PRISONERS' RIGHTS

Prisoners' Legal Rights Bulletin No 85

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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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NEWS

Prison and Probation Policy Frameworks

Having used Prison Service Instructions (PSIs) as one of the forms of non-statutory guidance on the day-to-day management of prisons since the late 1990s and as the sole form since 2009, in 2018 the Prison Service stopped issuing PSIs and is now moving over to the use of a different format.

From September 2018 guidance for both prisons and the probation service is being published in the form of **Prison and Probation Policy Frameworks**. At the time of producing this issue of PLRB, 17 Frameworks have been published on the Gov.uk website. We are aware of at least three more in the pipeline (Categorisation, Incentives and Earned Privileges, Transgender Prisoners) and in future issues of the PLRB will summarise them as they are published, as we have previously done with PSIs.

The Framework documents are currently not numbered so if you are citing them in correspondence you will need to quote the full name of the document. Of those issued to date, some contain entirely new policies and information (the Smoke Free Policy Framework for example), others amend and add to existing guidance (such as the Strengthening Prisoners Family Ties Policy Framework) and some add little or nothing new but consolidate all the existing guidance on a topic.

Notable amongst those that consolidates previous guidance is the Framework document on Home Detention Curfew which replaces the ten different pre-existing instructions, which needed to be cross-referenced with one another, causing much confusion. The substantive changes to policy are minimal but the policy and process are now far easier to understand. Likewise, Recall, review and re-release of recalled prisoners combines and replaces previous guidance, with useful tables setting out how the processes work for different types of prisoner and recall.

Such Frameworks, which make it easier to follow existing processes will be welcomed by prisoners, prison staff and legal advisers alike. Less welcome to prisoners and their advisers will be the worrying guidance in Intelligence collection, management and dissemination in prisons and probation to the effect that "Intelligence Evaluation codes (the first two parts of the 5x5x5) are not disclosed to offenders, their next of kin or legal representatives to enable the protection of sources and tactics." Intelligence Evaluation codes are those that indicate whether a piece of intelligence is from a source considered to be: A - always reliable, B - mostly reliable, C - sometimes reliable, D – unreliable, or E – untested. Disclosure of intelligence without the evaluation codes can easily lead to unreliable sources being indistinguishable from reliable ones to the disadvantage of prisoners concerned.

This is a full list of all the Framework documents issued to date:

1. Incentives Policy Framework - 11 July 2019
2. Prisoner complaints policy framework - 5 July 2019
3. HMPPS business continuity policy framework - 3 July 2019
4. Enhanced behaviour monitoring policy framework - 28 May 2019
5. Release on temporary licence - 28 May 2019
6. Counter corruption and reporting wrongdoing - 4 May 2019

7. Multi Agency Life Risk Assessment Panel - 4 April 2019
8. Progression regimes - 4 April 2019
9. Prison education and library services for adult prisons in England - 2 April 2019
10. Recall, review and re-release of recalled prisoners - 1 April 2019
11. Home detention curfew - 28 March 2019
12. Sustainable operations - 27 March 2019
13. Intelligence collection, management and dissemination in prisons and probation - 11 March 2019
14. Building Bridges: A Positive Behaviour Framework for the Children and Young People Secure Estate - 7 February 2019
15. Strengthening Prisoners Family Ties Policy Framework - 31 January 2019
16. Smoke Free Policy Framework - 23 January 2019
17. Women"s Policy Framework - 21 December 2018
18. Bail Accommodation and Support Service (BASS) - 21 December 2018
19. Access to Digital Evidence (A2DE) - 21 December 2018
20. Manage the custodial sentence - 12 September 2018

Although PAS remains willing to send out copies of prison and probation guidance to prisoners who need it in order to inform themselves submit complaints or mount legal challenges, it is worth pointing out that the Prison education and library services Framework makes it clear that, in addition to Archbold and the Civil Procedure Rules, prison libraries must have available: "Extant Prison Service Instructions (PSIs) and Prison Service Orders (PSOs), Policy Frameworks (when published) excluding those that have restrictions placed on them."

