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

JOINT ENTERPRISE

R v Jogee (Appellant) [2016] UKSC 8; Ruddock (Appellant) v The Queen (Respondent) [2016] UKPC 7

The case concerns a particular part of secondary party liability within joint enterprise, sometimes labelled as "parasitic accessorial liability". This is where secondary parties have been engaged with one or more others in a criminal venture (a "joint enterprise") to commit crime A, but in doing so the principal commits a second crime, crime B.

The question of law was whether the common law took a wrong turning in two cases – *Chan Wing-Siu v The Queen* [1985] 1 AC 168 and *R v Powell and English* [1999] 1 AC 1 – as concerns the mental element of intent that must be proved when a defendant is accused of being a secondary party to a crime, in joint enterprise.

Jogee

The appellant was convicted at Nottingham Crown Court of murder. The victim was stabbed to death in the hallway of his girlfriend's home by the appellant's co-defendant, who pleaded guilty to murder.

The appellant and his co-defendant spent the evening prior to the murder together, taking drink and drugs. They went to the victim's girlfriend's house, looking for the victim in order to 'sort him out', but he was not there. They returned later, and the co-defendant entered the house; an angry confrontation between him and the victim ensued. At this stage, the appellant was outside the house with a bottle, shouting at his co-defendant to do something to the victim; at one stage, the appellant came to the door and threatened to smash the bottle over the victim's head. The fatal stabbing was done by the appellant's co-defendant in the hallway of the house, with a knife that he took from the kitchen. At the precise time of the stabbing, the appellant was in the hallway.

The trial judge directed that the appellant was guilty of murder if he took part in the attack on the victim and realised that it was possible his co-defendant might use the knife with intent to cause serious harm.

Ruddock

The appellant was convicted in the Circuit Court at Montego Bay, Jamaica, of murder. His co-defendant pleaded guilty to murder.

The victim was a taxi driver, and the prosecution case was that the murder was committed in the course of robbing him of his station wagon. The police evidence was that the appellant made a statement under caution that amounted to an admission that he was involved in committing the robbery and that he was present when his co-defendant killed the victim by cutting his throat; however, the appellant was not responsible for the killing.

The judge directed that the appellant was guilty of murder if he took part in the robbery and knew that there was a possibility that his co-defendant might intend to kill the victim.

In each case, the direction to the jury by the trial judges derived from *Chan Wing-Siu* and *R v Powell and English* which were binding on the judges. These cases held that in the situations described in *Jogee* and *Ruddock*, the mental element required of the secondary party

(D2) is simply that he foresaw the possibility that the principal (D1) might commit crime B instead or in addition to crime A. If D2 did foresee this, his continued participation in crime A was treated not simply as evidence that he intended to assist crime B, but as automatic authorisation of it. Thus, D2 was guilty of crime B under this rule, even if he did not intend to assist at all.

The appellants argued that this element of parasitic accessorial liability set a lower test for D2 than D1: D1 will be guilty of crime B only if he has the necessary mental element for that crime, usually intent. Further, this contrasts with the usual rule for secondary parties, whereby the mental element required is an intention to encourage or assist the principal to commit the crime.

Judgment

The Supreme Court unanimously held that the Courts had taken a 'wrong turn' in *Chan Wing-Siu* and the cases that followed it over the last 30 years, and the Court must set the law on the right footing again. The error was to equate foresight of crime B with intent to assist, whereas the correct approach is to treat foresight simply as evidence (albeit sometimes strong evidence) of intent to assist or encourage. It is a question for the jury in every case whether intention to assist or encourage is shown on the facts.

It follows that in these two cases, the murder convictions must be set aside. Counsel for Jogee argued that he ought not to have been convicted of either murder or manslaughter and that his conviction should be quashed altogether; however, the Court rejected that argument as 'quite unrealistic'. On the evidence and the jury's verdict, he was unquestionably guilty of at least manslaughter and there was evidence on which the jury could have found him guilty of murder on a proper direction by the trial judge. In relation to Jogee, the Court asked for written submissions from both sides on the matter of whether there should be a retrial for murder or whether the conviction for murder should be substituted for a manslaughter conviction. In relation to Ruddock, there were other, unrelated, misdirections by the trial judge and the Court asked for written submissions from both sides as to what should be the appropriate disposal now the correct position in law has been identified.

