PRISONERS' RIGHTS

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PRISONERS' ADVICE SERVICE (PAS)

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

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Our barristers represent prisoners on a daily basis and have been involved in many of the leading cases securing the civil rights of prisoners and developing important remedies:

- **James v UK** [2012] leading IPP case
- **Vinter v UK** [2012] "whole life" tariff challenge
- **Osborn & Booth** (ongoing) PB hearings
- **Bashir** [2011] Art 9 voluntary fasting, MDT
- **Krstic** [2010] Cat A decision
- **Noone** [2010] earlier release on HDC
- **F & Thompson** [2010] Sex Offenders Register
- **Guittard** [2009] transfer to open prison
- **Ezeh & Connors v UK** [2004] adjudications

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Contents

Case reports	2
Updates on Prison Service Instructions	9
Ombudsman Cases	13
Other News	15

CASE REPORTS

ALLOCATION- ARTICLE 3 ECHR

R (on the application of F) v Secretary of State for the Home Department [2012] EWHC 2689 (Admin)

The Claimant, 'F', challenged the Defendant's decision to keep another prisoner, 'M', in the same prison as him. F had lodged a complaint of bullying and intimidation against M and had subsequently suffered a serious attack that he attributed to associates of M. Following the attack, F suffered Post Traumatic Stress Disorder (PTSD), and was granted a transfer to a prison closer to his home. However M also arrived at the prison sometime after, in order to be closer to his family and to complete offender behaviour courses. F complained that M should not have been transferred to the same prison as him given the history and allegations and two psychiatrists confirmed that the presence of M brought about an aggravation of F's PTSD. F challenged the Allocation Board's decision stating that it breached Article 3 ECHR on the grounds that M's presence adversely affected his mental condition.

The Court found that 1) there was no cogent evidence of "real and immediate" risk of physical harm to F, and that F's fear (though genuine) was based on imagined rather than real risk; and 2) although there had been and was a continued risk of psychological harm being caused to F by M's presence, appropriate steps had been taken at all times to manage that risk (housing F and M in different areas of the prison, and taking further pragmatic steps to reduce the possibility of their coming into contact, implementing for example staggered gym sessions and social visits). It was not appropriate to forcibly remove M to another prison, or to prevent M's progress towards parole on the basis of F's fear. The public interest in the early rehabilitation of all prisoners remains an important factor in any balancing exercise carried out by prison authorities.

INVESTIGATIVE OBLIGATION - ARTICLE 3

R (NM) v Secretary of State for Justice [2012] EWCA Civ 1182

The appellant prisoner (N) appealed against a judge's ruling that an investigation into him being sexually assaulted by another prisoner had complied with the prison's investigative obligation under Article 3 of the European Convention on Human Rights. N had learning difficulties and claimed he had been sexually assaulted by another prisoner. A formal investigation under PSO 1300 did not take place. Rather, the matter was investigated by prison officers under the prison's violence reduction strategy. N's solicitors had requested a PSO 1300 investigation and appealed on the basis that the judge at the first hearing had erred in concluding that the prison's investigation had therefore complied with Article 3.

The appeal was dismissed. While there had been faults in the investigation, such as the investigating officers' lack of knowledge about N's disability and the failure to appoint an appropriate adult for N in line with the prison's own disability policy, the investigation was not flawed. N had at all times been able to consult his father and a penal reform charity assisting him in the matter. N could also have brought civil proceedings against the state or criminal proceedings against the perpetrator of the sexual assault against him, though it is not clear why the availability of alternative legal remedies should be a factor in deciding whether a complaint and investigation was appropriately handled.

FOREIGN NATIONAL- HDC

R (on the application of Diana Francis) v Secretary of State for Justice (and Secretary of State for the Home Department as an Interested Party) [2012] EWCA Civ 1200

The appellant was a Jamaican national, granted temporary leave to remain in the United Kingdom in 1999. She was imprisoned for drug and violent offences and informed she was liable to deportation under the Immigration Act 1971. However she successfully challenged the deportation order as a breach of Article 3 ECHR, arguing her life would be in danger if she returned to Jamaica. As a result she was granted discretionary leave to remain until March 2009. In late 2008, she was convicted of further offences and imprisoned again. However the nature of her offences and sentence length meant she was eligible for HDC and she was found by the Prison Service to be provisionally suitable. However, on 23 July 2009, the UKBA notified her of the intention of the Secretary of State for Justice (("the SSJ") to make a deportation order, and that HDC would therefore not be appropriate. An IS 91 Detention Order was then served by UKBA preventing HDC. The appellant argued that the issue of an IS 91 should not have prevented the consideration of her claim for HDC. Further that had she been granted HDC, she argued that it was then highly likely that an Immigration Judge would have granted bail in relation to the outstanding IS 91.

