PRISONERS' RIGHTS

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PRISONERS' ADVICE SERVICE
JUSTICE BEHIND BARS

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

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HERBERT SMITH FREEHILLS

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CASE REPORTS

DEPORTATION OF FOREIGN CRIMINALS
R (Kiarie & Byndloss) v The Secretary of State for the Home Department [2017] UKSC 42

In this case the Supreme Court considered whether the Home Secretary may lawfully deport foreign criminals pending a human rights challenge and require them to make this challenge from outside of the UK.

The appellants were both foreign nationals who had lived in the UK for some time and developed significant family ties. Both were convicted of serious drugs offences and the Home Secretary decided to deport them, rejecting their claims that deportation would breach their rights to respect for their private and family life under Article 8 of the ECHR. Both appellants had a right to appeal this decision of the Home Secretary to the First-tier Tribunal (the Tribunal). The Home Secretary accepted that both appellants had an arguable case that their human rights had been breached and this would be explored by the Tribunal on appeal.

However, under section 94B of the National, Immigration and Asylum Act 2002 (the Act), a foreign criminal may be deported before the appeals process is exhausted, provided the Home Secretary considers and certifies that deportation of the foreign criminal pending the appeal would not contravene their human rights.

The Home Secretary issued certificates to the appellants under section 94B. The effect of this was that they would be deported and would have to pursue their Tribunal appeals from abroad. The appellants challenged this decision by way of judicial review, arguing that the issue of the certificate and their deportation pending appeal would breach their human rights.

The court considered case law of the ECtHR which establishes that the ECHR requires that foreign nationals facing deportation must be able to effectively challenge deportation on the basis that it infringes their Article 8 rights.

The appellants presented evidence that they would not have an effective possibility of challenging deportation from abroad because:

i) Legal aid would likely not be available and the appellants would find it difficult to secure legal representation

ii) the appellants would not be able to give critical live evidence to the Tribunal about rehabilitation and the quality of their relationships with their families and there were financial and logistical barriers to using a video link

iii) the appellants would face insurmountable difficulties in obtaining relevant expert evidence eg from a probation officer, forensic psychologist or social worker.

The court accepted this evidence and held that the existing system for the conduct of immigration appeals from abroad did not therefore comply with appellants' human rights. It followed that the Home Secretary had failed to establish that the appellants could be deported without breaching their human rights and the certificates permitting their deportation were quashed.

CATEGORY A- ORAL HEARING
R (Hassett & Anor) v SSJ [2017] EWCA Civ 331

This case concerned the standard of procedural fairness required to be observed by the Secretary of State's Category A Review Team (CART) and the Deputy Director of Custody – High Security (DDC) when deciding whether to maintain a prisoner's security classification in prison as Category A.

The appellants, each a Category A prisoner, had been denied re-categorisation to Category B. Their subsequent requests for an oral hearing by the CART/ DDC had been refused. The appellants challenged: (i) the lawfulness of the decisions to maintain their category A status, on the grounds that fairness required that they should have had an oral hearing; and (ii) the lawfulness of the guidance given by the Secretary of State at para. 4.7 of PSI 08/2013 regarding the circumstances in which an oral hearing should take place before the CART in relation to a decision to maintain a prisoner in Category A.

The appellants submitted that the guidance given by the Supreme Court regarding when procedural fairness would require the Parole Board to conduct an oral hearing in *R (Osborn) v Parole Board* [2013] UKSC 61 ("Osborn"), should apply equally to decisions of the CART / DDC.

HELD: The Court rejected the appellants' submission. In doing so, the Court noted that this argument had been rejected in a series of other cases at first instance, and set out the difference between the Parole Board on the one hand and the CART / DDC on the other; including: (i) the character of each body; (ii) the kind of decision each has to make; and (iii) the statutory framework in which each operates.

In particular, the Court noted that the CART / DDC are required to address the question of "the risk posed by a prisoner in the context of his escaping from prison and being at large", while the Parole Board is required to consider "whether release of a prisoner on licence would pose an unacceptable risk of harm, having regard to a range of management measures which may be put in place to support the prisoner and manage that risk if he is released."

The appellants argued that although para. 4.7(b) of PSI 08/2013 correctly implements the Supreme Court's guidance in *Osborn* in identifying "where there is a significant dispute on the expert materials" as a factor tending in favour of an oral hearing, the subsequent additional statement that this was only where there is "a real and live dispute on particular points of real importance to the decision" was unlawful.