It is important to recognise what the present cases do not decide. Firstly, they do not affect the law that a person who joins in a crime which any reasonable person would realise involves a risk of harm, and death results, is guilty of at least manslaughter. Secondly, they do not affect the rule that a person who intentionally encourages or assists the commission of a crime is as guilty as the person who physically commits it. Thirdly, they do not alter the fact that it is open to a jury to infer intent to encourage or assist based on the facts of the case, for example, from weight of numbers in a combined attack, whether more or less spontaneous or planned, or from knowledge that weapons are being carried. It is a commonplace for juries to have to decide what inferences they can properly draw about intention from an accused person's behaviour and what he knew.

At paragraph 100 of the judgment, the Court noted that this correction to the law does not mean that every person convicted in the past as a secondary party, where the law as stated in *Chan Wing-Siu* and *Powell and English* was applied, will have suffered an unsafe conviction. Indeed, it does not follow

that this change in the legal principle will have been important on the facts to the outcome of the particular trial or to the safety of the particular conviction. Where a conviction results from faithfully applying the law as it stood at the time and the conviction is out of time for appeal, it can only be challenged by seeking exceptional leave to appeal to the Court of Appeal (Criminal Division). The Court of Appeal has power to grant such leave, and may do so if substantial injustice is demonstrated; however, it will not grant leave simply because the law applied has now been declared mistaken. The same rules apply where the Criminal Cases Review Commission is asked to consider referring a case to the Court of Appeal.

CATEGORY A- RIGHT TO AN ORAL HEARING

Hassett & Price v SSJ [2015] EWHC 3723 (Admin)

Two Category A prisoners sought to challenge the decision to refuse them an oral categorisation hearing. They referred to the ruling in *Osborn and Booth* [2013] UKSC 61 (*Osborn*), which considered the circumstances in which the Parole Board must hold an oral hearing when considering prisoners' release from detention or transfer to open conditions. *Osborn* held that the Parole Board should hold an oral hearing whenever fairness to the prisoner requires it in the light of the facts of the case and the importance of what is at stake, reflecting a prisoner's legitimate interest in being able to participate in a decision with important implications for him. This would include circumstances where: important facts are in dispute; determining the credibility of a mitigation or significant explanation requires it to be heard orally; and the Parole Board cannot otherwise properly or fairly make an independent assessment of risk and how such risk should be managed and addressed.

The claimants asked the Court to decide whether any or all of the same requirements that apply to the Parole Board when considering release apply to the Category A Review Team (CART) when considering conditions of detention, in order to permit a prisoner to attend an oral hearing rather than having his categorisation considered by the CART in his absence.

HELD: The claims were dismissed. The Court stated there is no policy that oral hearings must take place in categorisation cases. The Court highlighted the significant differences in the function and status of the Parole Board and the CART, holding that the level of scrutiny that should be applied to the release of a prisoner, its importance to him and the wider public are factors which distinguish the functions of the two bodies. The Court noted that not having an oral hearing does not deny a prisoner his right to participate in the categorisation process, in which he is interviewed by prison staff, given the opportunity to make submissions, and entitled to legal representation.

DUTY TO FIND SUITABLE ACCOMMODATION FOR DISABLED AND ELDERLY PRISONERS

R (John Taylor) v SSJ and National Probation Service North West Division [2015] EWHC 3245 (Admin)

Mr Taylor was sentenced to life imprisonment with a minimum custodial term of 18 years in December 1974. This term was completed in 1992, but he was not released. He has now completed 40 years in prison, and is 77 years old. Mr Taylor has suffered a heart at-

tack and a stroke whilst in prison, and is now disabled. On 9 May 2014, the Parole Board directed Mr Taylor's release from custody to the 'Ashdene' hostel for adult male offenders, run by Langley House Trust. This is private accommodation, still controlled by NOMS, that has high-level security, and also is capable of caring for the special needs of disabled offenders. However, it has now been over a year and a half since Mr Taylor the parole board directed his release**,** yet he is still incarcerated.

Due to the specialist nature of the placement, meeting Mr Taylor's disability needs and licence requirements, it was expensive. Neither the local authority, nor the SSJ were willing to pay, and thus the hostel could not offer him a place.

Further attempts were made to release Mr Taylor into approved accommodation but these have so far proved unsuccessful, one of the reasons being that the Parole Board approved Mr Taylor's release specifically to Ashdene, and thus release to another facility is not currently authorised- although the case is waiting to be heard by the Board.

Mr Taylor has brought a claim for judicial review against the SSJ and the local authority. Permission was granted by McGowan J to proceed on two grounds:

> The defendants have breached their statutory duties towards Mr Taylor, pursuant to the Offender Management Act 2007 and the Care Act 2014 by not paying his extra care costs allowing him to be release, or locating suitable accommodation for him to facilitate his release from prison.
>
> The local authorities have unlawfully discriminated against Mr Taylor under the Equality Act 2010 because the difficulties in finding him accommodation are due to the nature of his care requirements as he is elderly and disabled.

