PRISONERS' RIGHTS

Prisoners' Legal Rights Bulletin No 78

Spring 2017

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.

The costs of printing this edition of the Prisoners Legal Rights Bulletin have generously been covered through the pro bono support of PAS by Herbert Smith Freehills; we are most grateful for their important support.

HERBERT SMITH FREEHILLS

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CASE REPORTS

LEGAL AID FOR PRISONERS

R (Howard League for Penal Reform and Prisoners' Advice Service) v The Lord Chancellor [2017] EWCA Civ 244

Three judges in the Court of Appeal ruled that cuts to legal aid for prisoners are unlawful because they are 'inherently' – meaning fundamentally – unfair. The result of the judgment is that it overturns the cuts in respect of three important areas, namely:

- Pre-tariff reviews before the Parole Board where the Board does not have the power to direct release but advises the Secretary of State for Justice on whether a prisoner would be suitable for a move to open conditions;
- Categorisation reviews of Category A prisoners;
- Placement in CSCs (close supervision centres).

This represents a positive, but limited development. It does not overturn the legal aid cuts in all areas of prison law.

Now the Government must present plans to give effect to the judgment. It is still too early however to know what will happen as a result of the judgment. The Government might try and appeal the decision. If the Government does not appeal, legal aid will still only be available if the current law is amended. We will obviously continue to lobby for the widest possible range of legal aid for prisoners in those areas.

Calls to PAS increased from 14,000 to 25,000 in the last year. We believe this stark increase directly resulted from the legal aid cuts and prisoners' limited ability to access justice.

The legal challenge by PAS and the Howard League began in 2013. At that time, prisoners – as a result of government cuts – no longer had any possibility of obtaining legal aid for a wide range of problems. In the time between then and the cases coming before the Court of Appeal in January and February this year, the government conceded on four areas of concern. In the following areas exceptional case funding (ECF) is in principle now available on the basis that Article 8 of the European Convention on Human Rights (ECHR) would be engaged:

- Applications for places on mother and baby units (MBUs);
- Licence conditions;
- Decisions regarding segregation;
- Resettlement issues.

This left five key problems for the Court of Appeal to consider and, in three out of the five, the judges found the cuts to be unfair. The court was not persuaded that the lack of legal aid available in two areas, namely access to offending behavior programmes (OBPs) and prison disciplinary proceedings where no additional days may be added (aka governors' adjudications) is unlawful.

The Court's judgment is 86 pages long and carefully analyses detailed evidence on the range of cases that go through the system and whether existing alternatives such as the internal complaints procedure are capable of filling the gap left by the removal of legal aid.

The final paragraph of the judgment states the following:

"... Almost no changes have been introduced to replace the gap left by the removal of legal aid. We have concluded that at a time when the evidence about prison staffing levels, the current state

of prisons, and the workload of the Parole Board suggests the system is under considerable pressure, the system has at present not got the capacity sufficiently to fill the gap in the run of cases in those three areas."

The Court of Appeal's judgment shows that the courts will strike down cases which show systemic unfairness and this represents a notable victory for justice.

WHOLE LIFE SENTENCES

Hutchinson v United Kingdom (57592/08) ECHR

In 1984, Mr Hutchinson now aged 76 was convicted of aggravated burglary, rape and three counts of murder after he broke into a family home, stabbing to death a man, his wife and adult son and raping their 18 year old daughter. The trial judge sentenced him to a term of life imprisonment and recommended a minimum term of 18 years (in line with the then-rules on sentencing). In January 1988, the Lord Chief Justice recommended that Mr Hutchinson should never be released and in 1994 the Secretary of State decided to impose a whole life term. After the CJA 2003 came into force, Mr Hutchinson applied for a review of his sentence. In 2008, the High Court upheld the Secretary of State's decision, as did the higher courts.

The issue in question before the European Court of Human Rights was whether imposing a whole life sentence gave rise to a violation of Article 3 of the ECHR and whether that UK domestic law was contrary to Article 3. UK law only allows for the power of review of the release of a life prisoner in "exceptional circumstances" where there are "compassionate grounds" in accordance with the Indeterminate Sentence Manual. This criteria was criticised as "highly restrictive" *in R v. Newell; R v. McLoughlin* [2014] EWCA Crim 188 but must be read in a manner compatible with Article 3 to elucidate a "wider meaning" although this meaning can only be determined on a case-by-case basis. However, *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, stated that whether there had been any changes in the life of the prisoner and their progress towards rehabilitation would be considered when making decisions regarding life sentences.

