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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LEGAL AID FOR PRISONERS - UPDATE

Following the Court of Appeal judgment of 10 April 2017 in *R (Howard League and Prisoners' Advice Service) v Lord Chancellor [2017] EWCA Civ 244*, the Lord Chancellor lodged an application for permission to appeal against the judgment. On 31 October 2017 the Government withdrew its application. The Lord Chancellor was then asked for confirmation of the steps being taken by the Government to address the matter of the provision of legal aid relating to pre-tariff reviews, categorisation reviews of Category A prisoners and placements in Close Supervision Centres.

The Lord Chancellor has written to the joint claimants stating:

> *Following the Government's withdrawal of its application for permission to appeal on 31 October 2017, an amending SI is being drafted to reinstate criminal legal aid in respect of the three categories of prison law highlighted by the Court of Appeal.*
>
> *The work to support the amending SI, including any necessary operational changes, are being taken forward promptly, and I expect all arrangements to be in force by no later than February 2018. I have instructed my officials to keep you updated on progress towards implementation.*

The claimants in this case will keep interested parties informed of progress in this matter.

CASE REPORTS

ACCESS TO REHABILITATIVE COURSES (ARTICLE 5)- EXTENDED SENTENCE

Brown v The Parole Board for Scotland, The Scottish Ministers and another [2017] UKSC 69

Background
The appellant was sentenced to an extended sentence of ten years' imprisonment, comprising a custodial term of seven years and an extension period of three years. He was released on licence after serving two-thirds of the custodial term, but was recalled to custody after committing a further offence. He then remained in prison until the sentence had been served in full.

In these proceedings, he complained that he was not provided with appropriate rehabilitation courses following his recall to prison, contrary to Article 5 of the ECHR. The principal issue before the Supreme Court was whether the duty under Article 5 to provide prisoners with a real opportunity for rehabilitation applies to prisoners serving extended sentences. The lower courts found that there was no violation of Article 5. The appeal provided an opportunity for the court to consider the earlier approach of the Supreme Court in R (Kaiyam) v SSJ [2014] UKSC 66; [2015] AC 1344 in light of the more recent case law of the ECtHR on the issue.

Judgment
The Supreme Court unanimously dismissed the appeal, finding that there was no violation.

<u>Previous relevant decisions</u>

In James v United Kingdom (2013) 56 EHRR 12, the ECtHR applied the general principle that Article 5(1) requires

the conditions of detention to be consistent with the purpose of the detention and concluded that after the tariff period, i.e. the punishment part, of an IPP sentence has been served and the prisoner remains in detention for reasons of public protection, a real opportunity for rehabilitation should be provided. Where detention is in violation of Article 5(1) by reason of a failure to provide a real opportunity for rehabilitation, the appropriate remedy is an order requiring such an opportunity to be provided and/or monetary compensation for the absence of the opportunity in appropriate cases. The court noted that the threshold for establishing a violation on this basis is a high one.

In *R (Kaiyam) v SSJ [2015]* the Supreme Court accepted there was an obligation to provide life and IPP sentence prisoners with a real opportunity for rehabilitation, but held this was not imposed by Article 5(1) but an ancillary duty in the overall scheme of Article 5 and existed throughout the prisoner's detention rather than being confined to the post-tariff period. The Supreme Court was concerned that the approach of the ECtHR in *James* implied that IPP and life sentence prisoners without access to rehabilitation courses were entitled under the ECHR to immediate release, and that the statutory regime preventing their release (except where recommended by the Parole Board) might therefore have to be declared incompatible with the ECHR. The Court therefore responded to this concern by concluding that *James* went beyond the reasoning of previous case law and was not part of a clear and constant line of decisions.

On the facts of *Kaiyam*, their Lordships concluded that the ancillary duty had been breached in the cases of two of the claimants. In the case of Mr Haney, a life sentence prisoner, there had been a delay of about a year, prior to the expiry of his tariff, in transferring him to an open prison after the Secretary of State had issued a letter indicating that that was appropriate. The Court concluded that the Secretary of State, by his letter, had identified what a reasonable opportunity was for Mr Haney to demonstrate that he was no longer a danger and deemed that he should have that opportunity then and there; accordingly, there was a violation of the ancillary obligation as a result of the delay in providing that opportunity, despite it being pre-tariff. In the case of Mr Massey, an IPP sentence prisoner, a timetable for his progress had been provided by the Secretary of State in a letter and had not been adhered to. As with Mr Haney, the Court found that the letter effectively defined what was regarded as a reasonable opportunity for Mr Massey to build on the progress he had made and to demonstrate that he was safe to release. Given the failure to adhere to the timetable, there was a breach of the ancillary duty.