The appellant lodged a claim that 1) consideration of her suitability for HDC had been unlawfully delayed, and 2) she had therefore been unlawfully detained between 13 October and 11 November 2011. The Court of Appeal accepted that simply because an IS 91 had been issued, did not statutorily exclude prisoners from HDC. The subsequent failure to consider an application for HDC, on the basis of a mistaken belief that the existence of an IS 91 prevented it, was a breach of duty by the Prison Service. However, in this case, HDC was highly unlikely to have been granted anyway because of the close proximity of her HDC eligibility date to the date of her proposed deportation. Therefore the Court took the view that the appellant had been lawfully detained throughout her sentence, by virtue of an order of the criminal court, and therefore there was no unlawful detention.

PSI 52/2011 (published after the alleged period of unlawful detention in this instance) has clarified the current policy. Where there is an intention to deport upon release, prisoners are not precluded from consideration for HDC but will be presumed unsuitable unless there are exceptional circumstances. Exceptional circumstances may exist, for example, where UKBA has confirmed that deportation is unlikely to be effected for the foreseeable future, and where there is no intention to detain the prisoner upon release. This policy was then considered very soon after in the following case

R (on the application of Antonio Serrano) v The Secretary of State for Justice and the Home Department [2012] EWHC 3216 (Admin)

The claimant, a foreign national prisoner, had been sentenced to two years imprisonment. No decision had been made at that time by the Home Secretary around whether to deport him pursuant to the automatic deportation provisions of the UK Borders Act 2007.

The question of whether to release him on home detention curfew ("HDC"), and for which he became eligible on 3 September 2012, was therefore in accordance with the current policy regarding HDC as it applies to a foreign national who has been notified of their

liability to deportation but where no deportation decision has yet been made. This policy, contained in paragraph 2.47 of PSI 52/2011, provides that such a prisoner "should be presumed unsuitable to be considered for release on HDC unless there are exceptional circumstances justifying release". In contrast to this test of "exceptional circumstances", a British national serving an otherwise identical sentence is subject to a different test under PSI 6700 namely that "prisoners must normally be released on HDC unless there are substantive reasons for retaining the prisoner in custody" until his release date. The claimant said that this difference in treatment amounted to unlawful discrimination on the grounds of nationality and that he had a strong case against being deported because, as a result of his period of settlement in the United Kingdom and the family life that he has built up here, such deportation would infringe his rights under Article 24 of European Union Directive 2004/38/EC ("the Citizenship Directive") and/or Article 8 of the European Convention on Human Rights and section 13 of the Equality Act. This meant he said that his position was analogous to that of a British national prisoner.

The claim was dismissed and the SSJ's policy was deemed to be lawful. Differential treatment in the granting of HDC on the ground of nationality did come within the ambit of Article 14 (*R (Clift) v SSHD* [2006] UKHL 54) as well as under the Citizenship directive and the Equality Act. However in this case PSI 52/2011 did not discriminate on the grounds of nationality as the differential treatment was based on immigration status, not nationality. The position of prisoners who were liable to removal in terms of HDC was not the same as for those who were not (such as foreign national prisoners serving sentences of less than a year or who are deemed to fall within the section 33 exceptions to automatic deportation). Once a prisoner is told he will be deported under the automatic deportation provisions of section 32 of the UK Borders Act, the prisoner then becomes statutorily ineligible for HDC save for that deportation decision being successfully challenged (as in the case of *Francis* above).The mere possibility of challenge is not enough. The Court also went on to say that even if the difference in treatment was on the grounds of nationality the decision of the Court of Appeal in *Brooke v Secretary of State for Justice* (2009) EWHC1396 suggested it would be justified under Article 14 anyway. As the court had found no discrimination had taken place the arguments under the Citizenship Directive and the Equality Act also fell away.

SEX OFFENDER REGISTER

X (South Yorkshire) v Secretary of State for the Home Department (and Chief Constable of South Yorkshire Police as an Interested Party) [2012] EWHC 2954 (Admin)

In 1990, X had pleaded guilty to serious sexual offences against children and was told that after his term of imprisonment he would be placed on the Register of Sex Offenders for life, subject to being able to make, from 2013, an application for removal under the new legislative provisions which came into force on 1 August 2012. In March 2010, the Home Secretary published a non-statutory scheme known as “The Child Sex Offender Disclosure Scheme” (CSOD). A Guidance document issued in support of the scheme provided that police may disclose information regarding a person’s past convictions for sexual offences against children, or other relevant information, if that person is to have some form of contact with children. X challenged the

guidance on the basis that 1) it provided inadequate procedural safeguards for the person on the register as there was no opportunity to make representations in respect of such disclosure, and 2) the CSOD misstated the test that police must apply in deciding whether to make disclosure i.e. the common law duty of striking a balance between the public interest in disclosing what is necessary to protect the public and the protection of the individual.

Under the CSOD, members of the public can ask police to provide details of someone who has contact with children to find out whether that person had convictions of sexual offences against children, or whether there is other relevant information about him. This is wide ranging as the disclosure is not limited to convictions, there is no requirement for concern or suspicion about the person in question and unlike the MAPPA scheme, there is no requirement that the person poses a risk of serious harm, merely harm alone. In addition, there is no requirement under CSOD for the offender to be consulted prior to his convictions being disclosed.