The Court rejected this, stating that the additional text in para. 4.7(b) is a fair amplification of the basic idea. The Court further noted that the judgment in *Osborn* has to be read as part of a judgment giving guidance on the procedural requirements in the context of decision-making by the Parole Board, and cannot simply be read across to the materially different context of decision-making by the CART / DDC. Appropriate modification is required for guidance relevant to the latter context, which is what para. 4.7(b) seeks to give.

R (Rose) v SSJ [2017] EWHC 1826 (Admin)

This case concerns whether or not the Secretary of State's Category A Review Team (CART) and the Deputy Director of Custody (DDC) must grant an oral hearing when making a decision about whether to maintain a prisoner's Category A security classification.

Mr Rose is serving convictions for crimes including kidnapping and murder. In 2015, he completed the 'RESOLVE' offender behaviour programme which aims to reduce violence in medium risk adult male offenders. In 2016, the Local Advisory Panel (LAP) and several experts recommended that his security category be downgraded, citing the progress made through the RESOLVE programme. However, on review of Mr Rose's categorisation, the DDC rejected these recommendations and decided that there were no grounds for an oral hearing and he should remain in Category A. Mr Rose challenged the DDC's decision not to hold an oral hearing.

At trial, the parties accepted that following the Court of Appeal's decision in *Hassett* (above), the standards of procedural fairness set out in *Osborn* do not fully apply in the context of security categorisation decisions and that an oral hearing will rarely be granted in this context.

However, Mr Rose argued that an oral hearing should still have been granted in accordance with the guidance set out in PSI 08/2013. PSI 08/2013 sets out a number of factors weighing in favour of an oral hearing which were met in the circumstances, including that Mr Rose had never had an oral hearing before, he was post-tariff and had been a Category A prisoner for a substantial amount of time. Most significantly, though, there was clearly a real and live dispute on the expert evidence because the LAP and experts' recommendations were consistent and supportive of downgrading but had been rejected by the DDC.

HELD: The court held that in this context, Mr Rose should have been given an opportunity to address the concerns troubling the DDC. The court quashed the decision of the DDC and ordered that Mr Rose be granted an oral hearing.

Mr Rose represented himself at his oral hearing, as legal aid is not available for legal representation, and has now been downgraded to Category B.

DUTY OF CARE TO PREVENT SUICIDE- ARTICLE 2 ECHR
R. (Scarfe & Others) v Governor of Woodhill Prison [2017] EWHC 1194 (Admin)

This judicial review was brought as a result of the very high rate of suicide at HMP Woodhill. At the time of the judgment (May 2017) there had been 18 self-inflicted deaths since 2013, the highest rate and the highest number of suicides of any prison in the prison estate. Eleven of the deaths had been the subject of an inquest (and some had been the subject of a 'preventing future deaths', or PFD report), and thirteen had been the subject of a report by the PPO.

The claimants included family members of prisoners who had committed suicide. One of the family members was also a prisoner who had previously been detained at HMP Woodhill and had been placed under observation due to concerns about his risk of suicide. The claimants argued that the defendants had breached their duties to comply with public law, common law and Article 2 ECHR duties to protect prisoners from suicide. In particular they complained that the prison had failed to act on recommendations in earlier reports into suicides at the prison.

The claimants sought a declaration that the defendants had breached their legal duties, and an order requiring the defendants to comply with the mandatory

provisions of national prison policy.

The parties agreed that the relevant policies were PSI 64/2011 ('Management of Prisoners at risk to harm to self, to others and from others (Safer Custody)' and PSI 03/2001 relating to responses to medical emergencies. The parties also agreed with the basic legal principles. These were firstly, that a decision-maker should act consistently with a published policy, and that a failure to comply with a mandatory provision of the policy can amount to a breach of a public law duty, and secondly, that as a result of the HRA and Article 2 of the ECHR, the defendants were subject to a negative and positive obligation to protect life. This included, in this case, a positive duty to put in place appropriate systems to protect life.

The key question (over which the parties disagreed) was whether the claimants could show that the suicides at HMP Woodhill were the result of a systemic failure by the prison. Garnham J found that this was necessary to justify the declaration sought by the claimants (though a single operational failure or a series of such failures would have been enough for damages).

HELD: Systemic failure necessary to justify the declaration had not been established. While there had been a high number of operational mistakes in suicide prevention at HMP Woodhill, the errors were different in each case. The fact that mistakes were frequent did not, by itself, demonstrate a failure of the system, but only showed it was a system prone to operational error. This was a result of the fact that policies were implemented by human beings in situations 'of some stress and complexity' and where there were inevitably 'numerous distractions from the performance of what are often important but routine tasks'.

