PRISONERS' RIGHTS

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PRISONERS' ADVICE SERVICE

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 PLRG is free to serving prisoners.

Sponsored by

GCN prison law team

Brigid Baillie
Sarah Daley
Jared Ficklin
Georgina Firth
Andy Fitzpatrick
Mark George QC
Vijay Jagadesham
Ian Macdonald QC
Mary McKeone
Matthew Stanbury
Kate Stone
Pete Weatherby

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Recent cases include:

Osborn & Booth [2010] (PB hearings); **Vinter v UK** [ongoing] ("whole life" tariff challenge); **Krstic** [2010] (Cat A decision); **Noone** [2010] (earlier release on HDC); **Angus Thompson** [2010] (Sex Offenders Register); **Guittard** [2009] (transfer to open prison); **Mohammed Ali** [2009] (Cat A high escape risk); **Brett James** [2009] (leading IPP case); **Manhire** [2009] (FNPs and categorisation).

People's rights through justice

22 Oxford Court, Manchester M2 3WQ · +44 (0)161 236 1840 · clerks@gcnchambers.co.uk
www.gcnchambers.co.uk

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PAROLE BOARD

Osborn & Booth v Parole Board [2010] EWCA Civ 1409

The Appellants (O and B) appealed against the refusal of their applications for judicial review in relation to the Parole Board's refusal to hold oral hearings concerning its decision not to recommend their release from prison. O was a determinate sentence prisoner. Before release, he had indicated unwillingness to comply with licence conditions, and an intention to abscond. On release, O immediately breached his licence – the paper review of his recall recommended a psychiatric assessment before re-release. O made representations disputing his behaviour which led to the recall. The application for an oral hearing was refused because the factors raised were not essential either to the recall decision or the panel's risk assessment.

B, was a life sentence prisoner who was 23 years post-tariff and had serious psychopathic tendencies. He had been refused a move to open conditions at a paper review on the basis of several reports. B requested an oral hearing to ask for direct release to a psychiatric support unit. The request was refused, on the basis there was no realistic chance of release or move to open conditions in the face of the previous reports. Permission for judicial review was refused in both cases and this permission decision was then appealed.

HELD: Appeals dismissed. (1) The criteria to be applied by the Parole Board when considering a request for an oral hearing were set out in ***R (Smith) v Parole Board [2005] UKHL 1***. Whilst oral hearings were now more common, it did not follow that an oral hearing was always necessary where a risk assessment of danger was being undertaken on the basis of personality and maturity. Whether an oral hearing was necessary depended on circumstances, including the information already available to the Board, which was entitled to take into account its own judgment of the material and to consider whether there was a realistic prospect of that being affected by an oral hearing. If this threshold was not met, an oral hearing was a waste of public money and risked raising false hope with the prisoner. However, where there was doubt as to whether an oral hearing would be of assistance the presumption should be in favour of holding one, due to its utility in resolving issues. (2) When reviewing decisions to refuse oral hearings, the matter of fairness is ultimately an issue of law for the court to decide. However, the issue should be judged in the context of the circumstances identified and evaluated by the Board, including their appraisal of the material already available and their assessment of the relevant risks formed with expertise which the court does not share. (3) In the instant cases, the refusals to grant oral hearings could not be challenged.

In O's case, the judge was correct to consider that the Board's refusal to direct release did not depend on the resolution of disputed issues. In B's case, even given some difference between professional opinions, there was no dispute about the need for B to remain in custody. In those circumstances there was no practical possibility of an oral hearing changing that position. Following the case, the Parole Board published guidance regarding the necessity and suitability of oral hearings.

R (Faulkner) v Secretary of State for Justice and the Parole Board [2010] EWCA Civ 1434

The Claimant (F) appealed against a decision refusing him damages due to

delay in the Parole Board considering his release. F was a two-strike lifer who had completed his minimum tariff in 2004. Following two refusals of parole, F was informed his case would be referred to the Parole Board in January 2008. However there was a delay of four months in sending the parole dossier to the prison, and further delays in sending papers to the Parole Board, meaning the case was listed for an oral hearing five months late. Yet more delays in forwarding the rule 6 dossier and preparing additional reports meant that F's case was heard a year behind schedule when F's immediate release was directed. F was later recalled to prison on suspicion of further offences. At trial he was acquitted at the direction of the judge and re-released having spent an additional 6 months in custody. At first instance it was held that there had been no breach of Article 5 (4) of the European Convention on Human Rights (ECHR), since the delay was not such that the 'system had broken down entirely' rendering F's detention 'arbitrary'.

HELD: For the Claimant. A breach of Article 5(4) did not require the system to break down entirely. Article 5(4) requires the basic Rule 6 dossier to be made available to the Parole Board (per Lord Brown in ***SSJ v James [2009] UKHL 22****).* The unjustified delay prevented C having the lawfulness of his detention decided and constituted a breach of Article 5(4). In the present case, the test for award of damages for breach of Article 5(4) was not loss of a chance of release. However, it could be shown on the balance of probability that, but for the breach, the Claimant would have been released 10 months earlier. C was entitled to damages for 10 months' imprisonment to be assessed on the basis of ***R (Greenfield) v SSHD [2005] UKHL 14*** if not agreed. In the circumstances, C's damages should not be reduced due to the time spent in prison following his recall.

