PRISONERS' RIGHTS

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PRISONERS' ADVICE SERVICE
JUSTICE BEHIND BARS

The Prisoners' Advice Service (PAS) is a charity that provides free legal advice and information to people in prison in England and Wales. We produce this bulletin, setting out case law, Ombudsman's decisions and legislative and policy changes relevant to people in prison. The PLRB is free to serving prisoners.

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HERBERT SMITH FREEHILLS

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CASE REPORTS

SMOKING IN PRISON

R (Black) v SSJ (2014), unreported

The applicant sought judicial review of a decision to refuse prisoners access to a NHS freephone line. The confidential phone line was to be used by individuals seeking to alert the NHS to violations of the public smoking ban under the Health Act 2006.

The issue was whether the applicant's claim was arguable. The SSJ argued that the Crown was not bound by the 2006 Act with respect to prisons, as the point had not been taken in *R (Smith) v SSJ [2014] EWCA Civ 380*. The applicant argued that if it was arguable that the Crown was bound by the 2006 Act judicial review was the only effective remedy.

HELD: The court granted the application, stating that while it was not the role of the courts to micromanage a prison's daily operational circumstances, the courts could in certain circumstances consider broader issues. If the 2006 Act bound the Crown then the restriction on prisoners' ability to complain about breaches arguably impacted upon their rights under Article 8 ECHR.

GAY PRISONERS

R (Bright, Keeley) v SSJ [2014] EWCA Civ 1628

The appellants, both serving prisoners, were in long-term homosexual relationships with their respective partners, who were also serving prisoners. Mr Bright's partner, Mr Beale, was moved for his own safety following his own complaints. Mr Bright accepted that the decision was for protection and not personal. Mr Keeley and Mr Doughty had been discovered having sex on several occasions and separated for reasons which included preventing entry into their cells and inappropriate behaviour. Neither appellant was allowed an inter-prison visit and neither had successful video-link or telephone contact.

Three issues arose: (i) whether the decisions to separate and to regulate conduct of the partners were "in accordance with the law" within the meaning of Article 8(2) ECHR. The appellants argued that there was no published guidance in relation to the location and separation of gay partners, nor regarding what constitutes decent or indecent behaviour or when a 'reasonable expectation of privacy' where sexual intercourse may not warrant a charge under PSI 47/2011 would arise. (ii) whether the separations were proportionate for the purpose of Article 8(2). The appellants submitted that no consideration had been given to the extent of the interference with the appellants' private lives cause by the separations. The decisions further implied that their aim was to avoid facilitating the relationships, and (iii) whether the decision-making process governing the separations complied with the procedural obligations inherent in Article 8. Article 8 was engaged. The appellants argued, relying on *Home Department v SP [2004] EWCA Civ 1750,* that they were deprived from an adequate opportunity to make representations before the decisions, which amounts to procedural unfairness for the purpose of Article 8.

HELD: The applications were refused.

(i) The discretion to separate the couples was used lawfully and had nothing to do with their sexual relationship. While the decision to separate Mr Keeley and Mr Doughty was taken for reasons related to their sexual relation-

ship, the failure to publish a policy explaining whether homosexual relationships are to be facilitated or restricted did not render the decisions otherwise than 'in accordance with the law'.

(ii) The submission that the decision to move Mr Beale was disproportionate was wholly without merit. Regarding Mr Keeley, the assertion that no consideration was given to his relationship when the decision was made to separate him from Mr Doughty is incorrect. In assessing the proportionality of the separation decision it is relevant that they could still see each other during their working periods (34 hours per week), have lunch together, and see each other in the course of other prison activities.

(iii) Mr Bright had had the opportunity to object to the move of his partner, but did not do so. As for Mr Keely, an interview with the Governor before the decision was taken to separate him from his partner satisfied any requirement to check the factual basis for the decision before it was made. Furthermore, SP does not support the proposition that, in every case where a separation of prisoners who are in a sexual relationship is under consideration, the affected prisoners must be given the opportunity to make representations to the prison authorities prior to the decision.

Applying the approach in *Tysiac v Poland (2007) 45 EHRR 42*, the appellants were both involved in the respective decision-making processes 'seen as a whole' when the complaint and appeal procedures are taken into account.

