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

Contents

CASE REPORTS

PAROLE BOARD: RISK ASSESSMENT AND PAROLE BOARD RULE 25

R (DSD, NBV & Ors) v The Parole Board, The Secretary of State for Justice and John Radford (formerly John Worboys) [2018] EWHC 4949 (Admin) (28/03/18)

The case concerned a decision by the Parole Board to direct the release of John Radford (formerly known as Warboys). It represents the first challenge both to a Parole Board decision by any party other than the parties to a Parole Board hearing (that is a prisoner and the Secretary of State for Justice) and also to Rule 25 of the Parole Board Rules 2016 which prohibits the Board from publishing its reasons.

Radford had been convicted in March 2009 of committing serious sexual offences against women. In April 2009, he was sentenced to an indeterminate sentence for public protection with a minimum term of imprisonment of 8 years, less time on remand. That term expired in February 2016 after which he was eligible to be released but only if the Parole Board was satisfied that it was no longer necessary for the protection of the public for him to be held in prison.

The Parole Board directed Radford's release on 26 December 2017. Its decision letter noted that he now admitted guilt for the offences for which he had been convicted and that there was a consensus amongst the psychologists, who provided evidence to the Board, that he represented a low risk of sexual offending.

The case was trigged by two of the women (DSD and NBV), who were victims of Radford and who had already successfully succeeded in litigation against both him and the Metropolitan Police. Three sets of judicial review proceedings were issued. The first, by the Mayor of London, named DSD and NBV, the Secretary of State and Radford as interested parties. The second was brought by DSD and NBV against both the Board and the Secretary of State, with Radford as an interested party. The third was brought by News Group Newspapers Ltd against both the Board and the Secretary of State, with Radford and DSD and NBV as interested parties.

The nature of these challenges was essentially the same though they differed in their exact formulation. The first and second set contended the direction to release was unlawful on Wednesbury grounds and should be quashed and that Rule 25 was ultra vires - unlawful. The third only challenged Rule 25. As a result of these proceedings, in January 2018, the High Court made an Order staying Radford's release. Permission was subsequently granted for all three challenges.

The Court was presented with material that was not in the dossier produced by the Secretary of State which was before the Parole Board. The Court noted that the absent material included the sentencing Judge's remarks, police reports of the circumstances of offending and also, in particular, although it had been referred to, any material from the prior proceedings by DSD and NBV against the Metropolitan Police which suggested there were at least 80 potential victims. The High Court in those proceedings had held, amongst other matters, that Radford had in fact committed in excess of 105 rapes and sexual assaults between the years 2002 and 2008; a decision upheld at the Court of Appeal prior to the Parole Board hearing (subsequently upheld in the Supreme Court). This was relevant in the

light of the fact that Radford had only been convicted of 19 serious sexual offences against 12 victims within a limited time frame (between October 2006 and February 2008). The additional material before the Court included a statement by Radford in which he confirmed he had settled, although on a 'no-fault' basis, civil claims by 11 women.

DSD and NBV submitted that material that had not been before the Board could not rationally be ignored but also that the release direction, even without reference to that, was Wednesbury unreasonable. The Mayor adopted their argument. The Parole Board countered that it was not the role of the Board to determine a prisoner's guilt in relation to matters where no such finding had been made by a criminal court. Second, the Board was not bound to consider evidence of wider offending. Third, that the Board adopted a particularly cautious approach and had addressed the possibility that Radford had displayed an extensive exercise in impression management. Fourth, that only victims of an index offence (which did not include DSD) had only a limited right to receive information or to make representations (about licence conditions) to which a prisoner on release would be subject. Radford submitted that the law did not require evidence of wider offending to be a relevant legal consideration and that the decision to release was not irrational but buttressed by expert evidence. The Secretary of State did not oppose the victims' challenge.

