets from the previous year, but due to his location at HMP Wakefield he had not received any family visits in the 7 years in which he had been housed there. Mr Stevenson raised his concerns but the board made the recommendation that he remain at HMP Wakefield and a Cat B prisoner. Mr Stevenson submitted a complaint, stating that his stay at HMP Wakefield was not justified as his continued stay was preventing his family, who reside in Portsmouth, from visiting and his applications for accumulated visits had been refused. He also argued that his views had been misrepresented.

HELD: Acknowledging the facts were finely balanced, Mr Justice Jay nevertheless dismissed the claimant's application for judicial review. It was held

that the distance between Mr Stevenson's family in Portsmouth and HMP Wakefield was not so great as to engage Article 8 according to the test in Vintman where the European Court of Human Rights stated that visits must be made "very difficult or even impossible" by the location of the claimant's incarceration (paragraph 78). In considering arguments in relation to Mr Stevenson's Article 8(2) rights, it was held that there was no breach and the decision for him to remain at HMP Wakefield must be viewed in the wider context of the psychological care he was receiving at the establishment and his acknowledgment to the board that he was settled there.

PAROLE- OPEN CONDITIONS

Khan v Parole Board [2015] EWHC 2528 (Admin)

The claimant was sentenced to imprisonment for public protection with a minimum term of four months for an offence of robbery, which expired on 19 August 2006. The claimant's behaviour in prison was mixed, attracting 7 adjudications, however, in the latter months of 2013 improvements were reported.

In November 2013 the Parole Board reviewed the claimant's case for the fourth time. It did not recommend his transfer to open conditions. This was despite reports from three professionals – a psychologist, offender supervisor, and probation officer – recommending such a move.

The claimant applied for judicial review of the decision on the grounds that the decision 1) failed to provide proper, sufficient and intelligible reasons; and 2) that it was irrational in that it gave too much weight to unproven and unsubstantiated allegations of bad behaviour made against the claimant.

HELD: Addressing the first ground, the high court judge noted that the Parole Board's decision did not include sufficient detail for him to ascertain either whether the panel had considered, as required, the Secretary of State's (SoS) 2004 directions to the Parole Board concerning the transfer of life sentence prisoners to open conditions, nor whether it had scrutinised the level of risk more anxiously because of the considerable period the claimant had remained in prison beyond his minimum tariff. The judge concluded that the panel failed to give proper and sufficient reasons for the rejection of the three professionals' recommendations, rendering the decision unlawful.

Addressing the second ground, the judge noted that the Parole Board relied on allegations of bad behaviour, certain of which were not substantiated by evidence, and that examples of good behaviour, such as a negative drugs test, appeared not to have been taken into account. He held that the panel gave far too much weight to the unsubstantiated allegations, and insufficient weight to the claimant's own account of events and other positive factors. The judge concluded that the decision to deny the claimant's request to transfer to open conditions was irrational.

It was ordered: 1) that the decision of the Parole Board be quashed; 2) that the matter be remitted to a fresh panel for a re-hearing; and 3) in view of length of the matter and the period the claimant had remained in prison since the minimum term expired, that the re-hearing take place within six weeks of the order.

DISCLOSING PREVIOUS CONVICTIONS

W v SSJ [2015] EWHC 1952 (Admin)

W, aged 16, was convicted of assault occasioning actual bodily harm in November 1982. He received a 2 year conditional discharge and was bound over to keep the peace for 12 months. Since then, he has made a success of his life and has not been in any trouble with the law. He now wished to obtain a qualification teaching English as a second language and in 2013 began a training course with a view to obtaining a certificate towards this qualification. W applied through his college to the Disclosure and Barring Service for a criminal records certificate, and the certificate showed his conviction for ABH as it is one of those which must be disclosed under the current statutory regime .

W sought to challenge this disclosure regime, arguing that it is a disproportionate interference with his right to a private life under Article 8 ECHR to require the disclosure of a conviction for which he received a conditional discharge 31 years previous. His claim did not seek to challenge the lawfulness of the disclosure regime, but merely that what was a minor historic offence disposed of by a conditional discharge should not be included in the category of mandatory disclosure. The defendant argued that Parliament decided ABH is a sufficiently serious offence that, irrespective of the sentence and the time which has passed since the commission of the offence, it is always potentially relevant to the prospective employer and therefore they are entitled to be aware of it before reaching a view as to a person's suitability for employment. Accordingly, it would be inappropriate for the court to go behind Parliament on this matter.