VOTING

R. (Tovey) v MOJ [2011] EWHC 271 (Admin)

The Ministry of Justice applied for summary judgment or to strike out the claims of a cohort of over 500 prisoners (N) for damages for being prohibited from voting in the May 2010 general election or European Parliamentary elections, and a declaration that their rights under the European Convention on Human Rights 1950 Protocol 1 Article 3 had been breached. The claim had been made on two bases. First, that N had a right to vote pursuant to Protocol 1 Article 3 which they had been denied. Second, the state had wrongly failed to implement the final decision in ***Hirst v United Kingdom (74025/01) (2006) 42 E.H.R.R. 41****,* in which the European Court of Human Rights had found that the United Kingdom had violated a prisoner's rights by subjecting him to a ban on exercising the vote during his time in custody. The ban was derived from the Representation of the People Act 1983 Section 3 and extended to European Parliamentary elections under the European Parliamentary Elections Act 2002 Section 8. The ban applied to all serving prisoners irrespective of the offence, the time for which they were imprisoned, and without any court having decided that in the particular case before it a ban on exercising such a right was appropriate. The relevant Secretary of State had expressly accepted that domestic law as it stood was incompatible with the Convention. N argued that the failure of the Government to implement the decision in ***Hirst*** speedily or at all entitled them to damages, since a declaration that N's rights had been denied would not pro-

vide just satisfaction under the Convention despite the thinking in ***Hirst*** and ***Greens & MT v UK (Application No: 60041/08 and 60054/08)*** that a declaration was sufficient.

HELD: Application granted. (1) Under the Human Rights Act Section 3(1), primary legislation had to be read and given effect in a way that was compatible with ECHR rights; however, pursuant to Section 3(2)(b) of the 1998 Act the validity, continuing operation or enforcement of any incompatible primary legislation was not affected. Because of the effect of Section 3(2)(b), unless the primary legislation, namely Section 3 of the 1983 Act, could be interpreted in such a way as to give effect to the decision in ***Hirst***, it would apply and a prisoner had to be refused the vote. The provisions of Section 3 of the 1983 Act and Section 8 of the 2002 Act were clear and could not be read in a Convention-compatible manner (***Sheldrake v DPP [2004] UKHL 43*** applied and ***R. (on the application of Chester) v Secretary of State for Justice [2010] EWCA Civ 1439)*** considered). (2) Under HRA Section 6(1), it was unlawful for a public authority to act in a way which was incompatible with a Convention right. However, under the terms of Section 6(6), a failure to promote or introduce legislation did not amount to an "act" for the purposes of Section 6(1). Insofar as the claim was that the Secretary of State or the State had failed to act to amend the legislation and that that failure justified compensation, the provisions of HRA Section 6(6) were against it. Section 6(6) itself could not sensibly be subject to reading down in a way which would advance the Convention right relied upon. (3) There were no reasonable grounds in domestic law for bringing a claim for damages or a declaration for being disenfranchised whilst a prisoner. Statute precluded it, case law was against it and European authority was against the payment of compensatory damages in respect of it.

A claim for a declaration was not hopeless, but difficult. The fact that the Secretary of State or the State had not acted to remedy the contravention did not itself give rise to a claim for damages, as the express wording of statute prevented it, ***Hirst*** and ***Greens*** considered. Even if the Secretary of State or the State had acted to fulfil the UK's obligations, it was far from certain all prisoners would have had the vote, as there were many ways short of full prisoner enfranchisement capable of remedying the breach ***Hirst*** identified. These were matters of law. On the law as it stood, N's claim could not succeed and had to be struck out. Alternatively, the court would have held that the claim had no reasonable prospect of success upon the same bases and, insofar as the claim was for damages, did so on the additional ground that the European Court had held that there was sufficient just satisfaction without compensation payment. Costs of £76 were awarded against each member of the cohort of prisoners, with each member given four weeks to show a reason why costs should not be imposed.

RECATEGORISATION/FOREIGN NATIONAL PRISONERS

R (Oge-Dengbe) v SSJ [2011] EWHC 266 (Admin)

The Claimant (G) applied for judicial review of a review board decision refusing to reclassify him as a category D prisoner. G, a citizen of Sierra Leone, had been granted asylum and refugee status in 2002. In 2006 he had been sentenced to 11 years' imprisonment for conspiracy to import Class A drugs. His Conditional Release Date was in March, 2011. On 20 April 2010, the review

board convened to consider his application to be moved from category C to D. It resolved to approve the application as he represented a low risk of absconding, given his exemplary custodial behaviour, the course work that he had undertaken and his refugee status.