The claimant argued that the defendants owed a statutory duty to find accommodation for individual offenders (a duty taken over from Probation), and that if a local authority failed to find anything suitable, the duty defaulted to the SSJ. It was also argued that the duty of cooperation under the Care Act 2014 imposed positive duties on the SSJ to cooperate with the local authority to provide for accommodation- meaning splitting the extra costs for Mr Taylor's special requirements. Secondly, the difficulties posed with finding Mr Taylor suitable accommodation stem from the fact that he has disabilities, including deafness and mobility issues, and is elderly, at 77 years old. This means that he is not suitable for all types of approved premises accommodation as he requires extra support. Therefore, by not paying the additional cost of the care he needed in Ashdene, Mr Taylor could not be released- a difficulty not faced by non-disabled elderly prisoners.

HELD: The claim for judicial review was dismissed on both grounds. The Court found that there was no breach of duty by the SSJ or the National Probation Service. The extra cost for Mr Taylor was partly due to social care needs and partly due to offender rehabilitation, having been incarcerated for over 40 years and thus not being used to the modern world. However, this did not impose positive duties on the SSJ to make special provision for each individual offender. The provisions are phrased in general terms. Additionally, a local authority failing to provide for an offender does not cause the burden to default

onto the SSJ. There was also held to have been no discrimination. The procedures in place for release into specific approved accommodation are in place to serve a legitimate purpose- rehabilitation of offenders and protection of the public from high-risk offenders. There was no substantial disadvantage incurred upon Mr Taylor merely by virtue of his being disabled.

DAMAGES – DATA MISUSE

Vidal-Hall and others v Google Inc (Information Commissioner intervening) [2015] EWCA Civ 311

The claimants issued proceedings alleging that private information had been misused by the defendant through their internet usage by passing their details onto third parties. The claimants argued to have suffered from distress and anxiety as a result of the invasion to their privacy. The claimants sought an injunction that would allow them to bring a claim against the defendants overseas, which was allowed. The defendant appealed that the judge had erred in his findings and that the claimants' claim should be dismissed.

The Court of Appeal had to address three issues on the law surrounding data protection. First, whether the cause of action for misuse of private information was 'made in tort'. Second, to establish if 'damages' for distress and anxiety could be recovered under Section 13 of the Data Protection Act 1998 and finally, determine whether the claimants had a 'real and substantial cause of action.'

HELD: Appeal dismissed against Google Inc. The Court made the distinction that a breach of confidence and a misuse of information were totally separate causes of action: and that a misuse of private information should now be recognised as a tort. The Court also found that the Parliament and Council Directive 95/46/EC (on the protection of individuals with regard to the processing of personal data and on the free movement of such data) took precedence over the Data Protection Act 1998. Although vague, the European Commission's objective remained clear and 'damage' under Article 23 of the Directive should be given "its natural and wide meaning." In turn, Section 13 of the DPA should accurately reflect the Commission's intentions through its transposition into English law, meaning that compensation for moral damages is recoverable.

Overall, claimants can now process a claim for 'any damage' suffered as a result of the actions of a data controller, i.e. an individual who uses or withholds your personal information. This is regardless of whether financial loss has occurred. However the question of 'personal data' should be determined at trial.

ARTICLE 3 & 8 - STRIP SEARCHES

BK and RH v The SSJ [2015] EWCA Civ 1259

The appellants BK and RH are women serving custodial sentences. On 28 February 2013, while at HMP Send, they were separately subjected to full body searches (strip searches) in their cells. It was since conceded by the defendant that the searches were unlawful. BK and RH now claim that the prison policy (PSI 67/2011 Searching of the Person) by reference to which the searches were purportedly carried out infringed their rights under Article 3 and/or Article 8 ECHR, appealing the judgment of the Divisional Court which rejected their arguments.

At around 8am on 28 February 2013, two female prison officers came into BK's cell. The officers were wearing gloves; they closed the door and said that they had to strip-search BK and also to search her cell. When she asked why, they said that the searches were targeted. BK was made to remove all her clothing and spread her legs in order to be inspected; there was no internal examination. The cell was then searched. Nothing was found either on her person or in her cell. BK's undisputed evidence was that the officers in fact expressed to her their surprise that her "name came up". Since the search, on her evidence, BK became scared and distrustful towards staff and there were incidents of self-induced vomiting and suicidal thoughts. Paperwork identified that the reason for the search was "Alcohol/Drugs" and that a dog had been used during the search; the Court noted that it was accepted by the prison that the search was incorrectly recorded as a Level 1 search, given that removal of underwear connotes a Level 2 search.