HELD: Claim dismissed. Mr Justice Simon held that Parliament was entitled to specify certain offences, such as ABH, in respect of which disclosure must always be made and simply to say that the line could be drawn elsewhere did not demonstrate that the same policy objective could have been achieved by less intrusive means. ABH is a serious violent offence, and therefore cannot be distinguished from common assault which does not need to be disclosed, nor does the fact that the offence attracted a conditional discharge indicate the seriousness of the offence and thereby undermine Parliament's entitlement to draw a line in relation to offences requiring disclosure.

ACCESS TO COURSES

Knights & Anor v Parole Board & Anor [2015] EWHC 136 (Admin)

Mr Knights (Mr K) and Mr O'Brian (Mr O) sought judicial review of the decisions made by the Parole Board and the Secretary of State to keep them in custody following the expiry of their minimum term tariff. It was argued that the detentions were arbitrary and in breach of the ECHR Article 5 (Art.5) because there was a lack of proportionality between the amount of time each claimant served and their set minimum term. It was also put forward that the inaccessibility of necessary courses breached Art.5, as well as the continued detention under the newly introduced Criminal Justice and Immigration Act 2008. This legislation amended the IPP provisions in the Criminal Justice Act 2003 so that an IPP could only be imposed where the minimum term was four years' imprisonment or more.

Mr K was an IPP and had a minimum term of eight months sentenced in June 2008. Having already completed one

sexual offender treatment programme, he was transferred to another prison to undertake an extended course as it was determined in his risk assessment in December 2009 that he still presented a very high risk of reoffending. Following his transfer, there was a delay in beginning the course as the programme was yet to be fully set up. Mr K eventually completed it in November 2011, and he was released in January 2014. Mr O was an IPP and had a minimum term of 14 weeks sentenced in February 2008. It was deemed that he was too great a risk to be released following his parole review in March 2011, and the review set for December 2013 was delayed until June 2014 because of incomplete reports. Mr O was eventually released the following month.

HELD: It was held that the continued detention of the claimants following the expiry of their respective minimum terms was not arbitrary and did not breach the Art.5. They had been lawfully detained in the given period for the purpose of public protection having met the statutory test for dangerousness. During their detention they had been appropriately periodically assessed and had gone on courses to enable them to reduce the risk they posed. Mr O was however awarded £300 in damages for an unacceptable delay in his parole review hearing which caused him frustration and distress, which was a deemed a proportionate remedy. Finally, there was no indication in the jurisprudence of the ECHR that detention became arbitrary for the purposes of Art.5 because sentencing law changed after a prisoner had been sentenced. Because an individual would have received a more lenient sentence had he been sentenced at a later date does not make the original sentence unlawful.

SENDING IN CDs AND DVDs

Mohammed Ali v SSJ [2015] EWHC 2221 (Admin)

The Claimant was sentenced to life imprisonment with a 22 year tariff. He is currently held in a category A prison. He is of Kurdish Sorani descent and his mother tongue is Kurdish. His family sent him a cookery book, a dictionary, 28 DVDs, 8 further books and 9 CDs, which were all in Kurdish. The items were refused by the prison on the ground that commercial DVDs must come from an approved supplier and any books to be added to the religious/ faith library should go through the chapel staff.

Judicial review proceedings were issued after exhaustion of internal avenues and a complaint to the Prison and Probation Ombudsman. The Claimant argued that 1) the prison had a "blanket" policy which did not provide for exceptions and is therefore inflexible and unlawful, and that a fair balance was not struck (*R(Daly)-v-SSHD [2001] 2 WLR 1622*). 2) In the alternative, the policy was unlawfully applied to the Claimant, primarily because he was unable to find material after suppliers had been identified. He argued the Defendant acted irrationally or unlawfully in failing to exercise discretion on a matter which represents exceptional circumstances. 3) Finally, the Claimant argued discrimination on grounds of his race. In light of the more recent decision in *R (oao Barbara Gordon-Jones)-v-SSJ and the Governor of HMP Send* (hereafter *Gordon-Jones*)*[2014] EWHC 3997 (Admin)* ("Gordon-Jones") providing a presumption in favour of books being sent by family and friends without restriction, the Claimant further argued it should extend to CDs and DVDs.