Mr Hutchinson argued that domestic law was contrary to Article 3 and that the review of whole life sentences was based on a vague discretion vested in a partisan government minister, not the judiciary and was therefore not fair, balanced or certain. He also stated that that the terms "exceptional circumstances" and "compassionate grounds" needed to be more specific and life prisoners needed clarity as to when their sentences would be reviewed.

HELD: The Court found that the *McLoughlin* decision had provided clarity and further specification may come through domestic practice. The Court concluded that whole life sentences can now be regarded as reducible de jure and de facto i.e. there is a prospect of release for the prisoner and a possibility of review in line with Article 3 which is not just limited to compassionate grounds. Furthermore, the Secretary of State's decision must be compatible with the Convention rights and is subject to review by domestic courts, providing sufficient judicial safeguards. Life prisoners can also initiate a review of their sentence at any time and the Court refused to set a minimum timeframe for such review. The appeal

was therefore dismissed, with three judges dissenting.

PAROLE BOARD –TRANSFER TO OPEN CONDITIONS

Wallace v Parole Board [2017] EWHC 295 (Admin)

The claimant was serving an automatic life sentence, with a minimum tariff of three years, for causing grievous bodily harm with intent. She was released after the expiry of the minimum tariff, but recalled less than a year later. She had since been released and recalled on a further five occasions. The circumstances giving rise to her recalls included non-compliance with hostel conditions, substance misuse and poor mental health.

After the most recent recall, the claimant's case was referred by the Secretary of State to the Parole Board to consider her suitability for release, and to advise on her suitability for a move to open conditions. The Parole Board refused to direct her release or to recommend transfer to open conditions. In its conclusion, the panel stated that it could not recommend the claimant for open conditions because there was evidence that the core risks underpinning the claimant's use of violence and serious harm remained active, and that these risks could not be sufficiently managed in open conditions.

The claimant applied for judicial review, contesting this decision on the grounds that the panel had failed to follow the directions given by the Secretary of State to balance risk and benefit when deciding on the move. 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.

HELD: The application was refused. The court agreed that the decision letter did not set out the correct test in the introduction to its decision, referring only to risk and failing to assert the need to assess risk in relation to potential benefit. The conclusion similarly failed in this respect. However, the court rejected the submission that the guidance given to the board invited a narrow textual analysis or imposed any particular structure on the reasoning of the Parole Board as set forth in the decision letter. The Court also emphasised that it was important not to cite selectively from the decision; it was sufficient that, in reading the decision as a whole, it was apparent that the required balancing exercise had been carried out.

In this case, the professional witnesses had identified the key benefits of a move to open conditions, such as access to a supportive family environment, and their reports were clearly referenced and considered by the panel. Read as a whole, the letter made it apparent that the panel was unsatisfied that any of the benefits proposed outweighed the risks posed by the claimant's lack of progress, poor record and unresolved vulnerabilities.

The court ruled that, although the board should follow its own guidance unless there is good cause not to, the purpose of the guidance was to assist panels in making and writing clear and lawful decisions; to find the decision of the panel to be unlawful solely because it did not follow a particular format or structure in its decision would elevate form over substance in an unacceptable way.

R (Noye) v Secretary of State for Justice [2017] EWHC 267 (Admin)

The claimant was currently serving a sentence in prison for murder committed in the course of a road rage incident in 1996. The claimant had a significant criminal background and had amassed significant wealth from his youth, not all through legitimate means (although he had not been convicted in relation to this).

His history included being convicted and imprisoned in 1986 for conspiracy to handle and dispose of stolen gold bullion (from the Brinks-Mat Heathrow Airport robbery in 1983) from which he was released in 1994. In 1985, the claimant came across a policeman, DC Fordham, in the grounds of his home and stabbed him inflicting fatal injuries. He was charged with murder, but acquitted in 1986 on the grounds of self-defence. The claimant appealed twice against the conviction for murder arising from the road rage incident (the Parole Board considered evidence of minimisation due to the appeals being based on arguments of self-defence and manslaughter). Prior to his arrest for this murder, the claimant had escaped the country via a helicopter to France and then flown to Spain in a private jet where he lived for two years.

In July 2014, the Secretary of State referred the claimant's case to the Parole Board for consideration of release on licence or to an open prison.