In her unchallenged witness statement, RH said that on 28 February 2013 at around 9.20am she was called back to her cell from work. She was told by female prison officers that she was being targeted for a full body search. She explained that she was menstruating but they insisted on a full body search, examining her whole body once clothing had been removed. Her clothes were then searched, along with certain areas of RH's cell, but nothing was found. Following the search, on her evidence, RH became scared and lost her confidence in dealings with staff and suffered from thoughts of self-harm. As with BK, paperwork identified that the reason for the search was "Alcohol/Drugs" and that a dog had been used to indicate RH's cell, though RH herself never saw the dog.

Both RH and BK put in written complaints following the search. After claims were issued by their respective solicitors, the prison conceded that the search was unlawful as it had not been carried out in accordance with policy, though it was maintained that the policy itself was lawful. It was further accepted that both searches were incorrectly recorded in the paperwork as a Level 1 search, given that removal of underwear connotes a Level 2 search.

BK and RH challenged the policy on two grounds. First, that PSI 67/2011 does not comply with Article 3 ECHR because where the prisoner is mentally vulnerable, such that a full body search creates a real risk of intense suffering or increased risk of self-harm, the policy gives no instruction or guidance about the decision of whether or not to carry out a full search. In this regard, the policy exposes women to a significant risk of degrading treatment and/or fails to obviate in advance a proven unacceptable risk or serious possibility of a breach of a female prisoner's human rights. Second, the PSI fails to provide a sufficiently clear legal framework adequate to render any strip search compliant with terms prescribed by law, and in its current form the PSI fails to cause prison officers to take relevant matters into account before engaging in a strip search, thereby giving rise to a real risk of such searches not being justified and not being proportionate.

HELD: The Court of Appeal dismissed the appeal, finding that the PSI provides a framework which is amply compliant with Article 3 ECHR. When read as a whole, the PSI makes sufficiently clear that prison officers are first to consider the need for, and impact of, a full body search before embarking on one; further, the PSI is clear that they cannot even contemplate such a procedure in the absence of intelligence or reasona-

ble suspicion that there may be a concealed item. The Court noted that such a conclusion was reinforced by the lack of evidence of systemic or significant failings indicative of a policy which does not comply with Article 3 ECHR, or which does not operate fairly in the generality of cases involving targeted strip-searching of female prisoners. The Court deemed it noteworthy that neither appellant, in their years in custody, had been the subject of any strip search prior to these instances.

For corresponding reasons, the Court of Appeal also dismissed the appeal based on the arguments made regarding Article 8 ECHR, finding that the provisions of the PSI satisfy all realistic requirements of clarity, justification and proportionality.

PROPERTY- SMALL CLAIMS COURT

Kevan Thakrar v The SSJ (Claim No: A76YP501)

Normally the judgment in a small claim would not be put into the public domain. The judge in this case took the view that it would be desirable that the details of the claim and the decision on it, and the reasons for that decision, should be readily available and in the public domain.

Mr Thakrar complains that in the course of his being transferred from one prison to another, his stereo was broken, a number of CDs were damaged beyond repair by shampoo being squirted on them, and four books of his were lost. He further complains that a canteen order which he placed at Woodhill on 10th June 2013 was never fulfilled and that the money concerned was never refunded to him. His claim is for £543.16, in addition to which he seeks general and aggravated or exemplary damages. This was not a claim under the Human Rights Act 1998, nor did Mr Thakrar rely on legal aid to bring the claim. Instead, Mr Thakrar was a litigant-in-person, not represented by a lawyer, and advanced the claim entirely in writing through the County Court.

Since March 2010, Mr Thakrar had been serving his custodial sentence in the Close Supervision Centre (CSC) at HMP Woodhill, segregated from the main prison population. The Court accepted that at all material times Mr Thakrar had been under close supervision, and effectively in solitary confinement, and therefore rejected what the Defendant hypothesised about what may have been “possible” in respect of the damaged property; Mr Thakrar could not have damaged the property himself without prison officers being aware of such activity, nor could he have lost the property.