The ECtHR in *Kaiyam v United Kingdom* (2016) 62 EHRR SE 13 considered an appeal by three of the IPP sentence prisoners following the UKSC's decision in *Kaiyam*. The Court rejected the appeal, finding the Article 5(1) complaints were inadmissible on the basis that Article 5(1)(a) does not require a real opportunity for rehabilitation during the tariff period since this represents the punishment part of the sentence. The Court regarded the issue of lawfulness as arising only after the tariff period has expired, although earlier measures to encourage the prisoner's rehabilitation will form part of the relevant circumstances. The ECtHR declined to adopt the Supreme Court's analysis in *Kaiyam*, and instead followed their approach in *James*. The question was whether, in light of a prisoner's deten-

tion as a whole, any delay in providing an opportunity was of such a degree as to render that period of his detention arbitrary and thus unlawful.

On the facts of *Kaiyam*, the ECtHR concluded that a real opportunity for rehabilitation had been provided to the applicants. In particular, in the case of Mr Massey, despite a delay of 18 months post-tariff to begin a course during which time he was not provided any other courses, there was no violation of Article 5. The court stated that the period of inactivity had to be put in context: Mr Massey had completed four courses in the space of five years addressing his offending behaviour, he had made significant progress during his sentence, and he had been afforded opportunities to present to the Parole Board evidence of his reduction in risk. Against that backdrop, the 18 month delay in access to the course could not be said to have deprived Mr Massey of a real opportunity for rehabilitation through the provision of reasonable opportunities to undertake courses aimed at helping him to address his offending behaviour. It is clear from the ECtHR's reasoning that Mr Haney's application, which succeeded before the lower court but was not before the ECtHR, would not have been considered to involve a violation of Article 5 as it was brought almost a year before his tariff expiry.

The approach of the Supreme Court in *Brown* to these cases

The Supreme Court noted that the differing approaches of the ECtHR in *James* and *Kaiyam* and of the Supreme Court in *Kaiyam* affect the substance of the obligation to provide rehabilitation opportunities, the standard of the duty and the weight to be placed on the SoS's assessment of what amounts to a reasonable opportunity. In light of this, the Supreme Court's approach in *Kaiyam* has resulted in the imposition of a duty on the prison authorities which is significantly different from, and more demanding than, the duty imposed by the ECHR; this divergence is highly unusual.

The Supreme Court held that the approach of the ECtHR in *James* should be adopted: the obligation to provide opportunities for rehabilitation should no longer be treated as an ancillary obligation implicit in Article 5 as a whole but reflecting the logic of Article 5(1)(a); the relevant standard is one of arbitrariness, not reasonableness; the fact that a delay occurs, even where it is at odds with what the SoS has indicated as a reasonable opportunity to demonstrate safety for release, is not sufficient to meet the threshold to establish arbitrariness.

Thus, a high threshold must be surmounted in order to establish a violation of Article 5(1): it requires that an opportunity must be afforded to the prisoner which is reasonable in all the circumstances, taking into account their history and prognosis, the risks they present, the competing needs of other prisoners, the resources available and the use which has been made of such rehabilitative opportunity as there has been. It is not simply that Article 5 creates an obligation to maximise the provision available to the prisoner, nor does it entitle the court to substitute with hindsight its own view of the quality of the management of a prisoner, and to characterise as arbitrary detention in any case which it concludes might have been better managed.

Application of the principle to extended sentences

The Supreme Court held that the duty to provide an opportunity for rehabilitation as established in *James* should ap-

ply equally to prisoners detained during the extension period of an extended sentence, having regard to the indefinite duration of detention at this time (albeit not unlimited as with life or IPP sentences), its purpose of protecting the public from serious harm, and the possibility of change in response to opportunities for rehabilitation. The rationale in *James* that rehabilitation opportunities had to be available to IPP sentence prisoners where they were detained solely because of the risk they pose to the public applies equally to prisoners detained during the extension period of an extended sentence.

Application to the present case

Mr Brown had been provided various opportunities for rehabilitation, and the Court found that there could be no doubt he was provided with a real opportunity for rehabilitation during his custodial sentence and extended sentence. He was not left in limbo without sentencing planning or any attempt to provide him with an opportunity for rehabilitation: courses were provided and completed, regular planning meetings were held, efforts were made to find appropriate rehabilitative work and he was transferred to less restrictive conditions. It was Mr Brown's commission of a further offence, rather than the failure of the prison authorities to provide appropriate courses, which resulted in him serving the whole of his sentence. Thus, his detention during the extension period, or at any other point during his sentence, could not be described as arbitrary contrary to Article 5.