On 21 April, the review board received notification from United Kingdom Border Agency (UKBA) that it might withdraw G's refugee status. On 29 April the board reconvened and refused to reclassify G, stating: "Recent communication from UKBA indicates that they are actively considering deportation in your case. This would significantly increase the risk that you would not comply with open conditions". G argued that the board's apparent sole reliance on his deportation status was irrational and unreasonable; the board had simply reacted to the notification of the intended change of refugee status and made a decision without proper consideration of countervailing factors such as his exemplary record, the presence of his wife in the UK and the likelihood he would appeal against a deportation order.

HELD: The decision appeared to consider withdrawal of refugee status the overriding consideration to the exclusion of all else. PSO 4630 (Foreign National Prisoners) states: "the need to protect the public and ensure the intention to deport is not frustrated is paramount". However, the fact something was paramount did not mean all other factors were not to be given proper weight. Board's decision was quashed.

CONDITIONS

R (Bourgass) v SSJ [2011] EWHC 268 (Admin)

The Claimant prisoners (B and H) applied for judicial review of the SSJ's decisions to instigate and maintain their detention, for certain periods, in a segregation unit. B was a lifer. A decision was made to segregate him under Rule 45 (good order and discipline) following an assault on him by a fellow prisoner (S) as a result of B's bullying. B's segregation was reviewed regularly, but continued on the basis that he was involved in the escalation of violence "for faith-related reasons" and bullying other prisoners to change their faith to Islam. B was removed from segregation after six weeks, but returned three days later following an assault on S which the prison had intelligence to suggest that B was involved in organising. B's segregation was maintained following reviews until B was transferred to another prison. H had been convicted of Islamic-orientated terrorist charges and was a high-risk category A prisoner. He was found to have carried out a serious attack on another prisoner and immediately placed in segregation. The attack was referred to the police and H's segregation confirmed under Rule 45 in light of intelligence information which linked him to the conditioning of other vulnerable prisoners, three of whom had changed religion to Islam. There was concern that H's interpretation of the Koran was in line with his terrorist beliefs and conviction and that promulgation of his ideals had the potential to cause serious disruption. H's detention in the segregation unit was regularly reviewed. H took up the opportunity to attend those meetings and make representations, but on each occasion the review board had concluded that his continued segregation was justified. The CPS later took the decision not to prosecute H for assault. B and H contended that the procedure adopted when they were segregated, and following their segregation, amounted to breaches of Article 6 of the ECHR. They submitted that there were no meaningful or sufficient procedural safeguards to

enable them to challenge the factual basis on which their segregation was founded since prison intelligence was not revealed to them and that the availability of judicial review was not an adequate remedy. B argued that he had been given insufficient reasons for his segregation. H contended that, because of a strict rota of access to telephones, his access to legal advice was inadequate, constituting a breach of prison service policy and/or Article 6, and therefore unlawful.

HELD: Applications refused. (1) In H's case there was little or no factual dispute underlying the decision to segregate him. It was not disputed that he was involved in a serious episode with another prisoner. Throughout the period of his segregation the Prison Service was aware of pending criminal prosecutions, and the decision to drop the criminal charge arose from different considerations than the decision to segregate. There could be no argument based on a lack of disclosure or the nature of the procedure in H's case.

(2) In B's case, the prison authorities had a high degree of concern about the potential threat he posed to good order and discipline, but it was difficult for B to challenge the intelligence suggesting that the attack upon him arose from his bullying and manipulation of others. Part of the decision to segregate was based on knowledge of the character of S: that was a matter of expert judgment by the prison authorities not susceptible to any fact finding exercise. Similar observations could be made in relation to B's second period of segregation. However, no safe means of revealing intelligence could be devised. It was inconceivable that prison authorities should ignore relevant intelligence in making decisions. There were considerable safeguards in the segregation procedure: a variety of individuals contributed to review boards, a prisoner had access to review boards, and the role of the independent monitoring board member (and perhaps the chaplains) in scrutinising the process and quality of what was done were important. The court felt that no prison governor or review board would have any predisposition or predilection for segregation, given that it was expensive and labour-intensive and of no advantage to the Prison Service. In B's case, he had been given adequate reasons for the decisions to maintain segregation. Crucially, the procedural safeguards inherent in the review board procedure were susceptible to effective oversight through the means of judicial review. Accordingly, B had not made out a case that the current procedure was generally unfair at common law or in breach of his rights under Article 6; nor had he established any specific breach in his case.

(3) A rigid practice in the approach to telephone calls had arisen in the segregation unit in which H had been detained, which meant that access, for legal advice at least, might be given on a Sunday afternoon when no lawyer was contactable: that was not helpful. However, the system of access to legal advice was not so poor as to be unlawful, either according to common law or by reference to prison policy, and H had not been prevented from receiving effective legal advice and representation.