LIFER- RELEASE

Hall & Koselka v Parole Board [2015] EWHC 252 (Admin)

Both applicants were serving IPP sentences, and applied for judicial review of the Parole Board's refusals to direct their release on licence. Mr Hall had been sentenced to a minimum term of two-and-a-half years, and had been detained for a further six years and two months. Mr Koselka had been sentenced to a minimum term of two years and five months, and he had been detained for a further two years and three months.

They had both been re-categorised to open conditions having made good progress in their sentence plans. However, both returned to closed conditions after a number of risk related incidents. The following reviews held that they remained a risk to the public.

During their detention, the IPP sentence was abolished under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.123. This legislation was more lenient, and the Board made the decision that they were not suitable for release in accordance to the arguably more stringent Crime (Sentences) Act 1997 s.28. The issues before the court were whether the Board had a duty to consider the abolition of the IPP sentence when making its decision, whether it paid substantial attention to Article 8 of the ECHR, whether the review should have been handled with particular consideration of the extended time spent in custody, and whether Mr Hall's continued detention had been in violation of his human rights (namely Article 3 and 5).

HELD: The court firstly decided that their extended stay in custody, exceeding their minimum term, would not require the Board to lower the threshold when determining their risk to the public upon release. The Board was also not required to consider as a mandatorily relevant factor the changes introduced by the 2012 Act.

Regarding the potential violation of Article 8, the Board did not have an obligation to balance public protection against other interests, including those of the prisoner and his family, in his release in order to enjoy family and private life rights. Furthermore, s.30 of the 1997 Act, which provided for release in exceptional circumstances on compassionate grounds, could be used in the event that Article 8 was jeopardized.

The court did acknowledge that Mr Hall's detention period post-tariff expiry exceeding the initial minimum term was an inevitable consequence of the IPP scheme. However, as the Board were not required to consider the changes introduced by the 2012 Act, this did not influence its decision when determining the extended detention was not grossly disproportionate as to amount to a violation of Article 3. It was also within the purpose of protecting the public and therefore did not amount to a violation of Article 5.

LIFER TRANSFER TO OPEN CONDITIONS

Gourlay v Parole Board [2014] EWHC 4763 (Admin)

In 1999, the claimant was sentenced for rape and given life imprisonment with a minimum tariff of 6 years which expired on 1st August 2005. The life sentence was imposed under the statutory automatic life sentence provisions consequent upon his antecedent history. In 1991, the claimant had been convicted of three rape offences on two separate women and was sentenced to 9 years' imprisonment, and released after serving two thirds. Following his release, he committed another rape on a third woman which attracted the life sentence. The circumstances of the rapes were similar: the claimant knew all the victims, and in all cases alcohol was a prominent component, amongst other things. The claimant denies all his sexual offending.

The Parole Board, on 10 March 2014, decided not to direct the release on licence of the claimant and not to recommend the transfer of the claimant to open conditions. The Parole Board assessed the risks posed by the claimant as being "to young women in the community who are known to [the claimant] and perhaps they have been drinking (perhaps excessively)". The challenge in this case is directed solely at the refusal to transfer the claimant to open conditions.

In considering whether to make a recommendation for transfer, the Parole Board followed the Directions of the Secretary of State in relation to the transfer of lifers to open conditions, and notably the fact the claimant had been unable to attend the necessary programmes, such as SOTP, to properly address his risk levels.

The claimant argues the reasoning given in the decision to come to this conclusion is flawed. The decision fails to take into account material factors going to the risk assessment, and puts an impermissibly high emphasis on one factor alone, namely that of the claimant's denial of his offending. Indeed, the panel acknowledged the claimant had completed more generic courses, and is of enhanced status but did not deem these as factors which go to the assessment of risk. Rather, the panel appears to have accepted as inevitable that the risk factors in the claimant's case could not be reduced without his attending the SOTP which requires admittance of at least some sexual offending. He argued that denial is not in itself a risk factor, but a factor which goes to assessment of the current degree of that risk.

Further, the maturation of the claimant now aged 47 ought to have been considered.

