PRISONERS' RIGHTS

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PAS 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.

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CASE REPORTS

RIGHT TO ANONYMITY IN COURT PROCEDINGS

R(M) v The Parole Board and Others [2013] EWHC 1360 (Admin)

The issue in this case was whether an order for anonymity made in the course of judicial review proceedings should be discharged.

The claimant (M) is serving a life sentence imposed in 1973 for a notorious crime. At various times over the past 40 years his movements in custody have been reported by the press which led to other inmates subjecting him to physical or verbal abuse. As a result, M has spent much of the past 40 years in segregation. He has been moved between open and closed conditions on numerous occasions, but attempts to rehabilitate him had been hindered by abuse or threats of abuse.

M sought a judicial review of a decision by the Parole Board in 2011 not to return him to open conditions. As part of those proceedings the judge had granted an order restricting the reporting of M's identity, the details of his offences, and his current location. In this hearing, various media organisations requested the discharge of that order.

The claimant, who is in a vulnerable prisoners unit (VPU), argued that the reporting restrictions order should remain in place, in the light of previous press reports which had triggered attacks or threats of attacks on him. These he said would threaten his right to life under Article 2 of the ECHR and protection from degrading treatment under Article 3. He also said that his rights under Article 5 were engaged because disclosure of his details would have the effect of his remaining in the segregated conditions of a VPU. Under Article 5 he had a right not to be detained arbitrarily. Finally as to Article 8, he argued that he had the right to respect for his 'physical and psychological integrity' which was threatened by the lifting of the anonymity order.

The media interveners argued that the principle of open justice (i.e., that public justice should be publicly reported) required the discharge of the order. They contended that M's challenge to the Parole Board's decision was a matter of public interest because it concerned his progress through prison towards release, and because of the exceptional nature of his crimes. They conceded that anonymity orders were appropriate where the risk to an individual's life was 'real and immediate', but this was not the case here given M would remain in custody for some time, and could be protected in the VPU. They accepted that an anonymity order would also be justified if M were re-entering society, but argued that while he remained in prison the risk of harm remained low. They stressed that his personal details were already in the public domain.

The Court considered the state's positive obligation to protect life under Article 2 and the need to balance this against the press interest in freedom of expression under Article 10. In doing so the court said there had to be a very high degree of risk calling for positive action for the authorities to protect life (*Osman v United Kingdom* 29EHRR) such as witness protection or other exceptional circumstances. The court said:

The importance of the principle of open justice at common law is so well known that it does not require further emphasis in this judgment. It is a cornerstone of the rule of law that public justice should be publicly reported unless the interests

of justice otherwise require: Scott v Scott [1913] AC 417 at 463

The central factor in the Court's decision was its view that, at present, M was not facing a real or immediate risk to his life and safety. This was precisely because he was currently incarcerated. As long as that was the case, his safety could be monitored and his well-being protected. The public did have a legitimate interest in M's progress through prison, and because M would be relatively safe whilst in custody, that public interest should prevail. The publication of M's judicial review proceedings may call for extra vigilance, but it would not subject M to a risk that could not be handled by his presence in the VPU. In addition, the court observed that M's details had been in the public domain for several years. It found no evidence that previous publications of M's identity had prevented him from engaging with the offence-related work necessary for him to progress through the prison system. It also found no evidence to support his Article 8 claim concerning his psychological integrity. It therefore discharged the anonymity order.

EXTRADITION AND DEPORTATION

Aswat v United Kingdom, (application number 17299/12) - ECtHR - 16 April 2013

In this case the European Court of Human Rights ruled that a terrorist suspect detained in Broadmoor hospital should not be extradited to the United States because of the risk that his mental condition would deteriorate there.

The applicant was indicted in the US in respect of a conspiracy to establish a jihad training camp in Oregon. He was arrested in the UK in 2005 and in 2006 the Secretary of State ordered his extradition. His appeals in the High Court and the Court of Appeal that his extradition would not be compatible with Article 3 of the Convention because he could be detained in a 'supermax' prison were he unsuccessful. However in November 2011 a mental health tribunal determined that he was suffering from paranoid schizophrenia.

After the US requested his extradition in May 2012, the US Department of Justice indicated that the applicant would have a full opportunity to argue that he lacked mental capacity to stand trial there. They also said that if he were to be convicted in the US then following sentencing the US authorities would determine which of the mental health services for sentenced prisoners would be appropriate. According to the US Department of Justice:

While a diagnosis of schizophrenia would not preclude a designation to a maximum security facility, most inmates with this diagnosis are managed and treated in other facilities.