Malcolm v Ministry of Justice [2010] EWHC 3389 (QB)

The Claimant claimed damages from the Ministry of Justice for misfeasance in public office and in respect of alleged breaches of his human rights during his imprisonment. The Claimant was serving a life sentence and had been held in a number of high security prisons. During a period in segregation specifically requested by the prisoner, he had been

provided with an average of only around 30 minutes in the open air every day - his complaint with regards to this had been upheld prior to transfer to a different establishment. He contended that the Defendant had acted incompatibly with his rights under Article 8 of the European Convention on Human Rights (right to a private life) and that he had suffered material damage, namely loss of residual liberty and other loss (increased stress arising from lack of purposeful activity, access to sunlight and exercise, together with physical discomfort and a general feeling of unfitness, and also disrespect of his human right to respect for his private life).

HELD: The Court held that allowing a prisoner who had chosen to be held in segregation only 30 minutes per day in the open air did not amount to misfeasance in public office, nor was it a breach of Article 8 of the ECHR. Sound operational and security reasons for a restricted regime at a time of high occupancy meant that the prison had fulfilled its requirement under the Prison Rules, and any impact on the Claimant's Article 8 rights was not serious enough to amount to an interference.

Chester v Ministry of Justice and Governor of HMP Wakefield (Evesham County Court, 8 February 2011)

The Claimant brought a claim for damages under the HRA for breach of Article 8 of the ECHR– Right to Private and Family Life – on the basis of interference with Rule 39 and Confidential Access correspondence. The Claimant had succeeded in a previous claim in which Rule 39 correspondence had not been properly handled, and had been granted a declaration that his Article 8 rights had been breached. The Claimant argued that the failure to take remedial action to prevent further breaches of the handling requirements made an award of monetary damages appropriate in the present case. The Defendants did not dispute liability for breach of handling requirements, but disputed the award of any damages.

HELD: The Claimant was awarded £500.

Elefteriadis v. Romania (application no. 38427/05)

The Applicant is a Romanian national serving a life sentence for murder. When entering prison in 1992, the prison doctor pronounced him clinically fit. Between 1994 and 2000 he shared a cell with three smokers. He made numerous transfer requests, which were unsuccessful until 1999 when he was diagnosed with pulmonary fibrosis. He was then held in various establishments until 2005 when he was again placed in a cell with smokers for eight months. Throughout his imprisonment he was transported in vans in which prisoners smoked. In 2008 he was diagnosed with chronic obstructive bronchopneumopathy. The Applicant's claims in domestic law were dismissed on the basis that it was physically impossible to separate smokers from non-smokers in accordance with Romanian non-smoking legislation.

HELD: It was incumbent upon states to organise their prison systems in such a way as to ensure respect for prisoners' dignity regardless of logistical or financial difficulties. In 2005 the Applicant had been held in a cell with smokers despite repeated requests to be transferred. The Applicant suffered from a chronic illness during this period, and the authorities were therefore under an obligation to take measures to safeguard his health. Overcrowding in prison and transport limitations in no way dispensed the authorities from their obli-

gations to protect his health. There was no domestic legal safeguard preventing a repetition of cell sharing with smokers. There had therefore been a violation of Article 3, and an award of €4000 was made to the Applicant under Article 41.

RECALL

R (McDonagh) v the Secretary of State for Justice [2010] EWHC 369

The Claimant sought to judicially review the decision made by the Defendant to recall him to custody. He maintained the decision as being entirely unreasoned and as one that should not have been made by the Defendant on the information supplied by the Police. He also contended that the decision to recall him was irrational in the public law sense, having regard to the material that was available, and sought an order quashing the decision to recall as well as an order requiring him to be released. The decision had been based on information received from the Police regarding the Claimant being involved in a road traffic incident and then 'attempting to flee the scene of what was potentially a very serious road traffic accident'.

HELD: The Court looked into the phrase 'to be well behaved' in the context in which it was used in the licence, and concluded that in attempting to flee the scene, the Claimant had not conducted himself in a proper, well behaved manner. The application was therefore dismissed.

R (Smith) v SSJ [2011] EWHC 81 (Admin)

The Claimant, S, brought judicial review proceedings in relation to his recall. S had been released on licence and his licence expiry dates had been incorrectly calculated under the CJA 1991 rather than CJA 2003. S was then recalled following his arrest for alleged offences committed whilst on licence. Despite a recommendation by his probation officer that S be subject to a fixed term recall, a caseworker in the Public Protection Unit instigated a standard recall. The new charges against S were later dropped, and S was released from court under the mistaken belief that his licence had expired. The error came to light soon afterwards and a further recall was instigated. However, S was unaware of the recall and was not returned to prison for some three months. S claimed: (i) that he should have been subject to a fixed term rather than a standard recall for the initial breach of licence; and (ii) that there should be a direction that time spent unlawfully at large through no fault of his own should count towards the remainder of his sentence.

HELD Both claims were dismissed. The SSJ's decision not to instigate a fixed term recall for the initial breach of licence was neither irrational nor unreasonable. The caseworker was entitled to reach a different view than the probation officer when considering all the facts in the case. The SSJ had considered all factors listed in relevant guidance when deciding not to remit time spent unlawfully at large. Whilst S was not at fault in this case that was by no means determinative of the issue and the decision could not be challenged as irrational or unreasonable.