SEX DISCRIMINATION- APPROVED PREMISES
R (Coll) v SSJ [2017] UKSC 40

The appellant was sentenced to life imprisonment for murder, with a tariff of 11 years and three months in August 2004. Her tariff expired in November 2015 and she was released on a licence. As a condition of this licence, she was required to live in an Approved Premises (AP), also sometimes called a bail or probation hostel, in Bedford. The appellant had no connection to Bedford, having spent nearly the whole of her adult life in London. She could not live anywhere other than the AP, even for one night without the approval of a supervising officer.

The appellant started the proceedings in January 2013 in anticipation that she would be sent to an AP far from London. APs are currently all single-sex facilities with only six APs throughout the whole of the UK for women, none of which are in London or Wales, as compared with 94 APs for men with a much greater geographic spread, including several APs in London.

The appellant argued that this current distribution of APs, which means that women are far more likely to be placed in an AP far from their homes/ communities, constitutes unlawful sex discrimination against women. She sought a declaration that the lack of a women's APS in London is discriminatory contrary to the Equality Act 2010 and/or Articles 8 and 14 of the ECHR.

The Supreme Court looked closely at the distribution of APs and considered whether this constituted discrimination against women. The court accepted the appellant's argument that living in an AP a long way from home is a detriment and that women are far more likely to suffer this detriment due to the smaller

number of APs for women. The appellant was being treated less favourably than a man due to sex, which is a protected characteristic under the Equality Act. The appellant was therefore a victim of direct discrimination.

The next question for the court was whether this discrimination was justified. The court accepted the premise that there are fewer female offenders and therefore fewer APs needed, as well as numerous budgetary concerns that the State faces in relation to the establishment of APs. Similarly, the court accepted that there were probably good reasons to keep APs single sex. However, the court was critical of the fact that the Ministry of Justice had never addressed the possible impacts upon women, assessed any disadvantages or any possible ways to lessen this disadvantage. It was for the Ministry of Justice to show that the discrimination was justified and that the present distribution of APs for women was a proportionate means of achieving a legitimate aim, but the court did not feel they had yet done this.

Accordingly, the appeal was allowed and the court granted a declaration that 'the provision of … [APs] … constitutes direct discrimination against women, contrary to section 13(1) of the Equality Act 2010 which is unlawful unless justified…'. Further, 'no such justification has yet been shown by the Secretary of State'. This declaration means that individual women who have been treated less favourably due to the provision of APs may bring a sex discrimination claim against the county court. It will then be up to the Secretary of State to show, on the facts, that the provision is justified.

SENTENCING: PAROLE ELIGIBILITY DISCRIMINATION
Frank Stott v SSJ [2017] EWHC 214 (Admin)

The claimant was sentenced to 21 years imprisonment with an extension of four years, therefore serving an extended determinate sentence (EDS). He is entitled to automatic release after 21 years, and eligible for parole once he has served two-thirds of that custodial term, i.e. 14 years. Those serving life sentences are eligible for parole after half of the appropriate determinate sentence. The claimant brought judicial review proceedings in the High Court, contending that this difference was discriminatory under Article 14 of the ECHR.

The court reviewed all relevant custodial sentences, namely life sentences, determinate sentences and special custodial sentences for offenders of particular concern. It follows that only EDS prisoners are subject to a different eligibility regime.

The claimant argued that this was discriminatory and that he should be eligible for parole after half of his sentence.

The Secretary of State argued that the court was bound the decision of the House of Lords in *R (Clift) v Home Secretary of State for the Home Department* [2007] 1 AC 484; [2006] UKHL 54. In *Clift*, it was held 'that the treatment of a prisoner serving a long-term determinate sentence in excess of 15 years, in contrast to a prisoner serving a life sentence or a long-term prisoner serving less than 15 years, does not fall within Article 14 of the ECHR because the term of imprisonment could not amount to "other status" within Article 14'. The claimant accepted that the decision in *Clift* is binding and that the claim will automatically fail, but submitted that the

ECtHR later took the view that it did fall within the definition of 'other status' under Article 14 (*Clift v United Kingdom* 7205/07, 13 July 2010). The ECtHR further considered that there was no objective justification for the difference in treatment. The claimant therefore argued that the Supreme Court should reverse the decision in *Clift*.

HELD: Claim dismissed as this court was bound by the House of Lords' decision in *Clift*, with permission to apply for leave to appeal to the Supreme Court directly. The court nevertheless made the following findings in favour of the claimant, noting that but for the binding decision in *Clift* the claimant would be successful:

1) The differential treatment would constitute 'other status' but for the decision in *Clift*.

