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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CASE REPORTS

CATEGORY A

R (Steele) v Secretary of State for Justice [2018] EWHC 1072 (Admin)

This case concerned a claim by Mr Steele, a serving prisoner, that the Secretary of State for Justice acted unlawfully by failing to hold an oral hearing as part of a review of his Category A status.

Background

In 1998, Mr Steele was convicted of three counts of murder and conspiracy to import cannabis and was sentenced to life imprisonment with a tariff of 23 years. Throughout his incarceration, he has been detained in Category A conditions.

In May 2017, a Local Advisory Panel (LAP) met to consider Mr Steele's security category and recommended that he be downgraded to Category B. The reasons given for this recommendation were Mr Steele's positive engagement with staff throughout his imprisonment and his age and maturity. The LAP did note, however, that he had declined to participate in any offending behaviour programmes because of his maintenance of innocence.

In June 2017, the Director of Long Term and High Security Prisons Group (completed a review of Mr Steele's security category and, having taken into account the LAP recommendation, decided that there were no grounds for holding an oral hearing and that Mr Steele should remain Category A. The Director, following paragraph 4.2 of PSI 08/2013, concluded that there was insufficient evidence that Mr Steele's risk of reoffending if unlawfully at large had significantly reduced and he should not, therefore, be downgraded to Category B.

The Case

The case considered Mr Steele's challenge to the Director's decision not to hold an oral hearing as part of the categorisation review. The claimant argued that the Director did not fairly or properly apply the guidance set out in paragraphs 4.6 and 4.7 of PSI 08/2013 and that his case warranted an oral hearing for the following reasons:

- there was a factual dispute with regards to the claimant's willingness and ability to attend offending behaviour courses;
- there was a significant dispute in respect of expert opinion;
- his case involved a significant length of time as he had been a Category A prisoner for over 20 years; and
- his case had reached an impasse.

HHJ Gosnell dismissed the argument that there was a factual dispute in relation to the claimant's willingness to engage with offending behaviour programmes because it was a matter of assessment, not fact.

The judge also found that the disagreement between the LAP and the Director did not amount to a dispute between experts and as such, it was not a factor the Director was required to consider when determining the necessity for an oral hearing.

In relation to the length of time the claimant had spent in Category A conditions, the judge observed that the Director had misinterpreted PSI 08/2013. However, even though the Director was wrong in his assessment that, in addition to the length of time served, there must be a further compelling reason to hold an oral hearing, the judge was of the opinion that holding an oral hearing

to examine the length of time served was unlikely to add anything to the decision-making process.

Finally, the judge observed that, as is common in cases where prisoners cannot participate in offender behaviour programmes whilst maintaining their innocence, there was an obvious impasse in the claimant's case. There was, however, no need to convene an oral hearing in relation to the impasse because, as set out in the PSI, an oral hearing serves to understand the reasons for and potential solutions to the impasse. In relation to the impasse, there was no need for the Director to hold an oral hearing because possible solutions had previously been suggested to the claimant and he had chosen not to pursue them.

HELD: The Director of Long Term and High Security Prisons Group was not wrong to refuse a Category A prisoner an oral hearing during the course of his review. The claim was dismissed.

IMMIGRATION DETAINEES IN PRISON

R (on the application of Muhammad Rehman) v (1) Secretary of State for Justice and (2) Secretary of State for the Home Department (24 July 2018)

The claimant issued a claim for judicial review following his detention in prison under immigration powers. The claimant had been detained in prison and repeatedly disclosed to the medical staff in prison that he was a victim of torture. These disclosures were neither investigated nor reported to the Secretary of State for the Home Department (SSHD) who was responsible for authorising and managing the claimant's detention.

The case raises an issue of wide importance, that being that potentially vulnerable immigration detainees who are detained in prisons are not provided with the same protections that would lead to their identification and release as those detained in Immigration Removal Centres (IRCs). It further highlights the gap that exists between the detention of vulnerable people (such as victims of torture or those suffering from mental ill-health) detained under immigration legislation within the prison system and the scheme that governs those detained in IRCs.