Parole Board Rules 2019

New Parole Board Rules came into force on 22 July 2019. They introduce a number of new things including:

- A new reconsideration mechanism, which allows both parties, the Secretary of State and prisoners (and victims, via the Secretary of State) to ask for a decision to be reconsidered if they believe that the decision is not legally sound. These applications must be made within 21 days of the decision and on the basis that the decision is either irrational and/or procedurally unfair. This test is designed to be similar to that of grounds for a judicial review. It applies to all decisions relating to the release of prisoners, who are serving an indeterminate sentence and also certain determinate sentences where initial release is at the discretion of the Parole Board (including Extended Determinate Sentence and Sentences for Offender of Particular concern) (Rule 28)

- A mechanism by which a prisoner serving an IPP can apply for the cancellation of the licence after 10 years (Rule 31)

- A power for the Parole Board to release lifers on the papers rather than having to have an oral hearing. This expands the type of cases in which a decision can be taken on the papers rather than al-

ways requiring an oral hearing. It applies even where a lifer has been recalled (Rule 19)

- A power to conclude a hearing on the papers if further evidence is received that satisfies the panel Chair that there is no need for an oral hearing but not if the oral hearing is less than three weeks away (Rule 21)

- A power for a Panel to appoint a representative where a prisoner lacks mental capacity (Rule 10)

- A power for the Parole Board to receive non-disclosure applications from third parties (Rule 17)

- Changes to the point at which a referral to the Parole Board is deemed to take place to allow for the panel to have control of the case management earlier

- The adoption of a single test for the application of a decision summary by either a victim or a member of the public. The Board can only now refuse an application for a summary in exceptional circumstances. There is a six month time restriction so that historical decision are excluded.

CASE REPORTS

PAROLE BOARD DECISIONS

R (Grantham) v PB and SSJ [2019] EWHC 116 (Admin)

The case concerned an application for judicial review of the PB decision not to direct release or recommend open conditions for a recalled IPP prisoner.

In September 2008, the claimant pleaded guilty to wounding with intent to cause grievous bodily harm. He was sentenced to an indeterminate period of imprisonment for public protection (IPP) and to a fixed minimum determinate period of 4 years and 6 months, later reduced on appeal to 3 years and four months.

The claimant was released on licence in June 2016. Following his release, he worked conscientiously for his parents' business. However, he breached the strict conditions of his licence in May 2017 by failing to return to Approved Premises. His licence was revoked and he was recalled to prison.

The SSJ referred the case to the PB for it to consider whether he could be re-released on licence, and whether he should be transferred to open conditions.

The PB did not direct release or recommend a move to open and the claimant remained in closed conditions. He then applied for judicial review of the PB's decision.

HELD: The PB decision was quashed. The court concluded that the two considerations before the Board were discrete and must therefore be considered separately.

The court held that the PB had failed to address the main factors to be considered when evaluating the risks against the benefits of transfer to open conditions. Section 239(6) CJA 2003 empowers the SSJ to give directions to the PB, which includes directions on transfers of indeterminate sentence prisoners to open conditions. Though the PB's letter had set out correctly the 'main factors' prescribed by the directions to be taken into consideration, it had failed to give

them ‘clear, separate and discrete consideration’.

In relation to the decision not to release, the court identified errors and omissions in the PB's approach which *"fatally undermine[d]"* the conclusions reached by the panel.

The court therefore quashed the PB's decision and directed it to consider the matters *"from scratch and with a fresh and open mind".* The court noted the *"very long time indeed"* in which the claimant had been detained beyond the determinate sentence and expressed the view that the matter should be reconsidered *"as a matter of expedition".*

The court also held that the SSJ was not required to make a new referral for the PB to reconsider the matter – it was only the Board’s decision on the referral that was quashed, not the referral itself.

REFUSAL TO MOVE INDETERMINATE SENTENCE PRISONER TO OPEN CONDITIONS

R (Kumar) v SSJ, Queen’s Bench Division (Administrative Court), [2019] EWHC 444 (Admin)

The case concerned an application for judicial review of the decision of the SSJ not to implement a PB recommendation that the claimant be transferred to open conditions.

Mr Kumar was imprisoned in 2008, following a conviction for theft and violent crimes. He was given an indeterminate sentence and his tariff was set at three years, less time spent on remand.

Initially, his behaviour in prison was poor; he received many adjudications for violence and generally disruptive behaviour. After his tariff expired in May 2011, however, Mr Kumar completed multiple rehabilitation programmes, leading to an assessment in December 2012 that found evidence of improved behaviour. In April 2013, the PB recommended a transfer to open conditions so he could be tested in a new environment. This was approved by the SSJ. However, he was quickly moved back to closed conditions, following a decline in his behaviour. When the PB next reviewed the case in November 2014, they decided against his return to open conditions.