The applicant complained to the ECtHR that the UK government would be in breach of Article 3 if it were to extradite him. He argued that were he to be sent to a potentially more adverse environment in a different country his condition would deteriorate, particularly if held in a single cell in a 'supermax' centre like ADX Florence. The government's case was that, in practice, most inmates with a diagnosis of paranoid schizophrenia were not sent to ADX Florence, but were managed and treated in other facilities. However even if the applicant were to be sent to ADX, the government argued that the court itself had dismissed an application under Article 3 from other detainees facing a similar future there (*Babar Ahmed and others v United Kingdom*, 10 April 2012).

The court upheld the complaint.

In contrast to the Babar Ahmed application, the court's conclusion under Article 3 was based solely on Mr Aswat's mental illness. The court was particularly concerned with a potentially long period of pre-trial detention and his possible placement in a 'supermax' prison which would be likely to exacerbate his condition of paranoid schizophrenia. This would result in a deterioration that 'would be capable of reaching the Article 3 threshold'.

The complaint was upheld even though the court accepted that if convicted the applicant would have access to medical facilities and, more importantly, mental health services, regardless of which institution he was detained in. Indeed it was never argued by the applicant in this case (or in the Babar Ahmed case) that psychiatric care in the US federal prisons was substantially different from that which was available in UK prisons.

Abdi v United Kingdom (application no. 27770/08) 9 April 2013

In this case the ECtHR ruled that a Somali national's detention pending deportation was not lawful under domestic law.

The applicant was a Somali national detained in HMP Brixton. He arrived in the UK on 7 May 1995 and was granted exceptional leave to remain until February 2000. On 23 July 1998 he was convicted of several serious offences and sentenced to eight years' imprisonment.

On 20 May 2002 the SSHD ordered his deportation and on 27 May 2002 issued an authority for detention until the making of a deportation order.

On 3 September 2003 Mr Abdi's release became automatic; however he remained in detention on the basis of the authority issued in May 2002 and on 5 April 2004 the Home Secretary authorized his detention until his deportation.

From August 2004 until July 2006 it was not possible for the government to remove Mr Abdi to Somalia. This was because in August 2004 the last carrier willing to take ''enforced returns'' to Somalia withdrew, and in November 2004 Mr Abdi refused a formal request to sign a disclaimer confirming that he was willing to return voluntarily. In July 2006 the government concluded an agreement with African Express Airlines which made enforced removals to Somalia possible again.

Mr Abdi challenged his detention in the British courts, The High Court held his detention was unlawful but the Court of Appeal overturned this decision though by the time its judgment came out Mr Abdi had been released (April 2007) and then re-detained (April 2008) after breaching his bail conditions.

In respect of Article 3 the ECtHR felt the UK government's undertakings, set out in a letter of 10 February 2012, not to return applicants to Somalia without a full examination of their claims, was sufficient to allow the applicant an opportunity to lodge new applications with the ECtHR should the need arise. Accordingly, it decided to strike out the Article 3 complaint.

In respect of Article5 the Court held that following a Supreme Court judgment in *Lumba* (March 2011), Mr Abdi's detention from 3 September 2003 to 13 April 2007 could not be said to have been lawful under domestic law. This was because the regular reviews required by the Secretary of State's published policy were not carried out. Also the Supreme Court in *Lumba* had since considered it necessary to distinguish between cases where the return to the country of origin

was possible and cases where it was not. Where return was not possible for reasons extraneous to the person detained, the fact that he was not willing to return voluntarily could not be held against him since his refusal had no causal effect.

SEARCHES

The Queen (on the Application of James Dowsett) v SSJ [2013] EWHC 687 (Admin)

In this case the claimant, who has been a serving prisoner since 1989, challenged the SSJ's policy on 'rub-down' searches and, in particular, the policy that a male prisoner cannot normally object to such searches conducted by a female prison officer other than when his case falls within the exceptions based on 'religious' or 'cultural' grounds (although cultural ground means an objection that arises from a sincerely and deeply held belief, so it is not clear how this ground differs from religion). In consequence, the claimant had been searched by female officers on many occasions. In contrast current policy with regard to female prisoners was that they can only be searched by female staff.