2) An EDS in the present case is analogous to the other types of sentences reviewed and discussed.

3) Extending the punitive element of the sentence, i.e. the length of compulsory imprisonment, for EDS prisoners on the basis that they committed serious offences provides no objective justification for doing so – those convicted to life sentences and many determinate sentence offenders will equally have committed a serious offence. The court added that contending this was the justification amounted to confusing punishment and deterrence with risk.

SEGREGATION
R (Syed) v SSJ [2017] EWHC 727 (Admin)

The claimant prisoner applied for judicial review of the decision to transfer him to a challenging behaviour unit (the 'Unit') within the prison.

The claimant had been convicted of committing an act preparatory to terrorism and was sentenced to life imprisonment. Following his conviction, the claimant had been segregated for several months. There was evidence that he had threatened an officer during his time in segregation and that he had discussed a proscribed organisation, Al-Muhajiroun, with others. The authorities considered whether he should be transferred from segregation to a Closed Supervision Centre, but decided to transfer him to the Unit instead, with certain limitations on association with other prisoners.

The defendant conceded that the transfer was unlawful due to policy breaches, as the proper process had not been followed and the claimant had not been given the opportunity to make representations. The court considered the remaining issues:

1) whether the conditions under which the claimant was detained in the Unit amount to his removal from association with other prisoners within the meaning of rule 45 of the Prison Rules 1999 (the 'Rules'); and

2) whether these conditions amount to an interference with the claimant's right to respect for his private life under Article 8(1) of the ECHR and, if so, whether that interference was justified.

HELD: The claim was upheld- the decision to transfer the claimant was, as the defendant admitted, procedurally flawed and for that reason the decision was quashed and the court said the matter would need to be reconsidered in light of any representations made by the

claimant and all up-to-date information. The placement itself of the claimant in the Unit did not however constitute removal from association with other prisoners within the meaning of Rule 45. Whilst the restrictions placed upon the claimant within the Unit did amount to an interference with his right to respect for private life within the meaning of Article 8(1) of the ECHR, they were necessary and proportionate measures implemented in pursuance of a legitimate aim (i.e. the protection of the lives and safety of other people such as prison officers). However, they were not in accordance with law as the decision to transfer the claimant to the Unit was procedurally flawed.
The court considered that the finding of a violation provided just satisfaction for the claimant, so no declaration or damages award was required. The violation was, essentially, a procedural one, and the decision would be taken again with up-to-date information.

CALCULATION OF TIME SERVED
R (Shields-McKinley) v SSJ and Lord Chancellor [2017] EWHC 658 (Admin)
Section 240ZA of the CJA 2003 provides for the crediting of periods of remand in custody towards an eventual sentence of imprisonment. With regard to prisoners who have been extradited from abroad after spending some time in detention there, section 243(2) provides that days spent in detention abroad can only be calculated as time served under section 240ZA if they have been specified in open court.

The claimant had been detained in Germany for 50 days before being extradited. He was then remanded in custody in the UK for 511 days prior to conviction and sentenced to four years' imprisonment. Neither of those periods were referred to in the submissions, and the Recorder said nothing about the extent to which they would count towards the claimant's total sentence. The claimant's release date was calculated by the prison service and credit was given only for the period he was remanded in custody in the UK.

The claimant sought judicial review of the following:

1) the failure to credit time spent on remand abroad towards his sentence of imprisonment;
2) the flawed calculation of time served and unlawful imprisonment; and
3) the failure to release the claimant by exercise of prerogative or other powers, amounting to unlawful imprisonment.

HELD: Had the Crown Court been informed that the claimant had been detained abroad, the Recorder would have been required to specify the number of days spent on remand in Germany in open court pursuant to section 243(2). However, the court held that the omission made in the Crown Court was one for which the claimant had had a remedy by way of the slip rule or an appeal against sentence, not by way of judicial review. The court said that, whilst the prison service had its own records of time spent remanded in custody in the UK for calculation of a prisoner's release date, it was necessary for the time spent on remand abroad to be stated in open court, as the prison service had otherwise no definitive statement of the number of days for which credit had to be given. Therefore, the omission to specify in open court the number of days of the claimant's detention in Germany meant that the claimant was not entitled to credit for those days. It was held that, in calculating his release date, the claimant was lawfully detained in accordance with a lawful court order and there had been no calculation error

Finally, the court said that the claimant's circumstances did not come within the ambit of a power of release on compassionate grounds under section 248, but instead that the power to order release under the royal prerogative of mercy was engaged. However, the Secretary of State could not be criticised for failing to exercise that power because the appeal process available to the claimant, in which he would have been required to explain the delay in raising the issue, would have been circumvented.