ACCESS TO REHABILITATIVE COURSES (ARTICLE 5) - LIFE SENTENCE

R (Dixon) v SSJ [2017] EWCA Civ 961

Mr Dixon is a former prisoner released on licence in March 2015 from a life sentence. He had previously been released on licence in February 2011, but was recalled to prison in October 2012 following his arrest on charges of involvement in offences of murder, attempted murder and causing an explosion. After a five month trial he was acquitted of those charges, but remained in custody pending further consideration of his case by the Parole Board.
At an oral hearing in September 2013, the Parole Board considered that it was not appropriate to direct the release of Mr Dixon from custody not to recommend his transfer to open conditions having concluded that his level of risk of serious harm to the public was high. The panel did, however, recommend that the appellant "should now undergo a psychological assessment" before further parole progress could be made. The prison service subsequently delayed arranging this assessment for three-and-a-half months. Despite arranging for an external assessment instead, Mr Dixon's release on parole was itself ultimately delayed by about 4 to 5 months. He sought to argue that this delay comprised a direct breach of Article 5(4), first at a judicial review and then on appeal.

HELD: There had not been a direct breach of the applicant's right, under Article 5(4), to have the lawfulness of his detention speedily decided. In *R (Kaiyam) v. Secretary of State for Justice [2014] UKSC 66*, the Supreme Court explained that under Art. 5(4) the State is also under an ancillary duty to provide a reasonable opportunity to a prisoner to rehabilitate himself and demonstrate that he no longer presents an unacceptable danger to the public. However, in disagreement with the decision of the ECtHR in *James v. U.K.* (25119/09) *(2013) 56 E.H.R.R. 12.*, the Supreme Court held that breaches of that ancillary duty, whilst giving rise to

damages for "legitimate frustration and anxiety", do not directly breach Article 5 (4) or 5(1) themselves. Such breaches will not, therefore, render imprisonment unlawful, or give rise to a second award of damages on that account. Mr Dixon sought to sidestep *Kaiyam* by arguing that the delay in providing psychological assessment in question breached Article 5(4) directly, whether or not it also breached the ancilliary duty identified in *Kaiyam*. The Court was unimpressed with this argument. It concluded that delay in providing a psychological assessment fell squarely within *Kaiyam*: there was no breach of Article 5(4), but only of the ancillary duty. By implication damages could only be sought in such situations on that sole account.

PAROLE BOARD; LIFER RECALL

R (Goldsworthy) v Secretary of State for Justice [2017] EWHC 2822 (Admin)

Mr Goldsworthy was a discretionary life sentenced prisoner who was sentenced in 2006. His tariff expired in 2009. He suffered from bowel cancer in 2009. He has a number of chronic physical disabilities, including nerve damage. He has restricted mobility, and suffers from incontinence. He uses a stoma and a colostomy bag. He suffers from neuropathic pain in his hands and feet which makes walking difficult, and uses a walking frame or a wheelchair. He also suffers from depression.

In 2017 the Parole Board ordered his release. In doing so the Parole Board recognised that he may be abusive to staff and resistant of care interventions. This was not deemed sufficiently indicative of a risk of future serious harm to justify his continued detention. Mr Goldsworthy was subsequently released to a care home. He displayed difficult behaviour within the care home when he learnt that he was terminally ill. In particular, he broke an iPad and a mug belonging to a carer. He was urgently recalled to prison. He lodged an application challenging his recall as being unlawful.

Permission was granted to bring a judicial review; and an order made that the SSJ immediately reconsider. The SSJ did so, stating that the residents the claimant was placed with were elderly and the staff were not used to dealing with offenders, and affirmed the decision to recall him.

HELD: The claim was allowed. The decision to recall was quashed, and £4000 damages awarded to the claimant for 33 days of unlawful detention. The court found (i) there was no evidence of a deterioration in behaviour that would indicate an increased risk of harm: he was acting in a way the Parole Board predicted he may well do; (ii) there was a failure to consider if recall was necessary and whether instead the claimant could have been moved; (iii) there was a failure to consider the stress which the claimant was under due to his diagnosis.