HELD: The Court quashed the decision of the Parole Board. The Court emphasised the narrow basis on which the challenge was granted. It clarified that it did not believe the only conclusion which could reasonably have been reached by a Parole Board properly directing itself, taking into account all factors, was one to recommend transfer to open conditions. The Court's conclusion was based solely on the basis that the Parole Board failed in its duty to take into account the entirety of the factors to be put in the balance, when assessing the risk currently posed by the claimant, for the purpose of assessing whether or not it would be safe to recommend a transfer to open conditions. Following this decision the claimant must await the decision of the Secretary of State as to whether or not he would accept the recommendation for transfer. Finally, the Court added that it found there was force in the claimant's submission that the risk he poses would not in itself arise in the event he was moved to open conditions, and would only arise if the claimant were or given temporary release while in open conditions. The Court however did not make a decision on these matters, and these were just observations.

Harris v SSJ [2014] EWHC 3752 (Admin)

The claimant was sentenced to life imprisonment with a minimum term of 12 years for murder on 15 October 2007. His tariff expires on 21 May 2016. During his time in closed conditions he engaged positively with his sentence plan and subsequently consideration was given as to whether his case should be referred to the Parole Board.

The claimant is subject to a deportation order, made on 22 June 2010. Immigration Enforcement had not yet started considering the claimant's case at the time this case was decided. The claimant regularly receives visits from his mother, stepfather, and is in telephone contact with his young son. However, he has always accepted that on release he will have to return to Jamaica, where he has other family members and a job waiting for him.

After a hearing, the Parole Board concluded that the claimant had done all the offending behaviour work appropriate to closed conditions and recommended open conditions. It agreed with the position of all the professionals responsible for the claimant that the benefits to the claimant of a transfer to open conditions outweigh the risks, and deemed that the claimant does not present a significant risk of absconding if transferred to open conditions.

The defendant considered the recommendation and did not agree to the transfer to open conditions due to the fact of the claimant being subject to liability to deportation and immigration enforcement will not be considering the case until 18 months prior to the claimant's tariff expiry on 21 May 2016, ie November 2014. Taking account of the uncertainty over the claimant's immigration status and the amount of time remaining before his tariff expiry date, and in view of its' concerns regarding the risk of absconding relating to his immigration status, the defendant considered that the claimant's immigration status should be resolved before his move to open condition. Should Immigration Enforcement inform the defendant that it would be unlikely the claimant would be deported, the defendant would take immediate steps to refer the claimant's case to the Parole Board for an exceptional pre-tariff review.

The claimant advanced three bases of challenge to the defendant's decision: (i) the defendant failed to give adequate weight to the Parole Board recommendation, bearing in mind the Parole Board had received oral evidence from the claimant and witnesses, as it treated his immigration status as in effect a new point when it was not; (ii) the defendant failed to provide adequate reasons to reject the Parole Board's recommendation; and (iii) the defendant's decision was irrational as nothing has changed in the circumstances of the claimant to justify or gainsay the Parole Board's decision in this case.

HELD: The application was dismissed. On the first argument the court agreed with the defendant that while it was true that the Parole Board's panel consisted of experts, and that the fact they had heard oral evidence meant that the defendant needed to afford significant weight to the recommendation the defendant is not bound by such recommendations. The court found that the defendant was simply assessing the claimant's risk of absconding, which was not treated in depth by the Parole Board and concluded that the defendant reached a different but rational conclusion. Regarding ground two, the court held that the defendant had explained clearly and sufficiently why he had reached a different conclusion on risk. Finally the court considered the cases used by the claimant to argue irrationality to be irrelevant due to the nature of the decision making process, as in this case it is the defendant who is the decision maker, not the Parole Board, so is entitled to come to his own conclusions. The court held that the defendant's decision passes the tests as set out in *Banfield* and *Hindawi* which are relevant to cases such as this.

LIFER- DELAY

R (Parratt) v. SSJ and the Parole Board [2014] EWCA Civ 1478

The appellant had been sentenced to imprisonment for public protection (IPP), with a minimum term of three and a half years, this minimum term expiring in January 2010. The appellant's first Parole Board hearing had been held in May 2010, four months after the date of eligibility for release. At that hearing, it was recommended that he should be moved to open conditions and another hearing date was set for August 2011 at which time the Parole Board directed the appellant's release.

The appellant claimed that there had been two periods of delay in arranging Parole Board hearings which gave rise to violations of Article 5(4) ECHR.

