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

Contents

CASE REPORTS

DEPORTATION — FOREIGN NATIONALS RIGHT TO REGISTER AS BRITISH CITIZENS

R (Johnson) v Secretary of State for the Home Department [2016] UKSC 56

The appellant, Mr Johnson, was born in Jamaica in 1985 to a Jamaican mother and British father who were not married to one another. His father moved to the UK with him when he was four, and he has lived here ever since. Under the law in force at the time of his birth, Mr Johnson became a Jamaican citizen but not a British one. He would have been a British citizen if (1) his mother and father had been married to one another, or married subsequently, or (2) his mother had been the parent with British citizenship, or (3) he or his father applied while he was still a child and, if over 16, he was of good character.

Between 2003 and 2008, Mr Johnson was convicted of a series of criminal offences, culminating in a conviction for manslaughter for which he was sentenced to 9 years' imprisonment. In 2011, the Secretary of State made a deportation order against Mr Johnson on the ground that he was liable to automatic deportation as a 'foreign criminal' under section 32(5) UK Borders Act 2007. Removal directions were set. Mr Johnson appealed, arguing that deportation would breach his right to family life under Article 8 ECHR and be unlawfully discriminatory under article 14 given that he would not have been liable to deportation had his parents been married to one another. After reconsideration the Secretary of State confirmed her decision and also certified that Mr Johnson's claim was clearly unfounded, removing his right of appeal against her decision in this country. Mr Johnson's claim was amended to challenge both the deportation decision and the issue of the certificate.

The High Court found there had been a violation of Mr Johnson's rights and quashed the deportation certificate. The Court of Appeal allowed the Secretary of State's appeal, holding that there had been no violation of Mr Johnson's rights at the relevant time, namely his birth, which was long before the Human Rights Act 1998 came into force.

HELD: The Supreme Court unanimously allowed his appeal. They found Mr Johnson's liability to deportation because of the accident of his birth outside wedlock was unlawfully discriminatory and in breach of his Convention rights. The Court quashed the certificate granted by the Secretary of State and stated Mr Johnson's appeal against the decision to deport him would be certain to succeed. The Court also made a declaration that the statutory requirement that a person in Mr Johnson's position must also be of good character in order to be granted British citizenship is incompatible with Convention rights under section 4 of the Human Rights Act 1998.

PAROLE BOARD - OPEN CONDITIONS

R (Mordecai) v Parole Board [2016] EWHC 2601 (Admin)

The claimant was serving a sentence of imprisonment for public protection, with a minimum tariff of two years, for making threats to kill his brother. The claimant's minimum tariff had expired in October 2012 and the Parole Board had considered the question of whether to recommend his release or transfer to open conditions on two occasions, in

January 2013 and May 2015. On both occasions the panel decided not to recommend release or transfer to open conditions.

The claimant sought to challenge the panel's 2015 decision not to recommend a transfer to open conditions, arguing that the decision was irrational. He suggested that the panel (i) gave undue weight to the report of a psychologist who had assessed him in 2013, preferring this over the 2015 reports of the claimant's offender manager and offender supervisor (both of which recommended that the claimant be tested in open conditions); (ii) relied too heavily on the claimant's past offences in Germany, the facts of which were unclear and in dispute; and (iii) failed to take account of the claimant's good behaviour and progress towards rehabilitation in closed conditions.

The Parole Board acknowledged service of this claim and provided the panel's dossier on the decision, but did not appear or provide any defence. It did so as, following case law, this meant the court could not order the Parole Board to pay the claimant's costs, unless the Parole Board was found to have engaged in flagrant improper behaviour.

HELD: The court found "*it was not necessarily irrational; to refuse to transfer to open conditions a prisoner who had demonstrated good or even exemplary behaviour in closed conditions*". Similarly, it stated the panel was not irrational to have regard to the offences the claimant had been convicted of in Germany, provided these were considered with caution. However, the panel's reliance on the psychologist's report (which was based on a short, historical assessment) and preference of this over the reports of two people who saw the claimant on a regular basis was found to be flawed. Particularly, the Court noted that: (i) no reasons had been provided to explain why the claimant was unsuitable for open conditions, given he had fulfilled all of the assessments and courses suggested in the psychologist's report; (ii) no explanation had been provided as to why the panel reached different conclusions on risk to those detailed in the offender manager's and offender supervisor's reports; and (iii) the panel's decision appeared to show suitability for release and transfer had been considered as one question, rather than assessed independently, as required. Therefore, the court quashed the panel's decision not to recommend transfer to open conditions and ordered that this be remitted to them for reconsideration.