In due course, the PB made the decision that he should be progressed to open conditions. This decision, in the context that Mr Kumar was many years over tariff, was mainly based on the belief that closed conditions and behavioural programmes were clearly not conducive to his rehabilitation. The recommendation of the PB was, however, rejected by the SSJ under the applicable policy, PSI 22/2015, which affords the discretion to depart from a recommendation of the panel within very limited parameters. The criteria for the rejection of a panel decision are (i) it goes against the clear recommendations of report writers without providing a sufficient explanation why; or (ii) it is based on inaccurate information. All proposed rejections must be approved by the Head of the Public Protection Group. As an additional catch-all provision, (iii) the SSJ may also reject a panel decision where he does not consider that there is a wholly persuasive case for the transfer of the prisoner to open conditions at that time.

In this situation, the SSJ found that criteria (i) and (iii) applied: there was insufficient explanation given of why the panel departed from the written recommendations, and an overall lack of clear reasoning for moving Mr Kumar out of closed conditions.

Mr Kumar's challenge to the SSJ'S decision can be split into two main arguments: the first centred on the lawfulness of the PSI 22/2015 policy, and the second on procedural unfairness.

Regarding the lawfulness of the policy, Mr Kumar's arguments centred primarily on the rigidity of the decision-making process, which he felt undermined the value of the oral evidence and placed too much emphasis on the written reports. This factor, it was argued, in conjunction with the broadly drafted catch-all provision in the policy, had prevented due consideration being paid to the expertise of the panel.

The allegation of procedural unfairness was based on Article 8 of ECHR. Noting the procedural obligations under this statute, it was submitted that Mr Kumar was not involved in the decision-making process to the extent required to protect his interests. In addition, when the decision of the panel was rejected, it was argued that Mr Kumar should have been given further opportunity to make written or oral representations.

HELD: The court found that the policy was lawful, and the process by which the decision was reached was fair, therefore dismissing Mr Kumar's application for judicial review.

It was stated regarding PSI 22/2015 that the broad drafting was essential to prevent the discretion of the SSJ being unduly fettered. It was held that the specification in the policy that this discretion should be subject to 'very limited parameters' preserved his autonomy, whilst providing adequate safeguards for the claimant.

Further, the alleged rigidity of the policy was refuted: as clarified in Annex Y of PSI 22/2015, the digression of the panel from the majority view of the reports is merely a starting point for greater scrutiny of their decision-making at a more senior level. In this case, the reasoning was found to be inadequate without either certain practical considerations being applied, or sufficient evidence that a change of behaviour would result.

In relation to procedural unfairness, it was noted as a point of departure that although the PB has a statutory role in deciding detention terms, their role in determining the progression of prisoners toward release is limited to a merely advisory one. Therefore, the SSJ is fully entitled to refute the findings of the panel, particularly when they run contrary to the majority view of the report writers. As such, allowing the prisoner to make further representations if a recommendation is rejected would not confer any advantages, as he would be unable to provide the justification the panel failed to provide, or fill the gaps in their reasoning. Adequate protection was thus found to be afforded by the option of applying for judicial review.

On this basis, the claimant's argument based on Article 8 also failed. It was found that the required threshold of involvement in the process was met: Mr Kumar gave oral evidence, his representatives submitted further written representations, all the relevant material was considered, and due respect was given to the panel's findings.

REQUIREMENT TO MAKE REASONABLE ADJUSTMENTS

R (on the application of Hall) v SSJ for Justice [2018] EWHC 1905 (Admin)

The case concerned an alleged failure to make reasonable adjustments to accommodate Mr Hall's disability, in line with the Equality Act 2010, during his

detention at HMP Manchester.

Mr Hall was given an indeterminate sentence for public protection for a robbery against his parents, the minimum term of which expired in August 2007. In September 2014 Mr Hall had a PB hearing. The psychiatric assessment for that hearing concluded that Mr Hall's presentation suggested a diagnosis of autism spectrum disorder (specifically Asperger's) and suggested that consideration be given to a future placement in a hospital setting with an autism specific service.

Following two transfers, in June 2015 Mr Hall was admitted to Ashworth Hospital under the Mental Health Act. His behaviour subsequently deteriorated; he was verbally abusive, refused to engage in treatment and elected to be kept in seclusion as a protest against his transfer to another ward. An initial assessment recommended that Mr Hall be moved to conditions of lesser security. However, subsequently, as he was unwilling to engage in therapeutic activities, it was concluded that the only option was held to return him to prison. It was noted he would benefit from a specialist unit to manage his Asperger's symptoms.