The Court held that the Guidance should require the decision maker to consider, in advance of disclosing information, whether the person on the register should be asked if he or she wishes to make representations. Additionally it would usually be appropriate to seek such representations, unless there was an emergency or immediate risk to a child. Without this consideration, it was possible that CSOD breached Article 8 ECHR. The Guidance also set out a policy and process that potentially did misstate the appropriate legal test for disclosure. The CSOD was not quashed, but the Guidance is to be redrafted subject to a timetable acceptable to the Court.

PAROLE BOARD

R (Gary Allen) v The Parole Board for England and Wales [2012] EWHC 3496 (Admin)

The central question in this case is whether the Parole Board is entitled to make a finding of fact concerning the motive of an index offence when the original sentencing judge at trial had made no positive finding himself.

In 1976 the Claimant was convicted of murdering a woman for whom he did some work as a window cleaner. He gave no evidence at trial, and was sentenced to life imprisonment. Although certain factors indicated a sexual element to the offence, including the Claimant's own contemporaneous account to the police, the trial judge concluded that "*the motive for the murder remains a mystery, and it is impossible to say … whether any kind of sexual association existed between the two parties*." In 1992 the Claimant was released on licence but in June 2005 was charged with the murder of another woman in circumstances similar to those of his index offence. His licence was revoked and he was tried for the murder, although the jury failed to reach a verdict on two separate occasions. It was also discovered around that time that he had been involved in domestic violence in 2001, and had possessed a number of voyeuristic pornographic images on his computer. In both 2008 and 2011 the Parole Board decided it would be inappropriate for the Claimant to be released. In 2011 the Board had, in deciding he posed an unacceptable risk to women, said it felt that "*there was a clear sexual aspect*" to the Claimant's index offence about which he remained in denial.

The Claimant argued that the Parole Board's decision should be quashed as it was unlawful for it to reach a finding on the (sexual) motivation of his index

offence where none had been identified at the original trial. However the challenge was rejected; It was emphasised that the Parole Board and the sentencing judge perform different functions with different remits. The sentencing judge passes sentence, and in doing so considers punishment, protection, and rehabilitation. But the Parole Board determines whether continued detention remains necessary, with public protection being its sole criterion. Further, the Court explained that the judge and the Board apply different standards of proof, and enjoy different evidentiary remits. The judge attends to matters relevant to the offence itself, whereas in assessing an offender's risk to the public, the Board looks at *all* matters which might be relevant, whether they occurred before, after or at the time of that offence. Second, the Court stressed that the sentencing judge did *not* determine the question of the motive but left it open. His only finding was that he was unable to make a finding. Thus he did not rule out the possibility that the Claimant's offence was sexually motivated. This meant it was open to the Board to revisit the matter and reach its own conclusion in light of all the evidence available, applying its own standard of proof, and with the aim of ensuring public protection. Finally, the Court held that there was a wealth of new evidence and material available to the Board, which had not been available to the trial judge. This included evidence from the Claimant himself, evidence of his behaviour towards women since the index offence, and evidence on his computer of voyeuristic pornography. This evidence justified the conclusion that the index offence included a sexual element.

R (Wilmot) v Secretary of State for Justice [2012] EWHC 3139 (Admin)

The question in this case was around whether the Secretary of State was entitled not to follow the recommendation of the Parole Board that someone should be transferred to open conditions. The Claimant was a discretionary life prisoner who received four life sentences, with a 10 year tariff which expired in 1996. He had served 25 years, and though he had been transferred to open conditions in the past, he had been returned to closed following concerns over his behaviour.

In 2011 an oral hearing was held by the Parole Board at which the Claimant appeared and was represented. The evidence from probation officers and prison psychologists was that the Claimant was not suitable for a move to open conditions, but it preferred contrary evidence from an independent psychologist and recommended that a transfer to open conditions should take place. However, the Secretary of State refused to follow this recommendation, arguing that such a recommendation was irrational given the evidence by prison staff that the Claimant was not ready for a transfer. The Claimant sought a judicial review of the refusal, arguing that the Secretary of State's policy gave rise to a legitimate expectation that a Parole Board's recommendations would be followed save for where it was based on a material error of fact or was entirely unreasonable in all the circumstances of the case.

The Court said there was no clear, published statement regarding the Secretary of State's policy, such as would be sufficient to generate a legitimate expectation. In regards to the Secretary of State's decision itself, the Court found that there was no obligation on the Secretary of State to accept a recommendation from the Parole Board. The decision remained that for the Secretary of State, and he was not bound by the Board, as otherwise he would be unlawfully fettering his own discretion. All that truly fettered the Secretary of

State's discretion were the established public law principles of fairness and *Wednesbury* rationality; providing that the Secretary of State abided by those principles, the Court would not interfere. In the instant case, these principles had been followed. The Secretary of State was rationally entitled to conclude that the Parole Board had failed to engage with the significant volume of evidence suggesting that a transfer would not be appropriate. Specifically, the Board had disregarded evidence pointing to the Claimant's outstanding risk factors, and it had done so without explanation.