The claimant did not argue that male prisoners should only ever be searched by male staff, rather he argued that the cultural grounds exception was too limited and should be extended to cover cases where male prisoners had a genuine and sincere objection that cross-gender searching would cause discomfort or distress. The issues before the court were whether the policy; amounted to discrimination on grounds of sex or lack of religion; infringed the claimant's rights under Article 8 or 14 of the ECHR; and/or constituted a breach of public law principles by being insufficiently flexible, unfair and irrational.

There was a time when prison rules only allowed for prisoners to be searched by officers of the same gender. But in 1992 this rule was revoked given that there were a growing number of female officers employed in male prisons. However a female officer successfully claimed discrimination on the grounds that she was required to rub-down search male prisoners, while male officers were not required to rub-down search female prisoners. As a result of this decision, the policy in 2005 was amended so that female members of staff could object to conducting rub-down searches of men.

In dismissing the application on the grounds that there was no discrimination on grounds of sex the court said that the claimant himself did not argue that male prisoners should only ever be searched by male staff. In their view this showed not merely that he accepted that the SSJ was entitled to have a policy of rub-down searches but that the policy for male prisoners could be different than the one for female prisoners.

The approach of the SSJ was first to allow cross-gender rub-down searching where appropriate for operational reasons, but then to grant exceptions where there were good reasons for doing so. There were sound reasons for not permitting female prisoners to be searched by male officers, namely that considerations of privacy and decency were more likely to arise and they were more likely to have been the victims of abuse by men. Similarly there were good reasons for granting exceptions for certain groups of male prisoners and those exceptions had been properly defined. The court felt the lack of similar complaints showed that the exceptions were fair, proportionate and reasonable

'*The Courts can and should apply a de minimis approach to the claimant's*

complaint of sex discrimination bearing in mind the extremely slight difference between the claimant's complaint and those cases covered by the cultural grounds exception. (para 65)'

The court dismissed the argument of the claimant around religious discrimination. A prisoner who lacked religious belief was still entitled to object to cross -gender searching provided he fell within the cultural grounds exception. The claimant had no religious belief on which to object but also could not bring himself within the cultural grounds exception, and that was a complete answer to any claim based on religious discrimination.

The court also held that there was no breach of Article 8 or 14. The claimant was a serving prisoner and did not have a 'reasonable expectation of privacy' in the way a person at liberty does, so his rights under Article 8 (1) were not engaged by the rub-down searches. In any event, the court said that the SSJ could rely upon the qualification in Article 8 (2) that the policy was 'in accordance with the law' and necessary in the interests of public safety and for the prevention of disorder and crime. The SSJ had a broad margin of discretion in striking a balance between the rights of prisoners, on the one hand, and on the other hand, the rights of prison officers and others who may be affected by security breaches in prison including the interests of individual prisoners in general in keeping the prison free from drugs, weapons and maintaining gender balance on the staff. Therefore, there was no breach of Article 8. This margin of appreciation ensured that the SSJ had not disregarded the prohibition on discrimination under Article 14.

Finally there was no breach of public law principles. The policy did not preclude officers from taking into account circumstances that might be relevant in a particular case and was therefore sufficiently flexible. Indeed it specifically stated that the exemption on cultural grounds was a matter to be decided case by case and showed that 'rational consideration' was required by officers. The policy under challenge made it clear that there are '*no hard and fast rules*' and the assessment should take into account '*all relevant factors*'. The court said the claimant had not been able to point to a case of unlawful decision-making by prison officers.

INDETERMINATE SENTENCES FOR PUBLIC PROTECTION AND OFFENDING BEHAVIOR COURSES

R (Kayam) v Secretary of State for Justice [2013] EWHC 1340

This case concerned an IPP prisoner, who was four years post-tariff. The claimant sought judicial review of what he considered to be a failure by the prison to provide him with suitable rehabilitative work in the interest of reducing his risk level.

It was argued by the claimant that there is a duty owed to each and every IPP prisoner, by the prison service, to ensure that IPP prisoners be 'given a reasonable opportunity to demonstrate their safety for release at the point of tariff expiry and at further parole reviews.' The claim relied upon the decision of the ECtHR in *James, Wells and Lee v UK* [2013] 56 EHRR 12, in which it was determined that the failure to provide access to rehabilitative services amounts to a breach of Article 5(1) of the ECHR. The claimant unusually acknowledged that the High Court was bound to reject the claim due to the court being bound by the decision of the House of Lords in *Secretary of State for Justice v James* [2009] UKHL 22. Despite this, the judge was invited to give

his opinion as to whether the claim merited an eventual appeal to the Supreme Court.