SENTENCE CALCULATION

R. (on the application of Parrish) v SSJ [2010] EWHC 3220 (Admin)

The Claimant, P, sought judicial review of the SSJ's calculation of his sentence expiry date. P had been sentenced un-

der CJA 1991 to 35 months with a three-year extension period. P was released on licence at the half-way point of the custodial period and then recalled under Section 254 of the CJA 2003. The case concerned the date on which P was entitled to re-release without a recommendation from the Parole Board. The SSJ argued that Section 50A(2) of the CJA 1991 disapplied the duty to release prisoners prior to the end of their sentence, and that P was liable to be held until three years from the end of the custodial period of his original sentence. P contended that under the CJA 1991, his extended licence ran for three years from the three-quarters point of the custodial term and that he was entitled to re-release on licence at that point, his licence then lasting until three years from the end of the original custodial term. P argued that because there was no express reference in Section 50A to the exclusion of Section 33(3A) which dealt with extended sentences therefore it ought not to be treated as coming within the scope of Section 50A whether as a matter of law or construction.

HELD: In favour of the SSJ. Recalled prisoners serving 1991 Act-extended sentences are liable to be held until the end of the combined total custodial period and extension period. The CJIA 2008 inserted Section 50A into CJA 1991 which applied to P because he was recalled after 14.07.08. Section 50A disapplied Section 33 in its entirety and this clearly covered Section 33(3A). P was unable to make out his argument by reference to Section 37 and Section 44 defining the duration of an extended licence with reference to the time of release on licence which had no application to P under Section 50A. The decision entailed that P was liable to serve longer in prison than otherwise, but matters concerning the administration of a sentence did not amount to interference with the sentence passed for the purposes of Article 6 of the ECHR (***R (Robinson) v SSJ [2010] EWCA Civ 848*** followed).

LICENCE AND PROBATION

R (Francis) v West Midlands Probation Board [2010] EWCA Civ 1470

The Appellant appealed against a decision dismissing his application for judicial review of a refusal by the Respondent local probation board to transfer his supervision to a different board. The Appellant had been imprisoned for murder and had been supervised by the probation service in the West Midlands area from 1983. While in prison, he established a relationship with a woman who lived in the area where he wished to be transferred, and this was the reason for his transfer request.

HELD: The Court held that the local Probation Board had been entitled to exercise its broad discretion in refusing to transfer a life prisoner's supervision to another board and had not misdirected itself in law or unlawfully interfered with the prisoner's rights under Article 8 of the ECHR (the right to a family life).

OFFENDING BEHAVIOUR COURSES/ DENIAL OF OFFENCE

Sagar v Governor of HMP Wakefield [2010] EWHC 1378 (Admin)

An application for judicial review was made by a tariff-expired life sentenced prisoner, S, who had been convicted of murder. S was imprisoned on 1995 with a tariff of 14 years. S complained that there has been a consistent refusal to consider or effect his transfer from HMP Wakefield to another prison. S maintained that because he has been in

consistent denial of the offence of which he was convicted, he has been unable at Wakefield Prison to engage in Offending Behaviour Courses which might address what the authorities see as the risk he poses to others. S argued that he had been refused access on the same ground to courses which, once the facts are properly understood, do not depend upon his admitting guilt for the offence for which he has been imprisoned.

S contended that in 2008, the Parole Board wrote to him describing the situation in these terms: A stalemate appears to have arisen at HMP Wakefield. There is no offence-related work that is possible and you have completed all the non-offence related work available. There were courses at other establishments, namely CALM and Healthy Relationship Programme. The problem is that there appears to be reluctance on the part of the authorities at Wakefield to recommend your transfer because you are a 'denier'.

The Lifer Manager suggested that there were enough prisoners who were not in denial to fill the places on the courses and they were the more deserving of the opportunities. The Secretary of State argued that S not only denied his offence, but refused to engage in any form of constructive discussion with the authorities which might have progressed his condition, so far as providing evidence of the risk he posed to others was concerned.

S relied upon two grounds. First, that it was irrational, illogical and unfair to keep him as an inmate of HMP Wakefield, where he could not undertake any work. Secondly, as a denier, he is in a category of prisoner where the fact of denial confers upon him a status which enables him to complain that he has been discriminated against, contrary to Article 14 of the ECHR, when read together, in this case, with Article 5 . Decisions as to transfer are, in this case, made by the respective Sentence Planning Boards. The judge decided in particular that S should not have refused to undertake the Thinking Skills Programme (TSP). It was recommended by a registered psychologist; it was endorsed by the Sentence Planning Board, and not unreasonably so; and it envisaged that the TSP would be completed as a necessary first step in the circumstances of this particular prisoner to his being given access to the CALM course (in another institution). It was a matter for the Prison Service to determine precisely how allocation to such courses should be given. The judge concluded that transfer has not been excluded and that the prison eventually recognised that a CALM course may be available to someone who is in denial.