It was proposed that Mr Hall be transferred to HMP Manchester in light of discussions with the claimant that he was willing to work with the offender supervision to address the necessary issues to attend his next parole hearing.

Section 6 of the Equality Act 2010 provides that a person has a disability if:

- a person has a physical or mental impairment; and
- The impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

Under section 20, the SSJ is under a duty, as a body exercising public functions to make reasonable adjustments to avoid any disadvantage that a disabled person is put to in comparison to a person who is not disabled. That duty comprises three requirements. The first of those requirements is that where a provision, criteria or practice puts disabled persons generally at a substantial disadvantage when compared to persons who are not disabled, there is a duty to take reasonable steps to avoid that disadvantage. The judge's starting point was that housing prisoners in prisons where there is no access to autism specific was such a practice, and puts autistic prisoners at a substantial disadvantage.

The claim focused on the alleged failure to make reasonable adjustments whilst Mr Hall was detained at HMP Manchester. The claimant argued that the following adjustments were reasonable and were not made:

- Provision of suitable establishment with specialist services for autism which would involve both a suitable environment, appropriately trained staff and teaching;
- Specially trained staff who understand the way to communicate with prisoners with autism; and
- Allowing the claimant to remain in segregation, rather than order relocation to a normal wing.

HELD: The judge noted that claimants are required to provide no more than some indication as to the adjustments which should have been made. It was for the SSJ to show that he complied with his duty to make reasonable adjustments.

There was evidence before the court from a number of doctors/psychiatrists, and differing medical reports, and the exact diagnosis was disputed by the

parties, but it was not the court to make a factual determination of which diagnosis has primacy.

The judge held that there had been no failure to comply with the duty to make reasonable adjustments:

There was no breach of the general anticipatory duty to make adjustments for autistic prisoners. The SSJ had taken steps to make adjustments for prisoners with autism (for example at Feltham Young Offenders Institute and HMP Dovegate) and this process is ongoing. HMP Wakefield has a specialist unit for prisoners with complex needs which is close to achieving accreditation.

It was intended from the outset of his transfer to HMP Manchester that Mr Hall be transferred to a specialist service for assessment. Having been rejected by specialist streams at two prisons, the SSJ investigated Mr Hall's wish to be transferred to a third prison but this too proved unsuitable. It is now proposed to transfer Mr Hall to the segregation unit at HMP Wakefield which is on the verge of accreditation and will have appropriately trained staff.

Although not all staff at HMP Manchester had autism training, reasonable steps had been taken to ensure the staff team supporting the claimant had a good understanding of autism.

There was no evidence to indicate a link or risk of transferring Mr Hall back to a normal wing. The proposed move to a wing was made in the belief that this might benefit the claimant by allowing him to interact with general population.

This case is highly fact-specific, but highlights that that the steps taken to make reasonable adjustments must be viewed as a whole and against the full background. In this case that full background included the steps taken prior to his transfer to HMP Manchester, and the claimant's response to that treatment.

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RIGHT TO VOTE

Miller and others v United Kingdom (application nos. 70571/14, 72616/14, 28334/16, 31138/16, 31413/16, 59442/17 and 81835/17), ECtHR, 11 April 2019

The applicants were seven prisoners from the United Kingdom claimed violations of Article 3 of Protocol No. 1 to the Convention (the right to free elections). The ECtHR chose to join the seven applications due to the similarity of the subject matter.

Background

The prisoners had been incarcerated following criminal convictions for a range of offences, and were prevented during their incarceration, from voting in one or more of the 2014 European Parliamentary elections, 2016 Scottish Parliamentary elections, and 2017 UK General Election.

HELD: The ECtHR held that the applications were admissible as the blanket ban on prisoners voting at the time of the elections did constitute a breach of Article 3, but declined to offer any compensation to the applicants.

The judgment makes reference to previous complaints that had been brought to the ECtHR against the United Kingdom on prisoners' voting rights, where

the ECtHR had also found violations of Article 3. The ECtHR did note that in 2018 the UK government had adopted a number of measures to allow prisoners released on temporary licence and on home detention curfew to vote, which were deemed satisfactory by the Council of Europe's Committee of Ministers in amending the blanket nature of the ban; however, these reforms were introduced after the breaches of Article 3 were committed in the present case.