COMMUNICATIONS UNDER RULE 39 OR THE CONFIDENTIAL ACCESS REGIME

R (Bruton) v HMP Swaleside & SSJ [2017] EWHC 704 (Admin)

Mr Bruton sought judicial review of the defendants' failure to comply with their duties to protect his right to privacy, confidentiality and legal privilege in correspondence and communications with his legal representatives and others. He claimed certain mail addressed to him attracted protection under Rule 39 of the Prison Rules or the protection of the 'Confidential Access' regime. Mr Bruton claimed that, contrary to these protections, certain mail was improperly opened by prison staff at the three prisons where he had been serving his sentence.

Subject to exceptions, Rule 39 and the Confidential Access regime allow a prisoner to receive legally privileged or confidential material without such material being opened, read or stopped. Mr Bruton relied on 34 alleged breaches of this right over a three year period to seek judicial review, pointing to the defendants': (1) failure to apply the defendants' own policy or to apply it consistently; (2) failure to provide access to justice; (3) unlawful treatment contrary to section 6 of the HRA by way of the failure to comply with and meet the minimum standards set by Article 6 of the ECHR and/or Article 8 of the ECHR; (4) breach of the right to privacy; and/or (5) breach of the prohibition on harassment provided by the Protection from Harassment Act 1997.

HELD: The application was upheld on grounds 1, 2 and 3 above. Grounds 4 and 5 were not considered. The defendants accepted 8 of the alleged 34 breaches. Of the remaining alleged breaches, while Mr Bruton was not able to overcome the evidential burden in every instance, the court considered that, as a whole, the documentary evidence was 'clear and compelling'. In relation to the time served at HMP Swaleside in particular, the court concluded that there were serious shortcomings in the mail handling systems, inadequate training of staff and a lack of knowledge of the regime. This included ignorance of the proper treatment of material not expressly marked Rule 39 but clearly from a recognised body to which the rule of confidentiality applies. Responses by the prison, following Mr Bruton's previously upheld complaint to the PPO, to effect changes to systems were considered to be 'too little and too late'. The prison in question issued an apology 10 months' after being ordered to do so by the PPO (and a further apology 8 months' thereafter). In the court's view, the initial apology was wholly inadequate and both apologies were substantially delayed. The court considered that Mr Bruton needed to be considered a 'victim' for the purposes of section 7 of the HRA and Article 34 of the ECHR. This depended on a number of factors, including: the number of letters opened; whether the letters were opened in error and not as a result of a deliberate or systematic disregard of the Prison Rules and PSIs; whether the letters were read; whether the claimant was

being singled out or targeted; whether the appropriate apologies were given to the prisoner and steps taken to prevent reoccurrence; and whether damage caused to the prisoner was a result of the openings. In the court's view, the repeated nature of the breaches indicating systemic failures, and the inadequate and delayed apology by the prison, afforded Mr Bruton victim status. The court distinguished this case from *Francis v The Home Office* [2006] EWHC 3021 (QBD) and *Woodin v The Home Office* [2006] All ER (D) 475 (Jul). While a breach of human rights did not necessarily entitle a claimant to financial compensation, the court considered damages necessary and appropriate in the circumstances given that judgment alone would not provide just satisfaction to the claimant. The amount of damages was to be agreed between the parties.

LICENCE CONDITIONS
R (ZX) v SSJ [2017] EWCA Civ 155

The appellant was convicted of two terrorism related offences and sentenced to 3 years in prison. He was subsequently released on licence, subject to a number of conditions. 10 months later, the National Probation Service (NPS) attached further conditions to his licence which prohibited him from having contact with his children (due to a risk of radicalisation), save as directed by the NPS and Tower Hamlets Children's Service.

The appellant challenged the decision to attach the further licence conditions alleging that the NPS had no lawful entitlement to give a direction separating him from his children. He argued that first, by imposing conditions preventing the appellant from contact with his children, the NPS had failed to follow its obligations under s.11 of the Children Act 2004. The NPS should have applied to the court for permission to attach the further conditions to the licence. Second, that the decision to prevent such contact was irrational and/or disproportionate and could not be justified.

HELD: Appeal dismissed. The court identified two points to be borne in mind. First, the functions of the NPS in this context are quite different from the functions of a local authority under the Children Act 1989. Second, the appellant was subject to a sentence of imprisonment and the actions and decisions of the NPS have to be viewed in that context. Release on licence is not an alternative to liberty; it is an alternative to remaining in prison.