His first claim related to the four month delay in the initial Parole Board hearing. The applicant had initially issued judicial review proceedings in August 2010 seeking a declaration that the delay in arranging his first Parole Board hearing had given rise to a violation of Article 5 (4). Following that application, the solicitors acting on behalf of the Parole Board conceded that the claimant's rights had been infringed in the four month delay in holding his post-tariff review.

Judge Arden made clear, '[If] a claimant can establish on the balance of probabilities that his detention has been extended by reason of a violation of Article 5(4), he should ordinarily receive an award of damages as compensation for the resultant detention.' The question was therefore whether the appellant did or did not prove on the balance of probabilities that the delay in the Parole Board process between January and May 2010 resulted in a prolongation of

his detention.

The court allowed the appeal to the extent of making an award of damages to the appellant in respect of the admitted violation of Article 5 (4), including delay in his eventual release from custody.

Secondly, the appellant also claimed that his Article 5(4) rights had been infringed in relation to the 15 month delay between first and second Parole Board hearings. He argued that a period of 12 months between the two hearings would have been appropriate but that 15 months was too long for the purposes of Article 5(4).

The court endorsed the findings of Males J in the Administrative Court, who stated that the appropriate review period must be assessed taking into account all the circumstances of the individual case, with no maximum review period prescribed by the ECtHR. He also made clear that there is no formal legal presumption that a Parole Board review must be heard within 12 months of the last review and that, consequently, this should not be regarded as the 'default setting'.

Review periods in excess of 12 months could be justified where the Secretary of State had identified the progress which the prisoner needed to make before the next review and the time within which it could reasonably be expected that the progress could be made. In the present case, the Secretary of State had written a letter detailing reasons for the 15 month review period, including stating that it would allow the applicant to undertake ROTL and home leave, consolidate his offending behaviour work, work on a risk management plan, and remain adjudication free. Males J had concluded that this justified the additional three months.

The court concluded that there was no error in Males J's approach and so, in the circumstances of the appellant's case, a review after 15 months had complied with the requirements of Article 5(4).

ACCESS TO REHABILITATIVE COURSES

Gareth Taylor v UK, no. 2963/12, §4, ECHR 2015

The applicant was convicted of offences of sexual activity with a child in 2007 and received an ISP with a minimum term of 18 months. On 11 January 2008, he was informed that he was suitable for the SOTP. HMP Albany, where he was detained, did not offer this programme and recommended that he transfer to another prison.

Between January 2008 and December 2010, the applicant made numerous attempts to be transferred in order to undertake the SOTP, which was made impossible by the long waiting lists and delays. The applicant in the meantime undertook several training courses to address other risk factors. Upon his transfer to HMP Wymott in July 2011 on compassionate grounds he applied for the SOTP but it was already full, so was told that he could attend in August/ September 2012. HMP Wymott asserted that that it was not at fault for delaying the applicant's progress when he informed them he was contemplating judicial review proceedings.

The applicant had a parole review in February 2009, and in December 2010, both of which were unsuccessful despite a positive change in his attitude. His risk remained high without completion of the SOTP. A third review was held in February 2014 after finally completing the SOTP in February 2013 but

the panel did not release the applicant and recommended open conditions.

The application to the ECHR was made arguing that his Article 5 right to liberty was infringed because of the delay in the authorities allowing him access to the SOTP. The Government argued that the applicant had done numerous courses, was assessed for SOTP courses and had himself elected to remain at HMP Wymott after his transfer on compassionate grounds after having been informed that he would have to wait one year to access the course.

HELD: There was no violation. While there is no absolute requirement for immediate access to all courses required, any delay must be reasonable. In the particular circumstances of the case, progress through the prison system began early. Access to the SOTP was delayed due to the waiting lists. The applicant was nevertheless able to undertake other relevant courses. His application to be transferred on compassionate grounds was successful. He was informed that his subsequent application to remain at HMP Wymott would delay his access to the SOTP until August 2012. He declined an offer for transfer to another prison where a course may be available. He commenced the course in August 2012. There was a real opportunity for rehabilitation and there was no unreasonable delay in providing access to courses.