In respect of the canteen order, the Court noted that although Mr Thakrar complained that in June 2013 he was charged £31.81 for a canteen order which was not processed prior to his transfer from Woodhill and that such monies remained outstanding when he commenced these proceedings, the Defendant stated in their defence that £31.81 was refunded to Mr Thakrar’s prisoner spends account on 14 January 2015. While the judge stated that the matter was now academic, assuming the evidence to be correct, any power of the Court to award interest would be very modest and amount to approximately £4 only. Accordingly, the Court chose not to assess such an award. The judge merely acknowledged that the lack of explanation for such a refund taking 18 months since Mr Thakrar’s transfer from HMP Woodhill in June 2013 was not acceptable.

In respect of the stereo, the judge con-

sidered on the balance of probabilities that the stereo sustained significant damage – sufficiently significant for the prison officers to decline to release it to Mr Thakrar whilst in custody, despite the Defendant arguing that any damage sustained was merely trivial. The judge found that witness statements from officers at HMP Woodhill were wholly contradictory and did little to support their case. The Court noted that the Defendant had a duty to take reasonable care of Mr Thakrar's property, and that the burden of proof was on them to show an absence of fault in respect of any damage alleged; the Defendant was unable to discharge this burden.

In respect of the CDs, the judge noted that the evidence was incomplete and less than satisfactory. Mr Thakrar indicated in written evidence that when he packed the CDs they were in a bag within another bag containing the stereo which was sealed, but when he received his property they were in a different bag without a seal which was inside another bag containing various toiletries; he also stated that had he been issued with his property to pack himself, he would not have put liquids in a bag with CDs. The Defendant did not acknowledge the matters raised by Mr Thakrar, merely suggesting that some shampoo had leaked onto the outside of the bag containing the CDs and only going as far as to say that they 'do not recall' any of Mr Thakrar's CDs being damaged. Nevertheless, the Court found on the balance of probabilities that the CDs had been moved from a bag packed by Mr Thakrar into a bag containing the shampoo, that the CDs were indeed damaged beyond repair by the shampoo, and that this could only have been done by the prison officers. The judge noted that "nobody taking reasonable care of his own property… would pack CDs and leaflets and inserts in the same place as liquids" and the only apparent reason for doing so would be to cause damage.

In respect of the lost books, the Court found on the balance of probabilities that the books were lost by the Defendant. The judge noted that no meaningful explanation for their loss was forthcoming in the Defendant's written evidence, and the assertion that the books were either lost whilst in Mr Thakrar's possession or as a result of being lent to other prisoners and not returned was wholly implausible considering Mr Thakrar was held in the CSC.

In terms of compensatory damages, the Court awarded Mr Thakrar £99.99 for the stereo, £175.20 for the CDs and £53.47 for the books.

Mr Thakrar also claimed for loss of use of the property, which the Court accepted but did not devote time to assessing damages for such a sum.

Finally, Mr Thakrar claimed for exemplary damages, alleging that the Defendant by its prison officers 'keeps acting in an oppressive, arbitrary and unconstitutional fashion…' (quoting Lord Devlin in *Rookes v Barnard (No 1)* [1964] UKHL 1, who states that the object of exemplary damages is to punish and deter as opposed to compensate as ordinary damages otherwise would). Since the Court was satisfied that the damage to the CDs must have been caused by the deliberate act of one or more prison officers, it only considered this in relation to the award of exemplary damages and concluded that an award of exemplary damages was justified on the bare fact of a finding that deliberate damage was caused to Mr Thakrar's property by those with responsibility for looking after it. Whilst the circumstances surrounding the damage to the stereo and the "disappearance" of the books were considered 'extremely

suspicious' by the Court, suspicion is not proof and is not a permissible foundation for a Court's decision; accordingly, exemplary damages could not be awarded in relation to the stereo or the books. The Court stated that the minimum award that would 'adequately mark the Court's disapproval of what has happened' is £1,000. However, according to *Thompson & Hsu v Commissioner of Police of the Metropolis* [1998] EWCA Civ 1042, any award for exemplary damages must be inclusive of any compensatory award, not in addition to it.

Accordingly, the Court found for Mr Thakrar in respect of the damaged stereo, damaged CDs and lost books, and awarded total damages of £1,000.

UPDATES ON PRISON SERVICE INSTRUCTIONS

PSI 30/2015 – National Security Framework CONTROL AND ORDER FUNCTION Amendments to Use of Force Policy

This instruction introduces amendments to use of force policy relating to personal safety techniques, use of batons, refresher training, debriefing and monitoring.

The stated aim of this PSI is to ensure consistency with the use of force training manual. The amendments are to PSO 1600 Use of Force, which remains in force. The instruction is supported by two training manuals: The Use of Force Training Manual for managing over 18s and The Minimising and Managing Physical Restraint Manual. These are restricted documents but are both available in redacted form from the National Security Framework and on the Ministry of Justice website.