The first issue considered was whether or not the decision in *James* meant that a failure to provide a specific prisoner with an appropriate course amounted to a breach of a public law duty. If it did then a claimant would not need to establish that the prison suffered from a systematic failure to provide courses; as the mere failure by the prison to provide a course would be sufficient to bring a claim.

The High Court rejected this submission, holding that the relevant case law does not '*support the existence of a wider duty in the absence of a systemic breach*' of Article 5(1). As such, any challenge by an IPP prisoner who has been denied the opportunity to undertaking necessary risk reduction coursework *must* establish that this denial has happened in the context of a *general* systemic failure.

The second issue was whether or not continued imprisonment due to the lack of availability offending behaviour courses amounted to 'arbitrary' detention in violation of Article 5(1). The court found that this is not the case, following the judgement of the Supreme Court in *R (Faulkner) v Secretary of State of Justice and another* [2013] UKSC 23, which held that detention is only arbitrary when it occurs as a result of 'exceptional circumstances'.

As such, any claim of a breach of Article 5(1) by a post-tariff IPP prisoner who has been unable to access necessary coursework will need to establish the existence of exceptional circumstances or the presence of a general, systemic failure by the prisons service to provide these courses.

DAMAGES FOR DELAY

Betteridge v UK – 1497/10 – HEJUD [2013] ECHR 97

In this case the ECtHR held that Mr Betteridge, who was serving an IPP sentence, had had his Article 5(4) rights (the right to a speedy hearing) breached due to delays in his case being considered by the Parole Board. They awarded him damages for his 'frustration'.

The High Court had previously held there had been a violation of Mr Betteridge's rights under Article 5(4), due to the delays he suffered, although it didn't make a formal declaration. They did so despite a finding that 'inevitably' Mr Betteridge would not have been released (given he was pre-tariff at the time) or even moved to open conditions because of his perceived risk. The High Court however refused to order his case to be heard, as that would simply allow Mr Betteridge to jump the queue past those who were also subject to the same delays. The High Court also deemed an 'acknowledgment' by the government that delays had occurred as being sufficient to meet the claim. The issue in the case was whether the High Court (and the government's) acknowledgment' of Mr Betteridge's Article 5(4) rights had been violated was sufficient redress.

In short, the ECtHR held that it wasn't, particularly in circumstances where the systemic delays on the Parole Board Review System were caused by the government's failure to recognize and plan for the full effects of the IPP sentence (brought in by the CJA 2003). The ECtHR accepted that putting Mr Betteridge to the front of the Parole Board queue wasn't the answer: that would simply jump him ahead of those who hadn't sought judicial review. How-

ever, damages could meet the 'frustration' he had been caused.

Interestingly Mr Betteridge did not appeal the High Court ruling, having been advised by his lawyers that the Court of Appeal would be bound to conclude that it could not prioritise any individual case when the evidence demonstrated that there was a systemic lack of resources.

However following the Administrative Court ruling another Parole Board hearing scheduled for September 2009 was also cancelled. So in December 2009, Mr Betteridge took his complaint to the ECtHR, and in doing so defeated the government's submissions that he ought to have exhausted his domestic remedies first: the ECtHR agreed that the legal advice to Mr Betteridge was correct, and that an appeal to the Court of Appeal could not offer him a reasonable prospect of success. Mr Betteridge was the victim of a continuing breach of his Article 5(4) rights at the time of the Administrative Court decision. In the end, his case did not get considered until January 2010, when the Parole Board recommended that the applicant be moved to open conditions.

R (Keith Haney and Peter Jarvis) v SSJ [2013] EWHC 803 (Admin)

The applicants were prisoners serving indeterminate sentences. They were due to be moved to Category D conditions but, due to severe backlogs, the SSJ instituted a policy under which prisoners who had served their tariff were given priority in transfers. This meant that the claimants both suffered delays in their transfer of approximately one year, which they claimed amounted to a breach of the SSJ's public duty to provide them with a reasonable opportunity to demonstrate to the Parole Board that their detention was no longer necessary.

They also argued that the policy was irrational and unfair; that the SSJ had fettered their discretion by imposing an inflexible policy; that the policy was unlawful because it was unpublished; and that it breached their rights under Articles 5 and 8.