The Parole Board had issued a Decision Letter on 21 September 2015 recommending transfer to open conditions. On 5 November 2015 the Secretary of State decided not to accept the recommendation, stating that the claimant should be reassessed in 18 months' time. The Secretary of State had, contrary to the Parole Board's conclusions, decided that the claimant's various appeals indicated minimisation and undermined his credibility regarding his changed attitude towards violence and reduced risk to the public. The claimant sought judicial review of the Secretary of State's decision.

The court considered the six current principles raised by the claimant to support his grounds; these principles relate to the Secretary of State's powers under Section 12(1) of the Prison Act 1952 and her duty to consider recommendations made by the Parole Board. The first five principles were established in *Banfield v SSJ [2007] EWHC 2605 (Admin)*; a sixth principle was also referred to from *Hindawi v SSJ [2011] EWHC 830 QB*.

HELD: Lavender J. rejected all the claimant's submissions but the one arguing that the Secretary of State had approached the assessment of future violence and related risk of absconding on an incorrect factual basis. This was because the Secretary of State had departed from the Parole Board's finding of fact as to the credibility that the claimant had made significant progress in changing his attitudes to violence, by changing his attitudes and tackling his behavioural problems. The Secretary of State's decision relied upon the Secretary's departure from the Parole Board's finding of fact (which had been supported by specific references to psychiatric analysis and consultation) as to the claimant's credibility that he had changed his attitudes towards violence and presented a reduced risk. The Secretary's decision was quashed on the basis of this error of law, and it would be for the Secretary to take a fresh decision on whether or not to transfer the claimant to open prison.

Section 31(2)(a) of the Senior Courts Act 1981 was considered. Lavender J.

found that as it was *not* highly likely that the outcome for the applicant for judicial review would not have been substantially different if the conduct complained of had not occurred, therefore under S. 31 (2)(a) relief on the application for judicial review did not need to be refused.

DUTY OF CARE- OCCUPIER'S LIABILITY

G4S Care & Justice Services v Kevin Manley (UK) [2016] EWHC 2355 (QB)

The claimant Mr Manley had returned to prison following a hip operation at the end of December 2012. On his return to prison he was walking with the aid of crutches and had a weak leg. In early January there was an electricity failure which caused the lights to go out in his cell at 8.10pm. Despite calling for assistance using the intercom in his cell, the problem was not rectified until 8.47pm. During the period where there was no electrical power, and consequently no light in the cell; the claimant needed to use the toilet and whilst feeling his way along the side of the bed, tripped over a slipper and hit his head on a cupboard. The claimant then brought a claim against the defendant for breach of duty to take reasonable care to ensure that the claimant was reasonably safe under section 2 of the Occupier's Liability Act 1957 (the 'Act').

At the county court hearing, the judge considered the amount of light in the cell and whilst it was deemed that it was not pitch black as the claimant had stated, the judge concluded that the fact that the room was darker was the cause of the accident and that power should have resumed at 8.35pm. The defendant was therefore found to be in breach of their duty of care under the Act and found liable to the claimant for personal injury.

The defendant sought permission to appeal. On appeal, it was considered whether the judge had approached section 2 incorrectly because he had failed to consider whether the lighting conditions rendered the premises unsafe. It was decided that the judge had taken the correct approach to section 2 and had applied the correct test. The claimant had to establish that the defendant had failed to (a) take such care as was reasonable in the circumstances and (b) ensure that the claimant would be reasonably safe in his cell. The judge considered that the senior officer at the prison should have been told that the claimant had reduced mobility and was less able to look after himself under poor lighting conditions. The lighting situation would then have been rectified far quicker had this information been passed on to the senior officer. It was also considered whether the judge was wrong to find that the delay of 15 to 20 minutes amounted to a breach of section 2 of the Act as it placed an unreasonably high standard of care in all the circumstances. It was also argued that the judge finding the claimant to be 'handicapped' was an overstatement of the claimant's disability and the requirement for the defendant to act more urgently than would otherwise be the case was unreasonable.

HELD: The defendant's appeal was dismissed. It was decided that the judge had not imposed an unduly high standard of care. It was not a case of a judge treating a delay of 15-20 minutes beyond the target time of 10 minutes for restoring electricity as a breach of the duty in section 2 of the Act. The judge was concerned with the failure to restore power within normal timescales where the defendant knew, or ought to have known, the need for urgency. It

was also found that the judge had used the description 'handicapped' at one point in his judgment as a shorthand word describing the fact that the claimant had mobility problems and was not overstating the extent of the claimant's disability.