The PSI stresses that the use of force must be legal for it to be justified. This means it should be no more than necessary and proportionate to the seriousness of the circumstances. The use of force should also, wherever possible, take into account relevant medical considerations. The prison staff should know the law in this area and managers should ensure that this is the case.

After a personal safety technique has been used, staff must justify their actions by stating why force was used and explain the personal safety technique the has been used, staff must justify their actions by stating why force was used and explain the degree of force in a Use of Force Form.

Relocating a prisoner using full Control and Restraint (C&R) must comply with approved techniques. These include the use of ratchet handcuffs and appropriate observation of the prisoner. The room for relocation must also be risk assessed and certified by a local C&R Instructor as suitable.

The use of a baton must be an 'exceptional measure' and only as a defensive implement, striking at the approved target areas. Its use should be recorded in the Use of Force form. A baton must never be used merely to obtain compliance with an order. A distinction is also made between the instruction to *draw* a baton and then the decision to *use* the baton, the latter of which requires personal judgement as to whether this would be justified.

Batons are not to be carried within a dedicated young people's unit, a women's establishment or a category D/ open establishment; nor are they to be used by hospital or nursing staff. There is an exception for when staff are responding to a Tornado incident (a riot).
Refresher training for staff must be attended every 12 months. All establish-

ments must also have a Use of Force Committee and ensure that after each use of force there is a debrief with the prisoner involved to explain the situation.

PSI 31/2015 – Managing Litigation Claims

This instruction revises arrangements for managing litigation claims in NOMS. It replaces the policy set out in PSI 02/2013 Claims Handling.

The aims of this PSI are to reduce spending on legal costs, protect NOMS' reputation and ensure a consistent and efficient approach to managing litigation claims. NOMS hopes that this will enable it to identify common themes and review its practice so as to reduce the risk of future claims.

Specific updated provisions include:

- The removal of 'bunk beds' as an example of those claims which bring greater financial risk to NOMS.
- The amendment to the claims handler Gallagher Bassett's postal address which is as follows: Gallagher Bassett, PO Box 21522 Stirling FK7 7ZG.

PSI 33/2015 National Security Framework EXTERNAL ESCORTS – NSF External Prisoner Movement

The purpose of this PSI is to provide policy and guidance on the external movement of prisoners. The following clarifications and updates have been made:

- Advice that the handcuffing of a prisoner on bedwatch should be assessed on an individual basis and the needs of security and control balanced against the need to maintain decency.
- There is a distinction to be made between the risks posed by a prisoner when fit and those posed by the same prisoner when suffering from a serious medical condition. In each case, a risk assessment is required. On the facts, the routine handcuffing of a prisoner receiving treatment without such a risk assessment is likely to be unlawful and involve a breach of Article 3 of the Human Rights Act.
- The use of handcuffs or other restraints on a terminally or seriously ill prisoner must be proportionate to the risks justified by credible security considerations, clearly recorded on the risk assessment form and reviewed regularly taking account of input from healthcare staff.
- All remand prisoners must be individually risk assessed to determine the appropriate level of both restraint and escort strength.

The PSI also abolishes single officer security escorts. Instead, any prisoner who is ineligible or unsuitable for release on temporary licence (ROTL) will have at least two officers and restraints according to the risk assessment. The PSI also:

- Provides more comprehensive guidance on the balance to be struck between security and decency when escorting prisoners to hospital.
- Includes updated references to the correct body belt forms.
- Incorporates key elements of PSI 26/2015 Security of Prisoners at Court, which update instructions and guidance previously held on the NSF.

The desired aim of this PSI is to ensure that prisoners are only escorted outside of the secure environment of the prison when necessary, under the proper au-

thority and that during escort they are kept in secure custody at all times.

OMBUDSMAN CASES

IPP – Delay in access to rehabilitative course

As an IPP prisoner, it was essential that Mr X complete the Healthy Relationship Programme (HRP) as part of his sentence plan. HMP Ranby had refused to transfer him on numerous occasions to prisons with vacancies for the HRP, on the grounds that he was 'on parole hold'. He remained at Ranby as other requests for transfer fell through due to staff sickness. He was finally transferred to HMP Erlestoke to undertake the HRP course, after a total delay of 18 months.

Mr X complained that this delay by the prison to facilitate access to the HRP was unreasonable and had resulted in him serving over double his minimum tariff.