LEGAL MAIL

Chester v Ministry of Justice & HMP Long Lartin [2012] Case No: 1IQ28077

This case arose from an appeal by the MOJ and Long Lartin after Mr Chester, a serving prisoner, had issued two successful claims against the prison service in the small claims court for damages for breach of Article 8 ECHR. The claims alleged that legal mail covered by Rule 39, and including mail from the Treasury Solicitor, had been interfered with at HMP Frankland and then at HMP Long Lartin. On the first occasion a District Judge had awarded a declaration and on the second awarded Mr Chester £5000 damages against the Defendants.

The MOJ and prison in appealing sought to rely on *Francis v SSHD* [2006] and *Woodin v SSHD* [2006] and that the District Judge was wrong to decide that correspondence from the Treasury Solicitor was covered by R39. They also argued that delays in receipt of mail, whilst inconvenient, could not be viewed as sufficiently serious to properly engage the operation of Article 8. Finally they argued that Mr Chester was not a victim within the meaning of section 7 and Article 34 of the ECHR, and that 'just satisfaction' in terms of Mr Chester did not require him to have been awarded damages. Mr Chester said that correspondence from the Treasury Solicitor falls within the spirit of the R39 regime and as such should be covered by it where the contents are of a legal nature. The blanket policy of treating all prisoners the same is irrational, given that he has an unblemished prison record and was unlikely to receive contraband items. He also stated that the cases of *Francis* and *Woodin* had been considered by the District Judge and that the facts of his case were distinguishable.

The County Court in Leeds held that R39 was in fact clear on the point that correspondence with the Treasury Solicitors did not fall in its provisions. The competing and legitimate interests of the prison and prisoners in respect of preventing contraband items from coming in and protecting legal confidentiality meant it was not reasonable for a prison to undertake individual value judgments and so a blanket policy was necessary. The fact that the opening of the mail had on one occasion led to a 'few days' delay' meant the issue was not sufficiently serious to engage Article 8. However the delay by over a week in Mr Chester receiving legal documents from his own legal advisers did engage Article 8, which was breached without justification and that Mr Chester was a victim. Mr Chester was awarded £750 for this breach. This is a disappointing decision given the number of complaints that continue to be received around Rule 39 mail and the fact that prisons tend to have often inadequate internal polices and safeguards in respect of protecting the confidential nature of such letters. What is also disappointing, but indicative of the Court's attitude to this issue, was the refusal for permission to appeal on the basis that this was not a test case, and that such an appeal

would become a second appeal which the Court of Appeal would not view as a matter of public importance.

TRANSFERS BETWEEN HOSPITALS TO HIGH SECURITY CONDITIONS

R (on the application of L) v West London Mental Health NHS Trust [2012] EWHC 3200 (Admin)

This case re-emphasises the need for common law fairness in transfers from hospitals to prisons. The Claimant suffered from a psychopathic disorder. Further to his transfer from a medium security hospital to high security conditions, he launched JR proceedings on the basis that he was not provided with any factual or clinical details for the transfer.

The Court held that the common law duty of fairness is engaged in transfers of a patient to high security conditions as there are serious and potentially adverse consequences flowing from the decision. The Court also issued guidance which managers of medium secure hospitals should consider when making a referral to a high security hospital. This includes informing the patient and their advisers of the potential transfer, and the reasons (or at least a gist) for it. Enough detail should be given to allow meaningful and focused representations to be made by the patient before any admissions panel meeting and before any decision to transfer is made. Where the transfer has had to take place as a matter of urgency then the information should be communicated immediately on the transfer taking place so that representations can be made shortly thereafter. If there is the possibility of an oral hearing to determine transfer then this should be communicated to the patient and consideration given as to its necessity, either before or as soon as reasonably practicable after the transfer. The ECHR was not engaged in respect of such transfers as the connection between the transfer decision and the continued loss of liberty was too remote.

This judgment is to be welcomed, providing, as it does, clear guidelines to be followed to ensure that transfers to conditions of high security don't take place without the opportunity for the patient to make representation against the need for such a transfer.

HDC

R (on the application of Stuart Whiston) v The Secretary of State for Justice (2012] EWCA Civ 1374

The appellant in this case had been released on Home Detention Curfew pursuant to section 246 of the 2003 Act during the custodial part of his 18 month sentence and then later recalled pursuant to section 225, by the Secretary of State within the custodial part of his sentence on the basis that his whereabouts could no longer be monitored in the community. The question raised was whether such a recall and renewed detention constituted administrative implementation of the original sentence, such that it remained justified, or whether it constituted a fresh detention attracting the safeguards of Article 5(4) of the Convention.

