PRISONERS' RIGHTS

Prisoners' Legal Rights Group Bulletin No 57

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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.

New outreach sessions at women's prisons

PAS's Women Prisoners' Caseworker, Camilla Pandolfini, is beginning a regular outreach clinic at HMP Holloway, with the first session on 9 February. This will be the first time that PAS has run an outreach clinic at Holloway, and represents a big step forward in our outreach programme.

Camilla is also available to respond to queries on the PAS advice line on Wednesdays and Fridays, on 020 7253 3323.

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CONDITIONS

Imran Shahid v Scottish Minister [2011] CSOH 192 Scottish Court of Session

The petitioner had been convicted of a crime which had led him to being segregated for nearly a year before his trial. During his trial he had been transferred to another prison and given association. However after receiving a minimum term of 25 years he was again segregated in various prisons for a further four years before being returned to the mainstream prison population.

The petitioner argued that the segregation breached Articles 3 and 8 of the European Convention on Human Rights (ECHR). The Scottish Prison Service argued there was reliable and continued evidence that the petitioner would be subject to serious assault if returned to the mainstream prison system and therefore segregation was not contrary to Article 3 and the measures were justified and in line with Article 8(2).

It was accepted that on a number of occasions (15) the time limits set down on the prison rules around extension and renewals of extension had not been complied with (for periods ranging from ten minutes to 66 hours). The prison argued that non compliance did not result in subsequent periods of segregation being illegal.

The court held that the real purpose behind the rules were to ensure the decisions of the local prison management should be subject to regular and independent scrutiny. The fact that such reviews took place was itself sufficient to show compliance with this purpose despite the delays, because the petitioner had not been prejudiced as he was being segregated for his own safety.

The court reviewed the Article 3 case law and said they demonstrated that segregation of four years and eight months was not, in itself, indicative of a violation of Article 3. For example, in *Ramirez Sanchez,* solitary confinement for over eight years was sanctioned. Other decisions supported the view that it is not sufficient simply to point to segregation lasting for several years. The assessment must be more sophisticated. The conditions under which the petitioner was held, and the effect upon him, must be taken into account. In this case they did not reach the minimum level of severity of ill-treatment required for a violation of Article 3. In addition there were sufficient procedural safeguards to guard against any risk of arbitrariness.

While such a lengthy period of segregation is a cause for concern, its purpose according to the court was legitimate. It was directed towards the petitioner's own safety and protection from the potential for serious injury or worse. In light of this the prison services response was held to be proportionate. Throughout the ultimate goal of reintegration was maintained. Cases where there had been a finding of a violation of Article 3 have turned on much harsher regimes and an absence of appropriate procedural safeguards; this case highlights how difficult it remains to cross the Article 3 threshold (see also the ‘slopping out’ case below).

Similarly, as regards Article 8, the aim pursued was a legitimate one (the petitioners’ safety). The court contrasted the circumstances of the petitioner's case with those in *AB* v *Russia*, where the government failed to demonstrate a link between the segregation and any threat to the prisoner's safety.

R (on the application of Gleaves and others) [2011] EWHC 3379 (QB)

Two prisoners argued that that their rights under Articles 3 and 8 of the ECHR were violated by the prison conditions in which they were detained, specifically the practice of 'slopping out'. The Claimants were accommodated in single occupancy cells. Although each made other complaints, the focus of their claims was upon the prison sanitation regime. All of the HMP Albany claims were made following the decision in *Napier v The Scottish Minister* in April 2004, in which the Court of Session in Scotland held that the conditions at HMP Barlinnie (which included regular slopping out) breached Article 3 rights. The use of buckets had been criticized by a succession of reports by HM Chief Inspectors of Prisons and Independent Monitoring Boards.

The Claimants at HMP Albany spent 7 to 11 hours per day out of their cells. However, when locked in for periods during the day (routinely for lunch, staff changeovers and roll calls, and sometimes when not in work or education or when there were staff shortage), they said prison officers would not manually open their cell door to enable them to use the toilet facilities, if required.

The main complaint, however, concerned the night time sanitation regime. There were 24 prisoners on each self contained landing. Each cell door had a computer controlled electronic locking/ unlocking system which operated at night, enabling one prisoner per landing to be released at any one time, to use the toilets on each landing. Each prisoner was able to obtain three exits per night, of nine minutes each.

The electronic system was, at times, very unreliable. When the duty governor considered there was a risk of it not working, he was able to call in additional officers for that night who would patrol the landings in turn, and manually open cell doors when required. Prisoners also had the ability to contact duty officers by intercom to ask them manually to release them to use the facilities, but they did not always do so.