R (Hoffman) v Parole Board [2015] EWHC 2519 (Admin)

Mr Hoffman was a recalled indeterminate sentenced prisoner being held in HMP Wandsworth. On 29 April 2014, the Secretary of State for Justice *(SSJ) referred Mr Hoffman’s case to the Parole Board to consider whether to direct Mr Hoffman’s immediate release. At the oral hearing on 25 September 2014, the Parole Board and Mr Hoffman accepted that the Board’s powers in this instance were limited to advising the SSJ as to transfer to open conditions, since immediate release was not possible. At the hearing, both Mr Hoffman’s offender supervisor and offender manager gave evidence that Mr Hoffman’s risk could be managed in open conditions. However, despite this evidence, the Parole Board did not recommend transfer to open conditions.

Mr Hoffman challenged the refusal by the Parole Board to recommend him for transfer to open conditions on the basis that they failed to apply the correct test, failed to carry out any proper balancing exercise when considering transfer to

open conditions and failed to conduct a fair hearing.

HELD: The court ordered that the application for judicial review be granted; the decision of the Parole Board dated 25 September 2014 was quashed, and Mr Hoffman's request to be transferred to open conditions was remitted for fresh consideration by the Parole Board.

The court stated that the Parole Board conspicuously failed to make it plain what factors they took into account. Moreover, they focused only on the one aspect of the risk assessment. On the basis that the Parole Board failed to carry out the balancing exercise, the court did not need to consider the other grounds put forward by Mr Hoffman. The court noted in particular that the Parole Board's decision focused on the risk of Mr Hoffman causing serious harm to the public by re-offending. The court stated that whilst this approach is consistent with the test for release of life prisoners, it makes no mention of what the Board considered the risk of re-offending to be in open conditions as opposed to on release. In line with previous authorities – in particular the judgment of Supperstone J in *R (oao Hill) v Parole Board* [2012] EWHC 809 (Admin) – suitability for release and suitability for open conditions require the application of different tests. The former is a threshold test, whereas the latter is a balancing test.

R (Khan) v Parole Board [2015] EWHC 2528 (Admin)

The claimant applied for judicial review of the Parole Board's decision not to recommend his transfer to open conditions in December 2013.

The claimant was sentenced to an IPP with a tariff of four months for robbery in April 2006; his minimum term expired on 19 August 2006. In March 2012, Mr Khan was recommended for transfer to open conditions, but after two months in open conditions he was transferred back to closed conditions due to drug use. On return to closed conditions, his behaviour was again mixed, but improved in the months leading up to the second parole hearing with a mandatory drug test returning a negative result.

In its decision of December 2013, the Parole Board concluded that Mr Khan was not suitable for transfer to open conditions, as he had not yet addressed the risk factors that had contributed to his failure in open conditions, and so it would be premature to recommend return to open conditions in such circumstances despite his offender supervisor, offender manager and a psychologist supporting it.

The claimant sought judicial review of this decision on the basis that: (i) the decision was unlawful in that it failed to give proper, sufficient and intelligible reasons; (ii) the decision was irrational in that it gave too much weight to unproven and unsubstantiated allegations of bad behaviour against the claimant.

HELD: The application succeeded on both grounds. The court ordered that the Parole Board's decision be quashed and the matter be remitted to a fresh panel for a rehearing within six weeks of the order.

In respect of the first ground, the court could not tell from the Parole Board's decision whether the Panel had considered the positive aspects of the claimant's behaviour, including the negative drug test after he returned to closed conditions. Further, the court could not tell whether the panel scrutinised the level of risk more acutely because of the significant differential between the minimum tariff served and the length of

time spent in custody. The court found that the Parole Board failed to give proper and sufficient reasons for the rejection of the three professionals' recommendations that the claimant should have been transferred to open conditions; in the circumstances, it was not sufficient to say the panel could draw the conclusion that they did by 'reading between the lines'. Therefore, the court found the Parole Board's decision was unlawful.

In respect of the second ground, the court held that while the Parole Board is entitled to take hearsay evidence into consideration and to consider allegations of bad behaviour, it must nevertheless be careful not to ascribe too much weight to it. The court noted that the panel did not appear to take into account the negative drug test once returned to closed conditions, yet gave 'far too much weight' to the unsubstantiated allegations as to the claimant's previous behaviour in prison and did not give sufficient weight to the claimant's own account and the positive factors that were advanced on his behalf when balancing the evidence. Therefore, the court found that the Parole Board's decision was irrational.

