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

CRIMINAL RECORD DISCLOSURE

R (P) v SSJ and Anor; R (A) v SSJ and Anor [2016] EWHC 89 (Admin)

The claimants came from varying criminal backgrounds, but both had been subject to full disclosure of their criminal records. Under Part V of the Police Act 1997, as amended in 2013, the mere existence of more than one conviction required disclosure of them all, even though none would have had to be disclosed had there been only one. Ultimately, this affected the first claimant's ability to obtain a job and the second claimant's ability to uphold their present position.

Two claimants sought judicial review on the grounds that this infringed their right to private life under Article 8(2) ECHR due to its disproportionality. The claimants also contended that the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975, as amended in 2013, was incompatible with Article 8(2) on the basis of ultra vires in that the authorities were acting beyond their power.

HELD: The application for judicial review was granted. The question of remedy was adjourned for consideration.

The court stated that in order for the interference with an individual's Article 8 rights to be 'in accordance with the law' for the purposes of Article 8(2), the provisions of the 1997 Act as amended in 2013 had to afford the individual adequate protection against arbitrariness. Since the disclosure provisions of the 1997 Act gave rise to arbitrary results in the claimants' cases, and others' cases, since its amendment, the court concluded that it did not provide a framework for testing the proportionality of the interference in individual cases and so the interference was not legal.

In relation to the 1975 Order, the court stated that the interference was not justified under Article 8(2) as 'necessary in a democratic society' since the claimants' convictions did not bear, for the duration of their lifetimes, a rational relationship with the objectives of the provisions of the Order. Further, the court acknowledged that had the same question arisen in relation to the 1974 Act, the interference would not have been justified on a similar basis, simply because each claimant had more than one conviction.

Appropriate amendments to the statutes were therefore required by Parliament. The court stated that whilst introducing a scheme involving individual consideration would be 'prohibitively time consuming…expensive and impracticable, this does not necessarily mean it would be unworkable; the effects of indefinite disclosure were arbitrary, and a mechanism to test the proportionality of the interference against a series of factors should be devised.

CONTINUOUS SEGREGATION

R (Dennehy) v SSJ and Sodexo Ltd [2016] EWHC 1219 (Admin)

The claimant was a convicted prisoner at HMP Bronzefield, which is privately run by Sodexo Ltd. She was first remanded on 18 April 2013 and was placed in segregation since 19 September 2013. From 21 September 2013 until September 2015, at intervals not exceeding 14 days, her continued segregation was authorised by a Segregation Review Board. The claimant suffers from a number of mental health illnesses, including psychopathic disorder, and has been on repeated open ACCT

plans during this period owing to regular self-harming.

The claimant argued that her continued segregation since 21 September 2013 was unlawfully authorised under the Prison Rules, was procedurally unfair, was in breach of Articles 3, 8 and 14 ECHR, and was irrational.

HELD: the application was dismissed, save that the court issued a declaration that the claimant's segregation from 23 September 2013 until 4 September 2015 was unlawful as it was not in accordance with the Prison Rules at that time. No damages were awarded.

ACCESS TO REHABILITATIVE COURSES

R (Weddle) v SSJ [2016] EWCA Civ 38

The SSJ appealed against a High Court decision ([2013] EWHC 2323 (Admin)) that he had acted irrationally by failing to provide the claimant with offender behaviour courses or other means to demonstrate reduced risk. The claimant cross-appealed for a declaration that the defendant had breached his rights under Article 5 ECHR.

The claimant is a life-sentenced prisoner with a tariff of 25 years, due to expire in 2018. He accepted responsibility for the offence, but claimed to have no recollection of it. He sought to participate in courses that would help him progress towards recategorisation away from Category A and towards eventual release, but was considered unsuitable for particular courses, owing to his lack of recollection of the offence, despite these courses being recommended on his sentence plan. In 2011, the claimant's recategorisation was refused as he showed no evidence of a significant reduction in risk.

The defendants claimed that means were available to the claimant to address his offending behaviour, either through psychological assessments or identified intervention programmes, but that he considered the claimant had 'precluded himself from progression due to his lack of recall, and that any impasse relating to his progress has not been imposed from the outside'. The defendant relied on evidence including psychological assessments and a sentence planning report in June 2013, which set out targets for progress which did not rely on the claimant recalling the offence. The claimant's application for judicial review succeeded, and the High Court held that the defendant was acting irrationally and in breach of its public law duty by failing to provide the steps by which the claimant could evidence a reduction in risk.