The Mayor contended Rule 25 was an exorbitant provision, which was ultra vires in its blanket terms and that victims should have right of access to Parole Board decisions. NewsGroup submitted that Rule 25 was contrary to both a common law right of freedom of expression and Article 10 of the ECHR. Neither the Board nor Radford opposed the challenge. DSD and NBV were silent on this matter. The Secretary of State defended Rule 25. He also argued that the Mayor did not have standing, that the claims were out of time and the issue was now academic as sufficient information was now public.

HELD:

The Court found the Board's decision was irrational. It quashed the decision and remitted Radford's case to the Board for a fresh determination.

In making its decision the Court reviewed the scope of the case law and legislative framework related to release of indeterminate prisoners, the Parole Board Rules 2016 and the test the Board must apply when considering release in relation to the doctrine of Wednesbury irrationality. In particular, it considered the preponderant weight to be given to the need to protect innocent members of the public from any significant risk of serious injury. It went on to consider the scope of Rule 25 and the principle of open justice.

The Court held that the decision itself was not irrational (though 'surprising and concerning'); the Board had given clear and detailed reasons for its decision and it was not irrational to fail to probe Radford's account. The decision was irrational because the Board should have undertaken further inquiry into the circumstances of Radford's offending and in particular his limited account of his offending behaviour, which might undermine his overall credibility and reliability even in relation to the offences of which he had been convicted, let alone any other.

The Court held that Rule 25 infringed principles of open justice. It was ultra vires and the Claimants were entitled to declaratory relief. Rule 25 implements a

blanket ban on the provision of information that does not permit exceptions. The Parole Board is a judicial body and is required to provide reasons for its decisions to the parties involved. It did not decide that there was a general right at common law for persons directly affected by administrative decisions to be given reasons but that the rights of the victims to bring judicial review proceedings was impeded because of the absence of any information about the release decision. Information could be readily provided in a way that does not undermine the Article 8 rights of the prisoner. It was for the Secretary of State to decide how Rule 25 should be reformulated.

The Court also found the Mayor did not have standing and that it did not have to resolve the standing of DSD and NBV.

Comment: There has been a change in the law prompted by the parole case of John Worboys. The Parole Board (Amendment) Rules 2018 came into force on 22nd May 2018. Members of the public, including victims and media, will be able to request summaries of Parole Board decisions made on or after this date. The Ministry of Justice is conducting a review of the law, policy and procedure relating to the Parole Board– the consultation closes on 28 July 2018.

PAROLE BOARD - RECALL

Michael Davenport v Parole Board [2018] EWHC 410 (Admin)

Mr Davenport was recalled on 13 January 2017 after a period on licence- he was by then almost 16 years past the 15 year minimum term for a murder he committed in 1986. He lodged a judicial review following the decision of the Parole Board of 16 August 2017, which post dated the oral hearing of the previous day. The main ground for seeking judicial review concerns an allegedly unlawful approach adopted by the Board when considering the circumstances leading to the claimant's recall, namely allegations of harassment against the claimant which were dropped by a magistrate's court. Mr Davenport also complained of the panel's decision not to recommend his transfer to open conditions, but this was rejected by the High Court though permission was granted to proceed on the main issue.

The permission order also addressed a concern the court raised as to whether or not the Secretary of State (SoS) should have been named as an interested party in the proceedings as neither the claimant or defendant had done so, contrary to paragraph 5.1 of the Practice Direction A to CPR 54 which states that any other parties to those proceedings "must be named in the claim form as interested parties" under rule 54.6 (1)(a).

The court stated the importance of the role of the SoS as an interested party, in particular it was noted that the SoS is the guardian of the public interest; and that the

SoS has an important role in assisting the court, specifically, where something has gone wrong, it is important for the SoS to recognise this and to draw the matter to the attention of the Board.

HELD:

Claim to proceed with the SoS named as an interested party in an amended claim form. Unless an acknowledgement of service is filed by the SoS indicating an intention to defend the claim, the matter will go back before the judge to consider an appropriate order. If the SoS files an acknowledgment of service indicating an intention to defend, then

the parties are to submit a joint note which is to be put before a different High Court judge for consideration of appropriate directions.