Under Rules 34 and 35 of the Detention Centre Rules 2001, which are applied by IRCs, there is a mechanism in place to identify those who are not suitable for detention by giving such detainees a prompt physical and mental examination. This enables the medical staff to report any detainees whose health is likely to be negatively affected by continued detention to the SSHD. The SSHD must then assess the report within two working days to determine whether continued detention remains appropriate for that detainee. The SSHD policy document sets out that the purpose of Rule 35 is '*to ensure that particularly vulnerable detainees are brought to the attention of those with direct responsibility for authorising, maintaining and reviewing detention'.*

However, the Detention Centre Rules 2001 do not apply to immigration detainees held within the prison system. These detainees are instead subject to different rules (the Prison Rules 1999, Prison Service Instructions and Prison Service Orders), which offer no equivalent safeguards. Since the prison estate is accountable to the Secretary of State for Justice and not the SSHD, there is no obligation on medical staff to report torture or health concerns to the SSHD, despite the fact that the SSHD are di-

rectly responsible for a detention of an individual in the prison system. The effect of this inconsistency between the rules for those detained in IRCs and those in the prison system means that detainees in prison who would be examined and found to be unsuitable for detention owing to their experiences of torture and/or their deteriorating mental or physical health if they were in an IRC are instead often left in detention for excessive periods of time due to the fact that the SSHD is unaware of their vulnerabilities.

The judicial review brought by the claimant submitted to the High Court that:

- there is fundamental unfairness/ unreasonableness in the failure to apply the same rules to those detained in prisons as compared to those detained in IRCs;
- it is unlawful discrimination in breach of Article 14 of the European Convention on Human Rights; and
- It is an unlawful breach of the Equality Act 2010.

As at the end of March 2018, Home Office statistics showed that there were 358 immigration detainees held in prison. Consequently, it is considered that the implications of this challenge are of great importance since it would affect such a significant number of people in detention.

REMOVAL FROM ASSOCIATION (North of Ireland)

Brockwell's (Derek) Application [2017] NIQB 53 (01 June 2017) [2017] NIQB 53 – Northern Ireland

Derek Brockwell was imprisoned following a significant record of criminal activities, often violent. Mr Brockwell was held under a regime provided for under Rule 32 of the Northern Ireland Prison Rules, which deals with Removal from Association.

Under a Rule 32 regime Mr Brockwell was subject to restriction of association. In practice, Mr Brockwell was housed in a secure unit in the prison with a number of individual cells. The unit is manned 24 hours a day and 7 days per week. The prisoner is permitted one hour's exercise per day and otherwise remains in the cell for 23 hours per day. Meals are taken in the cell, which is where sanitary facilities are provided. Domestic visits must take place in closed conditions, including a glass screen.

Mr Brockwell had remained under the Rule 32 regime for at least 8 months, following a number of extensions after an initial 72-hour period.

Mr Brockwell challenged the Rule 32 regime. Among other complaints, it was alleged that procedurally the Rule 32 regime had been applied without sufficient explanation being provided to Mr Brockwell, including as to how he could exit the regime, and substantively that the regime was not necessary for the purposes for which it is permitted.

HELD: the prison authorities had not validly applied the Rule 32 regime and it should be halted. This did not however prohibit the prison from reconsidering using the Rule 32 regime again, provided the correct procedures were followed.

Under the law, Rule 32 regimes should be imposed where it is 'necessary for the maintenance of good order or discipline, or to ensure the safety of officers, prisoners or any other person or in his own interests that the association permitted to a prisoner should be restrict-

ed, either generally or for particular purposes, the governor may arrange for the restriction of his association'.

The relevant guidelines provided that 'engagement with the prisoner is vital to the legal integrity of the process and decisions to invoke or extend Rule 32 should not be taken lightly or give the impression that governors and staff are simply following a process '.

In particular, the guidelines provide that 'the prisoner should be informed that the governor is actively considering placing them on Rule 32 and their reasons behind the decision. … Procedural fairness dictates that the information provided to the prisoner must be of sufficient detail to allow the prisoner to make meaningful representations that will inform the decision making in arriving at the decision to invoke Rule 32 '. The guidelines also provided that 'such restrictions will be monitored and reviewed within the required time scales and a prisoner will not be subjected to such arrangements for any longer than necessary. Representations from the prisoner should be taken into account '.

The court found that the prison had not followed the applicable rules or guidelines in Mr Brockwell's case. They had not provided evidence that they had considered other less drastic options to any potential risks that Mr Brockwell posed. It was found that the prison had seemingly not considered any other options, and while it was not for the court to determine potential practical prison regimes, there were likely some available options such as a specialist regime with other prisoners or CCTV surveillance which could have been considered, and there was no record of this.