The PPO found that despite Mr X spending a period of time incarcerated in a mental health facility which, although it had impeded Mr X's ability, it was not the sole cause for the 'unnecessary' delay in his enrolment on the HRP. The PPO also considered that Mr X's progression was inhibited due to staff sickness and an evident lack of communication between his Offending Supervisors. It was subsequently determined that HMP Ranby could have 'done more' as it knew well in advance that HRP was on Mr X's sentence plan. The PPO also held that 'parole hold' was not a substantial reason to suppress Mr X from completing his sentence plan. During the investigation, HMP Ranby commented that the implementation of policy was difficult and although the PPO acknowledged this, it upheld that the PSI 36/2012 on Generic Parole Process remains clear and for the sake of uniformity that prisons comply with the policy which clearly states "that there are exceptional circumstances whereby a prisoner may be transferred prior to their parole dossier being completed". The policy directly refers to the transfer of a prisoner being allowed to 'complete offending behaviour work, as identified through the sentence planning process'.

Overall, the PPO recommended that the Governor of Ranby should manage staff absences with improved protocol measures, to prevent the incident from repeating. The PPO further ordered a notice to be issued to the staff involved; stating that a parole hold should be set aside if it interferes with a prisoner's plan progression. A letter of apology to Mr X was also advised.

Arrangements for photocopying legal documents

Mr Z complained about arrangements for photocopying confidential legal documents. He said that because of restrictions on access to photocopying facilities, staff had been photocopying his legal documents for him, breaching Rule 39/Confidential Access procedures.

Mr Z first complained to the prison, which responded that there was nothing it could do and, because he was not permitted to photocopy his own documents, his only option was for staff to do it for him, or failing that, he could ask his solicitor for duplicates.

Mr Z then complained to the PPO, saying that this was a breach of Article 6 of the ECHR. He pointed out this method involved his confidential documents going through several channels before reaching the prisoners' monies clerk.

And as a litigant in person, he did not have a solicitor to copy documents for him.

The PPO upheld his complaint, and agreed that this process was in breach of Rule 39. Indeed Function 4 of the National Security Framework states that local procedures for photocopying on behalf of a prisoner must have provisions for the handling of legally privileged documents. It adds that, where a prisoner is a litigant in person: (i) if an officer copies the documents for him, the prisoner should be able to see that the paper are being handled properly; (ii) the prisoner can make arrangements for the papers to be posted to relatives or friends or handed over at visits for them to photocopy, or; (iii) if a prisoner is not satisfied with any of the above, he may make arrangements to send the papers out to a photocopying bureau.

The PPO contacted the prison to inform them that their local procedures did not comply with these instructions. The prison then updated the local security strategy to include these instructions.

Provision of toilet screens in single cells

Mr C complained that having a toilet in full view of the cell door meant that, if the door is open, other people can see a prisoner on the toilet. He noted that a previous PPO had recommended that prisons should provide an appropriate screen between the cell toilet and the door, and added that other high security prisons provided screens but, although 12 years had passed since the PPO published his report, his prison had still not provided them.

The prison responded that PSI 17/2012 on Certified Prisoner Accommodation states that a toilet screen is not necessary in a single cell and the cell door flap provides privacy. The prison added that its screening arrangements were compliant with PSI 17/2013, as privacy in this setting meant privacy from other prisoners, not from staff.

After investigation, the PPO noted that the PSI is clear, and states that single cells do not need toilet screens. The PPO also noted that recent inspection reports had recommended that the prison install in-cell toilet screens. Responses from the prison showed that, despite recommendations, it intended to stick to the minimum requirements set out in PSI 17/2012 – apart from safer custody and CSC cells. The PPO also remarked that a number of other high security prisons had toilet screens in single cells.

The PPO considered the matter unacceptable, and concluded that unscreened cells do not afford an adequate level of decency in a modern prison system. He argues this lack of toilet screening is inherently degrading for both prisoners and staff (who include female staff). He further noted that his investigation revealed an inconsistent approach to the issue in prisons across the country. On security, he found that arguments against toilet screens on the grounds that they can impede observation and hamper staff supervision are undermined by the prison's decision to install screens in the CSC which holds the most challenging prisoners. On safety, the investigation found that arguments that screens could create a risk are weakened by the prison's decision to install screens in Safer Custody cells, intended to hold prisoners at the greatest risk of self-harm. Both arguments were also undermined by the decision of other high security prisons to install screens. Finally, on resources, the PPO argued that resources had already been found in parts of the prison and in other high security prisons, usually for a low-

cost curtain option.