Considering the case of *R (Black) v Justice Secretary* [2009] 1 AC 949 and constant jurisprudence of the European Court, it was held that Article 5(4) ECHR does not apply to recall from Home Detention Curfew (HDC) in the same way as it would to recall after the custodial part of a sentence has expired. This is because recall during the custodial period does not constitute a fresh deprivation of liberty for the purposes of article 5(4) and thus does not trigger the right to a review by the Parole Board or any other judicial body.

Following the reasoning of the court, Release on HDC is not equivalent to freedom, "*it is properly to be seen as a modified way of performing the original sentence imposed by the judge; the recall simply restores the primary way in which it was assumed the sentence would be served*". Thus, detention on recall from HDC was justified simply by the original sentence. In the case of other ROTL before the expiration of the custodial period, the question of whether Article 5(4) is engaged would depend on the quality and nature of the licence in issue and its subsequent breach.

REASONABLE ADJUSTMENTS / OFFENDING BEHAVIOUR PROGRAMMES

R (on the application Tancock) v SSJ [2012] EWHC 3225 (Admin)

This claim considered whether the Secretary of State for Justice ('SOS') had complied with its duty to make reasonable adjustments under section 19 of the Equality Act 2010 and /or the public law duty in respect of the management of the sentence of a post tariff indeterminate sentence prisoner as explained in *R v Secretary of State for the Home Department ex.p Cawser [2003] EWCA Civ 1522*and *R v Secretary of State for Justice ex.p Dennis Gill [2010] EWHC 364*.

There was no dispute that the Claimant, who had as part of his sentence plan the completion of Sex Offender Treatment Programme ('SOTP'), was a disabled person within the meaning of the Equality Act 2010 on account of his severely limited intellect. The issue was whether the SOS had complied with its duties to make reasonable adjustments under the Equality Act 2010 and / or under its public law duty by making appropriate allowances for the Claimant's disability by providing him with an opportunity of taking part in SOTP given his severe learning disability. It had originally been intended that the Claimant would be transferred to a hospital to participate in a group SOTP for people with learning disabilities. However he was assessed as being unsuitable for group sex offending work on account of his severe learning disability. A modified foundation course had been adapted and completed by the Claimant as part of a 6 month plan and the Judge concluded that this amounted to a serious individualised approach to the management of his sentence with a view to enabling him to gain access to the course work which is a necessary, though not sufficient, condition for his release on licence.

UPDATES ON PRISON SERVICE INSTRUCTIONS

PSI 23/2012 Intelligence – Regulation of Investigatory Powers Act: Covert Human Intelligence Sources (CHIS)

This PSI replaces PSO 1000 - National Security Framework Function 4 regarding CHIS. It outlines how the power to use CHIS under the Regulation of Investigatory Powers Act 2000 (RIPA) should be used within prisons.

It instructs that CHIS must not be used unless the proper application process has been followed and an authorisation given by an appropriate officer.

The periods for which authorisations can be given are 12 months less one day for an adult CHIS, one month less one day for a juvenile CHIS and 72 hours from the time authorised for CHIS where the urgent oral provisions are used. The primary consideration in whether a person is a CHIS is whether they are manipulating or are being asked to manipulate a relationship for a covert purpose. Confidentiality is an ut-

most consideration when CHIS is in use and the correct approach by prison and relevant officers is to neither confirm nor deny the use of CHIS unless required to do so by law. The use of CHIS is 'highly likely to engage the right to respect for private and family life set out in Article 8 of the ECHR.

The information in this public PSI is supplemented by a separate, detailed, restricted instruction being issued to governors who 'must only share that PSI with appropriate staff involved in the management of CHIS and the CHIS system.

PSI 24/2012 The Introduction of Mandatory Call Enabling on the Pin Phone System in all Prison Establishments

This PSI introduces a requirement for all prisons to introduce in full a call enabling regime for the prisoner PIN phone system, as well as additional security measures to protect legal professional privilege, within three months of the publication of the PSI.

In addition to a mandatory requirement that all new receptions and prisoners being moved from call barring to call enabling sign the Communications Compact at Annex A of the PSI, prison staff are now obligated to check all numbers provided by prisoners as legal or confidential numbers and keep a written record of checks made. In line with its stated outcomes, the PSI provides instructions to staff engaged in monitoring communications on what to do in the event of an inadvertent capture of legal or other confidential information.

For a better understanding of the restrictions placed on prisoner communications, the PSI must be read alongside the policy on the interception of communications (NSF Function 4.4) and policy on communication services (PSI 49/2011).

PSI 29/2012 The Instructions System – The Approval and Implementation of Policy and Instructions

This replaces PSI 01/2011, PSI 23/2009, AI 1/2009 and PI 1/2009. It explains the framework and format of the current instructions system with the aim of ensuring that policy is as far as possible 'presented in a way that is easily understood by those it affects' and 'developed, published and implemented in a planned and coordinated way'. In line with these outcomes a new instruction template with minor amendments to the appearance of PSIs is introduced at Annexe B.