At the time of the High Court claim, no claim was open to the claimant under Article 5 ECHR. However, since that hearing, *R (Kaiyam) v SSJ* [2014] UKSC 66 held that a claim under Article 5 was open to indeterminate sentenced prisoners alleging delay or a failure to provide offending courses for a rehabilitative purpose and to demonstrate a reduction in risk in order to facilitate release at the expiry of the tariff period.

HELD: The defendant's appeal succeeded, and the claimant's cross-appeal was dismissed. The Court of Appeal found that whilst the defendant's response to the letter before claim suggested the claimant's inability to recall the offence was being treated as an absolute bar to progress and it was doubtful that this was rational, this response did not reflect the defendant's stance at the date the judge considered it. The High Court judge erred in his conclusion

that the sentence planning report in 2013, coupled with the possibility of other interventions, could not be regarded as affording the claimant any realistic chance to progress to release; they concluded that the report appeared to reflect a genuine attempt to plot a course towards recategorisation and eventual release, and there was no evidence to show that this would not occur before tariff expiry. In order to succeed on the ground of irrationality, a prisoner would have to show that the report gave them no real opportunity to prove the necessary reduction of risk. It would not be enough to show that the report was not fully detailed, or was uncertain of success.

In relation to the cross-appeal, the above conclusion on the claimant's claim under common law meant that his Article 5 claim also failed as the judge had applied a test substantially identical to that required by the Article 5 duty. However, the court acknowledged for future cases that it does not necessarily follow that a failure under common law meant a failure under Article 5, as a breach of Article 5 could occur where the failure was not *Wednesbury* unreasonable.

TARIFF REDUCTION

Bonelli, [2016] EWHC 1293 (QB); F, [2016] EWHC 1294 (QB)

These two tariff reduction cases concern very similar issues, but were not heard together or reported together.

Mr Bonelli was convicted of murder aged 17 and sentenced to detention at Her Majesty's Pleasure with a minimum term of 18 years, subsequently reduced on appeal to 15 years

F was convicted of murder and two counts of wounding with intent, which were committed at age 14 and sentenced to detention at Her Majesty's Pleasure with a minimum term of 14 years, subsequently reduced on appeal to 12 years.

In accordance with the House of Lords judgment in *R (Smith) v SSHD* [2005] UKHL 51, Bonelli and F applied for a periodic review of their tariffs. Pursuant to *Smith*, the court is limited to a consideration of the progress and development by the applicant in custody. In particular, the court must assess whether he has demonstrated exceptional and unforeseen progress, resulting in a significant alteration in maturity and outlook since the commission of the offence and consequently whether, compared with the date of sentence, there has been a significant reduction in the level of risk posed to public safety so as to warrant a reduction in tariff.

Bonelli

Whilst on remand in October 2007, Mr Bonelli had an adjudication for assault on another prisoner. In April 2010, it was noted that he had completed the ETS and CALM courses included on his sentence plan, for which he had obtained very positive reports. He had also completed courses in relation to drugs, alcohol, victim awareness and anti-bullying and harassment and had commenced a community and sports leader award course with a view to utilising this on his eventual release from custody. Mr Bonelli's behaviour on the wing was described as 'excellent' and he was described as an individual who, when faced with conflict, could behave calmly and rationally. In September 2011, Mr Bonelli received two adjudications for possessing unauthorised items. Subsequently, his Enhanced IEP status was downgraded to Basic following an assault on another prisoner;

however it was restored by February 2012 and maintained since then with no further concerns. Mr Bonelli had occupied various positions and employments, including as scorer for the volleyball team at HMP Moorland and gym orderly at HMP Garth, for which he gained excellent reports. In addition, Mr Bonelli mentors injured and disabled prisoners in the gym, gives support to those undertaking the Resolve course, and is training as a listener.

Mr Bonelli's most recent OASys placed him as a medium risk of serious harm to the public and other prisoners. The reports noted that, in contrast with the position at the start of his sentence, Mr Bonelli now accepted personal responsibility for his offending and showed significant personal insight and remorse. Further, the author of the report noted that, in contrast with his poor educational record prior to the offence, Mr Bonelli showed evidence of good motivation and an increased level of maturity having complied with all that was expected of him and more.

The court acknowledged that despite incidents of assault in the early part of Mr Bonelli's sentence, for over five years there had been no suggestion of further violence or aggression, and the adjudications for unauthorised items were relatively minor. Overall, the court considered Mr Bonelli's disciplinary record was very good and his work record was exemplary. Further, the court considered Mr Bonelli's change in attitude towards his offending as reflecting an increasing level of maturity gained over a sustained period of time, and in more than one prison, as a result of engagement with his sentence plan and positive relationships built and maintained with other prisoners and staff.