The Defendant in response argued that 1) it was not a blanket policy, whereby the Claimant had been individually considered as reflected by the authorisation for the dictionary and cookbook. He was further allowed to use non approved suppliers to purchase items and the Governor agreed for further items to be considered on a case by case basis. The Defendant submitted that 2) there is a general presumption against the sending to or handing of items to prisoners as provided in PSI 30/2013. The refusal was to prevent illicit material from entering the prison for the maintenance of good order and discipline which is the policy's legitimate aim. Furthermore, the lack of Kurdish material is not as a result of the Defendant's policy or it's unlawful operation, but rather the rareness of items in this dialect in the UK. 3) With regards to the discrimination argument, the Defendant argued that the duty was complied with by applying PSI 32/2011 "Ensuring Equality" which sets out which matters must be taken into account by the prison and the approach to be adopted.

HELD: The Defendant's concession regarding books is correct and the claim succeeds in relation to these. The rest of the claim was dismissed. The decision in *Gordon-Jones* clearly solely applied to books. No specific public law error can be identified with regards to the ground of discrimination and therefore it is rejected. The Court found no blanket prohibition on the Governor who used his discretion to allow DVDs and CDs sent in as such. The prison made considerable efforts to attempt to locate suitable material for the Claimant and the Governor considered the security level of the prison and the dangerousness of many of the prisoners alongside the risk of allowing DVDs and CDs which might contain encrypted, hidden or coded messages and therefore did not err in exercising his discretion which should not be tampered with lightly by the Court.

HDC RECALL- ORAL HEARING

Foster v SSJ [2015] EWCA Civ 281
The appellant had been sentenced to a term of 3.5 years' imprisonment, and was entitled to automatic release (after serving half his sentence) on 14 December 2012. On 2 August 2012 he was released on HDC. On 21 August, Serco (tagging equipment monitor) received a tamper alert, telephoned the appellant for an explanation, and subsequently visited the appellant to check the equipment. According to Serco, the appellant did not allow the equipment to be checked, and Serco rejected a suggestion by the appellant that Serco return the following morning to check the equipment. This resulted in revocation of the HDC on the grounds of breach of condition, and the appellant was recalled to custody under s. 255 of the CJA 2003. The appellant later submitted written representations challenging his recall, stating that Serco had not explained the consequences of not checking the equipment there and then, and they had agreed to return the following morning to perform the check.
The appellant appealed against the rejection of his argument at first instance that he was entitled to an oral hearing to contest revocation of the HDC. On appeal he argued that his conditional right to liberty had been engaged through his release on HDC, so that written representations contesting his recall raised issues of credibility which could not be resolved fairly without an oral hearing. He also argued that at common law cases where there was a factual dispute required an oral hearing, and that common law fairness went further than the ECHR and could impose the same requirement for an oral hearing following recall from HDC as is im-

posed following recall after the conclusion of a custodial term. Further, he argued that establishing that recall was unlawful is significant if the appellant is sentenced to a further and future term of imprisonment; given that based on current policy, prisoners who have been recalled under s. 255 CJA 2003 are presumed unsuitable for HDC barring exceptional circumstances.

HELD: the appeal was dismissed. The Court held that release on HDC under s. 246 of the CJA 2003 is discretionary and conditional, and consists of serving the custodial part of the sentence in the community. The appellant was therefore not in "conditional liberty", but rather was serving his custodial detention by other means (i.e. under curfew at home). HDC was not analogous to the situation arising after the conclusion of a custodial term. A no-fault breach of the conditions does not render the breach as having no effect, and can lead to recall. The relevant question is the application of the principles of procedural fairness in the specific circumstances of the case. In the circumstances, this case did not require the flexibility of an oral hearing to determine the truth of the appellant's account of the facts, nor to investigate potential mitigation. Whether the appellant is sentenced to a period of imprisonment in the future is irrelevant, and the Court refused to proceed on the basis of the appellant's entitlement to some consideration against the possibility that he would continue to commit crime in the future.