Although extent was in issue, it was common ground that, day or night, there would be times when a prisoner was locked in his cell and wished to use a toilet, and his door would not be opened promptly enough for him to use the proper landing facilities. For this eventuality, each cell was provided with a bucket and lid, washing bowl, soap, water and towel. The Claimants claimed that the bucket had to be used routinely. The Defendant said that there was a need to use the bucket only in exceptional circumstances.

The Claimants' case was that any requirement for a prisoner to urinate or defecate into a bucket is, in itself, degrading treatment and a violation of Article 3; but, alternatively, such a requirement was degrading, and a breach of their right to respect for private life under Article 8, when considered in the context of all of the conditions at the prison, particularly the allegedly inadequate space, light and ventilation in each cell. One Claimant contended it was particularly degrading for Muslim prisoners, because of their need ritually to wash before prayers.

Alternatively, it was submitted that, even if the Article 8 rights of the Claimants themselves were not directly breached, there was an unacceptable risk that the sanitation arrangements at the prison would breach a prisoner's Article 3 and Article 8 rights; and that risk itself amounted to a breach of their Article 8 rights.

Finally, one Claimant claimed that the fact that his cell space was less than the Council of Europe recommendation of six square meters was in itself a violation of Article 3.

All the claims were dismissed. In terms of the facts, The Judge found that the sanitation regime was 'not ideal'. However during the day, prisoners could regulate themselves so as not to need the toilet during those periods they were locked in; and, during the night, there were no significant problems when the electronic system was working.

The judge concluded that the system obliged a healthy prisoner to urinate in a bucket only rarely, and to defecate in a bucket very rarely. If a bucket were used, then there would usually be an early opportunity to empty it at a sluice in the toilet recess area (so waste would not remain in the cell for long), and with proper facilities there to enable him to empty and clean the bucket properly (e.g. a flushing sluice, hot water, brushes, cleaning agents and disinfectant). Prisoners were able to do that in un-cramped conditions, without any physical or time pressures. They were instructed both in cell hygiene, and in how to use and empty the bucket after use. Whilst he accepted that to urinate or defecate at all in a small locked cell was not optimal, the sanitation regime did not significantly increase risk to the health of prisoners.

He found that, on the evidence, neither Claimant used a bucket as often as alleged: he used it no more than rarely. Further, he found that the sanitation regime at HMP Albany did not cause either Claimant any distress, anxiety, feelings of humiliation or other harm. He also found that neither the Claimants nor any other prisoner had made any contemporaneous written complaint about either sanitation regime.

In relation to the specific grounds, the judge found as follows:

1/ Whilst the sanitation regime was not ideal, Article 3 did not require the state to provide an optimal regime, only one which did not degrade prisoners or otherwise offend their human rights;
2/ Where the burden of proof in relation to Article 3 fell on a complainant, the standard of proof was balance of probabilities; although, given the seriousness of such allegations, a court may require particularly cogent evidence in order to be satisfied that hurdle was overcome;
3/ The size, lighting and ventilation of the cells at HMP Albany did not materially contribute to the Claimant's assertion that the prison conditions were degrading;
4/ An obligation imposed by the State on a prisoner to use a bucket to urinate or defecate was not in itself a violation of Article 3. The Strasbourg jurisprudence did not support such a proposition. Whether a prison regime which included such a requirement was a violation depended on all the circumstances, including the effect on the particular prisoner;
5/ In all of the circumstances of the conditions at HMP Albany and the two particular Claimants, the Claimants fell far short of proving a breach of Article 3, even on the balance of probabilities. Particularly important was the absence of any harm resulting from the sanitation arrangements at HMP Albany. The regime was distinguishable from Napier; in that case, the pursuer shared a cell, and it was found that he suffered physical harm (eczema) as a result of slopping out.
6/ The regime did not present any specific difficulties for Muslim prisoners in practising their religion: at night, they could adequately perform their ablutions before they prayed, either via the electronic door system or in their cells using

the washing facilities there.
7/ Neither was there a breach of Article 8. The regime did not substantively lower the dignity of the prisoners, and their privacy was adequately respected. They did not share a cell, and the regime at the sluice did nothing to disrespect the prisoners' private life.
8/ Finally, the claim that the size of the cell alone breached Article 3 failed, because the recommendation upon which it was based was just that: a recommendation and not a mandatory requirement, not a norm for degrading treatment under the Convention.

This case highlights the continued discretion that will be accorded to prison authorities by the courts, and that Article 3, supposed to be an absolute right, is in fact no such thing. As the Judge made explicit, these conditions, which any reasonable person might conclude has no place in the 21st century, did not in his view go beyond the 'inevitable element of suffering or humiliation' connected with imprisonment.