F

F had been located in five secure establishments. Between 2010 and 2013 he had had five adjudications for assault, fighting, using threatening behaviour on two occasions and having unauthorised items. He had completed numerous courses, and reports from the Resolve course, in particular, noted his positive engagement and increased self-reflection.

F's most recent OASys placed him as a high risk of serious harm to the public and other prisoners. Notably, when discussing the index offences for the purpose of the OASys assessment, F showed very limited engagement with his personal involvement in the offending and so his static risk could not be reduced. F's most recent tariff assessment reports from his Offender Manager and Offender Supervisor recognised that whilst F had shown significant progress in custody and in relation to his offending behaviour, it was not considered exceptional.

F had also been actively involved in the Howard League for Penal Reform's U R Boss project as a young adviser. Through this, he underwent a forensic psychological assessment, the significance being that F provided the fullest account of his offending to date. The assessment placed F's risk as low, and although it was noted that F possessed a number of historic risk factors, he had good insight into the influence on his life of the critical risk factors and he was clinically stable. Accordingly, he did not require further core risk reduction treatment and the forensic psychologist was of the view that F had made both exceptional and unforeseen progress in custody, particularly considering his age.

The court acknowledged that whilst there were a number of adjudications

against F, they were relatively few in number and over four years had elapsed since the last adjudication, during which time F had undergone the Resolve course from which he appeared to have benefitted. The court remained somewhat troubled by F's historic lack of engagement with the circumstances of his offending, but acknowledged the positive outcome of the psychological intervention flowing from F's involvement with the Howard League and the significance of such expressions of remorse.

HELD: In both cases, the court was satisfied that the applicants' progress was not only exceptional but, given the low base from which they started, also unforeseen. Accordingly, the court reduced Mr Bonelli's tariff by one year to 14 years and F's tariff by one year to 11 years.

R (Cunliffe) v SSJ [2016] EWHC 984 (Admin)

Jordan Cunliffe, was convicted of murder at the age of 15 and his minimum term was set at 12 years. In his tariff review, the court decided that his minimum term should not be reduced.

The original judgment referred to a victim's statement which had been provided to the judge privately by the victim's widow, a prominent campaigner for victims' rights. This statement had not been disclosed to the defence. The claimant challenged his tariff review on the basis that natural justice required that he should have seen a copy of this. He also argued that the blanket policy that the SSJ always accepted the court's recommendation on tariff in such cases was unlawful, as it amounted to fettering the discretion of the SSJ's powers. It also was contrary to the decision in *R (Smith) v SSHD* [2006] 1 AC 159, where Lord Bingham had referred to a reduction in sentence imposed by a court as a 'well-recognised exercise of executive clemency'.

HELD: The application was refused. The SSJ's policy did not amount to an unlawful fettering of discretion. The principle of fettering of discretion had been widely recognised at the time of *Smith*, yet the judges in that case did not consider an executive policy of handing over the effective decision on the initial review of every HMP challenge to a senior judge to be problematic. There was no reason why the same policy in respect of periodic reviews should be treated differently. The SSJ nonetheless retains the general power of executive clemency.

However, the court was critical of the idea that victim personal statements should be sought when a High Court judge is asked to review a minimum term by assessing whether the prisoner has made 'exceptional progress' as outlined in *Smith*. Whilst there had been a procedural error in conducting a review of the claimant's minimum term by considering the victim personal statement, the statement was irrelevant to the main issue in the review, namely whether the claimant had made exceptional progress. Therefore, whilst natural justice demanded that the claimant should have seen the victim personal statement, there was no material unfairness to justify quashing the defendant's decision to accept the judge's recommendation as to minimum term since it had not been taken into account given the scope of the test for review.

LICENCE CONDITIONS

R (Rimmer) v SSJ, National Probation Service in Wales [2016] EWHC 329 (Admin)

The claimant applied for judicial review of conditions imposed on his licence upon his release from prison. He argued that the SSJ had misapplied policy framework from PSI 12/2005 which applied to his additional conditions and as a result were 'illegitimately punishing him' as opposed to pursing the objectives of rehabilitation. Secondly, he argued that his licence was excessively intrusive into his family life beyond any measure which could justify the conditions. Here, he also referred to an infringement of his Article 8 right to a private and family life.