PRISONER TRANSPORT CONDITIONS

Jatsõšõn v Estonia (application no 27603/15), 30 October 2018, European Court of Human Rights

The applicant Mr Jatsõšõn, an Estonian national who was serving a prison sentence for robbery and violence against a prison official, brought a complaint to the European Court of Human Rights (**ECtHR**) claiming that transport conditions in a prison van which was to transport him to the funeral of his grandmother were inhuman and degrading and therefore violated his rights under article 3 of the ECHR.

Background

The applicant was granted prison leave to attend his grandmother's funeral in May 2013 at a location approximately 80km from the prison. The applicant was considered highly dangerous and had received several disciplinary punishments which were still in effect. As a result, the prison ordered that the applicant must be escorted to the funeral by at least three prison officers and wear hand and ankle cuffs. The applicant had agreed in advance to these arrangements.

On the day of the funeral, the applicant was placed in a single occupancy compartment of a prisoner transfer van. The compartment was at least 60cm wide, 149cm high and 85cm long, with a floor area of 0.51 square metres. There was a plastic seat attached to the floor. There were no seat belts or handles. The van got as far as the exit gate of the prison premises when the applicant decided not to go to the funeral and was returned to the prison around 20 minutes later.

The arguments

The applicant complained that the transport conditions, being a small compartment without seat belt or handles, constituted inhuman or degrading treatment and therefore violated article 3 of the Convention. The lack of safety equipment had made him fear for his life; and he had suffered psychological trauma because he had been forced not to attend his grandmother's funeral primarily due to the transport conditions and the requirement to wear hand and ankle cuffs in front of his family, which would be humiliating.

The Estonian Government argued that the applicant's claim was inadmissible as he could not claim to be a victim (under article 34) of a violation of Convention rights because the applicant himself had decided not to go to the funeral and had therefore not actually been affected by the conditions of transport in the prison van. It was not sufficient that a violation could potentially have taken place (had the applicant travelled in the van to the funeral), nor that the applicant had allegedly feared for his life due to the lack of safety equipment. The Estonian government also argued that in any case there had been no violation of article 3 as the size of the van compartment was sufficient; the absence of seat belts could not alone lead to a violation of article 3; and as the applicant was young and healthy and had not spent more than 20 minutes in the van (and the van had not left the prison premises within that time)

any adverse transport conditions were not severe enough to come within the scope of article 3.

The complaint progressed through the domestic courts, where the applicant was unsuccessful, before reaching the ECtHR.

HELD: the ECtHR held that the complaint under article 3 was admissible, but found that there had been no violation. The ECtHR also considered article 8 of the Convention (right to respect for private and family life) and found that the applicant's complaint about being required to wear hand and ankle cuffs was inadmissible.

Admissibility of complaint under article 3: Although the applicant had decided not to go to the funeral, he did so after having spent some time in the van and having experienced its conditions. He could therefore claim to be a victim (under article 34) of an alleged violation of his rights under article 3 in respect of the time he had spent in the van.

Alleged violation of article 3:

Size of compartment: The ECtHR acknowledged that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has in certain cases found individual compartments measuring 0.4, 0.5 or even 0.8 square metres to be unsuitable for transporting a person (regardless of the duration of the journey). However the ECtHR found that an assessment of whether article 3 has been violated cannot be reduced to only a numerical calculation of square metres.

Seat belts: The ECtHR held that whilst the use of seat belts is recommended to reduce safety hazards, the absence of a seat belt is not in itself a violation of article 3. It can be a contributing factor when taken with other aggravating circumstances, but the court found no such circumstances in this case.

Parity with rules for non-prisoners: The ECtHR held that the basic conditions for transporting prisoners should not fall unjustifiably below the minimum standards that state authorities have committed to provide to the overall (non-prison) population. It was noted that the space available in the prison van was comparable to that required as a minimum standard for non-prisoners per Directive 2001/85/EC of the European Parliament. The court also noted that Estonian legislation does not require all vehicles to be fitted with seat belts.

Severity: The ECtHR noted that the assessment of whether any ill treatment is severe enough to violate article 3 is relative and depends on the circumstances of the case, including the duration of the treatment, its physical and mental effects and in some cases the sex, age and state of health of the victim. In assessing prison transport conditions specifically, account must be taken of the duration and number of journeys, the capacity of the van and compliance therewith, opportunities to exercise, provision of decent meals etc. In this case the applicant spent only a short time in the van on only one occasion. The ECtHR therefore found that the treatment was not severe enough to constitute a violation of article 3.