The court held that the SSJ was under a public duty to allow indeterminate sentence prisoners a reasonable opportunity to demonstrate that they were ready for release (see *R (James, Lee and Wells) v Secretary of State for Justice* [2010] 1 AC 553 followed). There was no need for the claimants to show a separate legal duty owed to them personally; a declaration that a breach of the duty took place was a sufficient remedy given that the backlog had since been cleared and the claimants transferred to open conditions. Whether or not they had lost the opportunity to demonstrate their reduced level of risk would only have been relevant if the court had been asked to consider damages.

The court also held that there was nothing to suggest that the SSJ's policy was irrational or unfair. The policy was intended to be a temporary one designed to address a serious problem and the outcome was achieved within a reasonable timescale. Transferring post-tariff prisoners to open conditions before pre-tariff ones was rational and fair as they were already eligible for release; to act otherwise could have led to the risk that Article 5 would be breached. The policy was considered therefore a lawful exercise of the SSJ's discretion. Further, the court also reminded itself noted that the SSJ enjoyed a wide discretion in the placing of prisoners, under section 12 of the Prison Act 1952.

It was also held that the SSJ was under a public law duty to publish the policy (*Lumba (WL) v Secretary of State for*

the Home Department [2012] 1 AC 256 followed). The arrangements under which the claimants' transfers were delayed were a significant addition to a published policy, not simply administrative procedures, and could be described as a policy. Whilst they were unaware of the policy, prisoners could not claim exceptional circumstances or understand why their transfer was being delayed. However, the policy was not unlawful and Mr Jarvis' outcome would not have been any different if the policy had been published, Therefore there was no need to quash the policy, merely to order that it be published.

The court found there had been no breach of Article 5 (1) but granted permission to appeal on this point.

The court found no breach of Article 8 either. A transfer to open conditions would not have allowed the prisoners leave to visit family or pursue employment. Any decision as to that kind would have been made separately, and therefore Article 8 had not been engaged in the process.

The court found it was bound to follow *R (Clift) v SSHD* [2007] 1 AC 484 in finding that a prisoner's status was not protected by Article 14. However, as that case had been overturned by the ECtHR, permission to appeal would be granted.

UPDATES ON PRISON SERVICE INSTRUCTIONS

PSI 42/2012 – Close Supervision Centre Referral Manual

This PSI replaces PSI 29/2009 and sets out the guidance on the identification and referral of adult male prisoners to the CSCs from within the high security prison estate.

The referral process aims to identify prisoners deemed to pose 'a significant risk to others and/or to good order or discipline', and for whom it may be necessary to refer for selection into the CSC system for assessment.

The principle behind the CSC system is described as being to provide a 'strong care and management approach enabling the prisoner an opportunity to develop a more settled and acceptable pattern of behaviour'.

The key changes from the previous CSC Referral Manual are:

- Enhanced guidance around the disclosure of reports and the rights of prisoners to make representations in respect of a referral;
- A requirement to include the prisoner's religion on referral forms;
- A requirement for a report from the prisoner's offender supervisor to be included in the reports considered;
- That referral forms confirm the disclosure of reports to the prisoner, and the appropriate protective marking;
- The CSC Management Committee (CSCMC) are now delegated with decision-making authority and the Director of High Security Prisons is no longer required to authorise the decisions made.

A key factor when considering referring to the CSC is a prisoner's mental health. They must assess whether placing a prisoner in a restrictive environment could adversely affect their mental health.

PSI 02/2013 – Managing Private Law Claims

This instruction revises arrangements for the management of private law claims: for example personal injury, property and unlawful detention.

It updates existing guidance issued in February 2010, specifically chapters one to three of the Guidance on the Management of Civil Litigation issued on 1 February 2010.

In respect of private law claims, the establishment in which the incident occurred is responsible for the claim and the cost of the litigation, except those with wider policy implications.

The key change in the management of the private law claims is that the MOJ has contracted Gallagher Bassett, a company which provides claims management and risk management, to provide a pre-action private law claims handling service rather than the Treasury Solicitors.

Compensation through request/ complaint processes or as recommended by the Prison and Probation Ombudsman/Parliamentary Ombudsman can still be made directly to prisoners without a private law claim. Other ex -gratia or compensation payments to potential claimants in advance of receiving a claim are not permitted.