The claimant had a history of sexual offences, with charges relating to indecent assault and possession of indecent images. He received a prison sentence, which he served and was later released. Following a routine inspection, he was again found to be in possession of such images and was recalled to prison to serve a further four years followed by an extended licence period of four years. Following his release, he was subject to licence conditions which: prevent him from possessing/using a computer without supervision, creating a data storage device, possessing more than one mobile phone or creating a device which will store digital images without permission, possessing non-digital/ digital cameras without permission, residing in the same household as a minor or have unsupervised contact with them and communicating to his grandchildren without permission. These were some of the conditions which the claimant wished to contest.

HELD: The application was refused. The court was satisfied that the SSJ had followed PSI 12/2005 in imposing and framing the conditions of the claimant's licence. Whilst the court acknowledged that such conditions involved an interference with the claimant's rights under Article 8 and Protocol 1 Article 1, such interference was proportionate in light of the circumstances of the case and the legitimate aims of the licence conditions imposed.

TRANSFER TO CLOSED CONDITIONS

R (McAtee) v SSJ [2016] EWHC 1019 (Admin)

In May 2014, a new 'absconder policy' had been brought in which placed greater weight on an inmate's absconding history when considering the risk to the public. The policy provided that any prisoner in closed conditions who had a history of absconding would be ineligible for transfer to open conditions or for any release on temporary licence unless there were exceptional circumstances. Indeterminate sentence prisoners who would be ineligible for transfer to open conditions as a result of this policy would instead be placed on a 'progressive regime' in closed conditions which was designed to provide an alternative means for a prisoner to demonstrate their suitability for release.

The claimant was a post-tariff IPP prisoner with a tariff of six years, who was already in in open conditions. On 9 July 2014, without incident or warning, the claimant was transferred to closed conditions. His transfer was the result of the defendant determining, as part of a central review of the cases of all prisoners with an absconding history who were currently serving their sentences in open conditions, that he posed too high a risk to the public to be allowed to remain in open conditions, given his high risk of absconding.

The claimant sought judicial review of the decision to transfer him to closed conditions on the following grounds:

I. the transfer was contrary to published polices, most notably chapter 4 of PSO 4700 which sets out the procedure for transfers to closed conditions and requires certain reviews, meetings and the delivery of certain reports;
II. the transfer was procedurally unfair, in that it was made according to an unpublished policy and reasons were not provided for the decision to transfer;
III. The defendant had breached his ancillary duty under Article 5 as he had failed, both generally and in this particular case, to make provisions to allow ISPs with absconding history to demonstrate that they were safe to be released.

HELD: the application was granted in part.

The court rejected the first ground, noting that the PSO was not law but 'at most…an expression of procedural policy'. The defendant was allowed to depart from the PSO provided he had good reason to do so and, in this case, the desire to ensure consistency, speed and secrecy (to avoid those persons under review from absconding) in the review provided such good reason.

The third ground was also dismissed by the court. The judge found that the mere fact that there was a delay in putting in place the progressive regime did not mean there was a breach of the ancillary duty because the defendant's approach was still 'reasonable in the circumstances'. The claimant was offered the opportunity to be assessed for the progressive regime five months after return to closed conditions and the court considered this reasonable in the context of a transfer that had been motivated by the desire to protect the public urgently.

However, the claimant did succeed on the second ground, on the basis that the claimant should have been informed of the criteria considered in the central review of his risk and the factors that weighed against him. At the very least, the claimant should have been informed in communication on 10 July 2014 that greater weight had been given to his absconding history when considering the risk he posed. Without this, the defendant had failed to ensure procedural fairness by giving the claimant sufficient information to make informed representation.

As an aside on the question of unpublished policy, the court noted that he could not accept the defendant's claim that there was a fundamental difference between applying new criteria to the question of the risk of a prisoner in open conditions and in applying new weighting to those criteria.

Despite the claimant's success on the second ground, the court was not minded to award any relief since the claimant did not, in fact, make representations on the weighting given to his absconding history or any of the factors taken account in the decision to transfer him to closed conditions when he was informed of them. Further, as the claimant had been released on licence in March 2015, the question of relief was to an extent now academic.