There was however a significant lack of information on what considerations the prison had used in making its Rule 32 regime decision with respect to Mr Brockwell. This also meant that Mr Brockwell cannot have been said to have properly been kept informed of decisions related to the Rule 32 regime or of what he could do in order to be taken off such regime.

Based on the procedural flaws in terms of lack of information, and the substantive flaws in not making relevant assessments for alternatives, the court determined that the Rule 32 regime was not being lawfully applied. It did however note that if the correct laws and guidelines were followed, it may be possible for the prison to come to the same conclusion and re-apply the Rule 32 regime to Mr Brockwell, but it must follow the correct rules to do this.

CHALLENGE TO THE INDEPENDENCE OF THE PAROLE BOARD

Paul Wakenshaw v. Secretary of State for Justice and Parole Board of England and Wales (2018)

Following the sudden resignation of the Chair of the Board, Professor, Nick Hardwick, on 27 March 2018, in the aftermath of the case of *Worboys* (see last issue of the Bulletin), the High Court considered a challenge to the independence of the Parole Board. The challenge was based on the lack of security of tenure for Board members.

The claimant, Paul Wakenshaw, had a long record of criminal offending. In 2009 he received an IPP sentence. This means that his imprisonment term has no fixed length of time but he had to spend a minimum amount of time in prison. His detention is now periodically reviewed by the Parole Board to determine his suitability for release.

Mr Wakenshaw began judicial review

proceedings relating to his current Parole Board review. He claimed that the Parole Board lacked the requisite independence under common law and Article 5(4) of the European Convention on Human Rights. Mr Wakenshaw stated that he could not receive a fair trial at the hands of the Parole Board. Mr Wakenshaw wanted his current review to go ahead but sought:

1. A declaration that the Board is not an objectively fair adjudicative body;
2. An interim order to halt the selection process of a new chair of the Board.

Mr Wakenshaw relied on the following grounds:

a. The Parole Board remains sponsored by the Ministry of Justice. As the MOJ is a party to proceedings before the Board it cannot be said that there is an appearance of fairness.
b. The process of appointment of the Board is flawed.
c. Tenure [of Board members] is too short and too precarious.
d. The power of the Secretary of State to give directions to the Board challenges its independence.

When considering Mr Wakenshaw's claim, the court considered the facts of the case *R Brooke and another v Parole Board (and another)* which was decided in 2007. In *Brooke*, the independence of the Parole Board had been challenged in that there had been criticisms about the constitution of the Board and its works. Applying the standard of 'objective independence', that the court must be and be seen to be fair and impartial, the court held that the sponsorship of the Parole Board by the MOJ did not affect the independence of the Board in that case.

After the *Brooke* case, the appointment process of the Board was altered. For the appointment of the Board's chair, an advisory panel is now formed which consists of a senior official, a High Court judge and two independent members. The applicants are sifted on paper, then those chosen are interviewed and a reduced pool is presented to the Minister of Justice for his choice. The Minister is permitted to consider any candidate before or after the interview by the panel. The Minister can reject any potential candidate and appoint someone else but if he were to do so, he must consult the Commissioner for Public Appointments and justify the appointment.

Mr Wakenshaw claimed that the changes in the process made since the *Brooke* case had not cured the problems that were identified by the court in that case. The court in the Wakenshaw case disagreed: the new process was fair and impartial and would be seen to be so by an observer. It held there was no merit in Mr Wakenshaw's claim that the process of the appointment of the Board is flawed.

HELD: The court held there were no merits in the grounds (a) (b) and (d). With regard to ground (c), the issue of board members' tenure, the court found that the relatively short period of appointment of 3 or 4 years coupled with the power of the Secretary of State to remove anyone appointed if they failed to perform their duties (without a procedure to determine the merit of that decision), failed the test of objective independence. 'A reasonable, albeit well-informed, observer could conclude that the short term of appointment, coupled with the precarious nature of the tenure, might wrongly influence a decision that had to be made'.