COMMUNITY CARE

R (Taylor) v SSJ & Ors [2015 EWHC 3245 (Admin)

In this case the court considered the position of a 77-year-old prisoner with multiple health problems. He was serving a life sentence and the Parole Board had directed his release to a hostel run by the Langley House Trust ('LHT') once funding was in place to meet his social care needs.

Such funding was not put in place and by the time of the hearing he had remained in custody for a further 18 months.

The prisoner brought a claim that the Secretary of State for Justice and the Probation Service were in breach of their duties to provide accommodation under the Offender Management Act ("OMA") 2007 and/or the Care Act 2014.

It was also argued that he was being detained on a discriminatory basis. The reason that the release plan could not be put in place was that the SSJ, through the NOMS agency, would not fund the entire cost of the hostel placement, in particular the additional amount that related to the provision of social care.

The court did accept the prisoner's argument that it was open to the SSJ to fund the hostel place on the basis that the provision of social care could have a rehabilitative purpose. However, it rejected the submission that OMA 2007 s2, placing a duty on the SSJ to provide accommodation for probation purposes, gave rise to a duty to individuals. It was a general duty relating to the overall sufficiency of provision (the court applying an earlier case of *R (Irving) v London Probation Board* [2005] EWHC 605 (Admin)). The court noted that no arguable basis had been put forward for disputing that the SSJ was entitled to consider that provision of hostel places was sufficient.

While the Care Act 2014 s6(1) included a duty on the SSJ and the Probation Service to co-operate with social services, the court held that this did not mean that they were obliged to attempt to agree with the relevant local authority an arrangement whereby the extra cost would be covered by them.

Further, although there was a crossover between provision of social care and rehabilitation, this did not mean that there was a duty to fund the provision of services where the local authority would not.

On the facts of the case there was no breach of duty as the additional costs in issue were related to the prisoner's disability, but the local authority had assessed him as ineligible for funding in the hostel provided by LHT. The court refused to allow the prisoner to argue that the ancillary duty set out by the Supreme Court in *Kaiyam* had been breached in this case on procedural grounds. However, the court noted that to hold that the ancillary duty had been breached on the facts of this case would involve finding that the provision of supervised accommodation was a matter of individual right, which would have major implications for public expenditure.

The arguments on discrimination were also rejected. The prisoner could not show that he had been treated less favourably on account of his disability - it was not enough to say that if he had not been disabled he would have been released earlier. The court held that there was insufficient evidence to demonstrate that the requirement for prisoners to live in approved premises put disabled prisoners at a disadvantage. In any event it was clearly proportionate to require prisoners judged to pose a significant risk of causing harm to reside in approved premises.

LICENCE CONDITIONS - CONTACT WITH CHILDREN

R (ZX) v NATIONAL PROBATION SERVICE [2015] EWHC 4074 (Admin)

This was a permission decision that proceeded by way of an oral hearing on the direction of the court. The claimant was seeking to challenge a decision to impose additional licence conditions restricting contact with his children following his release from custody.

The claimant was convicted in 2008 of raising funds for purposes connected to terrorism and he was sentenced to three years' imprisonment in June 2014 for offences connected to the dissemination of a terrorist publication.

On his initial release from this later sentence he had no conditions on his licence in respect of contact with his children but he was later banned from all contact due to fears over radicalisation. After three-and-a- half months this was reviewed and amended to allow him some degree of unsupervised contact.

The claimant sought to argue that the interference with his family contact through the imposition of licence conditions by the Probation Service had failed to take account of the children's welfare and had circumvented the procedural protections of the Children Act 2004.

The court did not consider that it was arguable that the Children Act 2004 s11 was directly binding on the Probation Service. Furthermore, although Article 8 was engaged, in a case concerning national security the margin of appreciation was considerable and the restrictions were both proportionate and sought to achieve a legitimate aim.

ARTICLE 3 - PROVISION OF MEDICAL CARE (DRUG THERAPY)

Wenner v Germany ECHR 272 (2016)

The case concerned the complaint by a long-term heroin addict that he had been denied drug substitution therapy in prison. Relying on Article 3 (prohibition of inhuman or degrading treatment), Mr Wenner complained that the refusal to grant him drug substitution therapy in prison, which had made him suffer considerable pain and had caused damage to his health, and the refusal to have the necessity of drug substitution therapy examined by an external medical expert had amounted to inhuman treatment.