Admissibility of complaint under article 8: Article 8 does not guarantee a prisoner an unconditional right to leave prison for family reasons. However the ECtHR acknowledged that refusing to allow an applicant to attend a close family member's funeral or deterring such leave might constitute a violation of a prisoner's right to respect for pri-

vate and family life under article 8. In this case, the ECtHR held to be manifestly ill-founded (under article 35(3)(a) of the Convention) the applicant's claim that the requirement to wear hand and ankle cuffs acted as a deterrent to attending the funeral. The applicant had accepted in advance that he would be required to wear hand and ankle cuffs. In addition, his statements to the prison and the domestic courts about his fear of being humiliated in front of his family had been contradictory. The ECtHR held that the applicant's complaint about the requirement to wear hand and ankle cuffs was therefore inadmissible.

UPDATES ON FRAMEWORKS

ROTL Framework

The ROTL Framework was issued in May
The stated purpose of this Framework is to increase the number of ROTLs – primarily those taken from open & women's prisons. It sets out new processes and criteria. It is designed to increase eligibility for ROTL and Governors will be able to consider ROTLs earlier and in more cases with the aim of increasing resettlement opportunities. In brief:

- The criteria for Restricted ROTL has changed, so that it is reserved for only the most serious offenders;
- The three month lay-down period to which men were subject has been removed;
- Even indeterminate sentence prisoners will be eligible to be considered for unaccompanied RDR from the point of entry to the open estate (or if female, when assessed as open);
- The assessment process is streamlined to avoid having to conduct multiple formal ROTL boards and one board should cover applications or potential applications for all types of ROTL;
- Workplace ROTL is to be used to a greater extent; release for paid work can now take place as soon as a prisoner is eligible for day release;
- There is no longer a requirement to spend at least one 24 hour period per week in prison;
- CRL is now allowed for primary as well as sole carers and for children up to 18;
- Even prisoners with a prior abscond history are not excluded from applying either for open or ROTL (as long as it occurred more than two years prior and only once in the current sentence)

OMBUDSMAN AND ICO CASE SUMMARIES

Use of Force by Prison Officer [Case ref 79483/2017]

Mr M complained that an officer used unnecessary force and assaulted him by striking him against the throat. The PPO investigated whether the force used was reasonable, necessary and proportionate and whether the correct administrative processes were followed following the incident.

Mr M and Officer K were involved in an altercation following Mr M's alleged misuse of his emergency cell bell. Officer K turned off the bell and unlocked Mr M's cell. Mr M walked out of the cell, and Officer K hit Mr M in the throat, forcing him back into the cell. A struggle between Officer K and Mr M ensued. Mr M was examined by medical staff after the incident, and complained of neck pains for several weeks.

The PPO reviewed evidence of the incident including CCTV footage, medical records, use of force paperwork, statements from Officer K and another officer who witnessed the incident, PNOMIS case notes and police interviews and statements.

The PPO found that it was not reasonable, necessary or proportionate for Officer K to use force when he did. Officer K should have attempted to de-escalate the situation by talking to Mr M and stepping away from him. There were only six seconds between when Officer K first turned to face Mr M, and only one second from the point Mr M reached his cell door, and when Officer K had both hands on his throat area. This was unlikely to be a sufficient time either to engage in a dialogue with Mr M, or for him to reasonably respond to any request.

PSO 1600 ('Use of Force') is clear that refusal to comply with an order is not, by itself, sufficient to initiate force. Force should only be used when necessary to prevent harm, taking into account the harm prevented (e.g. risk to life, limb, property or good order). The greater the risk, the easier it is to justify force.

Officer K's response was inappropriate, disproportionate and excessive: he used both hands forcibly around Mr M's throat to push him back into his cell. Officer K claimed to be fearful for his safety, but did not record this detail on his paperwork, leading the PPO to question the severity of the perceived threat.

The use of force paperwork submitted in relation to the incident did not comply with national guidelines, for example, Officer K's statement was completed 16 days after the event and not within the 72 hours stated in the guidelines.

The PPO was also critical of HMP Lindholme's handling of the investigation in general.

Rule 39 Legally Privileged Correspondence (1)

The governor of HMP Leyhill issued a Notice to Prisoners (NTP), which required (i) that prisoners leave all mail, except legal mail, open with their name and prison number written on the envelope; and (ii) that legal mail be sealed in front of prison staff.