PAROLE BOARD- REFUSAL OF ORAL HEARING AND DEFERRAL OF REVIEW

James Knight v The Parole Board [2018] EWHC 411 (Admin)

Mr Knight challenged the Parole Board's refusal to hold an oral hearing to consider his release, its policy not to agree to defer reviews for longer than four months and its refusal in his case not to defer his review for longer than that period.

Mr Knight is serving an IPP for offences of making, possessing and distributing indecent images of children. His tariff expired in February 2009. The Board first directed his release in May 2013. He was released from prison in July 2013 but recalled in September 2013. In January 2014, the Board directed his re-release. He was re-released in March 2014 but recalled again in December 2014.

In November 2015 the Board reviewed Mr Knight's case but did not direct his release. In March 2017, after reviewing his case on the papers, the Board decided that he should not be released and found that his case did not meet the grounds established in Osborn and Others [2013] UKSC 61, to merit an oral hearing. Mr Knight made representations. First, that he should be granted an oral hearing. Second that that the hearing should be deferred to allow time for him to partake in the Healthy Sex Programme (HSP), which he was then finally due to start and for post-programme reports to be completed. These representations were rejected in April 2017. The Board confirmed its decision that his case did not meet the criteria established in Osborn and also that the requested deferral would be longer than that allowable under the Board's current policy not to grant deferrals of more than four months. The decision was final. In May 2017, the Secretary of State confirmed the decision and set a period of 18 months until the next review.

HELD:

The Court considered that Mr Knight's request for an oral hearing could not be separated from his request for a deferral of this review. Because it was accepted that he would not be considered for release or transfer to open conditions until he had completed the HSP, the issues in Osborn did not apply at the date of the Board's decision. The question at that date was not whether an oral hearing was needed but whether a review should be deferred. And, if the deferral had been granted to allow completion of the HRP, one possible outcome was that a single member might on the papers recommend progress. There was, the Court found, no reason to direct an oral hearing and no unfairness in the refusal of an oral hearing.

The Court found the Board's policy was not unlawful and did not breach Article 5(4) of the ECHR nor the common law rule of fairness. Although the cut-off of four months risked being arbitrary, there was no legal objection to guidance providing a rule of thumb and the Board's guidance contained flexibility. Further the policy was to avoid delays arising from deferrals and was not in pursuance of administrative convenience or lack or resources.

The Court also found the refusal in Mr Knight's case to grant a deferral of more than four months was not unlawful. The Board's application of the guidance was rational and proportionate. The Court relied on information provided by the Secretary of State in reply to Mr Knight's objection that his review period of 18 month was excessive. In view of this the Court found that the requested period of delay was optimistic and that if the required work was completed within 18 months, there was a possibility that the review could be brought forward and last that Mr Knight's place on the HRP had been delayed by his own Court of Appeal case to appeal against sentence.

SPENT CONVICTIONS- 'THE RIGHT TO BE FORGOTTEN'

NT 1, NT 2 v Google LLC & Others [2018] EWHC 261 (QB)

BACKGROUND:

Under the Rehabilitation of Offenders Act 1974 convictions are regarded as having been spent after a specified period of time (time period varies according to sentence imposed). This is recognised under England & Wales law as the "right to be forgotten."

Google has accepted that when it provides results to a search against a person's name it is a "data controller" and subject to relevant data protection laws. These data protection laws are harmonised across the EU and so courts of member states (including the UK) can look to judgements in the European Court of Justice as guidance to the interpretation of law. One of these cases known as the Google Spain case (Google Spain SL –v- Agencia Espanol de Proteccion de Datos (AEPD) (Case C-131/12, 13 May 2014/ [2014] QB 1022) decided that after a period of time certain information about a person should not continue to be made available through a search engine. To continue to provide this information would breach data protection laws. This brought the concept of the right to be forgotten into data protection law. The Google Spain case stated that when deciding on whether information should be removed from internet searches a fair balance should be sought between an individual's right to be forgotten and an internet user's legitimate interest in access to the information, such balance may depend on the nature and sensitivity of the information.