PSI 30/2012 The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 – General summary of release and recall provisions

This PSI provides a summary of the effect of Part 3, Chapter 4 of LASPO pertaining to release and recall of determinate sentenced prisoners (section 108 to 121) which came into force on 3rd December 2012.

Previously, determinate prisoners were subject to an array of different provisions under the CJA 2003, the CJAs 1991 and 1967 and their amendments in the Crime and Disorder Act 1998, the Powers of Criminal Courts (Sentencing) Act 2000 and the CJIA 2008. The multiplicity of legislation created a difficult system that was hard to follow.

The relevant sections of LASPO consolidate and clarify the previous legislation including some modifications to the CJA 2003. Prisoners already serving CJA 2003 sentence will not be affected (other than by minor modifications); those already serving a CJA 1991 or 1967 sentence will also continue to be subject to the same release arrangements as before (for example, CJA 1991 prisoners released on licence until the ¾ point of sentence); but those sentenced after the commencement date of 3 December 2012 will be '2003 Act

prisoners' regardless of the date of their offence.

LASPO also abolishes the sentence of Imprisonment for Public Protection (IPP) and Extended Sentences for Public Protection (EPPs). These are replaced by a new Extended Determinate Sentence (EDS) which will be used for those who previously would have received an IPP or an extended sentence under the CJA 2003. Prisoners serving an IPP or EPP sentence imposed prior to 3 December 2012 will continue to be released as before – under the provisions of the Crime (Sentences) Act 1997 and the CJA 2003 respectively, which remain unchanged for these prisoners.

PSI 31/2012 Vetting Function – Security Vetting: Additional Risk Assessment Criteria Following Disclosed Criminal Conviction (Ex-Offender)

There is a new limited vetting level called Standard Plus for not directly employed applicants (paid and unpaid) who are ex-prisoners working on the Reducing Re-offending Pathways. It is aimed at encouraging greater involvement in the Voluntary, Community and Social Enterprise (VCSE) which provides services and increasing accessibility to a number of ex-prisoners working on reducing re-offending interventions in prison establishments, including in the High Security Estate where practical. This is pertinent in a context where security clearance for volunteers with previous criminal convictions have sometimes proved unsuccessful through the normal centralised vetting approach.

The PSI details the framework for the application of the Standard Plus Vetting system.

PSI 32/2012 Open University, Higher Education and Distance Learning

This replaces PSI 33/2010 and establishes mandatory requirements for all staff associated with and responsible for the learning progression of prisoners.

The stated desired outcome is to ensure that Open University (OU), other Higher Education (HE) and Distance Learning (DL) courses are available to prisoners who are identified as likely to benefit from such study in line with assessments, resettlement requirements, and aspirations. To be eligible for OU, HE and DL courses, a prisoner must be:

- sentenced, regardless of whether an appeal is underway or has been lodged;
- able to demonstrate evidence of appropriate learning and attainment at or above National Qualification Framework Level 2 through ILP records;
- in receipt of appropriate information advice and guidance, including from the National Careers Service
- able to show a current Individual Learning Plan indicating OU or DL as a viable objective whether or not the learner is self-funding;
- able to show evidence of the required potential and motivation to complete a DL or HE programme;
- able to meet the security screening requirements indicated at paragraphs 2.21-2.22;
- able to show evidence of a successful application or be in receipt of adequate funding to pay for their DL or HE programme.

PSI 37/2012 Supervision of Young Offenders

This PSI introduces the new legislative framework for the supervision of young offenders released from sentences of Detention in Young Offenders Institutions (DYOI). As part of the codification of the law on release and recall of determinate sentence prisoners by LASPO, two new sections, namely sec-

tion 256B 'Supervision of Young Offenders After Release' and 256C 'Breach of Supervision Requirements', have been inserted into the CJA 2003 replacing section 65 of the CJA 1991 and section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 which provide that young offenders receive a minimum of three months supervision upon release regardless of their sentence.

The new provisions do not substantially alter the previous position on supervision save that they apply exclusively to those serving less than 12 months and that age on release is no longer a relevant consideration. Changes have been introduced to the breach and enforcement provisions in that breach is no longer a separate criminal offence. Notwithstanding this, the court still has the power to impose either a term of imprisonment or up to a Level 3 fine for the breach.

A key distinction from the s65 procedure is that whereas a prisoner sentenced for breach would have been released at the halfway point, any term of imprisonment under s256C must be served in full.

The PSI comes with operational guidance which replaces the previous instruction on young prisoners and s65 supervision in Chapter 10 of PSO 6000 – 'Parole, Release and Recall'.

PSI 38/2012: The Early Removal Scheme and Release of Foreign National Prisoners

This PSI replaces Chapter 9 of PSO 6000 and PSIs 19/2008, 45/2008, 14/2009, and 59/2011. It provides guidance on the Early Removal Scheme (ERS) for foreign national prisoners and reflects changes in the law following the implementation of LASPO. ERS is mandatory, therefore any determinate sentenced foreign national prisoner liable to removal from the UK must be considered under the scheme.