APPEAL AGAINST IPP SENTENCE; COMPATIBILITY OF DUAL RELEASE SYSTEM WITH ARTICLE 5

Vowles v SSJ [2015] EWCA Civ 56

(1) Court of Appeal Criminal Division

Six IPP prisoners subsequently transferred to hospital under s.47 of the Mental Health Act 1983 (MHA) sought to appeal against their original sentencing decisions. The appellants argued that their sentencing judges should have made a hospital and restriction order under ss.37/41 MHA, so that their release and terms of release would be determined by the First-tier Tribunal (FTT) under the MHA rather than the Parole Board, as is the case for an IPP with a s.47 MHA transfer direction. The Court had to determine whether fresh evidence should be admitted under s. 23 of the Criminal Appeal Act 1968.

HELD: the prisoner's sentence must consider the points of view of both the prisoner and the public when considering all the evidence in the case. Matters to which the judge must have regard are: (1) the prisoner's need for treatment for his or her mental disorder; (2) the extent to which the crime is attributable to the mental disorder; (3) the extent to which punishment is required; and (4) protection of the public, which includes the regime for deciding release and the regime after release. The judge must have sound reasons for departing from the usual course of imposing a penal sentence. The Court laid out the matters for consideration where medical evidence suggests the prisoner is suffering from a mental disorder; namely that the offending is wholly or significantly attributable to that disorder, treatment is available and the court considers that a hospital order may be appropriate. These include consideration of a hospital and limitation direction (s.45A MHA), if not, whether a direction under

s.37 MHA would be appropriate, and finally whether other methods of dealing with the offender are available (including the s.47 MHA powers). The Court dismissed the appeals of Vowles and two others on the basis that IPP and s.47 transfer were appropriate given the nature of these prisoners' mental disorders, their culpability for their offences, the need for punishment and the risk to the public. The Court quashed the sentences (substituting them for a ss.37/41 MHA order) of three of the other appellants on the basis that there was a strong causal link between their mental illnesses and their offences, the treatability of their illnesses and the better public protection afforded by their release, the conditions of their release and their psychiatric care in the community being governed by the MHA regime.

(2) Court of Appeal Civil Division

Vowles contended that the process under which an application for release of an prisoner subject to a s.47 MHA transfer, namely the requirement that the application be considered by both the FTT and the Parole Board, was a breach of Article 5(4) of the ECHR, since the lack of a single judicial body prevents speedy determination. She argued that no justification exists for having to satisfy two different judicial bodies. She argued that she had been denied a speedy determination given the Parole Board's unreasonable delay in considering her release.

HELD: the appeal was dismissed. There are two issues to be determined: (1) whether the mental disorder of and need for treatment to protect the prisoner or public requires his or her detention under ss.72-74 MHA; and (2) whether the protection of the public requires the detention of the prisoner under s.28 of the Crime (Sentences) Act 1997. The State is entitled to choose different tests; each meeting a different concern and a different basis for detention. The State is entitled to establish different judicial bodies to determine these issues, even though there is generally an interrelationship between the risks arising from a mental disorder and the risks otherwise arising. The relevant 13-week timetable set out under Chapter 15 of PSO 4700 constitutes an "energetic and rapid approach". However, there are wider issues which Parliament may wish to consider; and public confidence may be improved if a single body presided over such decisions. The key question was whether the Parole Board's determination could have been made in a materially shorter time than it was actually made, taking into account the factors (including medical and psychiatric evaluations of Vowles's health) which enabled the Parole Board's determination to be made. On the facts, despite the Parole Board's failures, there was no breach of Article 5(4) ECHR since a speedy determination could not have been made more quickly than it was.

SEX DISCRIMINATION IN ACCOMMODATION OF WOMEN PRISONERS IN APPROVED PREMISES

Coll v SSJ [2015] EWCA Civ 328

The appellant was serving a mandatory life sentence for murder. A probation report had indicated her potential suitability for residence in Approved Premises (AP) or supported housing upon her eventual release from custody.

The appellant argued at first hearing that women are the subject of unlawful direct and indirect sex discrimination in the arrangements for placing prisoners in AP, since the configuration and loca-

tion of APs means that it is harder to place women close to their homes than it is men (i.e. male and female prisoners are placed in different APs; there are more men than women in prison, and proportionately more men who require accommodation in APs; and the policy is to place prisoners close to home where possible). These arguments were rejected by the lower court, which found neither direct nor indirect discrimination, and held that if there were indirect discrimination, then it would be justified. On appeal, the appellant argued that to mitigate the disproportionate impact on women, additional APs should be created or the existing ones relocated in more heavily populated areas in order to render it more likely that women prisoners may be placed close to home. The appellant sought a declaration that the current lack of provision for probation service-approved premises for women offenders in England and Wales results in direct and indirect discrimination, as well as a proper analysis of the discriminatory effects of this, involving the performance of the Public Sector Equality Duty which the respondent had accepted had never been properly conducted.