CASE:

These are two unconnected cases but the legal issues raised are substantially the same and so although the trials are separate they are to be held consecutively and before the same Judge. This is the judgment of a pre-trial review which is deciding certain matters of confidentiality before the trail itself begins.

The applicants in this case are named NT1 and NT2 in the court reports. NT1 was convicted in the late 90s of conspiracy to account falsely. NT2 was convicted of conspiracy to intercept communications over ten years ago. Both complain in their respective claims that Google is continuing to return, in response to searches of their names, links to information about their respective convictions. Some of the links that are complained about are links to newspaper articles reporting the original criminal proceedings. The Claimants argue that the time has come for them to be entitled to have these entries removed from searches carried out on Google.

NT1 and NT2 claim that in some respects the information returned by

Google is inaccurate, and in any event "way out of date and … being maintained for far longer than is necessary for any conceivable legitimate purpose …". The defences relied on by Google include that the information is substantially accurate, that such information should remain available to internet users who have a right to freedom of expression and that this is substantially in the public interest.

Google's defences involve reliance on background information about NT1 and NT2 and their convictions.

The importance of the principles of open justice are re-iterated in the case and it is noted that this is expected to attract legitimate media interest due to the potentially profound and far-reaching implications (as this is the first time the right to be forgotten is being considered by a court in England & Wales). However, if all the details of NT1 and NT2 were reported it would be ineffective as the very information they are seeking to have de-listed from Google would be brought back into the public domain.

This case considered whether an order would be required in relation to this case going forward to set out both restrictions to be imposed during the hearing of the trial in the courtroom and restrictions on those wishing to report on the trial.

HELD:

An order is made which includes the following:

(a) the claimants should not be named, but given pseudonyms until judgment or a further order is made; (b) details about the claimants and their convictions that would tend to identify them if made public should not be published until the court had resolved the issues; (c) only the claimants' names should be withheld from the public attending the trial (as withholding all identifying details could only be done by the court sitting in private, which would be too great an incursion on open justice); (d) any order should specify what could and could not be lawfully reported; (e) any order should be clear, explicit and precise, enabling the media to be sure about what they might report.

The order made is to be kept under review and it is acknowledged that this may be modified as preparation for the trial continues

APPEAL AGAINST SENTENCE

R. v Mitchell [2017] EWCA Crim 405

Holly Mitchell smuggled a mobile telephone into prison and supplied it to a prisoner who was her partner. She was sentenced to (i) 4 months' imprisonment, suspended for two years and (ii) a prohibited activity requirement, which prevented Mitchell from attending any prison establishment at which her partner was held.

She appealed against the sentence. The basis of her plea was that she received a phone call from an unknown male who said that if she did not deliver the telephone, her partner would be injured. She therefore acted under these threats.

HELD:

With respect to the custodial sentence (suspended for two years), the appeal court found the original trial court judgement was correct, as given the problems of mobile phones in prisons, a sufficient deterrent in the form of a custodial sentence is appropriate. It was also correct to suspend this sentence given

Mitchell's guilty plea and vulnerable state.

With respect to the prohibited activity requirement (which stopped Mitchell visiting her partner in prison), in order to make such a requirement section 203(2) of the Criminal Justice Act 2003 provides that a court may not include a prohibited activity requirement in a relevant order unless it has consulted an officer of a local Probation Board or an officer of a provider of Probation Services. Furthermore, it is clear that the primary purpose of a prohibited activity requirement is not to punish but to prevent or reduce the risk of further offending such that the requirement must be proportionate to that risk.

The court found that the prohibition of contact with her partner was having a negative impact on Mitchell's wellbeing and was unnecessary and inappropriate in the context of this case. This was particularly the case where a suspended custodial sentence was already imposed, which would act as a deterrent to Mitchell.