ARTICLE 5 – IPP – UNLAWFUL SENTENCING

GJD v governor of HMP Wakefield, SSJ [2016] EWHC 345 (Admin)

In 2006, the claimant was given an IPP sentence with a minimum tariff of 6 years for the rape of his daughter. In 2014, it was brought to the court's attention that an IPP sentence was not

actually open to the court as the offence in question had been committed prior to the CJA 2003 coming into force. As such, the Court of Appeal quashed the IPP in 2015, substituting a determinate sentence of 12 years. Had this sentence been imposed at the initial sentencing date, the claimant would have been entitled to be released on 22 November 2013, having served two thirds of the defined term. However, he was not actually released until February 2015, following correction of this sentencing error by the Court of Appeal.

The claimant applied for judicial review on the grounds that his detention from August 2006 until his release had been unlawful under Article 5 ECHR (although he accepted that the Court of Appeal substitution had cured the unlawfulness prior to 22 November 2013), and the SSJ had failed in its ancillary duty to provide him with the means rehabilitate himself and thus prolonged his detention as an IPP prisoner.

HELD: The application was refused. The court noted that the unlawfulness of a particular sentence will not necessarily render detention pursuant to it unlawful because an order of the Crown Court will be valid until quashed by the appellate court. The question, therefore, is whether the detention is otherwise arbitrary. A sentence may be arbitrary if the sentencing court: (i) showed bad faith or deception; (ii) failed to attempt to apply the legislation correctly; (iii) failed to give any or sufficient reasons by reference to legal authority to permit detention; or (iv) made an error that creates a gross and obvious irregularity. In this case, the sentencing judge had followed a fair procedure and given a reasoned judgement in a genuine attempt to apply the law. She had made an error as to the powers available to her; however, both life imprisonment and an extended sentence were open to the sentencing judge and, had either of these been chosen, the claimant may still have been detained between 22 November 2013 and February 2015. Therefore, the sentencing judge had not imposed a detention that was inherently unlawful, but rather had chosen 'an unlawful way of doing something which was lawful and proportionate.' The detention was not arbitrary in the sense set out above, and the detention at all times held a valid link to the offence committed and the risk the offender posed. As such, the claimant failed on the first ground.

On the question of breach of the ancillary duty, the court noted that 'it does not follow that because there were systemic flaws with IPP any IPP prisoner is entitled to damages under Article 5'. On the facts, there had been a delay in making certain rehabilitative programmes available to the claimant which was less than ideal. However, the court stated that this delay owed to reasonable changes in the programmes offered and from the behaviour of the claimant. As such, ground two failed and no award of damages was made.

INCENTIVES AND EARNED PRIVILEGES – DEMOTION

R (Mac) v MoJ (unreported) 29 July 2016

The claimant applied for judicial review of a decision to demote him from Enhanced to Basic after he had refused to return to his cell following an order.

Following the incident, the claimant's IEP status was reviewed and an adjudication conducted, at which the governor stated that the claimant had entered a guilty plea. CCTV footage was not obtained, and the governor's decision was made without reference to it on the basis that the claimant had pleaded guilty

and it was therefore not necessary.

Although the claimant was subsequently restored to Enhanced, the demotion was relevant to his upcoming parole review. He challenged the factual background and conclusions about the incident on the basis that the decision was unlawful, and that there had been procedural impropriety and a breach of natural justice.

HELD: The application was refused.

PSI 30/2013 describes Enhanced status as reserved for prisoners who are totally committed to rehabilitation. Paragraph 5.15 states that downgrading from enhanced to basic is reserved for the most serious cases of misconduct which warrant an adjudication charge. Although the examples listed include misconduct violence, supply and possession of drugs, possession of a mobile phone, absconding or possession of a weapon, the list is not exhaustive. It is for the prison to decide whether particular conduct falls within the scope of paragraph 5.15.

UPDATES ON PRISON SERVICE INSTRUCTIONS

PSO 7/2016 Searching of the person

This instruction updates and replaces PSI 67/2011 - Searching of the Person and PSI 16/2014 - Searching Young People. It contains the following new provisions:

- There must now be arrangements in place for keeping records of searches and finds. As a minimum, non-routine full-searches of prisoners must be recorded and records must be kept of any additional search procedure. This includes where a male prisoner is asked to squat as part of a full search;
- Prisons outside of the High Security Estate no longer need to routinely conduct full property record checks as part of cell searches. Instead, prisons are required to develop a local strategy on conducting property record checks, which may or may not be undertaken at the same time as cell searches;
- Male prisoners outside of the High Security Estate must routinely be given a Level A rub-down search and hand-held metal detector scan following visits. This is in addition to the requirement for a percentage of prisoners to be full-searched at random;
- The requirement that a prisoner must never be naked as part of a full search is made explicit;
- In open prisons there is now no central mandate for searching women prisoners on return from ROTL or an outside working party. Instead a risk assessment must be conducted to determine a searching response;
- The requirement that a search is a condition of entry to a prison is made explicit;
- A person who is not a direct employee of a prison can be authorised to conduct a rub-down search/metal-detector scan of a prisoner;
- Additional policy and guidance is provided to clarify what is meant by a ‘religious or cultural objection’, in respect of a male prisoner being rub-down searched by a female member of staff, and the processes/assessments that must be undertaken when an objection is made;
- Guidance and instruction is now included regarding the searching of waistbands as part of a rub-down search;
- Clarification is given on when prior authorisation should be sought for a full search;
- Guidance on searching of the anal/genital area no longer refers to fe-

male prisoners, as this this type of search can only be applied to male prisoners;
- Staff must wear plastic gloves when removing items from the genital area and the mouth;
- An explanation is provided as to why records are required to be kept when searches of other body areas are conducted;
- A new requirement is included that, where it is not possible to identify the source of a positive metal detector alarm, a risk assessment must be undertaken to determine what action should be taken; and a new section is included to provide instruction and guidance on responding to positive metal detector indications on prisoner discharges from prison;
- New guidance on the removal of underwear as part of a full search of a Sikh prisoner.
- New guidance that it is good practice to make available protective clothing for Muslim visitors, staff and prisoners attending Friday Prayers to wear when being searched by a passive drug dog;
- Guidance has been amended to allow persons wearing a pacemaker to walk through a metal detector portal and be searched with a hand-held metal detector;
- A new requirement is included for the searching officers carrying out rub-down searching of female wheelchair users to ask the woman being searched to empty her pockets and remove any jewellery, so as to reflect the instruction for men;
- Clarification is provided that the routine searching of babies is not mandatory either on visiting a prison or on entry to a Mother and Baby Unit, and that two trained officers of either sex can search a baby.

PSI 8/2106 Dealing with evidence
This instruction replaces PSI 51/2010 and contains the following new provisions:

- Drugs or suspected drugs must not be removed from any packaging they may have been found in, in any situation where a criminal investigation has been initiated. Otherwise, it is normal practice for staff to carry out an indicative drugs test locally and items can be removed from any packaging in order to carry out these tests.
- There is a reference to PSI 14/2015 Disposal of Prisoners' Unauthorised Property. This sets out when unauthorised property can be destroyed, and removes previous guidance on this matter.

PSI 9/2016 Cell, Area and Vehicle Searching
This instruction updates and replaces PSI 68/2011 - Cell, Area and Vehicle Searching, and contains the following changes to policy:
- A new requirement that there must be arrangements for keeping records of searches and finds. As a minimum, non-routine full-searches of prisoners must be recorded, and records must be kept of any additional search procedure.
- A new requirement that staff entering a cell to undertake a fabric check must take into account any decency issues and take appropriate action.
- Prisons outside the High Security Estate are no longer required to routinely conduct full property record checks as part of cell searches. Instead, prisons are required to develop a local strategy on conducting property record checks, which may or may not be undertaken at the same time as cell searches.
- New guidance on searching emergency vehicles entering a prison in

emergency circumstances.

OMBUDSMAN CASES

Prisoner Safeguards
Mr X complained that staff at HMP Hewell had inadequately safeguarded him against fellow prisoners. Mr X, who was a recovering addict, had asked prisoners who were smoking drugs in the same room as him to stop.

Random cell searches were later conducted and Mr X was labelled as a 'grass' by fellow inmates. He was relocated to various house blocks, over concerns for his safety, before being placed back onto the block where he had originally received threats. New threats were made and he asked to be moved to segregation for his safety. This was refused, so he refused to go behind his cell door, as it meant he would be moved to segregation. He was then threatened with warnings if he did not agree to move to one of the house blocks. As a result, he moved to the house block where he was later assaulted.

Mr X suffered multiple facial injuries and lost consciousness after being assaulted by a group of prisoners who were linked to the original incident. Safer Custody Officers were aware that Mr X knew who had assaulted him, yet he would not name his attackers out of fear of reprisals. On two occasions he was allowed on the same wing as two of the perpetrators, though he had to personally bring this to the attention of the landing officer. The PPO considered that there was a distinct 'failure in the system of recording this information' and was the reason as to why Mr X was unreasonably placed in these circumstances.