The PPO concluded that his findings had clear national implications, and that PSI 17/2012 should be amended to state explicitly that prisons should, over time, ensure all single cells have toilet screens. NOMS responded that, while it accepted the recommendations in principle, after researching the cost of implementing toilet screens in single cells, it concluded that this was unaffordable in the current financial climate. However, NOMS accepted that in the interests of decency introducing toilet screens would be beneficial and therefore would keep this under review.

The PPO upheld Mr C's complaint and recommended the governor put in place a formal programme of work to ensure that toilet screens are installed in all single cells within 12 months of the publication of his report; and that the Chief Executive of NOMS should ensure that PSI 17/2012 is amended to require that, in the interests of decency, toilet screens are installed in all single cells (and commissions a timetabled programme of work to achieve this).

IEPS downgrade for refusal to relocate wings

Mr D was downgraded from Enhanced status to Basic status for refusing to relocate wing. He took the matter to the PPO, complaining that the correct procedure had not been followed, and asking for his Enhanced status back as well as the money that would have been transferred from his private cash account.

Mr D was taken to the segregation unit under Rule 53 pending adjudication but then refused to return to normal location and was therefore segregating himself, and held there under Rule 45. He was then asked twice to return to normal location and refused. Following this, a review of his IEP status was held and he was downgraded from Enhanced status to Basic.

The prisoner's version of facts differs from the prison's and the PPO was therefore unable to establish what happened exactly. However, the PPO noted that paragraph 5.15 of PSI 30/2013 states that the downgrading of prisoners from Enhanced to Basic is reserved for the most serious of misconduct. When asked why refusal to relocate was sufficiently serious to warrant his immediate downgrade from Enhanced to Basic, the prison responded that this was the policy which was followed when all other avenues had been exhausted.

The prison's IEP policy says that prisoners segregated under Rule 45 will have their IEP status reviewed immediately, and that any prisoner segregated under Rule 45 will not be able to retain Enhanced status. The final sentence of this same paragraph says that any prisoner who refuses to relocate to an assessed suitable wing will immediately be downgraded to the Basic regime. The policy also says prisoners will be allowed a maximum of two IEP warnings before a review is carried out.

While the PPO accepts that the downgrade was not the prison's first course of action, he notes that there is no evidence that the prison was following its own IEP policy on segregated prisoners. Indeed, Mr D's status was not reviewed immediately upon segregation and he appears to have retained his Enhanced status until his review. The PPO argues that, had Mr D been downgraded to the Standard regime as soon as he was segregated under Rule 45 in line with the policy, he considers that the prison could have then conducted a further review and downgraded him to Basic regime for refusing to relocate.

The PPO acknowledges that refusing to relocate is a serious act of indiscipline and that such behaviour has a significant impact on the good order and discipline of the prison. However he does not consider that it meets the criteria for the 'most serious case of misconduct' referred to in PSI 30/2013. He is therefore not satisfied that Mr D should have been downgraded directly from the Enhanced to the Basic regime.

He adds that he considers that paragraph 19 of the prison's policy should be amended to make it clear that segregated prisoners should not be downgraded directly from the Enhanced to the Basic regime for refusing to relocate. They should be downgraded to Standard in the first instance in order to give them the opportunity to comply with a further request to relocate.

The PPO upheld Mr D's complaint and recommended that the prison amend its local IEP policy, apologise to Mr D for his status not being reviewed in accordance with the prison policy, and arrange for Mr D to be backdated any Enhanced level benefits to which he would have been entitled for the period that he remained in Basic level.

Duty of care - provision of sunscreen for outdoor work

Mr Y complained in April 2014 that healthcare had refused his request to supply sun protection cream to prisoners working in the gardens all day. The Industries Manager asserted that sunscreen did not form part of the equipment provided. He added there was no regulation stating the prison should provide sunscreen.

Mr Y appealed in May and the governor overturned the decision and authorised the issue of sunscreen. However, by the end of June, sunscreen was still not provided. Mr Y chased up the matter. He was informed the sunscreen was ordered on the 30 June 2014. In August, despite the fact the order had been completed, the sunscreen had still not arrived. Mr Y, suspicious that there was never an intention to supply sunscreen, then referred the matter to the PPO for investigation.

After investigation, the PPO noted that an order was submitted on 30 June 2014, but the reasons why the sunscreen never arrived were unknown and were unable to be investigated further due to the time that had passed. The PPO noted that the sunscreen had finally arrived in September, and was informed that it would be handed out to the prisoners next spring/summer. He was also told stocks would be replenished as necessary to avoid a similar situation in the future. The PPO was satisfied the action taken was reasonable.

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