ADJUDICATIONS

R (on the application of Bates) v The Secretary of State for Justice [2011] EWHC 3236 (Admin)

In this case, prisoner B challenged the decision of an Independent Adjudicator to find him guilty of possessing an unauthorised Article, a mobile phone, in breach of the Prison Rules 1999. B shared a cell with prisoner C. During a cell search the mobile phone was found in a Playstation owned by B. B and C were charged and both pleaded not guilty. The matter was referred to the outside Independent Adjudicator (IA), but, before the IA came to the prison, C was released. The day before his release C wrote a letter taking full responsibility for placing the phone in B's Playstation without his knowledge.

At the hearing in respect of B (C had been released so no charge was pursued against him) no application was made to dismiss the charge on the basis of procedural fairness rather the IA said he would consider the letter in the context of the other evidence. The IA found B guilty, noting that the letter from C had been written when it was clear no charge could be pursued because of release. C had initially pleaded not guilty and therefore C's credibility was severely damaged.

B argued that the adjudication breached Article 6 and the right to fair hearing: C's release meant he was deprived of the sole material witness who could establish his innocence; the IA's decision was irrational because C's subsequent confession was not made false by the fact he had originally pleaded not guilty; one of the reasons given by the IA (that there were better places to hide a phone than in the play station) was never put to B in the hearing; and that to cite a bad hiding place as evidence of guilt was also irrational.

The issue over C's attendance was dismissed. B had not asked for C to attend and indeed had said at earlier hearings he did not want to call witnesses. There was no reason to think C would have attended even if his whereabouts on release were known. The IA was entitled to proceed in C's absence, and did not need to request Cs attendance, especially as B was legally represented at the hearing (see *R (Maloney) v Governor of HMP Rochester 2000*). The letter from C had been considered and rejected, this went to the merits not to procedural fairness. Finally, had C attended it would not in all likelihood have made any difference and might have made things worse; if his letter was disbelieved then his oral evidence was also likely to have been rejected.

B's legal representative had made no application to dismiss the charge. Even more fundamentally: had such an application been made, the IA would have been entitled to proceed in the absence of the Co-Defendant. An analogy was made to criminal trials involving cut throat defences.

Finally, the IA was entitled to reject Cs evidence on the basis that it was suspicious and lacked credibility, and also entitled to consider the location of the phone. The comment around the phone and better places to hide it was deemed peripheral, and was not part of the reasoning behind the IA's decision.

The case is a warning to prisoners that charges against them will not automatically be dismissed simply because someone else takes responsibility. It is also an important reminder to legal representatives about what to do (or in this case not to do) in terms of procedure and witnesses.

R (on the application of Jason Garland) v The Secretary of State for Justice and the Prison and Probation ombudsman [2011] EWCA Civ 1335 (Admin)

In this case, an IPP prisoner had been charged and found guilty of disobeying a lawful order. He argued that the charge had not been laid "as soon as possible" as required by rule 53(1) of the 1999 Rules, but at the very end of the 48-hour period following commission of the offence. The charge form recorded that the offence had been committed at approximately 16.50 on 13 March 2009, and that notice of the charge was given to the Claimant at approximately 16.50 on 15 March 2009. The Court of Appeal considered the claim after the prisoner's complaint of maladministration had been dismissed by the Prison and Probation Ombudsman, and after permission had been refused.

In dismissing the appeal, the Court of Appeal held that under rule 53(1) of the Prison Rules 1999, prison authorities were allowed a full 48 hours from discovery of an offence against discipline to lay a charge against a prisoner, and longer where there were exceptional circumstances that made it impossible to lay the charge within that time.

The wording of rule 53(1) was significantly different from that of Civil Procedure Rules rule 54.5(1), which required Judicial Review proceedings to be begun "promptly and in any event not later than three months after the grounds to make the claim first arose". The formulation "and in any event" could easily have been used in rule 53(1) had Parliament so wished. The choice of wording was clearly intended to inject a degree of certainty, and reduce the scope for time-consuming investigation and argument as to whether charges could possibly have been laid earlier than they had been, which was inherent in the predecessor rule that provided simply for a charge to be laid as soon as possible. The meaning of rule 53(1) and the use of the word "within" did not therefore carry the implication that the charge must be laid before the end of the forty-eighth hour; it meant that the charge must be laid "not later than 48 hours after" discovery of the offence.

In this case all evidence pointed to the charge having been laid at the end of the 48-hour period and thus within the rule. That was sufficient to dispose of the appeal, but after hearing detailed argument on the proper approach to infringement of the rule, the court felt it was appropriate for it to express its conclusions on the point. The decision *in R v Board of Visitors of Dartmoor Prison, Ex p Smith [1987] 1 QB 106* that the

consequence of infringement was complete invalidity concerned the predecessor rule, and the reasoning did not apply equally to rule 53(1) of the 1999 Rules. Parliament cannot have intended that any non-compliance with the rule, however minimal and however devoid of prejudicial effect, should render the adjudication invalid. That was not to say that prison authorities were able to treat the rule as an 'empty vessel'. A charge laid outside the 48-hour period should be dismissed if the prisoner had been occasioned any prejudice by the delay, and might be dismissed if there was no excuse for unwarranted delay.