Mr F's complaint arose after his letter to the PPO was returned to him because he was over his allocation of statutory letters. The prison said that if Mr F wanted to send the letter, he would have to submit it unsealed under the new policy. Mr F complained that there was no restriction on the number of special letters he was permitted to send and that requiring legal mail to be submitted unsealed interfered with his rights under the ECHR, Article 8 and his rights under PSI 49/2011 were being interfered with.

Mr F's initial complaint was rejected, but his appeal was upheld. The prison committed to reminding its staff of the relevant rules and regulations but did not change or modify the way in which post was handled. Unsatisfied with this response, Mr F submitted a complaint to the PPO.

The PPO found that prison staff had been removing all Rule 39 letters from their envelopes to check that the mail did not contain anything that may be of harm to the public. However, this procedure was not in accordance with paragraph 14.2 of PSI 49/2011 which prohibited legally privileged correspondence from being stopped, opened or read unless (i) there were **reasonable grounds** to suspect that the letter

contains illicit enclosures or (ii) in exceptional circumstances where there is **reasonable cause** to believe that the letter would endanger prison security or safety. The application of these exceptions had to be decided on a case by case basis and, therefore, the implementation of a blanket policy was in breach of the rules.

The PPO recommended that the governor issue an instruction to staff saying that: (a) outgoing Rule 39 and Confidential Access mail must not be removed from envelopes by staff; (b) Prisoners must be allowed to seal outgoing Rule 39 and Confidential Access mail themselves without staff handling their contents; and (c) Where staff have reasonable grounds for suspecting outgoing Rule39 and Confidential Access mail of containing illicit enclosures, the procedures in Annex D of PSI 49/2011 must be followed.

The investigator also found that paragraph 2.4(h) of PSI 49/2011 permitted prisoners to be provided with one or more special letters to enable them to write to the PPO and that the prison must pay for the postage of such letter under paragraph 2.11. The investigator also recommended that the Governor of Leyhill remind all prison staff of the rules relating to special letters.

HMP Leyhill accepted all the recommendations.

Close Supervision Centre (CSC) Reviews [Case 83659/2018]

Mr M complained about the inadequacy of his monthly CSC reviews and reports. He had submitted a number of complaints about the lack of consistency in style and provision of his reviews and reports. In particular, he complained that reports were not being disclosed to him prior to meetings, reports were not being updated with relevant extracts from the minutes of the meetings, and final copies were not being provided to him. All of the above were in breach of the CSC Operating Manual. Further, he complained that information about risk was not being articulated within the reports, making it impossible for him to address his risk.

Mr M provided six CSC Management Committee (CSCMC) monthly review reports to the PPO. The PPO reviewed these along with Mr M's case notes. The investigation found a number of shortcomings, noting the lack of consistency and that the reports repeatedly failed to explain the level and nature of risk that Mr M was considered to pose and how he could reduce that risk. The PPO found this unacceptable given the purpose of the review was to determine Mr M's suitability for continued location within the CSC.

Upholding the complaint, the PPO recommended:

That within two weeks of the final report, the governor make necessary arrangements to ensure all staff involved in CSC monthly reviewsfulfil the requirements of the process set out in the CSC Operating Manual.

Mr M to be provided with a formal letter of apology. (In fact, this was received prior to issue of the draft report).

Privacy of legal visits rooms in CSC [Case ref 83774/2018]

Mr T made a complaint to the IMB regarding the privacy of the legal visits rooms in the Close Supervision Centre. There were two reasons: firstly, conversations in the legal visits room could be

heard by staff in the adjacent room; secondly, a CCTV camera in the legal visits room pointed down to where legal documents would sit on the table.

The IMB agreed conversations could be easily overheard and said they would ask for a suitable alternative to be found. However, Mr T wrote to the PPO to complain that over one week later, no steps had been taken to rectify the situation.

The PPO agreed that the prison failed to meet the requirements of Output 15 of PSI 16/2011 (provide an appropriate area for legal visits to take place) and Prison Rule 38 (legal visits should take place within sight but out of hearing of staff). It stated that the governor should take immediate steps to ensure there was an appropriate room for legal visits, either by relocating the room or adding soundproofing. If work was to be carried out on the room, it should be done as a priority and a notice placed in the room in the meantime to advice that it was not completely soundproof and that conversations can be overhead.