HELD: Case dismissed. There was no policy to refuse S transfer because he was in denial. The judge did not accept that S had been discriminated against contrary to Article 14, by being treated differently because he belongs to a group of prisoners who deny their offence, as this was not an individual characteristic. On the face of it Article 5 was unlikely to be engaged upon transfer from one prison to another.

ADJUDICATIONS

Anderson v Independent Adjudicator [2010] EWHC 2260 (Admin)

Mr Anderson (A), a serving prisoner, was charged under prison rule 51 (12) with possession of a number of unauthorised articles. He was adjudicated to be guilty and as a result he received an additional penalty of an extra 35 days. The incident with which this case is concerned was observed by a Prison Of-

ficer, who said she saw a person, whom she identified as A, put a white plastic bag through the window of Room 120 whilst he was outside the window. She then went into Room 120 and found another prisoner, B, in possession of the white plastic bag. The bag contained, according to the Prison Officer, a small clear plastic bag with a green leafy substance inside, two Nokia phones, two bottles of lager and one bottle of spirits. With the exception of the plastic bag itself the items were all unauthorised. The two prisoners were taken by staff to the office. It is alleged that, once in the office, A dived between the officers and ate the plastic clear bag and the green leafy substance. A was charged in accordance with the prison rules. The report duly alleged what the Officer had seen. However it made no reference to what happened in the office. The document refers to rule 51 (12) and refers to A passing the bag through the window. As this offence gave rise to the potential for additional days to be added to A's sentence, the complaint was not dealt with internally but by the Independent Adjudicator.

The Adjudicator had the benefit of the witness statements that had been made prior to the hearing. She heard oral evidence from the Prison Officer, A and two other witnesses called by A. B at that time was in a different establishment but provided a witness statement. There was a request that the other officer present in the office give evidence so that she could be cross-examined. She was apparently off duty and was not called. The Prison Officer gave evidence in relation to the incident and she was cross-examined both in relation to what happened in the office where she alleged that A swallowed a green leafy substance. A's case was one of mistaken identity. Throughout the time that the incident occurred, he was in the association room, either playing pool or on the telephone. A's evidence was supported by two other prisoners who gave evidence. Their evidence was consistent with their witness statements. A also denied the incident in the office when he is said to have eaten the plastic bag. Neither of the two witnesses that he called saw him move, although they were outside the office when the incident is said to have occurred. B said in clear terms that he did not see A take anything out of the bag.

The Independent Adjudicator found that the case was proved. There was no transcript of her judgment. On the form F256A, there were some notes in relation to her decision. She recorded a submission that was made to her that the charge was not made out, but she made a number of notes under the heading "Decision," pertinently "strange thing to make up". The solicitor's notes recorded "bizarre evidence to be made up. No-one else can account for the missing bag of evidence."

The first part of the challenge related to the adjudicator's finding of guilt. It is said that there ought to have been some doubt on the identification. There ought to have been some concern as to how the clear plastic bag can have been swallowed. The principal challenge relates to the inadequacy of the reasons that were given by the District Judge.

HELD: The judge was not satisfied that sufficient reasons were given for a finding of guilt; adjudication quashed.

HOME DETENTION CURFEW (HDC)

R (on the application of PA) v Gover-

nor of HMP Lewes [2011] QBD (Admin) Lawtel 28/2/2011

The Claimant (P) applied for judicial review of a decision taken by the Governor not to release him on HDC. P suffered from a debilitating social phobia manifested through social interaction. He was convicted of inflicting Grievous Bodily Harm and cruelty to one of his children and sentenced to serve three years' imprisonment. His mental illness was managed by the Prison Service and minimised his social interactions. He became eligible for release on HDC pursuant to the CJA 2003, Section 246 (1), having served the requisite custodial period. However, P's offence fell into a list that was unsuitable for release on curfew unless he could show exceptional circumstances.

According to relevant prison guidance, a prisoner would be an "exceptional case" if (i) the likelihood of his re-offending was low; (ii) he had no previous convictions; (iii) he was infirm by reason of age or disability or both. It was commonly acknowledged that the risk of P re-offending was low and that he had no previous convictions. The question for the governor was, thus, whether P was infirm by reference to his social phobia. The governor concluded that P was not infirm, that his social phobia was well managed in prison, and that release on HDC was not appropriate. He later affirmed that decision following receipt of further medical and prison reports. P submitted that the only conclusion open to the governor was that P was infirm by reason of his social phobia and therefore entitled to release on HDC.

HELD: Although P suffered from marked social phobia he was not "infirm" so as to meet the requirement of exceptionality in relevant prison guidance that would otherwise have justified his release on home detention curfew pursuant to the Criminal Justice Act 2003 Section 246(1). The judge went on to comment that the term "infirm" was not a medical one, but rather a description used by laymen to describe the consequences or a condition or conditions from which people might suffer. Whether or not a particular prisoner was infirm depended on a value judgment. Giving the word its ordinary meaning, the governor was entitled to conclude that P was not infirm.