The PPO upheld Mr X's complaint that HMP Hewell had failed to prioritise his safety, take 'appropriate steps' to verify these concerns and ultimately, 'take any appropriate action'. It was evident that there was 'a failure of communication' between the Security Department and Safer Custody. The PPO recommended that the governor apologise to Mr X and an addendum be added to correct an error made on Mr X's NOMIS case notes; a review should also be undertaken on how assaults are investigated and a system devised to ensure that the victims of prisoner assaults are not placed on the same house block as their perpetrators.

Interference with mail
Mr M made a series of formal complaints about incoming correspondence being intercepted. HMP Whitemoor gave the following reasons for withholding the correspondence:

1. Documents were withheld on the basis that they were available in the library.
2. Internet printouts were withheld since PSI 49/2011 states that prisoners should not have access to the internet. Whitemoor interpreted 'access' to include internet printouts.
3. Healthcare letters were opened and withheld by the Healthcare Department, as the contents of these could pose a risk to security and/or contain details of hospital appointments.

The PPO's findings were:
PSI 49/2011 does not allow a prison to restrict correspondence solely on the basis that the documents are available in the library. However, Whitemoor's local policy of limiting correspondence to four pages is within the PSI and was considered reasonable.

Whitemoor had misinterpreted PSI 49/2011 as regards 'access' to the internet; it was unreasonable for Mr M's correspondence to be withheld just because they were internet printouts. The current PSI is vague on this issue and the PPO referred to a new policy which is currently being drafted to replace PSI 49/2011 that will allow prisoners to receive information printed from the internet.

Since PSI 49/2011 states that healthcare letters may be restricted to ensure the prison's security, Whitemoor's actions were reasonable.

Transfer of property- prisoner to prisoner

Mr G wanted to give another prisoner a DVD as a gift. He submitted an application form to HMP Wakefield in accordance with PSI 12/2011.

HMP Wakefield informed Mr G that prisoners were only allowed to donate items of property to other prisoners after they had been discharged from custody, in accordance with a HMP Wakefield Notice to Prisoners.

Mr G submitted a complaint, stating that local policy cannot override the national policy of PSI 12/2011, which allows transfer of property between prisoners, subject to an 'acceptable reasons' test. HMP Wakefield responded that governors could make local decisions on how they deal with policy, and they had decided at HMP Wakefield that prisoners may only gift property on their release.

Mr G submitted another complaint, in the same terms as the previous complaint. The governor responded that the donation of property from one prisoner to another must meet the exceptional circumstances test under paragraph 10.4 of PSI 30/2013. He accepted that a blanket ban was not appropriate, however, and updated the Notice to Prisoners.

Mr G submitted another complaint, stating that the governor was mistaken in his interpretation, in that PSI 30/2013 refers to property being received into the prison and does not apply to gifting of property from one prisoner to another.

The PPO upheld Mr G's complaint. They considered that the exceptional circumstances test is not the appropriate test for property being transferred from one prisoner to another. The appropriate test is whether the governor is satisfied that the transfer is voluntary, for acceptable reasons and the transfer will not undermine the IEP scheme or good order or discipline, as highlighted in PSI 12/2011.

The PPO recommended that the governor of HMP Wakefield issue a notice to staff and prisoners to inform them of the correct test, and review the decision on whether Mr G could transfer the DVD to the other prisoner based on paragraph 2.9 of PSI 12/2011.

CSC regime, Whitemoor

Mr Z complained regarding the length of time and restrictive nature of the induction regime in the Close Supervision Centre (CSC) at HMP Whitemoor. The induction regime lasted for seven weeks, with one hour of exercise alone in the yard each morning, and 15 minutes for a shower afterwards. Mr Z also had an evening association and activity session.

The terms of Whitemoor's local Prisoner Regime Information Compact required that an induction regime should be reviewed every seven days. Whitemoor was unable to provide any review

documentation or any minutes from a case conference meeting. All of Mr Z's weekly Dynamic Risk Assessment Meeting notes and NOMIS case notes demonstrated positive behaviour.

The PPO investigation concluded that there was no evidence of concerns about Mr Z and that Whitemoor was unable to evidence why he was kept on the induction regime for seven weeks, or why the regime was so limited.

The PPO upheld Mr Z's complaint and recommended that the governor ensure that the Head of the Multi-disciplinary Term for the CSC provides a satisfactory apology for the lack of appropriate regime reviews; the length of time spent on the induction regime; and the restrictive nature of the induction regime.