The governor should also ensure that the CCTV cameras used in the legal visits area do not record audio during legal visits or record images of the text of legal documents.

Category A transfer [Case Ref 85639/2019]

Mr M is a Category A prisoner who was transferred from HMP Whitemoor to HMP Manchester in December 2018. Mr M complained that he had been made to wear a high visibility jumpsuit during the transfer. Mr M stated that national policy required only high risk, exceptional Category A prisoners and Escape List prisoners to wear a high visibility jumpsuit while outside prison on escort. Mr M also stated that the Head of Security at HMP Whitemoor had acknowledged at the time of the transfer that the high visibility jumpsuit was not a standard requirement and that the Local Security Strategy (LSS) needed to be updated to reflect this. Mr M agreed to wear the high visibility jumpsuit "under duress" so that he would not be penalised or "assaulted" for failing to do so.

The Security Manager replied to Mr M's complaint in January 2019. He stated that the LSS required Category A prisoners to be fully searched and dressed in sterile high visibility clothing, in line with PSI 09/2013 (Security and Management of Category A Prisoner External Movements). He also stated that high visibility clothing was required by Mr M's risk assessment.

Mr M appealed on the basis that (i) he had not been given the option to wear his own sterile clothing, in accordance with national policy, and (ii) he had been a Category A prisoner for some time and had never previously been required to wear a high visibility jumpsuit. Mr M received a reply on 17 January 2019, agreeing with Mr M's interpretation of national policy, but stating that unfortunately there had not been time to amend the LSS prior to Mr M's transfer.

The PPO found that PSI 09/2013 required a Category A prisoner leaving prison on escort to be "fully searched" and "dressed in sterile clothing (which may be their own clothes) or a high visibility suit". The PPO was disappointed that, despite the Head of Security at Whitemoor having acknowledged an error in the LSS, no immediate action was taken to advise staff of the error. Such action may have enabled Mr M to travel in his own clothing.

The PPO recommended that the governor of Whitemoor issue an apology to Mr M (which Mr M received in May 2019), notify staff of the error in the LSS and arrange for the LSS to be amended.

Access to stationery and computers [Case ref 82365/2018]

Mr T complained in May 2018 about the prison refusing to provide him with stationery. This meant he had difficulties corresponding with his legal adviser and the court and thus preparing his representations for on-going legal cases.

Mr T had asked for a number of writing implements and stationery, which included lined A4 paper, coloured pens and pencils, large A4 folder, clear folders, rubber and pencil sharpener. The basis for his complaint was Prison Rule 39(5), which requires prisons to give prisoners any items they needed to enable them to provide privileged material to a court or legal adviser.

Mr T received a range of responses from various prison units saying that his request was considered a “low-level issue” and that his request for stationery materials was unreasonable on the basis that prisoners had a weekly statutory allowance of two letters/envelopes and the rest of the stationery needed to be purchased via the approved suppliers. Mr T complained to the Ombudsman on 6 June 2018 saying that his request was not “unreasonable” because of the provision for it in Prison Rule 39(5) and that refusing him to have the writing materials breached his rights to a fair trial and various other rights.

The PPO reviewed the report from its previous investigation in which they had found, citing Rule 39(5) to support this, that the prison is not obliged to provide everything that Mr T has asked for. The Rule is clear that it must provide writing materials to allow him to correspond with his solicitors and any court, i.e. paper and writing materials but not necessarily the other materials he requested, and that such materials should be bought on Mr T’s expense. The PPO had also previously found that the paper provided to the prisoners for letter writing purposes would not be appropriate for legal work, nor would be the envelopes. The PPO had also recommended that the prison provide Mr T with paper suitable for legal work, such as envelopes big enough to take A4 paper.

In the case at hand, the PPO first concluded that in line with Prison Rule 39(5), the prison must at a minimum provide Mr T with paper and something to write with. Secondly, the PPO considered whether the prison is obliged to provide Mr T with all the material that he has asked for. On that note, the PPO found that the Prison Rule does not refer simply to a pen and paper but to “any writing materials” and it is therefore apparent that something more than this basic provision was envisaged. The PPO has slightly revised its view taken in relation to Mr’ T’s previous complaint about this matter saying that it might not be reasonable to expect the prison supply everything on Mr T’s list (for example, folders) and some other items might simply be lent to Mr T. As a recommendation, Mr T is to provide an explanation why he needs various requested items to the director of the prison for the director to consider whether these should be provided.

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