UPDATES ON PRISON SERVICE INSTRUCTIONS

PSI 01/2011 – The Instructions System – The Approval and Implementation of Policy and Instructions came into force on 10 January 2011 and replaces PSI 23/2009. This PSI introduced a revised arrangement for the preparation, governance and implementation of policy and instructions across the whole NOMS Agency. PSI 01/2011 introduces new procedures to the Operational Policy Group (OPG) governance process for the approval and issue of instructions, including a new Resources Impact Assessment and an OPG checklist. The PSI requires that the OPG checklist and Resource Impact Assessments are submitted along with a completed Equality Impact Assessment to be considered at pre-OPG meetings.

Prison staff are required to familiarise themselves with this PSI, to ensure that they understand the various types of instructions and when they are mandatory.

PSI 02/2011 National Population Census deals with the 2011 census, and the legal requirement for all members of the population to complete a census form. Convicted prisoners may consid-

er it ironic that, despite European Court rulings in their favour, they are barred from voting in elections; however they are still expected to fill in the census. Prisons are obliged to 'issue each eligible prisoner with a census questionnaire, to inform the prisoner of their legal obligation to complete the questionnaire, and warn them of the possibility of legal action if they fail to do so'. Remand prisoners are counted at their outside addresses, so are not expected to complete the census in prison. Non-British citizens who are convicted or detained under immigration law are expected to complete it, if they have stayed, or intend to stay, in Britain for more than three months.

PSI 06/2011 Prisoner Communications - Correspondence replaces and cancels PSO 4411. The majority of the text of the new PSI replicates the cancelled PSO; however there are important amendments, the most significant of which will not be welcomed by prisoners. In particular, the old guidance on recorded/special delivery mail, which dates back to Circular Instruction 10/1991 and which dictated that incoming recorded or special delivery mail should be signed for by staff on receipt from the postman but then only opened in the presence of the prisoner, has been replaced by the following:

"Any incoming correspondence or parcel, which is recorded/signed for or special delivery, must be signed for by staff at the gate as confirmation that the item has actually been delivered to the prison by Royal Mail. Unless covered by the arrangements for Rule 39 or Confidential Access mail, it must then be opened and examined in the normal way for any illicit enclosures and passed to the prisoner concerned as soon as is possible. In order to prevent complaints that a valuable item has been lost, it must be opened in the presence of another member of staff. A record must be kept of the receipt of all parcels and recorded signed for/special delivery letters, and any prisoner who requests the original Royal Mail receipt should be given this to keep."

There is also new guidance relating to publishing material on social networking sites such as Facebook, presumably following media scandals occasioned by prisoners who apparently continued to update their Facebook pages from inside prison. The new guidance states that:

"Prisoners must not be permitted to access or contribute via a third party to any social networking site while in custody."

The restrictions on correspondence equally apply to communication while on temporary release from custody. Prisoners do not have access to the Internet other than for educational or resettlement purposes (and only then under strict supervision), but some prisoners have managed to gain unauthorised access to social networking sites to update their profiles. This has been done by using illicit mobile phones, via a third party – e.g. a letter to a friend is posted on their Facebook profile, or accessing the Internet while on release on temporary licence.

Whilst the use of mobile phones in prison for this or any other purpose is clearly prohibited, a ban on the posting of letters on Facebook, which have been sent to third parties and which do not infringe any of the other conditions contained in the PSI for material intended for publication, appears challengeable.
The guidance on prisoners on dirty protest has been rewritten to make it virtually impossible for a protesting prisoner to send letters, including legal ones. Following earlier complaints and a posi-

tive ruling from the Ombudsman in relation to prisoners on dirty protests being prevented from sending out letters, PSO 4411 stated that "If a prisoner is on a 'dirty protest' he/she will still be entitled to send and receive mail", referring prisons to PSO 1700 for further guidance on health and safety. The new PSI states:

'If a prisoner is on a dirty protest they are entitled to send and receive mail. However, this will have implications for the health of both staff and the public. Royal Mail will not under any circumstances handle contaminated correspondence. Unless a prisoner can obtain the services of a delivery agent who is willing to deliver this correspondence (using suitable packaging) they will not be permitted to send out such mail. This also applies to Rule 39 correspondence."

On a less negative note, the PSI clarifies that prisoners may write to the Prison and Probation Ombudsman free of charge (the PSO wrongly said that this was discretionary) and incorporates clear guidance requested by PAS on writing to our organisation or another legal advice provider. Prisons have attempted to insist that prisoners know the name of an individual lawyer prior to commencing correspondence, but the PSI now makes it clear that Rule 39 applies to '"The prisoner's Legal Adviser (which may just be the name of a firm or organisation such as Prisoners' Advice Service where the prisoner does not know name of legal adviser)".

Finally, there is a new section on confidential correspondence with registered medical practitioners, although this only relates to 'life threatening medical conditions' already diagnosed. This would appear open to possible challenge by prisoners whose conditions are not yet fully diagnosed, or indeed whose medical problems are not life threatening.