ARTICLE 3 – CRUEL, INHUMAN OR DEGREGADING TREATMENT

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment" - Article 3, European Convention on Human Rights

Cirino and Renne v Italy, ECHR 319 (2017) (application nos 2539/13 and 4705/13)

The applicants, Cirino and Renne, brought a complaint to the European Court of Human Rights (ECtHR) claiming (1) violations of their Article 3 rights whilst they were detained in Asti Correctional Facility in Italy; and (2) that the prison officers responsible were not appropriately punished.

In December 2004, a fight broke out between Cirino and a prison officer. Renne intervened. The applicants were subsequently placed in solitary confinement and subjected to physical and verbal abuse. They were deprived of food, water, sleep, and clothing, and were detained in cells without adequate access to sanitation, heating and bedding. Cirino was held in these conditions for 19 days; Renne for 6 days. Renne was later admitted to hospital with a fractured rib and widespread bruising.

A criminal investigation was launched in 2005. In 2011, five prison officers were charged with ill-treatment under the Italian Criminal Code, with the aggravating circumstance of having abused their positions as civil servants.

The Italian District Court delivered its judgment in 2012, finding that the applicants' account of events was correct. The Italian District Court found that there had been a 'generalised practice of ill-treatment' that had been systematically inflicted on prisoners considered to be problematic and that the prison officers had operated in a climate of impunity.

However, the Italian District Court was unable to deliver convictions. The statutory limitation period for the offence of bodily harm had passed, and therefore proceedings against the officers had to be discontinued.

The Italian District Court found that the acts complained of could be classified as torture pursuant to the definition provided by the United Nations. However the domestic court could not convict as Italy had failed to incorporate the offence of torture into national law, in breach of its international obligations.

Furthermore, the statutory limitation period for the offence of abuse against detained persons had also passed.

The prison officers did have disciplinary proceedings instituted against them, but were not suspended from duty during the investigation or trial.

HELD:

The ECtHR held that there had been a violation of Article 3 both substantively, from the treatment inflicted on the applicants, and procedurally by the domestic authorities' response.

The behaviour the applicants had been subjected to could be defined as torture. The ECtHR highlighted the vulnerable position of the applicants and their mental suffering, the repeated violence and the serious material deprivations inflicted on them. The abuse had been deliberate, premeditated and organised, and had been practised systematically. It was therefore torture contrary to Article 3.

The ECtHR found that the provisions of the Italian Criminal Code which the Italian District Court had to rely on (and which were in any case time-barred) were incapable of punishing acts of torture and were devoid of any deterrent effect. Thus Italian domestic courts could not ensure that violations of Article 3 would be dealt with appropriately. Article 3 was therefore breached procedurally.

As to the disciplinary proceedings, they were also inadequate to deal with Article 3 violations; criminal prosecutions were needed to provide the necessary preventative effect. It was also incorrect for the officers in question to have continued working during the investigation and trial.

The ECtHR awarded each applicant €80,000 in damages and €8,000 for costs and expenses.

Abele v Latvia (applications nos 60429/12 and 72760/12)

The applicant, Abele, brought a complaint to the ECtHR, claiming violations of Article 3 rights whilst detained in Brasa prison in Latvia. In particular, Abele complained that as a person with special needs (he was deaf and mute with a poor understanding of sign language), the prison conditions had been inadequate in view of his particular situation.

The Latvian prison authorities had categorised Abele as disabled. However, he was held in the same cell as inmates in good health and had received little, if any, special assistance relating to his condition. In addition, the cell in which he was kept only provided a small area of personal space (less than 3 square metres).

The Latvian authorities challenged Abele's claims both on (i) admissibility, claiming Abele had not sufficiently used remedies under Latvian law and (ii) the merits of the case.

HELD:

The ECtHR found that the Latvian government had not provided sufficiently clear information that Abele would have been able to effectively either: (i) improve his conditions of detention; or (ii) receive compensation for such conditions under the applicable Latvian law. Thus, the ECtHR did not dismiss the case on admissibility grounds.