GOVERNOR'S ADJUDICATION

Soar v SSJ [2015] EWHC 392 (Admin)

The claimant was at all material times serving a life sentence as a Category B prisoner at HMP Full Sutton. He is post-tariff, which makes any adjudication findings particularly important to his progress and potential release on licence by the Parole Board, as well as to his categorisation. On 13 November 2013, the claimant was found to have hidden bread in the front of his trousers to bring to work with him due to a medical condition, namely constipation. He claimed to have found that eating a few slices of bread helped him with his condition. Despite being ordered to do so, he refused to go to work without his bread and was thus put on report and charged with disobeying a lawful order contrary to rule 51(22) of the Prison Rules. His defence was that this order could not be considered lawful as complying with it would have entailed doing something which was detrimental to his health.

At the adjudication hearing, the Governor verified this fact with the nurses at the Healthcare Centre, who told him there is no medical reason why the claimant would need to take bread with him at work and anyway whilst at work he was given a sandwich. The nurse's evidence was given to the claimant as part of the Governor's finding of guilt, and he was not given a chance to comment on the evidence beforehand.

This was an application on the papers for permission to proceed to judicial review seeking to challenge an adjudication review decision of the defendant's National Offender Management Service ["NOMS"] upholding a finding of guilt against the claimant. The claimant was found guilty of refusing to obey a lawful order.

The substantive challenge is now limited to a single issue, whether there was a procedural irregularity in the adjudication when the Governor took evidence from a nurse by telephone in the absence of the claimant, and then failed to give the claimant an opportunity to answer or challenge that evidence. The

claimant asserts that this irregularity was so fundamental that the fairness of the adjudication was affected, that it was irrational for the review decision to uphold the finding of guilt, and that in any event the review decision did not address this complaint at all.
This challenge was resisted by the defendant, who also raises an argument that the claimant failed to make use of a suitable alternative remedy in the form of a complaint to the Prison and Probation Ombudsman. In respect of this argument, the question arises whether it is available to the claimant after the grant of permission to apply for judicial review.

HELD: Permission to proceed to judicial review was granted on paper on the grounds that there were fundamental points of procedure relating to natural justice which were arguably more suitable for judicial review than for the PPO procedure. The Court went on to say that it is insufficient and unsatisfactory to say that the Claimant could have asked to question the witness after the verdict had been delivered. The Court added that the review decisions were flawed in that they failed to address the complaint made at all. However, the Court noted that it is not suggested the PPO procedure would have been inappropriate or ineffective. The only reason for not giving the PPO complaint precedence is said to be because it declined jurisdiction having been told that judicial review proceedings had been started, albeit only protectively. In this case, the Court held that, to refuse relief now on this ground, having made the findings it did on the substance, would be to force the Claimant to expend more time and money in seeking to revive his complaint to the PPO, or else would leave him without a remedy at all if the PPO were to say that it is too late to do so. Accordingly, the Court quashed the Defendant's decision.

UPDATES ON PRISON SERVICE INSTRUCTIONS

PSI 02/2015: Prison Library Service

All prisoners must be provided with effective access to a library. This PSI contains guidance to prison staff on how that right is to be secured. It provides, in particular, that:

- Prisoners must be granted weekly access to the library for a minimum of 30 minutes.
- Where prisoners are unable to visit the library, such as when they are in segregation or in hospital, they must be provided with an alternative library service. At a minimum, that service must allow the prisoner to borrow and exchange books or other audio-visual material.
- All prisoners must have access to an inter-library loan service.
- All prison libraries must stock: Archbold's Criminal Pleading, Evidence and Practice;The Civil Procedure Rules;Prison Service Instructions;Prison Service Orders.

Certain materials are proscribed and cannot be provided by the library. This includes 18-rated DVDs or computer games, or items decided by the Governor to be inappropriate in light of the Public Protection Manual.

The Governor may restrict an individual's access to material in the library on a case-by-case basis in accordance with the Public Protection Manual.

PSI 07/2015: Early Days in Custody-Reception In, First Night in Custody and Induction to Custody

This PSI sets out guidance for prison staff and CRCs with respect to their duties to prisoners in the 'early days' of custody. Those duties are centred on

three areas: the reception of the prisoner, the first night in custody and the induction into custody. PSI 74/2011 is repealed and replaced by this PSI.

The prisoner must be identified and have his identity recorded, subject to risk and health assessments and appropriately searched. Information gathered at this stage must be stored and shared with other relevant actors.