RELEASE OF TEMPORARY LICENCE / EARLY RELEASE

R (on the application of Nelson) v SSJ [2011] EWHC 2468 (Admin)

The Claimant (CN) applied for Judicial Review of a decision of HMP Kirkham that he was ineligible for early release under the Prison (Jersey) Rules, and also for Home Detention Curfew under the United Kingdom Secretary of State's Home Detention Curfew (HDC).

CN is serving a six year sentence imposed in Jersey for drug-related offences. He was transferred from Jersey to England on a restricted transfer, meaning that sentence length, release from sentence and (where applicable) supervision and possible recall following release is managed by the Jersey authorities, but all other aspects of his sentence are managed by the English authorities.

Under Jersey law his earliest release date is 13 July 2012, but he can be released four months early under the Jersey Temporary Release Scheme (TRS) to reside at an approved Jersey address.

HMP Kirkham made a decision not to release CN four months prior to his earliest release date of 13 July 2012, either in accordance with the TRS operated by the Jersey Prison Service or under the UK HDC scheme. The Court did not accept CN was eligible for either scheme. The Court found that CN was not eligible for the Jersey TRS because it does not apply to restricted transfer prisoners. This is because it is a temporary release scheme rather than an early release scheme.

Given the statutory construction in this case, one possible solution for prisoners subject to restricted transfers is to apply to the Secretary of State for temporary release on licence to match the scheme in the transferring jurisdiction. Although the Secretary of State retained discretion in such cases, it would allow a fair resolution to any disadvantage resulting from a transfer.

PAROLE BOARD

R (on the application of Leach) v Parole Board [2011] EWHC 2470 (Admin)

The Claimant applied for Judicial Review of a Parole Board decision to refuse to move him from closed to open conditions.

The Claimant was convicted of the murder of his girlfriend in 1985. There was a sexual element to the offence and he completed the sex offender treatment program in prison. In May 2011 a Panel of the Parole Board recommended a move to open conditions, and he was transferred to a Category D prison. He was returned to closed conditions after sending a female teacher flowers under a female pseudonym thanking her for showing him kindness and support. His behaviour in prison since the incident was exemplary.

In October 2004 a Panel of the Parole Board recommended a return to open conditions. In January 2007 the Claimant was moved to open conditions again.

In May 2008 the Claimant was moved back to closed conditions. While in the community on ROTL, he met a 16 year old woman at work and developed a friendship with her. He had not advised Probation of the friendship. In January 2009 the Parole Board did not recommend a return to open conditions.

A further Parole Board was held on 13 December 2010. Transfer to open conditions was not recommended by the offender manager, offender supervisor or the Prison service psychologist. An independent psychologist did recommend transfer. The Board declined to recommend a move to open on the basis that the degree of risk that the Claimant presented had not been sufficiently reduced to enable them to recommend a transfer to open conditions. It was this decision that was the subject of the application for Judicial Review by the Claimant, who argued that the Board had failed to balance the risks against the benefits of a transfer to open conditions and had failed to apply the proper test under the statutory directions.

The Court found that the Parole Board was entitled to come to the decision it did, on the basis that it accepted the evidence of the Prison Service psychologist over the opinion of the independent psychologist. The fact that it did not explicitly set out the balanced risks against the benefits (as required under the Parole Board 2004 directions, although the 2004 directions had also shifted the emphasis from earlier directions to a more 'risk reduction' aspect) was not significant. The Board, in the Court's view and reading the decision as a whole, had in mind the advantages of a move to open conditions, given the evidence it had summarised and had applied the directions as required.

The decision demonstrates the extreme reluctance of the courts to interfere with the Board's decisions where detailed reasons have been given. It also shows that the court will look at decisions in the round rather than expecting a verbatim recital of the statutory directions. Finally, in noting the changes made in the 2004 directions, the court also suggested that decisions prior to these changes (such as *R (Gordon v Parole Board* 2000) will not be applied directly by the courts now.

R (on the application of Holdsworth) v Parole Board [2011] EWHC 2924 (Admin)

This case concerned a challenge to the Parole Board refusing a request for an oral hearing, or the release or transfer to Open Conditions of the Claimant (H).

On 11 May 2009 H's minimum term expired. After disclosure of the dossier H submitted written representations to NOMS, urging them to support a progressive move. These were not forwarded to the Parole Board before they considered the case. The panel that considered the case initially decided an oral hearing was not necessary and declined to order release or to recommend open conditions. In line with usual procedures they sent the decision to H and invited further representations as to whether an oral hearing should be held. H and his representatives wrote to the Board, enclosing the earlier representations, and said as they had clearly not been considered a fresh Board should be held. The matter was then looked at by a single member, who considered the letter and representations as a request for an oral hearing and refused it.