HELD: there had been a violation of Article 3 of the ECHR. While the court did not have to decide whether Mr Wenner had indeed needed drug substitution therapy, its task was to determine whether the German authorities had adequately assessed his state of health and the appropriate treatment. The court came to the conclusion that the authorities, despite their obligation to that effect, had failed to examine with the help of independent and specialist medical expert advice, against the background of a change in Mr Wenner's medical treatment, which therapy was to be considered appropriate.

The court also noted that according to a study commissioned by the German Ministry of Health, drug substitution treatment was the best possible therapy for manifest opiate addiction. Opioid substitution therapy programmes were operational in 41 out of 47 of the Council of Europe Member States and 30 out of 47 States also provided such therapy to prisoners.

Both the standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the European Prison Rules laid down the principle of equivalence of care, under which prisoners were entitled to medical treatment in conditions comparable to those enjoyed by patients in the outside community.

Furthermore, in Mr Wenner's case, an external doctor commissioned by the prison authorities had suggested that the prison medical service reconsider providing him with drug substitution treatment which he had received prior to his imprisonment. The fact that following his release from prison he was again provided with such treatment also indicated that this was the requisite therapy for him.

The court was not convinced by the German authorities' argument that by the time Mr Wenner applied for drug substitution treatment he had not received that therapy for several months and no longer suffered from physical withdrawal symptoms. In this respect the court noted in particular that his state of health while in detention had been characterised by the chronic pain he suffered independently of previous physical withdrawal symptoms, and that his previous drug substitution treatment had been interrupted against his will. The court was further satisfied that the physical and mental strain Mr Wenner had suffered as a result of his health condition as such could, in principle, attain the threshold of Article 3.

The court rejected Mr Wenner's claim in respect of his alleged pecuniary damage and it considered that the finding of a violation of Article 3 constituted in itself sufficient just satisfaction for any non-pecuniary damage suffered. The court held that Germany was to pay Mr Wenner 1,801.05 EUR in respect of costs and expenses.

ARTICLE 3 - HANDCUFFING DURING HOSPITAL VISITS

James McDowall v G4S Care and Justice Services (UK) Limited 2016 Scot (D) 17/2

The Claimant was a prisoner in a secure prison serving a 9 year sentence for attempted murder. He also had a previous conviction for assault and was identified by prison authorities as having a history of violence and mental health issues.

In 2013, the claimant attended a public hospital on three occasions for medical examinations. As a result, the claimant came into close proximity to members of the public and medical staff.

The standard operating procedure when transferring a prisoner from secure prison accommodation to an insecure public area is to ensure that the prisoner is (i) escorted and (ii) appropriately restrained to prevent escape, damage to property or harm (either to himself or others). There are two main ways in which a prisoner can be cuffed - single cuffing and double cuffing. If double cuffing is used, then fewer escorting PCOs are required.

On each of the three occasions, the claimant was escorted to the hospital by the defendant and was double cuffed. On these occasions, no individualised risk assessment was carried out by the defendant. The claimant did not raise any complaints at the time about his treatment but subsequently brought a claim for damages and alleged that the double cuffing was a breach of his rights under Articles 3 and 8 of the ECHR.

HELD: The claim was rejected. The judge was satisfied that double cuffing had been appropriate and that the claimant's treatment was proportionate and justified.

Article 3 of the ECHR requires that the treatment complained of must be both degrading and must reach a "minimum level of severity" before it can considered to be a breach. The fact that a prisoner is handcuffed in public does not automatically amount to degrading treatment under Article 3, and handcuffing is permitted if it is intended to prevent an adequate risk of escape or harm. Article 8 of the ECHR provides that everyone has the right to respect for their private life. Any interference with Article 8 must be proportionate. The judge found that there was no question that the use of double cuffing was proportionate when a prisoner such as the claimant was taken from a secure environment to an insecure public environment.

The judge also confirmed that although the defendant did not carry out a written risk assessment on each transfer, they made an appropriate assessment of the overall risks in relation to the claimant on each transfer. Accordingly, any prejudice that the claimant may have suffered arose from his status as a secure prisoner and his criminal history, rather than from the visits to the hospital when he had been double cuffed.

ARTICLE 3 - FAILURE TO PROVIDE ACCESS TO REHABILITATION

Murray v Netherlands (2017) 64 EHRR 3

In 1979, Mr Murray was convicted of the murder of a six-year-old girl. As part of the criminal proceedings against him, he was examined by a psychiatrist who diagnosed him as a retarded, infantile, and narcissistic man whose character structure had a serious disturbance of a

psychopathiform nature. It was recommended that he receive institutional treatment or similar treatment in prison so as to prevent recidivism. At the time of the facts, no order for placement in a custodial clinic could be imposed by law. The domestic courts therefore sentenced him to life imprisonment instead.