The main focus relating to the prisoner's first night in custody is safety. The prisoner must be placed in first night accommodation which is appropriate in light of individual needs and risks. He or she must also be offered a shower or bath and a hot meal and a 'first night pack', consisting of various items such as sugar, tea and milk.

The induction to custody consists of two parts: a general introduction to custody which must be completed within five days of reception, and a localised introduction to the specific establishment. The induction must provide prisoners with information on their entitlements and responsibilities, including information on the 'core offer' of rehabilitative services available to them.

PSI 08/2015 Permanent Resettlement outside England and Wales of Offenders Subject to Post-Release Supervision

This PSI is contains an explanation of the processes applicable for the permanent transfer of offenders subject to post-release supervision where:

- the person seeks to be transferred outside of the UK and its Islands;
- the person wants to be transferred from one UK jurisdiction to another, including a transfer from England and Wales to another UK jurisdiction and the transfer to England and Wales.

Different procedures apply to applications for transfer to a jurisdiction outside of the UK than those which govern applications for a transfer to a jurisdiction inside the UK.

Any application for resettlement in a jurisdiction outside of the UK must satisfy the following criteria:

- Close family or residential ties.
- A lack of connection between the offence for which the individual was convicted and the jurisdiction in which resettlement is sought.
- Resettlement must not undermine the protection of the public, the reduction in reoffending or the rehabilitation of the individual.

An application for resettlement outside of the UK must be considered by the supervising officer and approved by the Head of the National Probation Service (NPS) local delivery unit. Resettlement directly from prison will only be considered in exceptional circumstances. Usually, the individual will be required to spend a suitable time under post-release supervision within the UK. Licence conditions will continue to apply to the individual whenever they are in the UK, including if they return after resettlement.

An application for resettlement transfers from England and Wales to another UK jurisdiction or vice-versa, must satisfy the following conditions:

- Close family or residential ties in the place where the individual wishes to resettle;
- Resettlement must not undermine the protection of the public, reduction in the risk of reoffending or the rehabilitation of the offender.

These transfers can be done on a re-

stricted or unrestricted basis. On the former, the exporting jurisdiction retains control over the sentence, on the latter it is the receiving jurisdiction that assumes control. The basis of the transfer will determine which jurisdiction deals with any breach of license conditions by resettled persons.

The transfer requests are dealt with by the NPS. In cases where the initial release is made by the Parole Board, however, that the decision will be taken by the Public Protection Casework Section.

PSI 09/2015: The Identification, Initial Categorisation and Management of Potential and Provisional Category A/Restricted Status Prisoners

Category A/Restricted Status prisoners are persons whose escape from prison would pose serious risks to the security of the public. This PSI provides guidance to prison staff in identifying Category A/Restrict Status prisoners and in ensuring that they are subject to appropriate security measures. It replaces PSI 05/2013.

Governors must put arrangements in place to ensure that staff can identify prisoners who may meet the criteria for Category A or Restricted status. Where prison staff consider that a prisoner may meet the criteria, the case must be reported to the Category A team within the High Security Prisons Group.

Prior to the Category A team decision, the prisoner will be classified as Potential Category A/Restricted status and be subject to the applicable security procedures. The Category A team may provide an interim decision that the prisoner remain subject to those procedures until a final decision is made. Final decisions should be made within 3 working days.

Governors must ensure they have a Local Security Strategy in place to manage Potential Category A prisoners which conforms with the National Security Framework. Pursuant to that strategy, Potential Category A prisoners are subject to a wide range of specific security constraints, including being; housed in the most secure accommodation available, checked at least once every 60 minutes, prohibited from being employed until they are within a High Security establishment, and subject to regular cell searches.

Visits and telephone calls are permitted only in exceptional circumstances and all non-privileged correspondence must be read and telephone conversations listened to by members of the prison staff.

PSI 10/2015 Management and Security of Escape List (E-List) Prisoners

This PSI outlines the procedures which prisons are required to put in place with respect to prisoners who pose a risk of escape. It forms part of the Security Management Function of the National Security Framework, and replaced PSI 56/2011.

A prisoner can only be placed on the E-List for so long as the additional security processes outlined in the PSI are necessary to manage his or her risk of escape. Prisoners cannot be placed on the E-List as a punishment. Their place on the list must be reviewed every 35 days and they must be removed as soon as the extra processes are no longer needed.