The court considered three issues: whether the Board erred in law by failing to consider the written representations made on behalf of H by his solicitors; whether in any event, the reasons provided by the Board were clear and adequate; and whether the Board's decision of 25 November was unlawful because it failed properly to apply the test of fairness in deciding not to hold an oral hearing to consider the case.

It was accepted by the court that the representations were not considered by the Board and not put before a panel as they should have been, and that the single member had only considered them mistakenly in the context of whether an oral hearing was required. In addition, the Board's reasons were inadequate in that they had not addressed the points made in the representations. Finally, fairness in this case required an oral hearing given that the decision letter refusing an oral hearing did not make clear why one was not required in light of the first Board's failings. The decision was quashed.

CATEGORISATION

R (Shaffi) v Secretary of State for Justice [2011] EWCH 3113 (Admin)

This was a Judicial Review challenge by a Category A prisoner to the Director of High Security's (D) categorisation decision.

The Claimant (S) had been convicted of terrorism offences 10 years earlier and his behaviour in custody was very good. He had educated himself with a view to obtaining a job on his release, had no adjudications or negative entries and his prison record was exemplary. A psychological assessment in 2010 indicated that his future risk was very low and Category A conditions were not necessary. D refused to de-categorise S on the basis that further coursework and assessments needed to be undertaken, although it was accepted no suitable coursework was available.

The question the judge considered was whether fairness requires that S be granted an oral hearing. PSI 03/2010 Chapter 4 says that an oral hearing should only be granted in exceptional circumstances. This means an oral hearing will not usually be required. However, the judge determined that D should have identified the criteria by which he could be satisfied that S had changed enough to be eligible for lower security conditions. There was an impasse that could only be resolved by recourse to an oral hearing. Reasons should also be sufficiently explained. The judge was not satisfied that D's reasoning was sufficiently clear, especially given the fact that no courses were available to S and this seemed to be a significant stumbling block. It was concluded that an oral hearing was appropriate here.

R (Abdulla) v SSJ [2011] EWHC 3212 (Admin)

The four Claimants challenged the Secretary of State's decision to maintain their classification as high-escape risk prisoners. This classification is the middle escape risk classification for Category A prisoners.

The definition of a Category A prisoner, at the time of the challenge, was: 'a prisoner whose escape would be highly dangerous to the public, or the police or the security of the State, and for whom the aim must be to make escape impossible.'

Category A prisoners are placed into one of three further categories, depending upon the escape risk which they pose. The policy in effect at the time of

a decision in March 2011 provided the category of high escape risk as: 'As standard escape risk; however, intelligence received either internally or from external agencies would suggest that the individual has access to the type of resources and associates that could provide assistance in attempting to facilitate an escape and the propensity to activate them.' The effect of being placed in the high risk category is that there is significant intrusion into the daily life of the prisoner.

The Claimants had all been convicted of terrorism offences linked to Al-Qaeda. The court found that, at least for three of the Claimants, it was almost exclusively the circumstances of the original offence which have caused the Secretary of State to determine the high escape risk category. It was alleged that the fourth Claimant had been part of a recent escape plan, although this was disputed.

The Court accepted that the mere fact that the Claimants had been convicted of very serious offences does not in and of itself justify a high risk category. However, the Court found that the decision to place the Claimants in a high-risk category was based on an inference from the circumstances of the offence that there were potential links with resources and associates, and that there would be a propensity to take advantage of any opportunity to escape. On this basis the application for Judicial Review by the Claimants was dismissed.

EDUCATION

R (Campbell) v SSJ [2011] EWHC 2596 (Admin)

The Claimants (C and F) applied for Judicial Review of a decision by HMP Wakefield to refuse them permission to undertake a distance learning course. The course was an NCFE Level 2 course in human anatomy and physiology. Rule 32 of the Prison Rules and PSI 33/2010 provide the legal framework relevant to education and distance learning in prison. HMP Wakefield has a local protocol applicable to distance learning.

The Claimants are life sentence prisoners. The educational pre-requisites for the course they wished to undertake are 'basic English, reading and writing skills'. F had previously completed a Level 3 archaeology course by distance learning. C had a Level 2 certificate in adult literacy and three other Level 2 qualifications in catering and hospitality.

HMP Wakefield refused F permission on the basis that he had to undertake a Level 2 assessment, and refused him access to the course until he had completed the Level 2 assessment. C was refused permission on the basis that the course was not part of his sentence plan targets and could not be taught within the prison.