Prior to the PPO's decision, Her Majesty's Inspectorate of Prisons (HMIP) produced a report on CSCs, which found that some prisoners at Whitemoor were on the induction regime for too long. HMIP recommended that induction arrangements should be improved and their restrictive nature reviewed. Following the recommendation, Whitemoor is reviewing the induction regime and has reduced the regime to one week.

Segregation conditions

Mr C complained about being unable to purchase single batteries for his radio whilst in Full Sutton's segregation unit, as he could not afford to buy the packs of four which were available for purchase.

Reference was made in Mr C's complaint to Lesson 3 of the Ombudsman's June 2015 Learning Lessons Bulletin on segregation, which states that segregated prisoners should be provided with the means to occupy themselves including at a minimum reading material and a radio.

During the PPO's investigation, it was discovered that batteries were previously sold individually but this was stopped due to 'health and safety reasons'.

Under section 2.4 of PSO 1700 'Management of Segregation Units' it states that normal cells are to have in-cell electrics. Where this is not the case, there is no requirement to provide alternative arrangements (e.g. providing batteries) but there is discretion to decide to.

The complaint was not upheld but HMP Full Sutton agreed to a compromise whereby a stock of batteries would be maintained to be provided to segregated prisoners for radio use.

Cell call system

Mr R complained that he had been held in the adjudication holding cell for too long at HMP Lincoln, and that the cell was unsuitable because it did not have a cell call system. The PPO partially upheld his complaint in the first instance because, following investigation, it found that he had been held in the cell for too long. The part of the complaint regarding the cell call system was not upheld because the prison staff said they could hear if a prisoner was knocking on the cell door for attention.

Mr R complained further because he said the door was thick, made of metal and did not rattle, so knocking was not suitable. Also, he said that officers were not always close by. The investigator at the PPO found that the Prison Act 1952 requires that any cell used for the confinement of a prisoner must allow them to communicate with an officer at any time. The Independent Monitoring Board for HMP Lincoln was consulted and gave the opinion that knocking on the door was not a reliable means of calling for assistance, particularly in an

emergency, and that a call system would be a safer custody measure.

Based on the additional investigations, the PPO upheld the complaint and asked the Head of Residence and Safety at HMP Lincoln to review the situation urgently.

Property search upon arrival - delays
Mr D complained that a delay of 12 weeks for him to receive his property, following his transfer to HMP Full Sutton, was excessive and unjustifiable.

Upon arriving at the prison, Mr D was informed that his personal property and legal documents would not be issued to him, as they had to be searched by the Dedicated Search Team (DST) for unauthorised articles. Mr D had requested to be present whilst the DST searched his property and arrangements to facilitate this caused further delays.

The PPO upheld his complaint. The Ombudsman was satisfied with the apology that he had already received from the prison and found the matter to have been resolved.

Smoking in workshops
Mr W lodged a complaint with the PPO regarding fellow prisoners smoking in the workshop toilets and how HMP Full Sutton had failed to implement preventative measures. He complained that as a result he was suffering from health problems associated with being subject to passive smoking, and contended that he could not access the workshop toilets as this was where the other inmates were smoking.

The Head of Reducing Reoffending had initially addressed Mr W's complaint and reassured him that both workshop staff and those on patrol were aware that tobacco must remain on wing, especially as smoking in the workplace was against the law.

Despite no longer being employed in the workshop, Mr W was still aware that prisoners continued to smoke in the workshop toilets and decided to contact the Ombudsman again about how the situation had since developed.

During its investigation, the PPO found that the workshop had been equipped with 'no smoking' signage and checks were being carried out on prisoners leaving wings. The Industrial and Employment Manager stated that despite Mr W's allegations of smoking in the workshop toilets, no such evidence had been found. The PPO requested someone from the IMB inspect the workshop toilets and determine whether Mr W's claims were legitimate. The IMB determined that prisoners were most likely smoking in the toilets, due to the 'overpowering' smell of tobacco smoke. The PPO agreed and was satisfied that the complaint had not been fully resolved for almost ten months, to the knowledge of the Ombudsman.

The Ombudsman upheld Mr W's complaint; irrespective of Mr W working elsewhere, any prisoner or officer within the area would still be subject to passive smoking. The PPO accepted that some measures had been taken to prevent smoking in the workshop toilets, however the formal notices that were supposed to have been issued had not and more could be done to prevent the illicit activity of smoking in the workplace.

The PPO recommended that within one month of his decision: there should be an increase in checks carried out on prisoners leaving the wing, an increase in checks on the workshop toilets and a written notice to staff and prisoners declaring that smoking in the workplace is illegal.

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