HELD: Appeal rejected and declaration refused. In relation to direct discrimination, the Court held that the respondent had adopted a practice equally applicable to men and women; namely the presumption that they will be placed as close to home as possible. Precisely the same rule is applied to both men and women, but its effect depends upon the configuration of the available AP at the time the prisoner is sent there, and the place where the prisoner has his or her home. The Court held, *obiter*, that even if direct discrimination had been established, there would be a potential defence of justification in paragraph 26 of schedule 3 to the Equality Act 2010 (Equality Act). In relation to the indirect discrimination claim, the Court held that the relevant practice which causes the adverse effect is the twin (and justifiable) facts that: (1) accommodation is provided on a single sex basis; coupled with (2) the presumption that prisoners are accommodated as close to home as possible. The Court rejected the appellant's submission that the relevant practice which led to indirect discrimination was that released offenders are required to reside in APs if an appropriate residence condition is attached to their licence. The Court found that the appellant was in fact seeking a form of positive discrimination; complaining of the failure to adopt a separate policy to deal with the distinct problem faced by women alone resulting from the small number of APs available to them, a complaint upon which the Equality Act does not bite.

UPDATES ON PRISON SERVICE INSTRUCTIONS

PSI 22/2015 – Generic Parole Process for Indeterminate and Determinate Sentenced Prisoners (GPP)

This instruction replaces the guidance for indeterminate and determinate parole, which was previously contained in separate instructions, providing one instruction that covers parole for both sets of prisoners.

The purpose of the change is to provide a parole process that is more efficient and streamlined, and provides prisoners with clear expectations of when they will receive their parole decisions. The aim is to increase transparency and minimise the potential for delays.

Specific provisions include:

- a new timetable for parole reviews,

including amended targets for reports to be submitted*;*
- new arrangements for compiling discretionary conditional release parole dossiers;
- amended criteria for the SSJ when considering Parole Board recommendations for transfer to open conditions;
- new requirements for prisons to facilitate prisoners instructing legal representatives to represent them throughout the parole process;
- new arrangements for engaging prisoners in the parole process;
- streamlined arrangements for compliance with Parole Board directions;
- new guidance and more robust lines of accountability for the production of the Parole Assessment Report by the Offender Manager (the PAROM1 report) and Sentence Planning and Review report (SPRL) by the Offender Supervisor;
- a streamlined core parole dossier and streamlined reports from establishments;
- new streamlined case management processes within the Parole Board.

PSI 24/2015 – Enhanced Behaviour Monitoring (EBM)

The aim of this instruction is to provide guidance to prisons on the Enhanced Behaviour Monitoring (EBM) process developed for use in open prisons.

The EBM process involves six months of enhanced monitoring of those National Probation Service caseload prisoners identified as exhibiting behaviour which could indicate elevated risk and require increased risk-management activity.

Once a prisoner is identified as requiring EBM, ongoing monitoring is carried out during the six months by all prison staff members who have contact with the prisoner, to look out for the presence or absence of specific risk-related behaviour. Their observations are fed back to the custody probation officer who oversees the process. They will meet with the prisoner monthly during the period, setting and reviewing targets for each meeting, assisting the prisoner to develop self-management skills and strategies for managing and reducing their risk.

When the prison assesses a prisoner for EBM suitability, the purpose is not to assess whether their progression to open conditions was justified or appropriate. The review will use existing information to enable prison and probation staff to identify and manage any risk-related behaviour displayed both within the open prison and whilst on ROTL. The information can also be used to assist subsequent decision-making, for instance in relation to suitable work placements.

PSI 28/2015 – Unlawfully At Large After Recall Offence Protocols

This instruction provides an explanation of the protocols and processes to be followed as a result of a new offence introduced by Section 12 of the Criminal Justice and Courts Act 2015 for offenders who knowingly remain unlawfully at large (UAL) after notification of recall.