The Claimants argued that the effect of the wording in provisions 1, 2 and 8 of the local protocol was to reduce or circumvent the circumstances in which a prisoner will be able to undertake distance learning courses, to an extent that was unlawful. The HMP Wakefield protocol is more demanding than the relevant PSI, because it states that no prisoner would be able to undertake distance learning unless they had achieved a level 2 qualification in literacy, numeracy and ICT, which went beyond the requirements of the PSI.

The Claimants were successful and the decision of HMP Wakefield to refuse the Claimants permission to undertake the distance learning course was quashed.

CORRESPONDENCE

R (Chester) v Ministry of Justice and Governor of HMP Long Lartin Evesham County Court, 22 September 2011 (unreported)

Mr Chester applied for compensation on the basis of a breach of his ECHR Article 8(2) rights by HMP Long Lartin. The claim concerned a consideration of whether letters to and from the Treasury Solicitors are subject to Rule 39. PSI 06/2011 provides a non-exhaustive list of organisations which are subject to Rule 39 and confidential access arrangements.

It was argued that letters to and from the Treasury Solicitors were not subject to Rule 39. However, District Judge Savage held that interference with Mr Chester's correspondence to and from the Treasury Solicitors breached his rights under Article 8(2) of the ECHR. This Article prevents public authorities from interfering with correspondence other than in a manner that is 'necessary in a democratic society'.

The Court held that Article 8(2) had been breached on the basis that: (1) there was a delay in Mr Chester sending and receiving his correspondence; and (2) two of Mr Chester's letters from the Treasury Solicitors had been opened.

As a result of this breach, Mr Chester was awarded damages: £250 non-pecuniary damages, and £750 damages in respect of the temporary withholding of Rule 39 material. This case has now been appealed, and similar cases have been stayed pending the appeal.

UPDATES ON PRISON SERVICE INSTRUCTIONS AND ORDERS

PSIs 39, 40 and 41/2011 all deal with categorisation and recategorisation and replace PSO 0900, which, although to an extent replaced by the National Security Framework, had remained the main published guidance on categorisation since 2000. The new PSIs largely consolidate guidance issued in a number of instructions since that date; however, the PSI which deals with the women prisoners introduces a major change in that it entirely removes the category of 'semi-open'. This is subject to challenge, due to be heard in January 2012.

It should also be noted that while PSI 16/2008 on Making Best Use of the Open Estate stated that: 'Governors (and Directors of Contracted Prisons) must put in place arrangements to conduct categorisation reviews at six-monthly intervals for all prisoners in the last 30 months of their sentence. These prisoners should then be moved when they are closer to the last 24 months of their sentence', thus allowing for a prisoner to be reviewed at 30 months in preparation for a transfer, without undue delay at 24 months, the new guidance states that: ' The following have a six monthly review… Prisoners in the last 24 months of their sentence.'

PSI 44/2011 - Identity (ID) for Bank Account Applications for all prisoners

This PSI replaces PSI 45/2007 and amends PSI 35/2009. The instruction sets out how prisons should complete a Personal Identification Document for prisoners who wish to open a bank account. This document only requires prisons to confirm the identity information that is held in prison records. The Prison Service and the banks recognise

that prisons rarely have documentary evidence to support this information. The PSI confirms that is considered generally advantageous for prisoners to open bank accounts and therefore states that establishments should assist them to do so.

PSI 46/2011 - Tackling witness intimidation by remand prisoners
This instruction outlines procedures designed to ensure prisons and staff are made aware of real or potential threats to victims and witnesses, made by prisoners on remand. It includes a Protocol outlining arrangements by which the police and Crown Prosecution Service are to notify the prison where such a risk of intimidation is considered to exist, and whereby the prison is then able to restrict a prisoner's communications throughout his/her time on remand.

PSI 47/2011 - Prisoner discipline procedures
This PSI replaces PSO 2000 Prison Discipline Manual Adjudications (except in terms of adjudications which began prior to the effective date of 1 October 2011), PSI 11/2008, PSI 13/2010, PSI 32/2010 and Standard 2 Adjudications. It provides guidance on the topic of adjudications and Minor Reports. Although PSI 47/2011 replaces PSO 2000, much of the contents are unchanged. However there are some changes, including the inclusion of the following: 'If the prisoner's legal representatives (i.e. solicitors who attend the hearing to put the prisoner's case on his or her behalf) request copies of the adjudication papers (DIS 1, written statements, etc) these should be provided at no cost (except any where disclosure would put someone at serious risk of harm, or where a medical report could identify someone other than the patient who has provided information). If legal advisers (i.e., solicitors who provide advice to the prisoner, but do not attend the hearing) request papers they should be told that papers will not be supplied directly to them, but the accused prisoner can ask for them and then, if desired, send them on to the advisers at personal expense.'