The NPS has statutory power to impose conditions on early release from prison, which can extend to restrictions on contact with a person. That decision making is entrusted to the NPS and not to a local authority children's care service. To require a local authority children's service and/or Family Court's approval would be unworkable in practice because that requirement would potentially extend to all criminal offences. This does not mean that considerations on the impact on the family life of the appellant and the children, and considerations regarding the welfare and interests of the children, have no part to play in the NPS's imposition of licence conditions. However, the focus of a local authority exercising its statutory functions is on the child; whereas the focus of the NPS, in setting licence conditions, is on the offender. Those are not mutually exclusive functions but they are not the same. The question in this case was whether the NPS in discharging its functions had made arrangements - both general and specific to the case - having due regard to the need to safeguard and promote the welfare of the children.

The court found the NPS had complied with all applicable guidance. In making its decision, the NPS worked closely with Tower Hamlets Social Services at all stages. The decision for the appellant not to have contact with the children was a 'joint' one between the NPS and Tower Hamlets Social Services. The decision to impose the licence conditions was lawful and proportionate, and was objectively justified given the facts and circumstances of the ca

UPDATES ON PRISON SERVICE INSTRUCTIONS

THE CARE AND MANAGEMENT OF TRANSGENDER OFFENDERS PSI 17/2016

PSI 07/2011 came into force on 1 January 2017, and replaces PSI 07/2011 The Care and Management of Transsexual Prisoners. It regulates the rights of prisoners to express their gender identity, and to have that identity respected. It does so by establishing a two-tier system, which distinguishes between prisoners intending a permanent gender change, from those who do not.
The former category encompasses prisoners "who identify as transgender and who have also expressed a consistent desire to live permanently in the gender they identify with which is opposite to the biological sex assigned to them at birth". This includes prisoners "who are intersex and who wish to transition to a gender different from the sex assigned to them at birth."

For such prisoners an Initial Local Transgender Case Board will be convened, before sentencing where appropriate, but within three days of arrival in prison otherwise. This will produce a Transgender Care and Management Plan, which can permit prisoners to live in a prison conforming to their identified gender, even if that is not their legal gender. Prisoners must provide evidence of living in the gender with which they identify, in such cases. In the meantime, prisoners will be housed according to their legal gender, with appropriate adjustments being otherwise made.

In all other cases, where a prisoner "discloses that they identify as non-binary, gender fluid, transvestite or are intersex and do not intend to transition permanently to a different gender, or refuses to state a gender, decisions in relation to location, services and interventions within custody must be based on the legal gender (whilst allowing the prisoner to express the gender they identify with subject to risk, security and operational assessments".
Prisoners in this latter category will generally conclude Voluntary Agreements with Prisons, determining what provisions should be put in place, and will only exceptionally have their case assessed by a Transgender Case Board.
The instruction notes that NOMs will establish a Transgender Advisory Board for the ongoing development of policy in this area.

NATIONAL SECURITY FRAMEWORK – SECURITY MANAGEMENT: BODY WORN VIDEO CAMERAS PSI 04/2017

This instruction came into force on 20 March 2017. It provides for the introduction and regulation of body worn video cameras (BWVC) on trained members of prison staff. It also discusses retention policies concerning data and audio captured by such cameras.

The instruction requires that any and all recording be overt, and that a clear verbal announcement be made before use. It states that BWVC must be used whenever a user has, or may be re-

quired to exercise force; when a user believes an interaction presents or is likely to present a risk to the safety of the user, other members of staff, prisoners, or other persons present; when a user is responding to an alarm bell or incident, or where a user considers the use a necessary and proportionate means of recording any other interaction or event.

In contrast, recording must not be used: covertly; to record general working practises; to record interactions without specific cause; to record the first accounts of victims and/or witnesses at incidents in order to avoid inadvertently conducting an investigatory interview; to routinely record the conduct of any type of search of the person, or outside the confines of the establishment.

The Instruction notes, however, that whilst BWVC must not be used overtly, unintentionally captured footage disclosing wrongdoing by any party (staff or prisoners) must be acted on where present procedures require.

BWVC data is regulated by the Data Protection Act. Prisoners can thus make a Subject Access Request in connection with such data. Non-evidential footage will generally only be retained for a maximum of three months, but copies of the footage produced in the course of any investigation or legal proceedings will not be disposed of until such investigations or proceedings conclude. Prisoners can lodge an objection to being filmed, under a procedure outlined in the instruction.

SEPARATION CENTRE REFERRAL MANUAL
PSI 05/2017

This instruction came into force on 12 May 2017. It sets out the processes and templates for referring a prisoner to the Separation Centre system.