REPATRIATION

Bucpapa v SSJ [2017] EWHC 1896 (Admin)

The claimant sought judicial review of the Secretary of State's decision to refuse his application to repatriate to his country of origin, Albania, to serve the remainder of his sentence there. In his application for repatriation the claimant had relied on the scheme established by the Council of Europe's Convention on the Transfer of Sentenced Prisoners, the Repatriation of Prisoners Act 1984 and the UK-Albania prisoner transfer agreement. Under the scheme the "receiving" country would convert the

prisoner's sentence into one that accorded with their own laws. Under the scheme the receiving country is not permitted to aggravate the sentence.

The claimant had been convicted in the UK of conspiracy to commit robbery, kidnapping and possession of a firearm. He had been sentenced to 30 years, with automatic release on licence after 15 years. The Secretary of State was provided with a submission setting out that the maximum sentence available to the Albanian Court would have been 20 years. This meant that the converted sentence in Albania would have provided for his release three years and nine months earlier than if he remained a prisoner in the UK. The Secretary of State rejected the application for repatriation, citing the seriousness of the claimant's offences and the undesirability of an earlier release.

The claimant submitted that this decision was irrational, as (1) the laws of Albania meant it was not possible for his sentence to be any longer there; (2) he was being unfairly singled out, as the Secretary of State had, in the past, granted applications for prisoners' repatriation to Albania even though they too would have had their sentences shortened as a result.

HELD: The claim was allowed. The Court agreed with the claimant's first submission. The Secretary of State had based his decision on the fact that the claimant could be released earlier if he repatriated to Albania. However, the Albanian sentence was the maximum available to the Albanian Court for offences of this nature. It was irrational to reject an application because of the inevitable consequence of the scheme which provided for the transfer of prisoners between the UK and Albania. The Court noted that the Secretary of State may not have realised that the Albanian Court had converted the sentence into the maximum available, as the submission he received did not explain the basis of the sentence. Although it was not relevant to the overall decision, the Court did not find favour with the claimant's second argument. Each case should be decided on its own facts, and the mere fact that others in a superficially similar situation to the claimant had been repatriated would not affect the ultimate test, which was whether any individual decision was rational.

CHALLENGE TO IPP AND PAROLE

Henley-Smith v SSJ [2017] EWHC 1948 (Admin)

The claimant sought judicial review of the Secretary of State's failure to consult on and exercise his power under s.128 Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). Under this section, the Secretary of State had discretion to relax the Parole Board's test for releasing prisoners serving sentences of imprisonment for public protection (IPP). Between 1996 and 2006 the claimant had been convicted of nine offences against women he was in a relationship with. He was given an IPP sentence in 2007 after reoffending against his then girlfriend. The claimant's minimum term ended in 2008 but on three separate occasions the Parole Board concluded that he remained a high risk to women, and it was likely that he would reoffend.

Although IPP sentences were abolished in 2012 by LASPO, existing IPP sentences remained in place. In 2015, the Secretary of State was given the power under s.128 LASPO to relax the test applied by the Parole Board in deciding whether to release prisoners serving IPP sentences. He chose not to exercise this power in this case.

The claimant submitted that (1) Parliamentary debates preceding LASPO indicated that Parliament had intended for the test applied by the Parole Board to be relaxed; (2) The Secretary of State had reneged on statements made in Parliament that there would be a consultation on the exercise of the power in s.128 LASPO; (3) It was unlawful for the Secretary of State to fail to exercise the power; (4) The test for release breached equality requirements because of the effect it had on prisoners with mental health problems; and (5) Without a more relaxed test for release, IPP sentences risked breaching Article 3 of the ECHR.

HELD: The claim was refused. The court did not accept any of the submissions. They took the view that the claimant was not entitled to rely on the contents of Parliamentary debates; the intention of Parliament is expressed solely in the wording of the legislation. Further it was not for the judiciary to demand that a statement made in a political forum to politicians be enacted, in the absence of any statutory authority for it. They did not agree that the failure to exercise the power given to the Secretary of State was unlawful. The Secretary of State had exercised his discretion reasonably, rationally and proportionately in deciding instead to improve the operation of IPP sentences to allow more prisoners to meet the conditions for release. The court found that the claimant did not have a disability within the meaning of the Equality Act 2010 and in any event the Secretary of State had taken steps to allow for quicker progression of prisoners through the prison system, focusing specifically on prisoners with mental health problems. The claimant's continued detention was necessary to protect a section of the public and therefore did not breach Article 3 of the ECHR. Finally, the claimant had been given the opportunity to demonstrate that he was no longer a risk to women.