PSI 48/2011 - Prisoners Earnings Act 1996 comes into effect following the government's implementation of the Prisoners' Earnings Act 1996 on 26 September 2011. The guidance envisages that prisoners working outside the prison for external employers will be subject to a levy of 40% of net income in excess of £20 per week (ie after deductions such as income tax, national insurance, payments for court orders, child support). The levy will be paid to the charity Victim Support. Legal challenges are in the pipeline.

PSI 49/2011 – Prisoner Communication Services replaces PSO 4400 Chapter 4 on telephones and the short-lived PSI 06/2011 on Prisoner Communications. It therefore provides detailed and consolidated guidance on all communication via letter or telephone between prisoners and their friends, family, legal advisers and other parties, including guidance on contact with the media and restrictions on access to social networking sites.

OMBUDSMAN CASES

Religion

Mr A is a Muslim prisoner. He complained that he has been prevented from issuing the call to prayer or Ad'han, which he said was an integral part of his faith, and that the prison was contravening his right to practice his religion. Mr A had been allowed to call the Ad'han at a previous prison, but, despite the new establishment initially agreeing permission to call the an-

nouncement to the start of prayers, this was withdrawn after 3 weeks as it supposedly breached the prison's own noise policy. Whilst the prison did not have a problem with the call to prayers being made, Mr A was shouting out of the window and this was why the initial permission was withdrawn. Mr A initially said that the call to prayer was a requirement, whilst the prison argued that it was simply a recommendation. Mr A on his appeal accepted that whilst the call to prayer may be a recommendation, the Koran and Sunnah (which provides guidance on the legal requirements of the Muslim faith) required Muslims to demonstrate their faith through following the verses of the prophet. By denying his right to call he was being asked to compromise on aspects of his religion. The Muslim Advisor at NOMS said there were varying schools of thought around the call to prayer, but that everyone agreed that if it was not performed the prayers were still totally valid. It was also confirmed that in the context of a non-Muslim country and within a prison setting, there was an obligation to follow the law of the land so that the prison's rule took precedent over the recommendation. The issue of consideration for others (around noise) was also a factor. On the basis of the fact that it was a recommendation (even a high one) and that prayers said without the announcement were still valid, the Ombudsman concluded Mr A had not been unreasonably disadvantaged.

Security

Mr B complained that he had been placed on closed visits 11 days after a visit had been stopped, that his brother had been banned from visiting him despite having been searched and nothing found. He also complained that he had not received written confirmation about a review of his placement on closed visits. The prison said Mr B had been placed on closed visits after security intelligence suggested his involvement in illicit activity within the visits hall. Prison Service Instruction (PSI) 15 'National Security Framework – Visits function – Management of security at visits' was considered. The PSI says that closed visits are an administrative measure not a punishment. Therefore they could be applied regardless of whether or not a prisoner has been charged with smuggling prohibited items through a visit and it may be applied on the 'balance of probabilities' rather than 'beyond reasonable doubt' in terms of evidence.

The imposition of closed visits has to be justified by the prison, taking into account the individual circumstances of a case, and the response must be proportionate and kept under regular review. In this regard the PSI says closed visits can be applied for a period of time where the prisoner is considered to be at risk (normally three months but an additional period can be imposed) and reviewed in terms of its continuing need every month.

The prison said there had been concerns that Mr B and his brother had been whispering during the visit, that another brother had had a drug dog indication and another visitor had not gone into the prison following a drug dog indication. Mr B was also suspected of being involved in the drugs culture of the prison, despite being an orderly and providing recent negative drug tests. The Ombudsman said a Security Intelligence Report (SIR) should be completed where an individual has concerns, but that these concerns only need to be perceived not proven. Any person can submit an SIR, and all information is deemed by the prison to be useful, no matter how trivial. The delay of 11 days from the initial visit to closed visits being imposed suggested, accord-

ing to the Ombudsman, that the prison had carefully considered the case and intelligence relating to Mr B and that further SIRs were received prior to the three month period ending, making it not unreasonable for the prison to extend the period of closed visits in line with the PSI. Mr B had also argued he was not able to represent himself at the reviews. However, the PSI does not stipulate how prisons should conduct the reviews (as long as they are monthly), and there was no requirement to hold a Board. Mr B was able to submit written representations and that was sufficient. The Ombudsman did not therefore uphold the complaint.