At the time Mr Murray lodged his application with the ECtHR in 2010, he had already been imprisoned for 30 years. He applied numerous times for pardon, but these requests were systematically rejected due to the fact the risk of recidivism which he was considered to pose continued to exist, as he had not received the recommended treatment.

Mr Murray argued that he had never received any treatment during his 30-year -long detention and that the remedies available to him to seek release were not effective remedies as they only offered a theoretical possibility of release. Indeed, as long as he had not been provided with treatment, his periodical reviews could only lead to the conclusion that he was still too dangerous to be released. The Government argued that he had been offered basic psychiatric help in prison, as well as access to various activities, which contributed to his behaviour significantly improving over the course of his sentence.

The case was referred to the Grand Chamber of the ECTCR. The question before the Grand Chamber was whether the lack of psychiatric or psychological treatment in effect deprived Mr Murray of any prospect of release, rendering his life sentence irreducible, and in violation of article 3 of the ECHR.

The Grand Chamber noted that, while Mr Murray had access to activities such as work and some basic psychiatric help, which both contributed to his behaviour significantly improving, the decisions not to release him were based on the fact that he had not received in prison the treatment that was recommended for him, making the risk of his reoffending too great to allow his release. There was therefore a close link in this case between the persistence of the risk of Mr Murray's reoffending on the one hand, and the lack of treatment on the other. The Grand Chamber also noted that the domestic authorities knew that treatment had been recommended in order to prevent recidivism and that he had not received any.

The Grand Chamber observed that States have a wide margin of appreciation in the determination of what facilities or measures are required in order to give a life prisoner the possibility of rehabilitating himself or herself to such an extent that he or she may become eligible for release. However, a life prisoner must be realistically enabled to make progress towards rehabilitation, which means that States have the duty to provide for conditions of detention, facilities and measures or treatments capable of enabling a life prisoner to rehabilitate himself or herself. In Mr Murray's case, the Grand Chamber found that the lack of any kind of treatment – or even of any assessment of treatment needs and possibilities – meant that his life sentence could not be reduced as he could not effectively show any significant progress towards rehabilitation. Therefore the Grand Chamber found a violation of Article 3 which constituted sufficient just satisfaction; accordingly it made no award but orded that the Netherlands pay Mr Murray's son and his sister 27,500 EUR in respect of costs and expenses.

ARTICLE 5 - UNLAWFUL DETENTION

Faulkner v United Kingdom [2016] ECHR 823

The applicant was sentenced to life imprisonment, with a minimum tariff of two years and eight and a half months, for grievous bodily harm in 2001. Following the expiry of his tariff in April 2004, the Parole Board reviewed the applicant's detention in May 2005 and January 2007, recommending each time that he should be moved to open conditions. These recommendations were rejected by the Secretary of State, who indicated that the next review of the applicant's sentence would be in January 2008 (well within the requirement under the Crime (Sentences) Act 1997 which required review every two years). However, there was a significant delay and the applicant's sentence was not reviewed until January 2009. The Parole Board then directed the applicant's release.

Prior to the order for his release, the applicant began a challenge to the lawfulness of his detention, which was gradually escalated through the appeals process. In March 2011, the Court of Appeal found that the applicant's right, under Article 5(4) ECHR, to have a challenge to the lawfulness of his detention decided speedily by a competent court had been violated as a result of administrative delays between March 2008 and January 2009. The Court found that there had been no significant change to risk posed by the applicant during this period, and therefore found that, on the balance of probabilities, the applicant would have been released in March 2008, were it not for these administrative delays. Therefore, it awarded significant damages of £10,000; well above the amount normally awarded in 'legitimate frustration' cases, where it is unclear if a prisoner would have been released earlier had there been no delay. On appeal to the Supreme Court this award was reduced to £6,500.

The applicant then applied to the European Court of Human Rights, seeking a declaration that his detention between March 2008 and January 2009 had not only violated his procedural rights under Article 5(4) ECHR, but also his substantive right not to be unlawfully detained under Article 5(1) ECHR. He argued that, although he had originally been detained lawfully following a conviction by a competent court, his detention ceased to be lawful from March 2008 because he no longer posed a risk to the public. He contended that, from this point, the causal connection between his sentence to life imprisonment due to the risk he posed to the public and his actual detention had been severed. Therefore, his detention had become unlawful.