IPP SENTENCES

R v Docherty [2016] UKSC 62

The Supreme Court heard an appeal about the transitional arrangements for the imposition of IPP sentences following the abolition of such sentences on 3 December 2012 by LASPO Act.

The transitional arrangements provided that persons convicted before 3 December 2012 and sentenced after that date would still be eligible to receive the sentence of IPP. The appellant had been convicted on 13 November 2012 of offences under Offences Against the Person Act 1861 s18. He was sentenced to IPP on 20 December 2012 following a finding that he had displayed a clear pattern of aggressive offending and posed a high risk of serious further violence.

He argued that it was unlawful and in breach of Article 7 of the ECHR for the commencement order to preserve the sentence of IPP for those convicted before 3 December 2012 but sentenced after its abolition. Article 7 prohibits the imposition of retrospective penalties. This gives effect to the principle of *lex gravior*, which prohibits the imposition of a heavier penalty than was available at the time the offence was committed. In this case, the maximum sentence for the offence was and remained life imprisonment and so that did not provide any assistance.

However, the appellant also contended that Article 7 now incorporates *lex mitior*, the principle that if, subsequent to the commission of an offence, the law changes to provide for the imposition of a lighter penalty, this should be applied.

Lex mitior had been approved in *Scoppola v Italy* (No 2) App No 10249/03, 17 September 2009; (2010) 51 EHRR 12 as forming part of Article 7 under developing case law and international instruments, even though in earlier decisions of the European Court of Human Rights ECtHR it had been rejected.

The Supreme Court considered that the *Scoppola* judgment had to be read in the context of domestic Italian law, which contains an express *lex mitior* provision. It noted that there is no such provision in English law and no consensus as to its' application in common law jurisdictions. Furthermore, sentencing practice in England is premised upon judicial discretion guided by the Court of Appeal and the Sentencing Council, subject to a statutory maximum, whereas in Italy and other jurisdictions, sentences between a minimum and a maximum period are prescribed.

Thus, the *lex mitior* principle in domestic law extends only to the principle that sentences should be imposed 'according to the law and practice prevailing at the time of his sentence, subject to not exceeding the limits (ie in England normally the maximum) provided for at the time the offence was committed' (para 55). It does not include a requirement that the sentence must be passed in accordance with any more favourable law or practice that has been created between the time of the commission of the offence and the imposition of the sentence. Finally, in respect of the unfairness created by the introduction of the new sentencing regime,

the court considered that the phased commencement of the new sentencing scheme was both legitimate and rational.

The court rejected a submission that it was discriminatory to subject the appellant to a different sentencing regime than would be applied to another prisoner due to a different date of conviction, pursuant to ECHR Article 14. In its opinion, the differential treatment was clearly justified in any event by the need for all sentencing changes to start somewhere.

INDEPENDENT ADJUDICATION-DAMAGES FOR ADDITIONAL DAYS

Brooks v Independent Adjudicator and SSJ [2016] EWCA Civ 1033

The prisoner in this case had succeeded at first instance in arguing that he was entitled to damages pursuant to ECHR Article 5(1) having served 11 additional days imposed by an independent adjudicator in circumstances where the finding of guilt had been quashed after the days had already been served.

The prisoner had been serving an extended sentence of 10 years with a custodial part of five years when he was found guilty of being in a place where he was not authorised to be (Young Offender Institution Rules 2000 SI No 3371 r55(20)).

An application had been made for the adjudicator to recuse himself but this had been refused and the prisoner had pleaded guilty.

The finding of guilt was subsequently quashed following the commencement of judicial review proceedings, by which time the days had already been served. The secretary of state had refused to pay compensation on the basis that the detention was lawful until such time as the finding of guilt was quashed.

The Administrative Court made a finding that the quashing of the finding rendered the decision void and that the punishment was not analogous to a sentence imposed by criminal court (*R (MA) v Independent Adjudicator* [2014] EWHC 3886 (Admin)).

The secretary of state appealed against that decision on the basis that the statutory scheme of the CJA 2003 required the detention of the prisoner, making it lawful at all times. Further, she argued that it was in accordance with a procedure prescribed by law following a conviction by a competent court, meaning that it fell within Article 5(1). Finally, she submitted that the quashing of the award had effect only from the date of the order and did not render it void.