In a separate case, Mr C complained about a Pre-Sentence Report (PSR) prepared by Probation which contained an allegation that there was 'substantial evidence' (derived from a Multi Agency Public Protection Arrangements [MAPPA] meeting) to prove that he had been writing to two 15 year old girls who he had met online. Mr C denied this and said he had written to one girl, but it was established by police that she was 16 years old and the trial judge made no comment on the matter. The '5x5' summary of the SIRs on Mr C from Head of Security at the prison said that there was no evidence to support the view that Mr C had written to two 15 year old girls, but that there was an uncorroborated SIR relating to information disclosed to Mr C by his partner during a phone call, that identified his contact with a 16 year old girl. The Ombudsman said it was reasonable to suppose that, had Mr C been writing letters to 15 year old girls that had been intercepted by the security department, it would have been referred to in the '5x5' summary of SIRs. In the absence of any other evidential basis for the statement contained in the PSR, the Ombudsman upheld the complaint. The relevant probation department agreed to give Mr C a written apology; file entries made via CRAMS (Case Record and Administrative System) were to be amended and unsubstantiated information removed.

Correspondence

Mr D complained about HMP Wakefield's decision not to allow him to have a book - *Prisoners - Law and Practice* - in his possession. The prison had refused to allow him to have it because it was not obtained from an approved supplier. Mr D had been allowed to purchase the book via an advert in a prisoners' newspaper by means of a cash disbursement, but when it arrived it was placed in stored property. There was nothing in the book's contents that made it inappropriate for Mr D to own, and it was available in the prison library. Prisoners could also order their own copy from an approved supplier. Section 1 of PSI on property at paragraph 1.7 states: 'Such limitations and restriction on the property held in prisoner' possession are operated as are necessary to maintain good order, discipline, security and safety of those identified at-risk of suicide and self-harm'. Paragraph 2.70 goes onto say that prisoners may be permitted to order items through mail order from an agreed contractor as detailed under PSO 5800 (paragraph 3.8), provided that: they are within the volumetric control limits; the item is appropriate to their IEPS (Incentives and Earned Privileges Scheme) level; it is consistent with the local facilities list; it does not compromise the good order or discipline of the establishment.

Prison Rule 4(4) gives governors the discretion to restrict this practice in respect of convicted prisoners on a case-by-case basis if it would result in a prisoner exceeding their volumetric control limit or having to place property in storage in order to accommodate the purchased item.

NOMS confirmed there were currently no agreed contractors in respect of the supply of the book and it was for individual prisoners to decide which suppliers they would use. The Ombudsman upheld the complaint. There was nothing inappropriate in the content of the book. Whilst governors (especially in high security prisons) should be able to exercise controls over what items prisoners can have in their possession and where they purchase the items from, to require Mr D to order another copy from a different supplier, as HMP Wakefield suggested, was unnecessarily bureaucratic. The prison had allowed Mr D to order the book from the publishers, whether by mistake or not, and given that there was no objection to the book in principle, it was recommended that he should be allowed to keep it in his possession.

OTHER NEWS

IPP SENTENCES TO GO

On 1 November 2011 Justice Minister Kenneth Clarke set out to Parliament his plans to abolish Indeterminate Sentences for Public Protection (IPPs). The following day the House of Commons voted through an amended version of the Legal Aid, Sentencing and Punishment of Offenders Bill, containing clauses 113-117 to that effect, and passed it to the House of Lords where it is currently being debated.

The government plans to replace IPPs with a combination of long determinate sentences with extended licences, and mandatory life sentences for those who commit a second serious violent or sexual offence. This latter provision is similar to but more refined than the old 'two strikes' automatic life sentence introduced by the Crime (Sentences) Act 1997. Under that provision, and especially prior to the challenge in the case of *Offen*, any second violent/sex offence was sufficient to trigger a life sentence; under the new system, the life sentence can only be passed if the individual offences would themselves each have resulted in at least a ten-year determinate sentence.

There is clearly great interest in the planned changes in the prison system; however, it has been made clear that anyone already convicted and sentenced to an IPP will be unaffected and will continue to serve that sentence. IPPs were a central plank of the previous government's 2003 Criminal Justice Act, the sentencing provisions of which came into force on 4 April 2005.

The Bill has also been amended to allow the possibility of the release test applied by the Parole Board to indeterminate sentence prisoners to be changed. It was suggested in the Green Paper prior to the Bill that the test might be reversed so that, instead of keeping prisoners who have served the minimum custodial part of their sentences inside until they 'prove' they are safe to release, they would be released at that point *unless* it was clear that they remained dangerous. The amendments to the Bill make it possible for the release test to be changed in the future by Statutory Instrument, but do not actually make the change. Instead there will be further 'consultation', in particular with the Parole Board, which has apparently made it clear that it is not happy about changing the test.

The provision in the Green Paper allowing for foreign national indeterminate sentence prisoners to be deported once they have completed their minimum terms without a release direction from the Parole Board is also included in the Bill.

PRISONERS' LEGAL RIGHTS GROUP MEMBERSHIP APPLICATION FORM

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

PAS PRISONERS' ADVICE SERVICE

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
( )	Voluntary Organisations	£30pa	'Prisoners' Advice Service')
( )	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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