Prisons must adopt systems to identify prisoners who pose a risk of escape. An

assessment must be carried out where there is:

- A PER warning marker;
- An indication of increased risk of escape on reception;
- An incident of escape or attempted escape,
- Finding escape related equipment,
- A history of escape attempts,
- Escape related intelligence.

Prisoners must be able to appeal a decision to place him or her on the E-List. That appeal should be dealt with by the Deputy Governor within 5 working days of it being made.

A number of additional security measures apply to all prisoners on the E-List. These include:

- Photographs must be taken of the prisoner and displayed at certain places throughout the prison,
- Phone calls and correspondence must be monitored,
- They must not be considered for release on temporary license
- Intelligence gathering
- Escort preparation

Prisoners who are placed on the E-List Standard or E-List Heightened are subject to additional measures. The prison must adopt a local security strategy which specifies:

- A system for monitoring the prisoner's movement inside the establishment, including agreed, risk-assessed movement plans,
- Systems to monitor and record the prisoner's location inside the prison,
- Handover systems,
- Constant supervision by a member of staff,
- Frequent and unpredictable changes to accommodation,
- Supervision during visits.

In addition, these prisoners must be housed in the most secure accommodation available. Ordinarily they will be placed in single cell accommodation. They must, furthermore, wear distinctive clothing whilst inside the prison and on escort.

PSI 12/2015 Licence Conditions, Licences and Supervision Notices

This Instruction updates the arrangements for the application of standard and additional licence conditions for people being released from prison on licence following the creation of the National Probation Service and the Community Rehabilitation Companies.

It also updates advice on the setting of conditions as well as updating the menu of additional conditions available, and adds the templates for licence and supervision notices to be used for offenders sentenced under the changes to be introduced under the Offender Rehabilitation Act 2014. These menus include a wide range of stringent conditions which can be imposed on 'extremist offenders'. The PSI also includes a breakdown of who is responsible for approving additional conditions for each type of sentence. It also introduces the new licence conditions for polygraph examinations for sex offenders, following the commencement, after various pilots, of provisions contained in Sections 28-30 of the Offender Management Act 2007.

PSI 13/2015 Release on Temporary Licence

This is the long-awaited new guidance on ROTL which NOMS had said would be issued in October 2014. It entirely replaces PSO 6300 (other than in relation to prisoners under the age of 18), which has previously been amended by PSIs and most recently by the 'interim instructions' issued in August 2014.

Much of the new PSI reiterates the procedures set out in those instructions.

There is now a 'two-tier approach to ROTL' in which 'more serious and higher risk offenders' must be considered under the new Restricted ROTL regime. This precludes temporary release from closed conditions and preserves it for where enhanced behaviour monitoring operates; requires greater external agency involvement before release is considered; and requires the release decision to be endorsed by the governor or deputy. There is also more monitoring of time whilst released and more stringent reviews of failures. Other prisoners are considered under the Standard ROTL regime.

There is a big emphasis on there being no presumption that ROTL will be granted once the eligibility date has been reached and on all all resettlement ROTL being clearly linked to the sentence plan (for those who require a sentence plan) or agreed resettlement goals (for those not requiring a sentence plan).

Resettlement Overnight Release is now only available to prisoners in the final nine months of their sentence. Resettlement Day Release to maintain family ties (as opposed to for the purpose of working) can only be granted for one day every two weeks.

In the long term, the MOJ plans to electronically tag all prisoners on ROTL.

PSI 14/2015 Disposal of prisoners' unauthorised property

This Instruction provides guidance on the new power introduced by the Prisons (Property) Act 2013, which amends the Prison Act 1952, giving Governors (and Directors of private prisons) the power to destroy or otherwise dispose of unauthorised or attributable property found in the possession of prisoners, in prisons or in prison vehicles. The new powers came into effect from 26 March 2015. The Prisons (Property) Act was brought in specifically in order to reverse the court decision in the 2009 case of Coleman that it was unlawful for prisons to destroy unauthorised items.