The referral process identifies prisoners who pose a terrorism-related threat within the prison population, most obviously by encouraging radicalisation. Where the risks posed by such prisoners cannot be managed in the mainstream location, a referral will be considered.

Referral may be permitted: a) in the interests of national security; b) 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; c) 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 d) to prevent any political, religious, racial or other views or beliefs being used to undermine good order and discipline in a prison.

In addition to being unable to manage the prisoner in a mainstream location, consideration must be given to how and why other management and existing control strategies are insufficient to protect the public, wider prisoner population, staff and visitors. The referral must also be non-discriminatory, proportionate, transparent and legally defensible.. The individual's mental health or the presence of a diagnosed personality disorder should be considered before referral where this is known. There must equally be consideration of the risks of suicide, self-harm, increased vulnerability due to age, health and whether the individual may be placed at increased personal risk in any way from entry into a SC.

The instruction provides broadly for a three stage process: Referral, Assess-

ment and Decision. Specifically, referral may be of one of four types: Routine, Urgent, Re-referral, and Recall following de-selection. Each is explained in detail in the instruction.

Legal representations may be made as part of the referral process, and any referral will be decided upon by the Separation Centre Management Committee. Reviews subsequent to any referral decision will be quarterly, i.e. every three months. The Instruction does not otherwise allude to any right of appeal.

OMBUDSMAN CASES

AMENDMENT TO PPO CASE SUMMARY IN WINTER 2015 BULLETIN

We reported a PPO decision relating to arrangements for photocopying legal documents. The summary is reproduced here with an amendment setting out the relevant arrangements from the National Security Framework (NSF).

Mr Z complained about arrangements for photocopying confidential legal documents. He said that because of restrictions on access to photocopying facilities, staff had been photocopying his legal documents for him, breaching Rule 39/Confidential Access procedures.

Mr Z first complained to the prison, which responded that there was nothing it could do and, because he was not permitted to photocopy his own documents, his only option was for staff to do it for him, or failing that, he could ask his solicitor for duplicates.

Mr Z then complained to the PPO, saying that this was a breach of Article 6 of the ECHR. He pointed out this method involved his confidential documents going through several channels before reaching the prisoners' monies clerk. And as a litigant in person, he did not have a solicitor to copy documents for him.

The PPO upheld his complaint, saying that Function 4 of the National Security Framework, that deals with photocopying on behalf of a prisoner, had not been followed. The prison updated the local security strategy to include these instructions.

Function 4 of the National Security Framework states that where a prisoner is a litigant in person, the following options are open:

1) Arrangements where a prisoner gives papers to an officer, who copies the papers and seals them in a bag or hands them back to a prisoner. These arrangements may be in breach of Article 6 and must not be followed unless the prisoner can see that the papers are being handled properly.

2) The prisoner can make arrangements for the papers to be posted out to relatives or friends or handed over at visits. *Local arrangements will need to be in place to manage this so that security is not breached and due weight is given to the privileged nature of the correspondence*.[our emphasis]

3) Finally, if a prisoner is not satisfied with any of the above, he may make arrangements to send papers out to a photocopying bureau. Again, *local arrangements will need to be in place to manage this so that security is not breached and due weight is given to the privileged nature of the correspondence.* [our emphasis]

Photocopying is at the prisoner's own expense.

USE OF UNLAWFUL FORCE

Mr A complained to the PPO that staff at HMP Full Sutton had used unlawful force on him. He contended that it was unlawful as the force was only used because he had refused to comply with an order to remove his hands from his pockets while he was walking to the segregation unit. Mr A also complained that he was not examined by medical staff afterwards, despite having suffered swollen wrists as a result of the force used.

When Mr A had complained about the same to the prison, the governor referred the complaint to the police given the nature and seriousness of the complaint. The police decided to take no further action and the matter was then referred back to the prison for investigation. The prison concluded that while there was credibility to Mr A's complaint, there was no evidence that unlawful force was used as removal of his hands was the safest thing to do in the circumstances and he had failed to comply with instructions. However, the prison informed Mr A that a review would take place of the unofficial, unwritten policy that required prisoners to keep their hands out of their pockets when en route to the segregation unit.

During the course of the PPO's investigation, clarification was sought as to the review of the unofficial policy. The prison had informed staff some five months after their investigation into Mr A's complaint had been completed that the policy was not part of any local or national searching strategy and so the restriction against putting hands in pockets should be removed. However, no review took place.