HELD: The Court of Appeal upheld the appeal on the first and second grounds. It considered that the detention was authorised by statute, the release dates having been calculated by reference to the CJA 2003. In consequence, there was no unlawful act within the meaning of Human Rights Act 1998 s7 and so there was no cause of action under s6 of that Act. In respect of the Article 5 claim, it did not consider that either domestic law or decisions of the ECtHR mandated compensation where a decision to detain had been made in accordance with a prescribed procedure but subsequently quashed on procedural grounds.

ARTICLE 3 & ARTICLE 8- PERMISSION TO ATTEND MOTHER'S FUNERAL

Kanalas v Romania ECHR 397 (2016)

Relying on Article 3 Mr Kanalas complained about the conditions in which he was held in two prisons. He also argued that his rights protected by Article 8 had been breached by the refusal of the prison authorities to grant him permission to attend his mother's funeral.

HELD: There had been a violation of Article 3 in respect of the conditions of the applicant's detention – as it had already found in respect of the same prisons, and a violation of Article 8.

The Court noted that Mr Kanalas had alleged in particular that he had endured overcrowding, lack of appropriate lighting and ventilation, and poor quality of the food, in the two prisons. The Court observed that Mr Kanalas' allegations reflected actual conditions and constituted a structural problem that it had already observed in the past as regards the two prisons in question. Having regard in particular to the fact that he had personal cell space of less than 3 sq. m, together with the length of the deprivation of liberty, Mr Kanalas had experienced detention conditions which were above the threshold of seriousness under Article 3, having been subjected to hardship exceeding the inevitable level of suffering associated with detention.

The Court reiterated that the right to prison leave was not guaranteed as such by the ECHR and that it was for the national authorities to examine the merits of each request. The Court took the view that the reasons given by the national authorities when refusing to grant Mr Kanalas leave to attend his mother's funeral did not suffice to show that the interference in question was "necessary in a democratic society". His request was rejected by the prison on the grounds, in particular, that his remaining sentence left to serve was too long and that he had already been rewarded in the same month. The Court concluded that the national authorities had not weighed the various interests at stake, namely Mr Kanalas' right to respect for his family life, on the one hand, and public safety, or the prevention of disorder or crime, on the other.

As regards the offence for which Mr Kanalas had been sentenced and the length of his prison sentence, the Court had previously found that measures of temporary leave could contribute to the social rehabilitation of prisoners, even where they had been convicted of violent crimes. In addition, in cases regarding leave for family reasons, the Court had not attached paramount weight to the offence of which the applicants had been convicted. Moreover, in relation to Mr Kanalas' rewards, the Court noted that Mr Kanalas had been rewarded on numerous occasions for his conduct and considered that the principle of limiting rewards to one per month did not apply in the case of permission to attend the funeral of a family member.

The Court held that Romania was to pay the applicant 15,000 EUR in respect of non-pecuniary damage.

MACKIE V SCOTTISH MINISTERS [2016] CSOH 125

Two prisoners serving life imprisonment in Scotland petitioned for judicial review of a failure by the Scottish Ministers to provide them with a reasonable opportunity to rehabilitate themselves, which they argued constituted a breach by the

Scottish Ministers of an implied duty under Article 5 ECHR.

The prisoners' sentences were due to expire in August 2019 and November 2019. Upon expiry of the punishment part of their sentences, prisoners are able to seek release through the Parole Board if they no longer present an unacceptable danger to the public. The determination of such release is judged by completion of courses, in order to move to conditions of reduced security. Both prisoners asserted that they were denied the opportunity to participate in such courses (e.g. relating to substance abuse; and violence prevention) within reasonable time before their respective critical dates. The delay would effectively extend their sentences beyond the minimum term.

HELD: The petition was dismissed. The petition related solely to the alleged complaint of delay in placing the prisoners on their respective courses. The decision of *R. Kaiyam, Haney & Others v SSJ* [2014] UKSC 66 (the "*Haney*" decision) accepted there is an implicit duty under Article 5 ECHR to provide a reasonable opportunity for a prisoner to rehabilitate himself and to demonstrate that he no longer presents an unacceptable danger to the public. However, *Haney* was also relied upon to hold there is no legal obligation to provide a course specifically: provision of such courses is just one method of addressing rehabilitation. The court rejected their interpretation of *Haney:* that the reasonable opportunity to demonstrate rehabilitation at or within a reasonable time before the expiry of the tariff period equated to a duty to ensure that a prisoner in every case is able to demonstrate his rehabilitation at the critical date. In any case, the petitions were brought 3 years before the critical date, and could not therefore be considered to demonstrate a legitimate frustration. Allocation and timing of rehabilitation courses is a matter for the experience and expertise of the prison authorities taking account of each individual prisoner's circumstances; the courts should not be overzealous in setting timetables which cannot take into account such factors.