By contrast, the government argued that the connection between his sentence and his detention did not cease when he no longer posed a risk to the public, but rather when he positively demonstrated to the Parole Board that he no longer posed a risk to the public. This did not happen until January 2009 and the applicant was released at that point. As such, it argued, the applicant's detention had never been unlawful under Article 5(1), even though his Article 5(4) rights had been violated. Further, the government stated that this case was not admissible to be heard by the European Court of Human Rights. This was because, even if the applicant's Article 5(1) rights had been violated, it argued he had already been adequately compensated and had not, therefore, suffered a significant disadvantage.

HELD: The ECtHR found that the application raised an important point of principle, regarding whether a failure to pro-

vide a speedy means to challenge the lawfulness of detention could be so serious as to render that detention unlawful in and of itself. As such, the application was admissible, irrespective of whether the applicant had suffered a significant disadvantage.

However, the court nevertheless dismissed the application. While recognising that "*there may be circumstances in which, exceptionally, a delay in the review of the legality of post-tariff detention is such as to give rise to concerns that the detention itself has become arbitrary and incompatible with Article 5 (1)*", the court found that there were no such circumstances in this case. Particularly, the court took note of (i) the length of the delay; (ii) the fact that the applicant's detention had been reviewed within the two-year period required by Crime (Sentences) Act 1997, and had not therefore breached domestic law; and (iii) the fact that the delays were purely administrative, with no suggestion of malice or bad faith.

ARTICLE 5 - ACCESS TO REHABILITATION/UNLAWFUL DETENTION

Kaiyam & Ors v UK (2016) 62 EHRR SE13 and R (Weddle) v SSJ [2016] EWCA Civ 38

Three of the prisoners whose cases were considered in the Supreme Court (*R (Kaiyam and others) v SSJ* [2014] UKSC 66) took their cases further to the ECtHR. They had all suffered delays in accessing courses aimed at their rehabilitation.

The Supreme Court held that unjustifiable delays in providing such courses could breach Article 5, but importantly it treated the duty to provide courses in ECHR terms as being implicit in the scheme of the Article - the 'ancillary Article 5 duty' - rather than arising from the express wording of either Article 5 (1) or Article 5(4).

This sidestepped two problems that the court considered would otherwise arise: first, if the duty was located in Article 5 (1), prisoners assessed as highly dangerous might nevertheless be able to argue that they were unlawfully detained merely through the lack of course provision; and, second, if the duty was seen as implicit in the scheme of Article 5 then this would enable it to arise before tariff expiry, which was much more likely to ensure that those who could be rehabilitated before that point could be released when it was reached.

Two of the prisoners had failed to establish any breach of Article 5 domestically and the other was awarded £600 by the Supreme Court for an Article 5 breach for a delay of about a year in the provision of an offending behaviour course. In the ECtHRthe prisoners complained that the Supreme Court had erred in refusing to find that Article 5(1) had been breached in their cases.

The court reiterated the position it had reached in *James, Wells and Lee v UK* App Nos 25119/09, 57715/09 and 57877/09, 18 September 2012; (2013) 56 EHRR 12 that Article 5(1) did require a real opportunity for rehabilitation to be a necessary element of any part of detention justified solely by reference to public protection. This meant that on a strict analysis the opportunity only needed to be provided in the post-tariff phase of the detention. However, the court reiterated that in determining whether there had been a violation, the prisoner's general progression through the prison system is to be assessed in light of the particular circumstances of the case, and this could include consideration of opportunities provided pre-tariff expiry. The court again noted that

such breaches 'will be rare' as it is not for the court to second-guess what individual states might consider to be appropriate sentence plans (para 70).

The court did not comment on the Supreme Court's innovative approach to Article 5, stating, '[i]t is not the role of this court to determine in the abstract whether the [UK] has properly implemented the judgment in James ... within its domestic legal order', and it is not clear from the decision whether any arguments were put by the government to argue that the Supreme Court had got it wrong.

The court accordingly applied its approach in *James*, namely that failure to provide courses could result in a breach of Article 5(1). It did, however, note that its approach was likely to be more 'stringent' than that applied domestically by application of the ancillary duty approach (para 72). In light of this it is not surprising that the prisoners' complaints in relation to Article 5(1) were held to be inadmissible.