PSI 05/2013 – The Identification, Initial Categorisation and Management of Potential and Provisional Category A/Restricted Status Prisoners

This PSI is one of two new PSIs which replace PSI 03/2010. The instruction aims to prevent prisoners considered to be highly dangerous from escaping, to identify Potential Category A/Restricted Status Prisoners and, once identified, to apply 'the appropriate security measures lawfully, safely, fairly, proportionately and decently'.

Category A prisoners are subdivided into: Potential Category A, Provisional Category A and Confirmed Category A. Prisoners can be identified and placed in these sub-groups regardless of their escape risk classification.

A Restricted Status prisoner is any female, young person or young adult prisoner, convicted or on remand, 'whose escape would present a serious risk to the public and who is required to be held in designated secure accommodation'. Separate procedural security arrangements apply to Restricted Status prisoners. Unlike Category A prisoners, Restricted Status prisoners do not have escape risk classifications; their designated secure accommodation is deemed sufficient enough to make any attempt to escape impossible.

PSI 08/2013 – Category A Function – The Review of Security Category – Category A/ Restricted Status Prisoners

This is the second of the PSIs that replaces PSI 03/2010 and provides instructions and guidelines regarding the procedures for reviews of Category A and Restricted Status prisoners and how appropriate escape risk classification of Category A prisoners should be decided and reviewed.

The responsibility for the categorisation and allocation of Category A prisoners rests with the Deputy Director of Custody (DDC) High Security, although there can be delegation of this authority as and when appropriate.

The Category A team is responsible for ensuring that reviews take place of both Provisional Category A and Restricted

Status prisoners at the following stages:

During remand periods - review of security category every 12 months, or sooner if there is new information to indicate that Category A or Restricted Status may no longer be warranted; and reviews of escape risk classifications every 6 months for high risk and every 3 months for exceptional risk.

Immediately following conviction and sentence - review of security category; if the prisoner remains Category A, this will be followed by:

First Formal Review - this normally takes place approximately 3 months after conviction and sentence. If the decision is that the prisoner should continue to be Category A/ Restricted Status, then the prisoner is a confirmed Category A/Restricted Status.

A prisoner in this category and their risk classification can also be downgraded; this decision lies with the DDC High Security

Prisoners held under Detainee or Extradition Legislation will be reviewed in the same way as the Category A or Restricted Status prisoners.

Former Category A/Restricted Status prisoners returning to custody are reviewed by the Category A team who put their review forward to the DDC High Security for the final decision.

PSI 06/2013 – Mandatory Use of ViSOR

ViSOR is a national confidential database used by the Multi Agency Public Protection Arrangements (MAPPA). The police have expanded ViSOR to include information on non-convicted individuals who they deem to be potentially dangerous. It replaces PSIs 05/2009 and 27/2009, and summarises the mandatory requirements for prisons and probation trusts in England and Wales for the use of ViSOR.

All prison and probation trust staff are required to have passed accredited training and gone through security clearances before using ViSOR.

Once someone is no longer identified as a relevant MAPPA case, the ViSOR record pertaining to the person will be archived, however it can be re-activated where necessary.

PSI 13/2013 – Sentence Calculation – Determinate Sentenced Prisoners

This replaces PSO 6650 and takes into account the new recall and release provisions of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPOA 2012) which came into effect on the 3 December 2012. The PSI aims to make the calculation of sentences and the release dates of prisoners easier and that prisoners are released on the correct date.

The changes that affect sentence calculation are in respect of:-

The calculation of all standard determinate sentences **imposed** on or after 3 December 2012 irrespective of date of offence, including a change to the calculation of sentences of less than 12 months imposed on or after that date;

The calculation of the new Extended Determinate Sentences (EDS) for those dangerous offenders who are **convicted** on or after 3 December 2012;

The application of remand to custody time towards sentences imposed on or after 3 December 2012;

The application of remand time towards sentences in concurrent mixed Act cases for those prisoners sentenced prior to 3 December 2012;

The calculation of the re-release date of those prisoners who were previously subject to the release provisions of the Criminal Justice Act 1991 and Criminal Justice Act 1967, recalled from licence before 14 July 2008 and who remain UAL on or after 3 December 2012 (this includes such prisoners who were returned to custody following the recall but then absconded/escaped from the recall period and who remain UAL on or after 3 December 2012);

The abolition of the power of the court to impose a period of imprisonment under Section 116 Powers of Criminal Courts (Sentencing) Act 2000;

The supervision arrangements for young adult offenders after release from a DYOI or section 91 sentence of less than 12 months.