The court further held that a prisoner being unable to demonstrate that he is no longer a risk to the public by the critical date was not enough to demonstrate a breach of the implicit duty under Article 5 ECHR found in *Haney*. The court accepted that breach of the Article 5 ECHR duty could occur from 'legitimate frustration' before the critical date, but there would likely have to be a systemic failure in provision of the reasonable opportunity to rehabilitate within a reasonable time.

UPDATES ON PRISON SERVICE INSTRUCTIONS

Statutory Instrument 576/2017, which was laid before Parliament on 19 April, introduces new Prison Rule 46A, which allows for prisoners to be sent to a 'Separation Centre' (SC).

Prison Service Instruction 5/2017 sets out the referral procedure for the SCs, describing the purpose of the referral process as 'to identify those prisoners who may require separation from the mainstream prison population in the interests of national security; to prevent the commission, preparation or instigation of an act of terrorism, a terrorism offence, or an offence with a terrorist connection, whether in prison or otherwise; to prevent the dissemination of views or beliefs that might encourage or induce others to commit any such act or offence, whether in prison or otherwise, or to protect or safeguard others from

such views or beliefs; or to prevent any political, religious, racial or other views or beliefs being used to undermine good order and discipline in a prison.'

The PSI states: 'When a prisoner is identified as requiring a referral to the SC system, the following procedure must be followed. There is a strong presumption that the referral should not be disclosed to the prisoner at this point due to a likely operational risk to security, order and control that may arise from disclosure of this referral before a decision to assess has been made and an appropriate management plan put in place.'

However, following this secretive stage, once the referral for assessment has actually been made, the PSI says: 'Written reasons… will be given to the prisoner with details of why they meet the criteria under Prison Rule 46A. Sufficient information will be disclosed to explain the rationale for the decision and to permit the prisoner to make meaningful representations.'

SC selection is to be reviewed every three months. In addition to the PSI covering Referral, an Operating Manual is in the process of being produced.

Pubic Protection Manual- 2016 Edition

This manual deals with risk of harm, Multi-Agency Public Protection Arrangements (MAPPA) ViSOR, Disclosure and Barring Service (DBS), the barred lists, safeguarding and promoting the welfare of children, persons posing a risk to children (PPRC), child contact procedures, personal photographs of children, harassment measures and no-contact requests, sex offender registration and notification, terrorist notification requirements, foreign national offenders and controlled materials.

PSI 15/2016 & PI 14/2016 Handling of sensitive information, including infomation provided by victims, for the purpose of Parole Board reviews

This Instruction updates PSI 26/2014 / PI 22/2014. It sets out the arrangements for handling sensitive material where the prison sees it necessary to apply to the Parole Board to withhold information from the prisoner.

The instruction states that any information which is relevant to a prisoner's risk within the community must be disclosed to the Parole Board, even if it is not suitable for disclosure to the prisoner.

NOMS, including individual prisons, as well as the National Probation Service (NPS) and Community Rehabilitation Companies (CRCs), must make available to the Parole Board any information that may be pertinent to a prisoner's risk .i.e. to the management and assessment of the risk of serious harm and likelihood of reconviction posed by the prisoner.

Much of the sensitive information is likely to relate to victims. Victims who have elected to receive the National Probation Service Victim Contact Service may make a Victim Personal Statement (VPS) to the Parole Board, setting out the impact of the offence and what the impact of release would be. Victims may also make representations about licence conditions, and the Victim Liaison Officer may also submit a Victim Contact report to provide information about the victim issues and concerns to the Parole Board.

The final decision whether to withhold information from a prisoner ultimately rests with the Parole Board.

PSI 14/2016 Marriage of prisoners and civil partnership registration

This instruction sets out the legal requirements, policy and procedures for facilitating prisoners' requests to marry (including same sex couples) or enter into a civil partnership in England and Wales. This instruction also makes it mandatory for all Governors to consider applications from prisoners for marriage and civil partnership.

This instruction sets out eligibility criteria in order to apply to marry or enter into a civil partnership. It deals with security concerns, legal requirements and responsibilities of prisoners, information on ceremonies and registrations, ceremonies outside of the establishment and requests for purely religious or faith ceremonies.