Shortly after the decision of the ECtHR, the Court of Appeal reviewed the domestic approach in the context of a prisoner serving a life sentence for murder of a police officer, whose 25-year tariff does not expire until 2018 R (Weddle) vs SSJ). He claimed he had not been provided with courses that were able to demonstrate a reduction in risk.

In relation to the common law, the court reiterated the principles set out by the Supreme Court in *Kaiyam*, namely that there is: a general duty to provide the systems and resources necessary to allow indeterminate sentenced prisoners a reasonable opportunity to show that they are no longer dangerous; a duty to act rationally in the provision of such systems and resources, which on the facts may be breached in relation to individual prisoners; and a duty to comply with any current policy on such provision. Breaches of these duties will not render detention unlawful or give rise to damages, and they can arise both pre- and post-tariff expiry.

It does not appear that the Court of Appeal had seen the ECtHR's decision in *Kaiyam*. In analysing the relationship between the common law and Article 5 duties, the court noted that the ancillary duty is both more extensive and allows the possibility of damages, and was therefore more likely to be relied on than the common law duties. The Court of Appeal doubted a submission on behalf of the Secretary of State that damages for breach of the ancillary duty could only arise post-tariff.

However, the court rejected a submission on behalf of the prisoner that the test for breach of the common law duties should be in line with that for breach of the ancillary duty. While the court accepted that the degree of intensity of review will be affected by the nature of the decision in question, it rejected the suggestion that in this context it should be at the 'high-intensity' end of the spectrum (para 33). Such an approach was not supported by how the Supreme Court approached the common law duties in *Kaiyam* itself.

On the facts the Court of Appeal upheld the Secretary of State's appeal on the basis that the judge at first instance was wrong to hold that the prisoner's rehabilitation was being unlawfully prevented. In doing so the court took into account material post-dating the claim's issue, which indicated the possibility of one-to-one psychological intervention in light of the prisoner's lack of recall of the offence.

The prisoner's cross-appeal sought to argue a breach of Article 5 in light of the

Supreme Court's decision in *Kaiyam*. This was rejected on the basis that such a claim would fail in any event by application of the ancillary duty, Underhill LJ stating (at para 50) that he was 'sceptical about whether the apparent theoretical difference between the standards of review at common law and under Article 5 would in practice lead to different outcomes in many, if any, cases'.

ARTICLE 10 - APPEAL AGAINST CONVICTION

R v Norman [2016] EWCA Crim 1564

The appellant was a former prison officer at HMP Belmarsh who had been sentenced to 20 months imprisonment for abuse of public office. He had been found guilty of this offence as a result of his five-year-long arrangement with a tabloid journalist, in which he provided information on HMP Belmarsh (in relation to a wide variety of stories) in return for payment. This had been done in violation of the Prison Rules and the Civil Service Code (the 'PRCSC') which prohibited the appellant from: (i) making unauthorised disclosure of information that he had become aware of in the course of his duties to the press or other persons; and (ii) receiving any benefit from a third party, which might reasonably be seen to compromise his personal judgement or integrity.

As a result of the regular newspaper stories, officials at HMP Belmarsh became aware that someone was leaking information to a journalist, but had not identified the appellant as the source. Instead, he was only identified when Mirror Group Newspapers ('MGN') provided material on him to the Metropolitan Police Service (the 'MPS'). MGN provided this information as part of a wider voluntary disclosure of information relating to payments to public officials against the background of the Leveson Inquiry. The trial judge had noted that MGN may have been motivated by a hope that this would help it avoid prosecution on corporate charges.

The appellant challenged his conviction on two grounds. Firstly, he argued that the judge ought to have stayed proceedings on the basis that there had been an abuse of process in the collection of evidence against him. The appellant argued that the MPS had put improper pressure on newspapers in an attempt to get them to disclose their journalistic sources and had, therefore, breached his right to freedom of expression under Article 10 ECHR. Secondly, the appellant argued that the trial judge had been wrong to refuse his submission of no case to answer on the offence of abuse of public office. He suggested there could be no basis for finding that he had '*wilfully neglect*[ed] *to perform his duty and/or wilfully misconduct*[ed]' himself, or that he had done so to a degree that amounted *'to an abuse of the public's trust in the office holder'*, both of which were necessary elements of the offence. Therefore, the appellant said the charge ought never to have been put to a jury. In doing so, he contended that the element of the PRCSC which prohibited him disclosing information to the press was inconsistent with his right to freedom of expression under Article 10 ECHR. Therefore he suggested this did not bind him and his disregard of this could not constitute wilful misconduct. Further, he argued that any misconduct he had engaged in was minor and would be insufficient to be considered as an abuse of the public's trust.