From 3 December 2012, the governor can authorise the release, for the purpose of removal, of parole eligible foreign national prisoners on or after PED and before NPD without a positive parole recommendation from the Parole Board. Where the UKBA are unable to effect the removal for whatever reason, then the 'prisoner is entitled to be considered by the Board for release in the UK in the normal way'.

The PSI contains guidance on the calculation of ERS eligibility dates for all relevant sentences. Prisoners with confiscation orders should not be removed under ERS and other reasons to refuse ERS include:

- Clear evidence that the prisoner is planning further crime, including plans to evade immigration unlawfully
- Evidence of violence or threats of violence, in prison on a number of occasions
- Dealing in class A drugs in custody
- Serving a sentence for a terrorism or terrorism related offence
- Other matters of similar gravity relating to public safety.

This PSI should be read in conjunction with PSI 52/2011 – Immigration, Repatriation and Removal Services and PSI 18/2012 – Tariff Expired removal Scheme.

PSI 40/2012: Licences and Licence Conditions

This replaces PSI 34/2011 Licences and Licence Conditions and updates advice on the setting of conditions and updates the menu of additional conditions available. It also provides a breakdown of who is responsible for approving additional conditions for each type of sentence.

Previous conditions relating to computer ownership and internet access have been revised with a view to sup-

porting the aims of resettlement in the community. So where a prisoner is engaged in study or employment, the licence condition now provides for them to be able to access the internet in certain public places and for specific purposes.

Following the implementation of the LASPO, all previous release provisions included in the CJAs 1967 and 1991 will be moved into Chapter 6 of the CJA 2003.

OMBUDSMAN CASES

DISABLED PRISONERS

All prisons should have their own local policy to ensure they manage prisoners with disabilities in line with the Equality Act 2010. Prisons must encourage prisoners to disclose any disability and make reasonable adjustments to avoid placing the prisoner at a 'substantial disadvantage'. Each prison has a disability liaison function, responsible for identifying how best to support prisoners with disability and ensuring that they can fully access the regime.

Mr A arrived in prison with documents outlining his medical needs and completed the disability questionnaire. His mother contacted the prison with information about how to manage her son's disability. Despite this information, the extent to which Mr A's disabilities would affect his life in prison and whether he needed any reasonable adjustments to be made, were never properly assessed. No personal emergency evacuation plan was prepared. No one took responsibility for ensuring Mr A's needs were being met and, as a result, he was located inappropriately and did not have access to the most basic comforts, including appropriate footwear that his mother had sent to the prison. As he did not complain staff failed to identify how unwell he was before he died very suddenly. Although the PPO said his death could not have been foreseen, they made a number of recommendations aimed at improving the prisons care of men with disabilities. Governors and directors need to ensure that staff are aware of their personal responsibilities and duty of care towards prisoners with disabilities. Specifically, discipline and healthcare staff had to work together to ensure the needs of disabled prisoners are being met.

In their national guidance, NOMS suggest that 'it is not normally appropriate' to accommodate disabled prisoners in the healthcare centre, unless their medical needs require it. Nevertheless, the PPO has found that healthcare centres were often used as the default to accommodate those with disabilities.

Mr B was located in the healthcare centre, despite having no clinical need for inpatient treatment. He was a wheelchair user and staff assessed that he could not be accommodated safely on a residential wing. He received no medical intervention related to his disability and was not referred to the disability liaison officer. The PPO upheld his complaint.

OLDER PRISONERS

In June 2012, there were over 9,000 prisoners aged over 50 across England and Wales, 10.5% of the population. Prisoners aged 60 and over are now the fastest growing age group in the prison estate and this rose 128% between 2000 and 2010.

One measure used to support elderly prisoners with complex medical needs, is the use of other prisoners as carers. Caring may involve physical help such as washing, dressing and personal care or providing social support to those who cannot mix easily with others as a result of their medical condition.

Mr C volunteered to act as a carer for an elderly prisoner with complex medical needs. He had cared for his parents in ill health, but had no formal experience or healthcare qualifications. However, he was expected to shower the elderly prisoner, and often had to clear up his incontinence, among other difficult duties. Mr C told the PPO investigator that he felt isolated and unsupported by staff. Officers and healthcare staff did not take responsibility for the elderly prisoner's complex and demanding needs. The carer was an excellent source of support for the elderly man, but has been left vulnerable himself. In this case, the PPO recommended formal training and support for prisoners acting as carers. In order to protect the older prisoner being cared for, and the individual acting as carer, such arrangements must be formalised with clear parameters and structured staff support. Prisoner-carers need to be a supplement to the care that staff provides, not a replacement.