CHALLENGE TO EXTENDED DETERMINATE SENTENCE

Stott v SSJ [2017] EWHC 214 (Admin)

Mr Stott was serving an extended determinate sentence, made up of a custodial term of 21 years and an extension of 4 years, for sexual offences. He argued that he suffered unlawful discrimination under Article 14 of the ECHR when compared to prisoners serving life sentences. Under s.246A Criminal Justice Act 2003, prisoners serving extended determinate sentences could only be eligible for parole two thirds of the way into their sentence, whereas those serving life sentences could be eligible halfway through their sentence (the minimum term of a life sentence is normally one half of the appropriate determinate term to reflect the need for punishment and deterrence). He submitted that he should be allowed to apply for parole after serving half of his sentence.

The Secretary of State argued that the court was bound by the decision of the House of Lords in *R. (Clift) v Secretary of State for the Home Department [2006] UKHL 54, [2007] 1 A.C. 484,* in which it was held that different prison terms did not qualify as "other status" for the purposes of determining whether discrimination had occurred under Article 14.

HELD: The claim was refused. Article 14 was not a freestanding right, and had to be invoked in the context of discrimination with regard to another Article contained within the ECHR. In this case, the relevant Article would be Arti-

cle 5.
The Court agreed that it was bound by the House of Lords decision in *Clift.* However, it noted that the *Clift* case had been subsequently taken to the European Court of Justice (ECJ) in 2010 (*Clift v United Kingdom (7205/07) Times, July 21, 2010*). In this case the ECJ held that there was no objective justification for the difference in treatment between prisoners serving extended determinate sentences and those serving life sentences. Therefore, the ECJ concluded that Article 14 in the context of Article 5 had been breached, and accordingly the instant Court had to consider whether the House of Lords decision in *Clift* could be reversed. However, the Court in this instant could not interfere with the sentencing policy legislated for by Parliament. All it could do was make a declaration of incompatibility under the Human Rights Act 1998, of s.246A Criminal Justice Act 2003 with Article 14 of the ECHR, which it would have been prepared to do. The Court was indeed bound by the House of Lords decision in *Clift* so the claim had to fail. However, it was prepared to grant a certificate under s.12 Administration of Justice Act 1969 to permit an application directly to the Supreme Court so the decision in *Clift* could be revisited in light of the ECJ's decision.

CHALLENGE TO IPP SENTENCE

Knights v SSJ [2017] EWCA Civ 1053

The claimant had pleaded guilty to offences relating to indecent images of children and was sentenced in 2008, three weeks before changes to the law enacted by the Criminal Justice and Immigration Act 2008 came into force. Had these changes been in force when the claimant was being sentenced, he would not have been eligible for an IPP sentence. The claimant argued that the length of his term compared to the gravity of his offence represented a breach of Articles 3 (prohibition of torture and inhuman or degrading treatment) and 5 (1) (right to liberty) of the ECHR.
The claimant also argued that Article 14 (the right not to suffer discrimination) of the ECHR was breached because those sentenced for identical offences after the changes in the law came into force would not still be in custody. The first instance Judge rejected these arguments, holding that the continuation of his detention did not breach the ECHR. The claimant appealed.

HELD: The appeal was dismissed. It was held that there had been no breach of Article 3. The claimant had served the minimum term of his IPP sentence but he continued to be detained because of the risk that, if he were to be released on parole, he would breach his licence conditions which were intended to protect the public. The claimant had already been released on parole twice and both times had breached his licence conditions. It was also held that there was no breach of Article 5(1). It had been established in *Saadi v United Kingdom (13229/03)(2008)* that as long as there was a sufficient causal link between detention and a lawful conviction, the detention was a matter for national authorities. The claimant had argued that one of the reasons he was unable to demonstrate he did not pose a risk was that there had been delays in his accessing courses which would have helped him in this regard. However, the Court agreed with the first instance Judge that such delays had to be considered in the context of the prison system's limited resources. Further, the provision of courses would not necessarily have made a difference, given that he had already twice breached licence conditions.
As to Article 14, the Court held that the first instance Judge had correctly con-

cluded that in light of the House of Lords decision in *R. (Clift) v Secretary of State for the Home Department [2006] UKHL 54, [2007] 1 A.C. 484,* (in which it was held that differing lengths of prison sentences did not qualify as "other status" for the purposes of determining whether discrimination had occurred under Article 14), Article 14 was not engaged here. The effect of finding discrimination here would be to make change to the law impossible.