It is now an offence for a person to remain unlawfully at large, where he or she has been notified orally or in writing that they have been recalled to custody, and subsequently failed without reasonable excuse to take all reasonable steps to return to prison within the period specified in the notice. The new offence will apply to anyone who following a recall was UAL on or subsequent to the

commencement date of 13 April 2015. The offence carries a maximum penalty of two years imprisonment and/or a fine.

The purpose of the instruction is to set out the arrangements for processing of the new offence by the Public Protection Casework Section (PPCS), as well as the requirement on prisons, police, and probation staff to ensure that offenders who are released on licence are aware of the offence and the potential penalty if convicted.

PSI 30/2013 – Incentives and Earned Privileges (Update)
This update lifts the 'prison book ban'. Families and friends are now allowed to send and hand in books to prisoners directly, regardless of whether there are any exceptional circumstances or not. Visitors will not be allowed to hand books directly to prisoners; they will need to be left with staff to process.

Additionally, the limit on the number of books allowed to be held in cells has been lifted and two companies, Mr B's Emporium of Reading Delights and Wordery, have been added to the list of approved retailers from which to order books. The other approved retailers are Blackwell's, Foyles, Waterstones, WH Smith.

Games consoles have been removed from the standardised facilities list and will only be allowed as an additional privilege under the local IEP scheme, and provided they are not for communal use or at the public's expense. Only prisoners on Enhanced level are allowed possession of a games console.

Additionally, games consoles that have wifi connectivity in their factory state are not permitted. The retention of wifi enabled games consoles held in possession or ordered before 1 September 2014 is subject to the Governor's discretion.

OMBUDSMAN CASES

Conduct During Social Visits
Mr A complained that there was a rule at HMP Manchester which prevented prisoners standing to greet their visitors. The rule against standing did not exist at other prisons and therefore there was no reason it should exist at Manchester. Mr A argued that the rule ruined the quality of the visit, and to expect to prisoners spending years in custody never to be able to stand and hug their visitors properly was inhumane; he suggested that there was no acceptable reason for this rule, particularly in light of Prison Rule 4 which concerns the right to respect for family life.

The PPO investigated the complaint by contacting a number of high security prisons – including HMPs Whitemoor, Frankland, Full Sutton, Belmarsh and Woodhill – all of whom confirmed that as a minimum they allowed prisoners to stand to greet their visitors at the beginning and end of visits, with some of the establishments permitting hugging as well. This was in accordance with PSI 16/2011which states that: *"reasonable physical contact between prisoner and visitors should be permitted…prisoners should be allowed to embrace their visitor at least at the beginning and at the end of the visit…"*

The PPO acknowledged that the wording of the PSI was ambiguous, and although the above establishments interpreted it to mean that prisoners can stand to embrace visitors at the beginning and end of the visit but remain seated the rest of the time, they could not say Manchester's interpretation was wrong.

However, when considering what is "reasonable", per PSI 16/2011, the PPO agreed with Mr A that the requirement for him to remain seated throughout visits was likely to have a negative impact on the meaningful maintenance of relationships. The PPO acknowledged that while Manchester view standing to embrace visitors as a security risk, other high security establishments with similar security concerns, similar staffing levels and similar numbers of visitors took a different view. Accordingly, the PPO concluded that a blanket ban by HMP Manchester on prisoners standing while greeting visitors was disproportionate, and Mr A's complaint was upheld. The PPO nevertheless added the caveat that if specific concerns arise to particular prisoners, special conditions might be applied to them in this respect that were not necessarily disproportionate.

The PPO recommended that within two months of the issue of the report, the Governor at HMP Manchester changed the rule to enable prisoners to stand to greet and say goodbye to their visitors. The PPO further recommended that within three months of the issue of the report, NOMS issue a revised PSI making it clear that prisoners will normally be allowed to stand to embrace visitors at the start and end of a visit.

Prisoner Safety

After receiving threats from other prisoners, Mr A asked to be segregated for his own safety. His request was refused. Mr A subsequently deliberately disobeyed an instruction as a means of being transferred to the Segregation Unit. He felt safe there, and while on the unit raised his safety concerns repeatedly at weekly Rule 45 reviews. However he found the reviews to be ineffective in that they were conducted by a different Governor each time without information being shared, meaning he was forced to newly repeat his concerns each time. It appears that at this stage staff failed to investigate, or intervene, in regard to the threats against Mr A. While on the Segregation Unit Mr A faced continuous pressure to return to another house block and finally agreed when he was informed he would receive a warning through the Incentives and Earned Privileges (IEP) scheme or go on report if he continued to refuse.