PSI 07/2011 – The Care and Management of Transsexual Prisoners came into force 14 March 2011. It introduces some amendments to PSO 4455 Requests from Prisoners to Change their Name. Under the PSI, a transsexual person is someone who lives or proposes to live in the gender opposite to the one assigned at birth. The gender in which the transsexual person lives or proposes to live is then known as that person's acquired gender. This Instruction accepts that a transsexual person may or may not have been diagnosed with the condition known as dysphoria. From 14 March 2011 onwards, establishments which are covered by this PSI must ensure that the care and management of transsexual prisoners are carried out in accordance with this PSI.

Under the Gender Recognition Act 2004, which this PSI makes reference to, a transsexual person may apply to the Gender Recognition Panel for legal recognition of their acquired gender by issuing a gender recognition certificate. A male to female transsexual person with a gender certificate may only be refused location in the female estate on security, but a female to male transsexual person with a gender recognition certificate may not be refused location in the male estate. Where a prisoner requests location in the estate opposite to the gender which is recognised under UK law, a case conference must be convened to consider the matter.

Where a prisoner is diagnosed with gender dysphoria, that prisoner must be provided with the same quality of care they would expect to receive from the NHS outside prison. Such care may include counselling, pre-operative and post-operative care and continued access to hormone treatment. If an unconvicted prisoner asks to begin treat-

ment for gender dysphoria, the prisoner would be advised that generally the matter would be reconsidered by prison medical if the court orders a subsequent custodial sentence. The prison health care team must inform the relevant NHS commissioning authority of any request from a sentenced prisoner to begin medical treatment for dysphoria.

This Instruction mandates that the doctor working in the prison must refer all applications for gender reassignment surgery to a consultant specialising in gender dysphoria and will ordinarily accept advice from the consultant about whether gender reassignment surgery is considered appropriate in a particular case. Where there is an application for reversal of gender reassignment surgery, it must be addressed by full reference to the gender dysphoria specialist and psychiatrist familiar with the case.

PSI 07/2011 provides that an establishment must permit prisoners who consider themselves transsexual and wish to begin gender reassignment, to live permanently in their acquired gender. This includes allowing prisoners to dress in clothes appropriate to their acquired gender, and to allow the prisoner access to items to maintain their gender appearance always, and regardless of their level on the Incentives and Earned Privileges Scheme or any disciplinary punishment being served. Establishments must produce a management care plan outlining how the individual will be managed safely and decently within the prison environment.

PSI 09/2011 – The Cell Sharing Risk Assessment replaces the Cell Sharing Risk Assessment (CSRA) process in PSO 2750 Violence Reduction, with a new process and forms, effective from 4 April 2011. This Instruction requires that an evidence- based check of specified sources is carried out on the day prisoners are received into custody, or the next working day. It is likely this new process will slightly increase the time taken to complete the risk assessment.

The CSRA process is used to identify prisoners at risk of seriously assaulting or killing a cell mate in a locked cell. This Instruction mandates that the CSRA process must only be used to assess the risk a prisoner poses to another prisoner in a locked cell or other unsupervised enclosed space, such as holding cells. There are two risk categories in the CSRA process, namely, High Risk and Standard Risk. If a prisoner is identified as being at risk of self-harm or suicide, then an Assessment, Care in Custody and Teamwork (ACCT) plan must be open in accordance with PSO 2700. The CSRA process should not be used where healthcare staff determine a prisoner should be accommodated in a single cell for healthcare reasons not covering CSRA risk issues.

Under this PSI every prisoner held in closed conditions must have an up-to-date Cell Sharing Assessment, even where there is no shared accommodation. However, the instruction does not expressly state how often the assessment needs to be carried out. Every time a prisoner is transferred to another establishment, the sending prison must ensure that an up to date CSRA form accompanies the prisoner as part of the transfer documentation.

Despite the mandate of CSRA, high risk prisoners can share cells in some circumstances, provided there is a satisfactory risk assessment. The PSI does not rule out cell sharing by prisoners who pose risk.

PRISONERS' LEGAL RIGHTS GROUP MEMBERSHIP APPLICATION FORM

Please complete this form in block capitals and send it to PAS at the address below:

Name: ______________________________

Company: ______________________________

Address: ______________________________

______________________ Postcode: ____________

Telephone: ________________ Fax: ________________

Email: ________________ Website: ________________

IS THIS A RENEWAL? (Please circle) Yes / No

PLEASE TICK THE TYPE OF MEMBERSHIP REQUIRED:

( ) Prisoners Free

( ) Professionals/Other £50pa (please make cheques payable to 'Prisoners' Advice Service')

( ) Voluntary Organisations £30pa

( ) Academic Institutions £50pa

( ) Prison Libraries £30pa

( ) Solicitors and Barristers £50pa

( ) Back Copies £5.00 each

( ) Ex-prisoners £10pa

( ) I would like to sponsor a prisoner PLRG member for one year £10

What issues/themes would you like to see covered in future issues?:

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PRISONERS' ADVICE SERVICE
PO BOX 46199 LONDON EC1M 4XA
Local Cost Call 0845 430 8923
Tel: 020 7253 3323 / Fax: 020 7253 8067