On the merits of the case, the ECtHR has previously found that where a disabled person is kept in detention, authorities "should demonstrate special care in guaranteeing such conditions as corre-

spond to the special needs resulting from his or her disability". The ECtHR found that the Latvian authorities had failed in this respect. They had left Abele in a cell with less than 3 square metres of personal space for a considerable amount of time (over one year), and the ECtHR found this to be a "hardship going beyond the unavoidable level of suffering inherent in detention and thus amounted to degrading treatment prohibited by Article 3".

In addition, the Latvian authorities had taken few or no steps to demonstrate special care in relation to Abele's disabilities. They had subjected him to the same regime as other prisoners and no particular attempts were made to overcome the obvious communication problems of the applicant with the prison staff, or to allow him to communicate with other inmates. When a hearing aid had been provided after four years, it did not work properly.

In view of the cumulative effects of the above-mentioned considerations, the ECtHR found there had been a violation of Article 3. It awarded Abele €7,500 in damages.

UPDATES ON PRISON SERVICE INSTRUCTIONS

PRISON SERVICE INSTRUCTION 03/2018 on: The Data Protection Act 2018 and General Data Protection Regulation, The Freedom of Information Act 2000 and Environmental Information Regulations 2004

PRISON SERVICE INSTRUCTION PSI 04/2018
Records, Information Management and Retention Policy

These two PSIs update Prison and Probation Service guidance on data protection, freedom of information and environmental information regulation in the light of EU Regulation 2016/679, the General Data Protection Regulation, which came into force on 25 May. They replace all previous guidance.

GDPR sets out a new framework for control of data. The PSI sets out that in relation to information held on them, individuals are entitled to:

- subject access;
- have incorrect personal data corrected and incomplete data completed;
- have their data erased or to restrict its processing; not be subject to decision-making solely by automated means including profiling;
- have a copy of their data provided in a machine-readable format (referred to as data portability);
- object to processing based on legitimate interests or the performance of a task in the public interest;
- compensation for damage suffered as a result of an infringement of the data protection laws by the data controller;
- make a complaint to the Information Commissioner's Office.

In relation to subject access, requests for disclosure should now be dealt with within 30 days and at no cost. Exemptions to disclosure, such as for the prevention of crime or protection of a third party, continue to apply as under the pre-GDPR regime.

Routine disclosure of information to which a prisoner should in any case or already has been privy should not be made subject to this procedure, for example 'the reasons for categorisation decisions, disclosure of parole dossiers, requests to see money accounts, correspondence sheets or property cards(s) etc [and] information that the offender would be expected to see as part of the day-to-day running of the prison, such as adjudication records or other information the offender has already been party to.'

In relation to retention periods, the records of lifers or prisoners who are unlawfully at large; for other prisoners, the record must be kept for six years after release or conclusion of the licence period.

PAS has produced an updated information sheet on prisoners' data protection rights, which is available on our website or by request from the office.

OMBUDSMAN CASES

Privacy during legal visits

Mr A brought a complaint to the PPO that the room designated for Legal and Official Visits at HMP Woodhill was not adequately soundproofed, and that confidential conversations could thus be overheard.

The Supervising Officer who originally responded to his complaint, and the Custodial Manager who dealt with his appeal, were both satisfied that staff could not hear the content of confidential conversations and that double glazing was not needed. They noted that officers had a duty of care to visitors, and would be positioned at the "play end" of the room during visits so as to see, but not hear, visits taking place.

The PPO considered PSI 16/2011 Providing Visits and Services to Visitors which states that visits should take place in sight, but out of hearing of any officer or authorised member of staff. The PPO felt that Mr A's risk level was such that this policy was appropriate in his case. Mr A did not feel he posed a risk, and thought visitors should be consulted as to whether they required additional security. In response, the PPO considered that prison officers were best placed to assess a prisoner's risk, and it would be inappropriate for visitors themselves to determine what level of security they require.

Secondly, PSI 16/2011 requires staff to consider the purpose of the visit and provide an appropriate space within the existing physical layout in order to meet the needs of the prisoner and the visitor. To evaluate this, the PPO asked that the IMB at HMP Woodhill conduct an independent inspection of the Legal Visits room. Three members of the IMB found that a person stood still in the

room or corridor adjacent to the Legal Visits Room could hear the majority of a conversation taking place between the two others. They noted that this was helped by the lack of background noise, and in the case of the corridor, required a person to "make a determined effort to listen in".