The PSI contains transitional provisions, which in particular relate to items confiscated prior to the implementation date but not claimed by any prisoner. If, for example, a mobile phone was confiscated before 26 March 2015, the phone can now be destroyed if a representation as to ownership is not made within the designated six month grace period (26 March–26 September). If a mobile phone or other 'relevant item' is confiscated after 26 March 2015, it can be destroyed or disposed of but must not be destroyed for three months to allow the prisoner or a third party to make representations in respect of how the mobile phone is dealt with. As possession of mobile phones etc is a disciplinary offence, prisoners who make a claim as to ownership may face adjudication.

OMBUDSMAN CASES

Prisoner Assaulted by Prison Officers

Mr D complained that he was assaulted by staff in the Segregation Unit (SU) at HMP Whitemoor. He was subsequently denied the opportunity to speak to a member of Healthcare or a Governor afterwards, and had further contact with three of the officers he had accused of assaulting him and found this intimidating.

Whilst the Ombudsman did not condone Mr D's behaviour to continue to engage in a 'stare down' after one of the officers began to act provocatively, he considered that the use of force on Mr D had not been necessary, reasonable, or proportionate. He had not acted aggressively in the build-up, was not given sufficient time to comply when asked to return to his cell, and offered no physical resistance when force was initiated. It was also considered that in some key respects, the accounts given in the Use of Force statements differed from the CCTV evidence.

The Ombudsman therefore made the following recommendations to the Governor of Whitemoor:

- To arrange an apology to Mr D for the poor handling of his complaints;
- To initiate a disciplinary investigation into the actions of the officers that carried out the assault, and the Care and Separation Unit Manager for taking no action over the disproportionate use of force;
- To ensure that a record of the findings and recommendations of the Ombudsman's report is included in the prison staff records of the above,
- To issue a Notice to Staff reminding them about the contents of PSO 1600 in relation to the circumstances in which the use of force on a prisoner is lawful;
- To satisfy himself that arrangements are in place to ensure that, after the use of force:
    1. The prisoner is debriefed by an appropriate person.
    2. The prisoner is seen by a doctor or registered nurse within 24 hours.
    3. Any requests to see a Governor are passed to the Duty Governor to decide.
    4. Any written requests to see the PLO are actioned immediately.
    5. CCTV footage of events prior to and after the use of force is automatically retained.
    6. A formal investigation is commissioned if the prisoner makes a complaint of assault.
    7. Shares this report with the managers named in the report.
    8. Shares the PPO's Learning Lessons Bulletin on the Use of Force with all managers.

Governor's Adjudication Quashed

Mr W was placed in report for trying to contact Miss A, whom had requested to the prison non – contact with Mr W. It was alleged that Mr W had tried to conceal a letter within a letter to Miss A, and had informed a third party over the phone of this concealment. He was found guilty at his adjudication. Mr W complained that the adjudication finding was unlawful.

The PPO investigation found that whilst Miss A may have made this request, this was not communicated to Mr W, so he would not have been aware. This was also set out by Mr W in a written statement and that he considered the

prison had broken its own rules by not serving him with the non-contact request to acknowledge and sign.

The PPO was concerned that even though Mr W had remained silent throughout his adjudication, he had provided a written statement, and there was no record of the adjudicator pursuing this line of enquiry or whether it was taken into account during the adjudication.

The PPO concluded that, following the prison's own rules under paragraph 23 of Prison Rule 51, 'was the prisoner aware that the regulation or rule applied to him or her or whether staff had taken reasonable steps to make the prisoner aware of it' could not have been satisfied beyond all reasonable doubt – and that the adjudicator considered no aspects of Mr W's written statement. The PPO shared the view of Mr W that the adjudicator has a duty to consider all evidence before him – including written statements even if the defendant wishes to remain silent. The PPO recommended that the finding of guilt be quashed and Mr W's loss of earnings restored.

Inaccurate Information

Mr D complained that two adjudications dated June and July 2012 had been left on his category A dossier. These adjudications had been quashed after the Ombudsman had reviewed them and the Prison Service had agreed to the Ombudsman recommendations. Mr D made the complaint considering that any adjudications recorded would have an effect on his review. The adjudications should have been removed to reflect that they had been quashed. The dossier should therefore have stated that Mr D had not had any adjudications during his sentence. Whilst considering this complaint, the dossier was rightly amended.

Although the Ombudsman was satisfied that the prison had recorded incorrect information, the correct amendment suggested that no further recommendations was needed on this matter.

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