HOME DETENTION CURFEW

Mormoroc v SSJ [2017] EWCA Civ 989 (HDC)

The appellant prisoner, an EU national, appealed against the dismissal of his claim for judicial review of the Secretary of State's refusal to grant him early release on dome detention curfew (HDC) under s.246 Criminal Justice Act 2003 (CJA). As a fixed term prisoner, the appellant would have been eligible for automatic early release after serving half his sentence, pursuant to s.244 CJA.
The Secretary of State declined to release the appellant on HDC, based on a policy in Prison Service Instruction (PSI) 52/2011 relating to foreign prisoners who had been notified that they were liable to deported but a decision had not been taken to deport them. Under the PSI, such prisoners, as in the appellant's case, should not be deemed suitable for release on HDC unless there were exceptional circumstances.

The appellant submitted that (1) the policy amounted to direct discrimination against him on grounds of nationality under the Equality Act 2010, Article 14 of the ECHR, and/or Directive 2004/38 articles 24, 27 and 30, which deal with EU nationals' rights to freedom of movement within the EU; (2) although in the case of *R (Francis) v Secretary of State for Justice [2012] EWCA Civ* 1200, it was held that there was no discrimination against a foreign prisoner, because the difference in treatment was due to immigration status, not because she was Jamaican, the index case was different because the appellant was an EU national, and therefore the EU directives on freedom of movement were engaged; (3) even if the difference in treatment was, in fact, because of a difference in immigration status rather than nationality, that still amounted to indirect discrimination under EU law; and (4) the policy carried an unacceptable risk of illegality because of an inherent risk that some prisoners would be denied HDC if no decision had been taken in their case

HELD: The appeal was dismissed. The Court found that there was no discrimination on grounds of nationality. The difference in treatment was based on liability to be deported, not nationality. The decision in *Francis* was not distinguishable with the index case. In both cases, the difference in treatment was again based on liability to be deported, and not nationality. The Court stated that the policy was not indirectly discriminatory under EU law. The purpose of generally granting HDC to those not liable to be deported, and denying it to those liable to be deported, was that in the case of the former, the aim was to promote resettlement into the UK community, which was not relevant to those liable to be deported. It was necessary to have a policy for those who were liable to be deported, but who had not yet had a decision taken on this. Finally the submission that the policy risked illegality could only succeed if the policy was found to be discriminatory, which it had not been so this submission was not accepted.

BREACH OF RULE 39; ARTICLE 8 (1) ECHR

Chester v Ministry of Justice [2017] [unreported]

Mr Chester was previously awarded damages of £1,000 on 10 April 2014 after the York County Court found that HMP Full Sutton had breached Article 8 (1) ECHR by opening his legal correspondence. The letter in question was apparently from the County Court Money Claims Centre and had the abbreviation "CCMCC" on its envelope.

In February 2017, HMP Full Sutton once again opened a letter to Mr Chester from the County Court Money Claims Centre with the abbreviation "CCMCC" on its envelope. Mr Chester submitted an internal complaint. The governor responded that the letter was not in a double envelope nor did it contain a reference to Rule 39 on its face; he added that it had been opened in error and offered an apology. Mr Chester did not accept this response: he noted that the governor had previously assured him that he had briefed his staff about court correspondence and the meaning of abbreviation "CCMCC". He rejected the offer of an apology and asserted breach of Article 8(1) ECHR. He claimed for a minimum of £1,500 in damages to reflect that this was the second time his Article 8(1) rights had been breached by staff at HMP Full Sutton opening his legal correspondence.

In response, the Ministry of Justice reasserted that the letter had been opened by mistake and argued that Mr Chester had suffered no damage and was therefore not entitled to any remedy.

The York County Court awarded Mr Chester £1,000, as it had in 10 April 2014. This would suggest that it did not accept his argument that the breach was aggravated by the fact that it had occurred for the second time.

Please note that judgments of the County Court are not binding on other courts.

CHILD PROTECTION ORDER

R. (Khosa) v SSJ [2017] EWHC 1355 (Admin)

Mr Khosa, a prisoner serving a life sentence for murder, sought judicial review of a decision by the prison authorities to make him subject to a form of a child protection order. The impact of the order was that no children would be allowed to visit him, which was concerning for Mr Khosa as he wished to be able to see his nieces and nephews if they visited him.

The order was brought into effect in October 2015. It was then decided in January 2016 that it need not continue. However, there was an occasion in February 2016, when one of Mr Khosa's nephews requested to visit him but was turned down.