Shortly after relocating to another house block Mr A suffered an assault involving serious facial injuries requiring surgery. Following the assault, although Mr A was placed on a unit on which he felt safe, on at least two occasions prisoners suspected of assaulting him were placed on the same unit. Though the names of these prisoners had appeared on Mr A's case notes, they were seemingly not recorded anywhere else, limiting the ability of staff to guard against these prisoners arriving on the same house block as Mr A.

The PPO upheld Mr A's complaint, finding that the prison failed to take his safety concerns seriously, to take appropriate steps to verify these concerns, and then to take appropriate action. It noted a lack of communication between the Security Department and Safer Custody, though acknowledged the prison has introduced weekly meetings between the departments to address this.

The PPO recommended that the prison should review its current process for assessing and investigating threats made against prisoners; ensure that staff complete all appropriate paperwork when assessing threats against a prisoner, and record this properly on the prisoner's core file; ensure that investigations into prisoner assaults are concluded in a timely manner; and devise a system for ensuring that prisoners who have been assaulted or threatened by other prisoners are not then placed on the same house block as them. It further recommended that the Governor

should apologise to Mr A for the handling of the matter.

Laundry Facilities

Mr X complained that the facilities at HMP Whatton for laundering personal clothes were inadequate.

Mr X complained that in light of the opportunity for prisoners eligible to wear their own clothes – a key earnable privilege under the IEP scheme – they must also be provided with adequate prison laundry facilities to wash them. However, Mr X, and the other prisoners on his wing, had their access to laundry facilities restricted for over a year on the basis that there were not enough washer/dryer machines on the wing. During this time, only bedding, socks and boxers were accepted for laundry, and even these were restricted for fortnightly washing rather than weekly. None of Mr X's other clothing was accepted for laundry. Mr X had been told repeatedly that new machines had been ordered, but none were produced. Mr X therefore had to launder his own clothing in his cell, incurring expense, inconvenience and safety hazards. During this period, prisoners on the two nearest wings to Mr X had continual access to adequate laundry facilities.

Mr X also complained about the Head of Residence and Service's refusal to investigate, instead saying it should be dealt with at a lower management level before he became involved. In any case, the COMP1 had been forwarded to the Custodial Manager, and he had dealt with it for 5 weeks, before it being forwarded to the Head of Residence and Service.

In addition, Mr X complained that he had been asked to support his claim for compensation for washing materials, despite the fact that it was far easier for the prison to access his canteen sheets than it was for him, and it would cost him £10 to obtain them.

In terms of the complaint regarding laundering facilities, the PPO found disparity between the account provided by the Activities Unit Manager and those provided by Mr X and five other prisoners. The PPO noted that HM Chief Inspector of Prisons was satisfied with laundry facilities in January 2013, but general conditions were considered to be worse on Mr X's wing and that this complaint had arisen after the inspection suggesting conditions had in fact deteriorated.

On balance, the PPO upheld Mr X's complaint and found the supporting accounts of the five prisoners compelling. The PPO agreed with Mr X that the necessity of washing and drying personal clothing in cell, and at the expense of the prisoner, necessarily undermined and militates against the privilege of allowing the facility in the first place. The PPO re-stated that if prisoners are to be allowed to wear their own clothing, and have their own bedding, adequate laundry facilities must be provided for these.

The PPO ultimately viewed that the complaint was handled poorly on all fronts, and upheld Mr X's complaint in this respect: Mr X should not have had to prove evidence of what he was saying in order to substantiate the complaint, and he should certainly not have been expected to gather his own evidence; the complaint should have been addressed by the Custodial Manager in the first place; but even if it could not be addressed by the Custodial Manager, there was nothing preventing Mr X directing his complaint to a specific member of staff or grade of staff, and although it is for the prison to decide who is most appropriately placed to respond, Mr X should not have been lectured

about seemingly trying to bypass the complaints system when escalating the complaint.

The PPO recommended that within two weeks of the issue of the report, the Governor at HMP Whatton reimburses Mr X for the expense he incurred in laundering his personal items.