The Ombudsman therefore upheld Mr A's complaint, concluding that the Legal Visits room at HMP Woodhill and how it is currently used fails to meet the requirements of the PSI 16/2011. It recommended that, first, notices should be displayed in the Legal Visits Room to advise that the room is not completely soundproof and conversations may be overheard. The Governor at HMP Woodhill commented that such arrangements had been made.

Secondly, the PPO recommended that the Legal Visits room be moved to another location, or otherwise explore improving the soundproofing of it. While acknowledging the Governor's comments regarding the practical difficulties associated with either option, the PPO reaffirmed this recommendation.

Forced move to prison wing from in-patient unit and discriminatory comment (disability)

Mr B complained to the PPO about attempts to move him from an in-patients unit in the prison back to a normal prison wing. Mr B also complained that a governor's reply that the governor found Mr B's description of himself as a "vulnerable" prisoner "without foundation" was discriminatory.

Mr B had resided in the in-patients unit in May 2016 while certain lifts in his normal wing were being fixed. Once the lifts were fixed, there were several attempts to move Mr B back to the normal wing. Mr B complained that HMP Swaleside was too dangerous and he feared for his safety, and so did not want to return to the wing. Mr B admitted he had not faced specific threats himself, but that his concerns regarding safety were based on a HM Inspectorate of Prisons report which found that the levels of violence at HMP Swaleside were far too high and there were many serious incidents.

Mr B was placed on the "basic" regime of incentives and privileges due to his refusal to move back to a normal prison wing, though this decision was reversed once Mr B was formally admitted as a resident to the in-patient unit by a doctor.

The PPO found that the initial steps taken to try to move Mr B to the normal prison wing due to Mr B's safety concerns were not inappropriate (and were therefore permitted). Prior to the move to the in-patient unit due to the lifts being broken, Mr B had not reported any problems with his wing and had not faced any specific threats, with his complaints only being based on the HM Inspectorate of Prisons report. It was therefore not unreasonable of the prison to try and move Mr B to the normal prison wing or move him onto the "basic" regime for refusing to move.

However, the PPO found further attempts to move Mr B once he had been admitted to the in-patient regime as a patient were not appropriate. This was still the case even if the in-patient unit was required by a patient with a greater need. The PPO found that the prison should not have tried to move Mr B until he had been discharged as a patient and with the express authority of a doctor. The PPO recommended that the governor apologise for the attempt to move Mr B once he had been admitted to the in-patient unit.

The PPO also investigated the discrimination claim, whereby the governor had replied to Mr B's claim that he was vulnerable as "without foundation". Mr B had responded to this on a Discrimination Incident Reporting Form ("DIRF") complaining about the governor's response. In response, a Safety and Equality Officer replied stating (i) the governor had been "quite reasonable", (ii) that only Mr B was displaying discriminatory behaviour and (iii) that the fact that Mr B was disabled did not mean he was "vulnerable by default".

The PPO found that the response to Mr B's complaint by the governor and the response to the DIRF could have shown more empathy. The PPO noted that an element of discrimination against a disabled person can be treating everybody the same, without taking into account individual needs. Given Mr B had specifically expressed he felt vulnerable and the fact that other prisoners had expressed the same concerns in the HM Inspectorate of Prisons report, it was possible that Mr B might be (or might consider himself to be) more vulnerable than other prisoners who were not disabled. The governor's interpretation of "vulnerable" was thus too narrow and failed to take Mr B's specific circumstances into account.

The PPO recommended that the governor apologise to Mr B for the insensitivity in the response to his complaint and the DIRF.

Delayed IEP Scheme Review

Mr. C submitted a Confidential Access Form to complain that he had been placed on the basic level of the Incentives and Earned Privileges Scheme (IEP) for seven days without a review taking place.