The PPO reviewed CCTV evidence, witness statements given by the officers involved and Mr A's account. They concluded that the force about which Mr A complained was unlawful, and therefore upheld this part of his complaint. Despite assertions by officers that Mr A was acting in an aggressive manner when they arrived at his cell, the PPO were not convinced this was the case: this was not supported by the CCTV evidence and no examples of his seemingly aggressive behaviour were provided by officers. The PPO found that the only reason for the use of force was the unofficial policy, and that it was reasonable to conclude that Mr A was restrained as a result of that policy and not his seemingly aggressive behaviour. Further, it was clear from the PPO's investigation that staff had differing understandings of why the unofficial policy was in place thereby creating uncertainty. Given that the prison acknowledged the unofficial policy was not part of any local or national strategy, the PPO found that the order made by staff in accordance with this policy was not a lawful order and therefore should not have been given in the first place. The PPO observed that, in any event, non-compliance with an order is not usually sufficient to justify restraint and notwithstanding the unlawful nature of the order there would be a question mark about the justification of the force used in these circumstances.

The PPO found on the evidence that Mr A had in fact been seen by medical staff 20 minutes after the incident. Therefore, they did not uphold this part of his complaint.

Further, given the prison had failed to undertake a review of the policy which they themselves recognised as unofficial, the PPO upheld this part of Mr A's complaint about the investigation process.

Amongst other things, the PPO recom-

mended that within four weeks of their report the governor of Full Sutton issue an apology to Mr A about the force used against him and identify any other unofficial rules within the segregation unit, or any other part of the prison, and either instruct staff to dismiss them or incorporate them into official policy.

DUTY OF CARE FOLLOWING ALLEGED ASSAULT

Mr L complained to the PPO about the lack of care by HMP Moorland towards him following an alleged assault. Mr L and another prisoner were involved in a fight / assault with two other prisoners whilst they were being transferred to different parts of the prison. Mr L claimed that two prisoners had deliberately targeted him, having earlier directly threatened him. Mr L pursued a PPO complaint because he believed that the prison had tried to cover up the alleged assault, hence why they had not pursued adjudications processes fully, nor referred the matter on to the police.

HMP Moorland stated that they had fulfilled their duty as they had submitted a police report as requested (the police had elected not to pursue it) and only adjourned the adjudication because one of the prisoners had been discharged. This information had not, however, been communicated to Mr L. They also denied that there had been a direct threat against Mr L, and have since taken action to ensure that the two sets of prisoners would not mix as easily in the future.

The PPO upheld Mr L's complaint. There were a number of discrepancies, and an unfortunate lack of several key sources such as the CCTV and the information in relation to the direct threat, both of particular concern. The PPO found that the prison could have prevented the incident, had the security department been aware of the weaknesses in the process; whilst the prison had taken steps to correct this as a result, they were not sufficient to answer Mr L's complaint.

The PPO recommended that the prison issue an apology to Mr L for failing in its duty of care. They also made a recommendation that the governor should issue notices to staff regarding the need: to retain CCTV in disputed incidents; to retain written records; and to supply full responses to requests for information from the PPO within a reasonable timeframe. The PPO made a further recommendation that HMP Moorland introduce a system whereby the decisions of police referrals and adjourned adjudication outcomes would be communicated to the prisoners involved.

RULE 39

Mr K complained about his correspondence with the Prisoners' Advice Service not being covered under Rule 39 (R39) at HMP Littlehey. Staff at the prison had opened the mail, clearly marked with 'Prisoners' Advice Service' (although not with R39). Mr K stated that this was in violation of Prison Service Instructions 49/2011 and 04/2016 and that he should have been sent a letter of apology and been provided with a reason for opening the letter. HMP Littlehey responded stating that PAS letters are not directly covered by R39 and that the prison was merely working to the policy .

The PPO found, however, that PAS communications nonetheless came under R39 as it applied to prisoners and their legal advisor (which could be an organisation i.e. PAS, where the prisoner does not know the name of the legal advisor). Thus, the prison was wilfully misunderstanding the PSI. HMP Littlehey has since sent Mr K a letter of apology.

PRISONERS' LEGAL RIGHTS BULLETIN SUBSCRIPTION FORM

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

PRISONERS' ADVICE SERVICE
JUSTICE BEHIND BARS

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
( ) Voluntary Organisations	£30pa	'Prisoners' Advice Service')
( ) 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 PLRB member for one year £10

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

_____

PRISONERS' ADVICE SERVICE
PO BOX 46199 LONDON EC1M 4XA
Local Cost Call 0845 430 8923
Tel: 020 7253 3323 / Fax: 020 7253 8067

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