The PPO also recommended that within two weeks of the issue of the report, the Governor at HMP Whatton apologise to Mr X for the poor handling of his complaint.

THE POSITION FOR SEGREGATED PRISONERS POST BOURGASS AND HUSSAIN

On 29th July 2015 the Supreme Court handed down judgment in *Bourgass and Hussain v Secretary of State for Justice* [2015] UKSC 54. The Court unanimously held that key aspects of the Prison Service's segregation review and disclosure policies were unlawful. It held that under Prison Rule 45(2) governors and officers in prisons had no lawful authority to segregate beyond the initial 72 hour period; all decisions to continue segregation had be authorised by external officials; and all segregated prisoners have the right to be treated fairly including genuine and meaningful disclosure of reasons.

Paragraph 100 sets out the minimum level of disclosure that now has to be provided to all prisoners segregated for longer than 72 hours: "*A prisoner's right to make representations is largely valueless unless he knows the substance of the case being advanced in sufficient detail to enable him to respond. He must therefore normally be informed of the substance of the matters on the basis of which the authority of the Secretary of State is sought…… what is required is genuine and meaningful disclosure of the reasons why authorisation is sought….. The imposition of prolonged periods of solitary confinement on the basis of what are, in substance, secret and unchallengeable allegations is, or should be, unacceptable*."
This judgment successfully challenged some of the more flagrantly unfair aspects of the segregation process. It was hoped that it would lead to a major and long overdue overhaul of the system by which decisions are made to keep prisoners in solitary confinement, and that it result in fewer instances of prisoners being segregated for longer periods, across the estate, and that those who are segregated would have a better prospect of challenging its application.

<u>Secretary of State's Response to *Bourgass and Hussain*</u>

However, rather than amending the current segregation practice to ensure that segregation decisions were made lawfully in the future, the Secretary of State responded by effectively ignoring the uncontested expert evidence that had been before the Supreme Court, and key aspects of the findings that were reached. An amendment was made to Prison Rule 45 that not only invests prison governors with the power to authorise a prisoner's segregation for 72 hours, but which enables them to do so (subject to 14 day reviews) up to a maximum period of <u>42 days</u>. In other words a wholly unexplained *14 fold* increase in the power that was provided for in the original 1999 Prison Rules. If further segregation is deemed to be necessary after 42 days, then the governor must seek leave from the Secretary of State in writing and leave must also be obtained for any subsequent period of up to 42 days. Continuous segregation beyond 6 months must be reviewed by the Deputy Director of Custody. For Young

People the policy provides that the existing system continues with the DDC carrying out a review at up to 21 day intervals and continuous segregation beyond 3 months must be reviewed by the Director.

The rulings regarding fairness and disclosure do appear to have been followed. The proposed new policy that is out for consultation provides that prisoners are entitled to be provided with meaningful reasons for authorising continuing segregation to enable them to understand the basis for segregation and allow them to make representations against their continuing segregation. Prisoners must also be allowed to attend all or part of Segregation Review Boards wherever possible and must be allowed to make representations to the segregation review board ('SRB'), to DDC Reviews and to Director Reviews. Segregation Review Boards (SRBs) continue as now meeting within 72 hours of initial segregation and then at a maximum of 14 day intervals. The timing of SRB meetings must now link into the timing of external reviews by DDC and the Director. The chairperson at the 72 hour Board and the first 14-day Review Board, must be a different person to the person who authorised initial segregation other than in exceptional circumstances. If this is impossible then a second manager must review and countersign the paperwork as soon as possible.

The Statutory Instrument containing the above amendments to Rule 45 was laid on 3 September 2015. The provision which removes the need for external authorisation by the Secretary of State after 72 hours came into force on 4 September 2015 and the requirement for the Secretary of State to authorise segregation after 42 days came into force on 16 October 2015. It is a negative Statutory Instrument and as such will remain in law as it has not been struck down as unlawful or voted down by Parliament. The Legislative Scrutiny Committee may consider the Statutory Instrument and challenges have already been issued in the High Court challenging the new policy, which may well be ultra vires in light of the Supreme Court's findings in *Bourgass*.

Sally Middleton and Daniel Guedalla are solicitors at Birnberg Peirce & Partners who acted for the claimants

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