Release arrangements for those prisoners sentenced prior to 3 December 2012 who remain in custody on or after that date, are not affected by the changes made by the LASPOA 2012, **EXCEPT in the following cases:-**

The need to revisit the calculations for those prisoners who are subject to concurrent mixed Act sentences imposed prior to 3 December 2012 to ensure the remand has been applied in accordance with LASPOA 2012.

The re-release date of prisoners who were released under the provisions of the Criminal Justice Act 1991 (CJA 1991) or the Criminal Justice Act 1967 (CJA 1967), recalled before 14 July 2008, but who remain UAL on or after 3 December 2012 because they have either, not been arrested and returned to custody, or have been arrested and returned to custody, but subsequently absconded or escaped from the recall period.

OMBUDSMAN CASES

SEGREGATION

Mr A complained that he had been excluded from corporate worship (Friday prayers) for a period of six weeks following his segregation under Prison Rule 45. The Ombudsman considered a previous complaint from Mr A where he had challenged the decision to place him on the Managing Challenging Behaviour Strategy (MCBS). Mr A had been assaulted by another prisoner and wielded a chair in retaliation, which led to a disturbance involving around 30 prisoners. Mr A had been segregated as a result and was subject to several security intelligence reports around possible threats to security and the good order of the prison, including the safety of other prisoners and staff.

The Segregation Unit said all applications to attend religious services were independently assessed and the paperwork stored in a prisoner's core record. The PPO investigator was not however able to locate a risk assessment regarding non-attendance at Friday prayers.

At the time of Mr A's complaint PSO 4550 (the Religion Manual) was in place. This has now been replaced by PSI 51/2011. PSO 4450 makes clear that provision must be made for all prisoners to be able to attend a minimum of one hour weekly corporate worship or religious observance. The only exceptions are where prisoners are either excluded under Rule 45, are in Close Supervision Centres or on a Special Supervision Unit. In exceptional circumstances, authorised and recorded by a Governor or Medical Officer, prisoners may be excluded for a period of one month, to be renewed thereafter, where there are exceptional and specific concerns over a prisoner's mental or physical health, or where a Governor judges there to be evidence of 'misbehaviour' at a time of worship or meditation, or their presence would be likely to causes a disturbance or a threat to security or control. Where such a decision is made the Governor must inform the Chaplain or Minister and the decision should be noted in the prisoner's F2052 (core record). Where prisoners are located in special secure units and permission had been granted from prison service HQ for corporate worship to take place on the unit, facilities must be provided for this.

The PPO said that there was intelligence that Mr A was linked to inciting other Muslim prisoners to commit acts of violence. Despite the inability to locate the risk assessment, the investigator felt this security intelligence would have formed the basis of the risk assessment and in such circumstances the decision not to allow Mr A to attend Friday prayers was a reasonable and proportionate one to the risks identified. The Ombudsman acknowledged the importance of security intelligence to the prison service in assessing risk, but that much of what was recorded fell well short of 'hard evidence'. As a result such information needed to be properly collated, evaluated and handled responsibly.

IEPS

Mr B was placed on the basic regime after an incident which led to prison disciplinary charges being brought, but prior to any finding of guilt. He complained that the IEPS should not be used as a 'de facto' disciplinary process and that prisoners should not be automatically placed on basic regime simply because they had been placed on report. He argued that it constituted a form of punishment without trial. Mr B accepted that in certain circumstances a single incident may result in an IEP review but that this should not happen when the prisoner has a substantive defence to the charge as he did, in this case self-defence to an assault charge. The caveat that disciplinary offences must be proven before being taken into account under IEPS also meant, according to Mr B, that unproven disciplinary offences should not be taken into account in setting an IEPS level.

The prison argued that, because of the serious nature of the incident involving a number of prisoners, it had been necessary to place all the prisoners involved on basic whilst an investigation occurred. Mr A had been returned to standard as soon as 'operationally possible' after the investigation was concluded.

The Ombudsman looked at the local IEPS policy in light of the IEPS PSI 11/2011. This states that the determination of a prisoner's privilege level must be based on patterns of behaviour rather than a single incident (unless it is especially serious and in this instance an urgent review must take place), active engagement with the sentence planning process (where applicable), be

separate from the disciplinary system, and reviewed regularly. Prisoners must be able to make prior representations. Decisions on IEPS must be recorded and notified to the prisoner. Prisoners must be informed of the local appeal process, including Request/Complaint procedures.