The issues in question were, firstly, whether or not the order should have been made. If it should not have been made, then the court would consider whether the distress caused to the claimant would merit an award of damages.

HELD: It was accepted by the court that there was at least some possible basis for making an order, as the murder in which Mr Khosa was involved also entailed holding up a child at gunpoint. However, the court commented that it was difficult to view Mr Khosa as a risk to children whilst he remained in custody. Crucially, it was also accepted by the defendant, that there was not a

proper basis for saying that the order was made properly and within the terms of Article 8 of the ECHR, namely the right to a private and family life.

The court therefore concluded that it was appropriate to grant Mr Khosa relief in the form of a declaration that the order should never have been made. Mr Khosa sought damages for having been caused 'extreme distress' in all of the circumstances, not least on the occasion where he was denied a visit from his nephew. The court rejected this claim for damages. Cases decided by the ECtHR confirm that the appropriate relief in this matter would be a declaration in the terms described. Though the decision made by the prison authorities was cause for concern, to say that it was of such concern as to merit an award of damages was 'not sustainable'.

DEPORTATION - ARTICLE 8 (FAMILY LIFE)

WZ (China) v Secretary of State for the Home Department [2017] EWCA Civ 795

The Appellant, a Chinese citizen, made an unsuccessful asylum claim in 1998, but he was given temporary admission with a reporting requirement that he complied with until 2006. The Appellant and his wife had two children in 2007 and 2009; in 2009 they applied for leave to remain in the UK. His wife and children were granted indefinite leave outside of the Immigration Rules, and in 2010 and 2011 the Appellant's wife and children became British citizens. In 2012 the claimant was sentenced to 2 years in prison for production of cannabis. He was released on bail in 2013 and later that year the Secretary of State gave notice that he was liable for automatic deportation. In 2014 the First-tier Tribunal allowed the Appellant's appeal on grounds of proportionality under Article 8 of the ECHR, however, the Upper Tribunal subsequently allowed the SoS's appeal- it determined that it was not unduly harsh to expect his wife and children- all British citizens- to move to China with the Appellant.

The Appellant appealed to the Court of Appeal on the grounds that the Upper Tribunal had made an error of law.

HELD: The appeal was dismissed. The judges upheld the decision stating that the Appellant's deportation was in the public's interest, given the 2 years' imprisonment, despite the fact that the First-tier Tribunal showed that he was unlikely to reoffend and has an established family life in the UK. The judges further stated that it was not out of the ordinary for deportation to result in a break-up of the deportee's family. The judgment also took into account that neither the Appellant or his wife speak sufficient English and therefore the family would find it easier to reside in China. Under the Immigration Rules, the circumstances in this case did not meet the test requiring very compelling circumstances to avoid deportation. The judgment concluded that the First-tier Tribunal failed to give weight to the public interest in deportation, which the Upper Tribunal correctly accounted for.

OMBUDSMAN CASES

Public Protection Restriction

Mr. A wrote to the PPO to investigate a complaint about the public protection restriction placed on him while at HMP Long Lartin and which remained in place when he was transferred to HMP Lowdham Grange. He requested removal of the restriction on the basis that he contended that as it was set up as a joint non-contact by a social worker and the prison, so it was not up to the individual who wished the non-contact (Person X) to request cancellation of the non-contact.

The prison stated that the Public Protection Manual (PPM) had been followed and that current non-contact restriction will remain unless the individual to which the order relates (Person X) contacts the Public Protection Unit (PPU) to retract their request to prevent contact. Mr. A appealed and the Custodial Operational Manager responded by agreeing with the initial reply adding that the procedure is guided by PPM and therefore the social worker has no authority over the restriction.

The Ombudsman's investigator reviewed the complaint and the relevant section of the PPM, and contacted HMP Lowdham Grange for an update on the current restrictions. She considered the 'Prisoner Notification of Identification as Being Subject to Restrictions' form, signed by Mr. A, indicating that he was made the subject of a no contact request in respect of the individual, Person X.

Mr. A supported the complaint to the Ombudsman with a letter stating his child protection restrictions had been removed. HMP Lowdham Grange took the position that the non-contact restrictions in relation to Person X however were to remain in place.

The Ombudsman was satisfied that HMP Lowdham Grange had sufficiently explained the restriction which was correctly imposed under the PPM, and advised on what was required to remove the no-contact restriction and therefore the complaint was not upheld.