OMBUDSMAN CASES

SEARCH PROCEDURE AND LOSS OF EMPLOYMENT

Mr B asked the PPO to investigate two complaints. The first was that he had been assaulted by a prison officer when in the workshop. He alleged that as part of a Level B rub-down search a prison officer had "put his fingers down [his] pants and touched [his] pubic hairs". He also complained that after this incident, he lost his employment in the workshop, despite not having received an IEP warning.

The PPO did not uphold either of the complaints. She noted that the searching procedures for a level B rub down search allow officers to search a prisoner's waistband by hooking one finger or thumb around the waistband: she did not think there was enough evidence to suggest that the prison officer had done more than this, or touched Mr B's pubic hair intentionally. While there was evidence that the prison officer had said "if you don't like it, don't come to prison", this could have been said in relation to searches generally.

The PPO Investigator also found that the prison had followed its own Employment and Pay policy when removing Mr B from the workshop. The security department and activities hub had discussed the dismissal, which had been approved by a governor grade member of staff. Having reviewed Mr B's file, the PPO was satisfied that Mr B's conduct met the condition for immediate removal for security reasons.

Finally the PPO found that the prison's investigation of the complaint was in line with PSO 1300 despite the recommendation that it is advisable for a record of simple investigations to be kept locally. There was no supporting documentation relating to the investigation (apart from the prison's response to Mr B's complaint), but the PPO was satisfied that a simple investigation had taken place, and relevant individuals had been spoken to.

OMU CONTRIBUTION TO MONTHLY CSC REVIEW

Mr Z asked the PPO to investigate his complaint about a contribution made by the OMU to his monthly CSC Management Committee review at HMP Whitemoor and the response to his subsequent appeal on this issue.

The PPO considered the notes of the CSC review, which included the OMU contribution, which stated:

> "Concerning and challenging behaviour especially towards female staff, appears to want to control every aspect which includes his inter-action with staff….. Mr [Z] stated that he does not agree with the OMU contribution. He stated that out of all the staff he has had issue with on the unit, only 1 of them was a female member of staff. He stated that he goes to female officers for advice….There appears to be a disagreement between the opinion of the OMU and that of Mr [Z]."

The PPO reviewed Mr Z's NOMIS case notes and found that it was clear from them that Mr Z challenged a female Senior Officer and on another occasion was challenging towards a female Psychology department staff. Mr Z readily acknowledged that this was the case, but also argued that he was equally challenging to male staff during this period but those incidents were not noted.

The PPO found that it was clear that Mr Z's relationship with the Psychology department and the Psychologist in particular was very fraught. Although it might be inferred that gender was the issue, it is just as likely that gender was irrelevant and that it just happened to be that the Psychology staff were women: there was no adverse comment about Mr Z from the Psychology department for the CSC review.

The PPO had several concerns about the OMU contribution and the way Mr Z's complaint was handled. It considered that the OMU contribution failed to take account of the bigger picture and relied heavily on a single incident that had happened outside the relevant period for the review and risked skewing the whole process. The wording of the contribution was a sweeping, generalised statement with no explicit reference to specific incidents. It presents itself as fact, but is in fact an individual's interpretation of NOMIS entries. This fell some way short of factual objective reporting.

With respect to the handing of Mr Z's complaint, the PPO found that some of what was written in response to his appeal simply did not make sense. Mr Z's reference to entries relating to his dealing with male staff was entirely valid in the context and should not have been dismissed so readily.

The PPO upheld Mr Z's complaint. It recommended that the OMU contribution be deleted, that the OMU Senior Officer be reminded that any reports on prisoners should be factual and objective and that Mr Z receive an apology for the response to his appeal.

FAILURE TO RESPOND TO ALLEGATIONS OF BULLYING

Mr L complained to the PPO that he was transferred to HMP Grendon to undertake therapy in order to address his offending behaviour but that he had experienced bullying and abuse from other prisoners, which he had informed staff would happen if located on a normal wing. Mr L stated that he had exhausted all avenues in an attempt to resolve the matter, but the bullying and abuse continued, and he was refused location to the vulnerable prisoners' unit as it was full.

The PPO noted that HMP Grendon had accepted this behaviour by other prisoners was unacceptable and would not be tolerated. Staff had identified the prisoners responsible for this behaviour and

took the necessary steps to prevent further issues.