The charges against Mr B were not proceeded with and the adjudicator was satisfied that he had acted in self-defence. However the IEP Board had, prior to this, viewed the CCTV footage, they felt it showed Mr B acting violently, and that it was serious and dangerous enough to warrant a decision to 'fast track' him to basic. Given the Board's 'interpretation' of the incident the PPO, on this occasion, was satisfied that placing Mr B on basic did not constitute a form of punishment without trial. The IEP board exercised their judgement in interpreting Mr B's behaviour and an internal inquiry was conducted in line with national policy with the adjudication process beginning soon after. The fact that Mr B was returned to standard regime as a result of the adjudication decision, demonstrated in the PPO's mind that the IEP system had in this case 'operated independently of the adjudication process'.

ACCOMMODATION

Mr B was subject to a Sex Offender Probation Order (SOPO) following a conviction for sexual offences against a child. He complained that he had lost his deposit on his rented accommodation (nearly £300) when he had to leave after reporting that a child was living there. He asked the Probation Trust to refund his deposit. He was told in response that it had been his choice to leave the accommodation and that the Trust was not therefore liable for his loss.

The PPO investigation found that the existence of the SOPO meant that Mr B had little choice about where he lived and one of the conditions was that he could not live in accommodation with children and that any address had to be approved beforehand by the Public Protection Unit (PPU). He could not live in his own property as it was too close to an area which he was not permitted to enter.

On his release from prison Mr B moved into accommodation identified for him by his offender manager (OM). However, the next day he was told he would have to move out as the PPU had not approved the address. He moved as required to another address with the same landlord which his OM found for him but which had also not been approved by PPU. The day after he moved in he realised that a child was staying at the new accommodation. He reported this to the duty OM and was told to move out immediately or he would be in breach of his SOPO. He was given emergency accommodation at an approved premises hostel. The landlord refused to return his deposit as he had broken his contract. The PPO did not accept the Probation Trust's argument that Mr B was not entitled to compensation because he was the author of his own misfortunes. In the view of the PPO Mr B's difficulties arose from his OM's failure to clear the original release address with the PPU before he was released from prison. The PPO considered that Mr B acted entirely responsibly in informing the duty manager as soon as he realised there was a child in the house and had followed his OM's instructions by moving out. If he had moved back in he would have been in breach of his SOPO and would still have been required to move out. The Probation Trust agreed to refund Mr B's deposit after a PPO recommendation to do so

OTHER NEWS

PRISONS (PROPERTY) ACT 2013

This act was enacted on 28 February 2013 and amends Section 42 of the 1952 Prison Act. Changes made by this act also apply to Young Offender Institutions and Secure Training Centres (Subsection 2).

The 2013 act deals with the disposal of unauthorised or unattributable property and in effect reverses the decision in the case of *Coleman 2009* which stated that confiscated items must be handed back to a prisoner on permanent release unless they are dangerous, hazardous or by their existence, criminal.

The act now allows a Governor or Director to dispose of or destroy unauthorised items found in a prisoner's possession and for such items to be sold (paragraph 5 (c). The act extends to unauthorised items discovered in escort vehicles and also when the owner of the article cannot be identified. For the purposes of the act, authorised means any item allowed by the Prison Rules or by the Governor or Director and would suggest that reference should be made to local facilities lists.

Paragraph 2 of the act further mentions that authorised items may be treated as unauthorised where a Governor reasonably believes that they are to be (or have been) used for purposes listed in Paragraph 3 which include: concealing an unauthorised article; causing harm to others and compromising prison security. Paragraph 4 states that some items may be authorised only in a specific part of the prison; for example workshop tools although authorised in the workshop, are unauthorised elsewhere. Paragraph 6(a) states that 'relevant articles' discovered **before** the passing of the act can be destroyed, removed or sold **if** they remain unclaimed after six months of their discovery. Otherwise the power to destroy or dispose of items found before the enactment date cannot be exercised. Finally as for 'relevant articles'; this is defined in Paragraph 7 as those specified in the amended section 40 of the Prison Act 1952 i.e. cameras, sound recording devices, and devices capable of transmitting or receiving images, sounds or information.

PRISONERS' LEGAL RIGHTS GROUP MEMBERSHIP APPLICATION FORM

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PAS PRISONERS' ADVICE SERVICE

Name: _____

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PLEASE TICK THE TYPE OF MEMBERSHIP REQUIRED:

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