HELD: The appeal was refused on both grounds. The court noted that there was no evidence to suggest that the

MPS: (i) had placed improper pressure on MGN; or (ii) promised or implied that provision of information on the appellant, amongst others, would help MGN avoid corporate charges. Further, the court found that the appellant's Article 10 ECHR rights had not been violated, either by MPS or by MGN's disclosure. This was because the right to freedom of expression, and the expectation of confidentiality for journalist sources associated with this, had to be balanced against the public interest in prosecution of crime and maintenance of faith in the prison service in this case. Given that: (a) there had been no misconduct by the MPS; (b) the appellant's Article 10 ECHR rights had not been violated; and (c) the appellant had received a fair trial, the Court found there had been no abuse of process and the judge had been correct to refuse to stay proceedings.

The court also found that the trial judge had been correct to refuse the appellant's submission of no case to answer. It found no inconsistency between the right protected under Article 10 EHCR and the PRCSC. Therefore, given that the appellant had ignored the restriction placed on him by the PRCSC, there was sufficient evidence to allow the jury to decide if he had engaged in wilful misconduct. Similarly, there was sufficient evidence to allow the jury to decide on whether this misconduct had amounted to a breach of the public's trust, as the appellant had engaged in a long term breach of his duties, for monetary gain, and had attempted to conceal his gain by routing payments through a third person's account.

OMBUDSMAN CASES

RULE 39 AND CONFIDENTIAL ACCESS

Mr Z asked the PPO to investigate two complaints. He complained that letters from the Government Legal Department (GLD) that were addressed to him were being opened by prison staff before he had received them. He believed that correspondence from GLD should be handled by the prison either as ‘Rule 39’ or confidential access because the GLD were official solicitors.

Mr Z also complained about the GLD sending him correspondence in the form or faxes or emails through the prison’s fax and email systems. He argued that this constituted a breach of the Data Protection Act.

The PPO Investigator did not uphold the complaint. The Investigator expressed a view that paragraph 14.6 of the PSI 49/2011 was misleading, if erroneously read in isolation, because it appeared to say that mail to *any* legal body should normally be treated as confidential access. He took the view that it should be read in context of the PSI and the list of groups whose mail is treated as confidential access is exhaustive.

The Investigator said the purpose of paragraph 14.6 was to explain that confidential access mail might also sometimes qualify as Rule 39, for instance when the mail included enclosures that would be Rule 39. And, that the ‘other legal bodies’, in the paragraph, refer to those bodies listed as confidential access, not Rule 39.

In short the GLD is not included in the paragraph as a confidential access organisation. Therefore mail exchanged

between Mr Z and GLD did not qualify as either confidential access or Rule 39.

In regards to Mr Z's second complaint the Investigator noted that the prison and the GLD had agreed to cease this practise after Mr Z had complained to them both. Henceforth GLD would seek Mr Z's agreement before sending him faxes or emails through the prison's email and fax systems.

The Investigator pointed out that an individual prison wasn't responsible for the actions of the GLD and that the GLD was outside the remit of the Prisons and Probation Ombudsman. Therefore Mr Z's second complaint could not be included in the PPO's investigation.

UPDATED PAROLE BOARD RULES

On 22 November 2016 the new Parole Board Rules came into force. They apply to all cases that are referred to the Board including those that had already been referred before the new Rules came into force. They address a number of issues affecting the way the Board operated. The revisions allow Parole Board members greater flexibility to make decisions at all the different stages in the parole process. Of most interest to prisoners will be that under Rule 14, single Board members can now decide to release prisoners serving IPP sentences without an oral hearing.

The other key points are:

Rule 8 (covers the withholding of information or reports) – This does not change the substance of the non-disclosure application process but sets it out in more detail. There is no change to the grounds for non-disclosure or the test.

Rule 9 (covers representations by and evidence of the parties) – Evidence submitted less than 14 days before the hearing will be accepted at the discretion of the chair and parties must give reasons for late service (which can be done orally at the hearing). The Board member must consider fairness to the prisoner when deciding whether to accept the evidence.

Rule 12 (covers adjournment and deferral of hearings) – Decisions to adjourn or defer an oral hearing must be recorded in writing with reasons and must be provided to the parties within 14 days.

Rule 13(2) (covers time scales) – This allows a Board member to change any period of time in the Rules where it is appropriate to do so. They must have a cogent reason for doing so and take into account fairness to prisoner.

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

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