The Head of Residence at HMP Rye Hill rejected his complaint on the grounds that a number of negative entries had been made about his behaviour during the period of March to June 2017. Mr. C was informed that he needed to improve his negative attitude towards staff and to speak to people with respect.

The PPO concluded that the decision to downgrade Mr. C to basic was valid. Mr. C had been downgraded to basic following an IEP review on 16 June 2017 and his appeal against this decision was considered and rejected three days later on 19 June 2017. The PPO reviewed the relevant NOMIS entries and concluded that the Head of Residence's decision that Mr. C should remain on basic was supported by entries which suggested that his behaviour from March to June 2017 was unpredictable, confrontational and unnecessarily hostile.

Mr. C also complained that the decision to downgrade him to basic involved a breach of his protected characteristics. The PPO dismissed this complaint because Mr. C did not specify the protected characteristic that had been breached and did not provide any evidence (aside from his general complaint) to suggest that the decision to downgrade him was motivated by intolerance. The PPO found no evidence to suggest this either.

Annual Incentives and Earned Privileges (IEP) Review

Mr. D brought a complaint to the PPO on the grounds that he had not been given an IEP review for 2017 or informed that one had taken place and in addition about the reasons given for keeping him on Standard IEP level.

Mr. D had made internal complaints about not receiving an IEP review for 2017 or being informed that one had taken place. The SO responding to the initial complaint advised Mr D that his IEP status remained standard due to his failure to attend sentence plan meetings on 14 March 2017 and 27 April 2017. Mr D appealed this response on the basis that these meetings clashed with a legal meeting and a video link court attendance, respectively. The CM responding to this appeal confirmed these clashes with Activities Hub; however, the CM advised Mr. D that because he had failed to attend a meeting with Probation on 9 September 2017 and had opted to attend the gym instead, he had demonstrated that he was not proactively engaged in the sentence plan process and was not eligible for Enhanced status.

The PPO's investigation found that the IEP review took place on 15 March 2017 and the IEP paperwork stated that Mr. D was not Sentence Plan compliant, partly for the reason that he did not attend a sentence board on 14 March 2017. The paperwork made reference to a legal visit, stating that Mr D had "four weeks to inform staff…but chose to say nothing". It was also recorded that Mr. D was not informed about the right to appeal and was not issued with an IEP3 appeal form. The investigation noted that PSI 30/2013 Incentives and Earned Privileges Scheme states that prisoners must be informed of local appeal processes, including complaints procedures.

The investigation found that because legal visits are deemed as high priority, the Activities Hub had cancelled the sentence plan meeting on 14 March 2017. The PPO found therefore that Mr. D was not unwilling to attend the sentence plan meeting because it had already been cancelled by the Activities Hub. As Mr. D's failure to attend this meeting was the only consideration for the IEP review, it was not sufficient to justify the decision.

The investigation also considered Mr. D's failure to attend a meeting with Probation on 9 September 2017. The Activities Hub confirmed that as this date fell on a Saturday, there were no scheduled activities. The prison confirmed the correct date for the telephone conference meeting was 17 May 2017. This had been previously addressed in a partially upheld internal complaint. It was incorrect that Mr. D did not attend the scheduled phone call. Instead Mr. D was unable to attend the call because he was not unlocked. Mr. D was advised that he should have notified staff of his phone call to ensure he was unlocked.

The PPO found that Mr. D therefore did not fail to attend a meeting on September 9 because he chose to go to gym and that it was unreasonable to hold Mr. D responsible for not attending a telephone conference when he was not unlocked.

The PPO upheld Mr. D's complaint on the ground that the reasons given for refusing his Enhanced status were not fully supported by the evidence and that while Mr. D could have made more of an effort to make staff aware of issues affecting his ability to attend Sentence

Plan meetings, he had genuine reasons for not doing so.

Recommendations were made for a new IEP Review to take place for Mr. D and to remind staff that where prisoners do not attend their IEP reviews, they must still be informed about the local IEP appeal process and be provided with the IEP 3 appeal form.

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