The PPO checked Mr L's P NOMIS case notes and did not find any entries to suggest that he had asked to be moved to the vulnerable persons wing or that staff inappropriately failed to consider such a move for him. Further, staff had previously accommodated Mr L's request to move cell on health grounds. The PPO noted that when Mr L was transferred to HMP Grendon he agreed to be on a normal wing, that whilst on that wing Mr L was continually encouraged to engage in therapeutic groups and to discuss issues with staff which were addressed accordingly, and that Mr L deselected himself from therapy.

The PPO did not uphold the complaint. Overall, they found that there was insufficient evidence to suggest that the prison's actions had been less than expected. Rather, there was a lot of evidence to suggest Mr L found the function of HMP Grendon as a therapeutic community uncomfortable, and there was no evidence to suggest that he was being bullied or that staff failed to help.

PAROLE BOARD REPORTS

Summary: National Audit Office (NAO) Report on the Parole Board – February 2017

The NAO conducted an investigation of the Parole Board's performance in relation to the back log of outstanding parole cases, which has led to increased delays and costs.

There are 215 independent Board members. The Board holds more than 15,000 paper hearings and more than 7,000 oral hearing each year. However, the ruling in *Osborn* in October 2013 resulted in more cases being eligible for oral hearings. The number heard by the Board increased from 4,628 in 2012-13 to 6,872 in 2014-15.

The Board had had a backlog of outstanding cases for several years but between October 2013 and January 2015 the numbers increased by 143%. In January 2015 there were 3,163 cases that had passed the Board's target date. In September 2016 of the 2,117 cases heard, 13% were more than a year past their target date. At that time, there were just under 4,000 prisoners serving IPP sentences, 84% of whom were over tariff. In addition the backlog meant that older and more complex cases have been less likely to be heard as determinate recall cases were prioritised; in September 2016 the oldest of these cases had an original target date in 2009.

The back log has been made worse by the fact that once listed, 34% of the hearings were deferred and more than half were deferred or adjourned on the day. The most common reason for this was the unavailability or incompleteness of reports. In addition, the reason that 40% of the cases that the Board was unable to list in December 2015 was due to the unavailability of a psychologist member.

The backlog has also caused an increase in costs; the cost of an oral hearing is five times that of a paper hearing. Spending on members fees has increased by 43%. Furthermore, the Board has had to pay compensation for delayed hearings. Since 2011-12 the Board has paid out £1.1 million in compensation; in 2015-16 it paid out £554,000.

The NAO found that the Board had tried to deal with the backlog. A new model Member Case Assessment had led to

an increase in listings per month. In September 2016, under its new Chairman, the Board launched a new strategy; one of its priorities was to prioritise the safe release of IPP prisoners and also to reduce deferrals and adjournments. This has been partially effective. In July 2016, the Board set a target of reducing the number of IPP prisoners by 1,500 by 2020. The Board has been trialling paperless parole reviews. The numbers of members had been falling but in September 2016, 104 new members were recruited, seven of which are psychiatrists and 20 are psychologists. Despite this, the Board's original target date of reducing all outstanding cases to 1,200 by April 2017 has slipped to December 2017.

Summary: Parole Board's Update on Determinate Sentence Prisoner Pilots – March 2017

There has been a steady increase in the number of recommendations for oral hearings for determinate recall cases. Under the Listings Prioritisation Framework, recall cases are prioritised over indeterminate cases. This has meant that the back log of indeterminate prisoners' cases, particularly post tariff cases, has built up.

To deal with this, the Board has adapted its approach to listing oral hearings. It trialled four pilots from August to December 2016:

1. The Board collaborated with PPCS to increase the use of Executive Release.

   Between April and December 2016:

   - PPCS reviewed 2,610 prisoners and released 1,192 (46%)
   - The Board released 2% of the 8,061 referrals of determinate recall cases at the Member Case Assessment stage.

   The MoJ is reviewing the guidance on recalling offenders. The guidance is likely to mean an increase in Fixed Term Recalls.

2. The Board extended the Sentence Expiry Date cut-off for determinate recall cases from 12- 24 weeks. The identified benefits of this did not appear to have been borne out. The Board is looking at alternative solutions.

3. The Board made changes to the Listing Prioritisation Framework. During the pilot, recall cases were no longer prioritised. A full review of this pilot is yet to take place.

4. The Board trialled dedicated oral hearings for determinate recalls in regional hubs. The Board worked with the Ministry of Justice and HM Court Service to find potential sites. The Board trialled 'remote' hearings at the Royal Courts of Justice. It is due to start a routine listing there for stand-alone single member determinate recall hearings on a monthly basis.

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