Mr D was reliant on crutches for his mobility. Staff completed an escort risk assessment for a hospital appointment, the medical section of which was completed only by an administrator who said that there was no medical reason not to restrain Mr D. In fact, the double cuffs that were used for his restraint meant that Mr D could not use his crutches and therefore was not able to attend his appointment. When completing an escort risk assessment, staff should take into account a prisoner's health and physical condition at the time of the escort. The PPO highlighted that there is too much reliance on the static risk suggested by the original offence even though there has been substantial physical change since, meaning the actual likelihood of escape or capability of causing harm has reduced significantly. Any escort risk assessment must strike the appropriate balance between protecting the public and ensuring the humane treatment of the individual prisoner. The PPO said that they continue to see too many examples where prisons restrain frail and elderly prisoners even when their physical condition renders it implausible that they could present any risk.

YOUNG PRISONERS

Ms E, a young prisoner, complained, among other things, that she was unable to complete her Detention and Training Order (DTO) because she was transferred to an adult establishment on her eighteenth birthday. The investigation found that, once Ms E transferred to the adult establishment, she was no longer engaged in a DTO regime and followed the normal regime for adult sentenced offenders. In the view of the PPO this effectively subverted the court's intentions and substituted a different, less therapeutic, form of sentence. They also found that different procedures are followed for male and female young prisoners. The presumption is that, on turning 18, a male young prisoner will remain where he is and continue with his DTO. Female young prisoners, however, are routinely transferred to adult establishments because of lack of space and are, therefore, unable to complete their DTOs in any meaningful sense. The Chief Executive of NOMS accepted the PPO recommendation that he carry out a review of national policy on the transfer of 18-year-old women serving a DTO, to ensure that they are not treated any less favourably than young men and they continue to experience a regime that is consistent with the intentions and ethos of a DTO.

PROPERTY

Mr F complained that several items of clothing had gone missing in the laun-

dry. The prison had refused to compensate him on the grounds that he had signed a disclaimer saying that he held property in his possession at his own risk. However, following a previous Ombudsman's case, Prison Service policy makes it quite clear that it is not reasonable to expect a prisoner to bear responsibility for any loss or damage to items that have been handed over to the prison laundry. The PPO, therefore, upheld Mr F's complaint and recommended that he be paid £100 in compensation.

Mr G had been convicted of serious sexual offences against the young daughters of his previous partner. After being released on licence, he had formed a relationship with another woman with young daughters. He was subsequently recalled to prison and then applied to marry his new partner. The prison was concerned that she was a vulnerable individual and that her children would be at high risk of harm if she married Mr G. They, therefore, delayed taking a decision on his application while they consulted the Multi Agency Public Protection Panel. Mr G complained that this amounted to an unlawful refusal. The investigation established that Mr G's partner had been told about his convictions and that she still wished to marry him. It was also established that Social Services had been made aware of the situation. The PPO found that the prison's delay had in effect amounted to a refusal of Mr G's application. The PPO said it had recognised that the prison had acted in what it believed to be the best interests of Mr G's partner and her children. However, Governors have no authority to refuse a prisoner's application to marry on the grounds that the marriage is undesirable. They therefore upheld Mr G's complaint. He had by then transferred to another prison where the marriage had gone ahead.

Mr H complained that he was not able to make a hot drink when he was locked up overnight (for between 12 and 15 hours depending on the day of the week). This was out of line with Prison Service policy and practice in most prisons. In the view of the PPO, both health and decency require that prisoners are provided with the means to make a hot drink when they are locked up for such long periods. The Prison Service accepted the recommendation that all prisons should provide prisoners with vacuum flasks or in-cell kettles for this purpose.

OTHER NEWS

We are pleased to announce that PAS was awarded the prestigious Longford Prize on the 22nd November 2012. The Judge's citation read:

"The Prisoners' Advice Service has a long, distinguished and unique track record in providing legal advice, standing up for the rights of prisoners, and ensuring proper judicial scrutiny of what goes on behind bars. This courageous, persistent and independent organisation is an unsung national treasure, and plays a role that, we judges believe, is ever more vital at a time when legal aid is being cut."

PRISONERS' LEGAL RIGHTS GROUP MEMBERSHIP APPLICATION FORM

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

PRISONERS' **A** DVICE **S** ERVICE

Name: ______________________________

Company: ______________________________

Address: ______________________________

______________________________ Postcode: ______________

Telephone: ______________________________ Fax: ______________________________

Email: ______________________________ Website: ______________________________

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

PLEASE TICK THE TYPE OF MEMBERSHIP REQUIRED:

( ) Prisoners Free

( ) Professionals/Other £50pa (please make cheques payable to 'Prisoners' Advice Service')

( ) Voluntary Organisations £30pa

( ) Academic Institutions £50pa

( ) Prison Libraries £30pa

( ) Solicitors and Barristers £50pa

( ) Back Copies £5.00 each

( ) Ex-prisoners £10pa

( ) I would like to sponsor a prisoner PLRG member for one year £10

What issues/themes would you like to see covered in future issues?:

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