Lack of exercise and facilities

Mr. B complained about a lack of access to exercise and facilities on the Duty of Care (DOC) regime at HMP Belmarsh. He alleged that he had not been getting showers, exercise or phone calls; for example he claimed he had gone 11 days at one point without a shower. He felt the regime did not comply with prison policy nor human rights.

Mr. B was placed on the DOC following his return to normal location from the Segregation Unit after an altercation with his cellmate where he is understood to have thrown boiling water over his cellmate as he slept. Mr. B was removed from DOC on 5th October 2016 when the scheme was withdrawn at Belmarsh.

Her Majesty's Inspectorate of Prisons' Report had previously criticised the DOC regime and its governance stating that it "should be improved and regular reviews of each prisoner should be documented". In the Situational Prisoner Care Regime document, it was acknowledged that Belmarsh had found it "increasingly difficult" to provide prisoners on the DOC regime with a range of activities including access to exercise, showers and PIN telephones; the same activities as the ones Mr. B raised in his complaint forms and letter to the PPO.

The PPO upheld the complaint as it found that Mr. B was subjected to restricted activities while on the DOC regime and that the restrictions of this regime were also highlighted and criticised by the HMIP. However, as Belmarsh has withdrawn the Duty of Care (DOC) regime and replaced it with the Situational Prisoner Care Regime which provides "facilities and services offered to all other prisoners" at Belmarsh, no further recommendations were made.

Time in Open Air

Mr C complained to the PPO because HMP Littlehey cancelled time in the open air and did not record the reasons for doing this.

HMP Littlehey said the exercise yard had been closed due to inclement weather conditions and for the health and safety of prisoners. Mr C reported that reasons given by wing staff for the closure of the exercise yard included that there were too many puddles inside; that staff did not want the floor to get dirty; and other wings were not doing exercise. On one occasion Mr C complained that time in the open air had been cancelled even though there had only been light showers earlier on in the day.

Prison Service Instruction (PSI) 75/2011 states that prisoners must have a minimum of 30 minutes in the open air on a daily basis; that this time is subject to weather conditions; and any cancellations must be recorded by the authorised manager, as nominated by the Governor.

The PPO requested the dates when open air time had been cancelled at HMP Littlehey and the reasons for this. HMP Littlehey informed the PPO that no log existed for recording when exercise was cancelled.

The PPO considered that as no record of when time in the open air was cancelled could be provided, there was no evidence that cancellations were in accordance with the provisions in the PSI.

The complaint was upheld and the PPO recommended that the Governor of HMP Littlehey nominated managers to be authorised to cancel time in the open air, and ensures that all nominated managers record any decisions they make to cancel time in the open air and that these records are accessible.

Access to Clothes Washing Facilities

Mr D complained about the lack of washing facilities for personal clothing on the induction wing (Wing E) at HMP Littlehey. He asked staff to let him access alternative washing facilities or agree to pay for his clothes to be washed. The response said that at that time in October 2016 the prison were unable to provide a washing machine. Mr D then submitted a COMP 1A appeal asserting that the wing had lacked washing facilities for a long time and staff had failed to resolve this issue. A custodial manager replied explaining that the induction wing had never had washing facilities because it lacks power, a water supply and waste access that would be suitable for the installation of a washing machine. Mr D then took his complaint to the PPO asserting breach of PSI 74/2001: Residential Services, by failing to providing washing facilities.

On investigation PSI 75/2011 was considered in which paragraph 2.10 states ‘Prisoners have access to washing facilities (not in living accommodation) for

personal clothing'. The PPO contacted the prison and asked about the progress of the installation of a washing machine and length of stay in the induction wing. The prison said that they did not want prisoners to be on the Induction Wing for more than 2 months and that steps had been taken to install a washing machine and that the assistance of an outside contractor was being sought in order to overcome the logistical difficulties. They also said that Mr D stayed in the Induction Wing for eight days and is now on a different wing in which he has washing facilities.

Whilst it was acknowledged that the Induction Wing does not have the facilities to allow prisoners to wash their own clothes which breaches PSI 75/2011, remedial action was being taken by the staff to try and resolve the issue despite the logistical difficulties. The complaint was upheld due to the breach but on the facts of Mr D's own circumstances there was no further remedial action that could be taken and it was not considered reasonable for the prison to have to pay for Mr D's clothing to be washed for the eight day period during which he was without facilities.

PRISONERS' LEGAL RIGHTS BULLETIN SUBSCRIPTION FORM

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

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JUSTICE BEHIND BARS

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Company: _____

Address: _____

_____ Postcode: _____

Telephone: _____ Fax: _____

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

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