The court considered the resignation

process of Nick Hardwick to be an example of the precarious nature of tenure. It felt that it was not acceptable for the Secretary of State to pressurise the chair of the Parole Board to resign because he is dissatisfied with the chair's conduct without formal proceedings. The chair and other members of the board make up a quasi-judicial board in respect of which there must be complete judicial independence. The Secretary of State's action breached the principle of judicial independence enshrined in the Act of Settlement 1701. If the Secretary of State considers that a chair or board member) should be removed then he should take formal steps to remove him.

For that reason, the court considered that the provisions of tenure of Parole Board membership failed the test of objective independence and granted permission to Mr Wakenshaw limited to seeking a declaration on this basis.
Mr Wakenshaw's application for an interim order to halt the appointment of a new chair was refused as the court did not consider that it should halt the current selection process for. Instead, it recommended the provision of a fully independent and impartial review to examine the merits of a board member's removal – to apply to both existing and future members.

REVOCATION OF CONDITIONAL RELEASE

Etute v Luxembourg (application no. 18233/16) European Court of Human Rights 30 January 2018 ECHR 113 (2018)

The European Court of Human Rights has ruled that Article 5(4) (the right to challenge the lawfulness of one's detention or arrest) applies to the revocation of a prisoner's conditional release into the community. This revocation was held to be a new decision, separate from his original sentence. The applicant in this case, Mr Etute, was therefore held to be entitled to a judicial appeal against it.

In 2010 Mr Etute was sentenced to 30 months' imprisonment. Later, in 2013, he was granted conditional release from prison under the Luxembourg Criminal Code. In line with this code, where the release is later revoked, the individual is recalled to prison and must restart their custodial sentence – the time spent in the community does not count towards the custodial term to serve when recalled back into custody.

In 2015 Mr Etute's release on licence was revoked on the basis that he had failed to comply with the licence conditions imposed on him. This case concerned Mr Etute's complaint, relying on Article 5(4), that under Luxembourg law he was unable to appeal this decision to revoke his release.

The court held that the decision to revoke Mr Etute's release amounted to a new decision, made on the basis of new facts. This new decision, it was found, engaged Article 5(4) and thereby entitled Mr Etute to a judicial appeal against it – an appeal that was not available to him in Luxembourg law.

This ruling is important because it contrasts with previous decisions of the European Court of Human Rights in this area. The court has previously held that because the original sentencing process satisfies the requirements of Article 5(1), no new issues can arise under Article 5 during the course of that sentence. In previous cases, therefore, the revocation of a prisoner's conditional release has not been found to engage Article 5(4) (see, for example: *Brown v*

UK App No 968/04, 26 October 2004, unreported; and *Ganusauskas v Lithuania* App No 47922/99, 7 September 1999; [1999] Prison LR 124). This is because this release was considered to be during the course of the original sentence.

However, there is a difficultly in identifying a clear principle from this ruling that can be applied to the UK. This is because the ruling itself does not address the conflict with the court's earlier decisions this area, though two of the judges do deal with this issue to some extent. The first, Judge Pinto de Albuquerque, addresses this inconsistency by casting doubt on the correctness of the earlier, inconsistent cases, such as *Brown*. Judge Kuris, the second, distinguishes *Etute* and *Brown* on the basis that in *Brown* UK law already provided for judicial review of the decision to revoke the prisoner's conditional release, which Luxembourg law did not do in *Etute*. Judge Kuris went on to note the weight attached to *Brown* by the UK Supreme Court in *R (Whiston) v Secretary of State for Justice* [2014] UKSC 39; [2015] AC 176. In *Whiston* the Supreme Court said that Article 5(4) was not engaged by the revocation of conditional releases in relation prisoners serving determinate sentences. Moreover, the UK courts have since held *Whiston* to be binding authority for this statement (see, for example: *R (Youngsam) v Parole Board* [2017] EWHC (Admin), a decision which is due to be considered in the Court of Appeal in December 2018).

PRISON CONDITIONS

Sokolov v Russia (application no. 63392/09) European Court of Human Rights 28 November 2017 ECHR 1054 (2017)

This case concerns a Russian prisoner, Mr Sokolov, who was serving a prison sentence of five years in a prison 2,400km away from his family. After being convicted Mr Sokolov's mother died, followed by his father 5 months later. He was refused permission to attend either funeral. No provision was made in Russian law to enable a prisoner to attend a funeral outside of the region in which they are detained. This case concerned Mr Sokolov's challenge, under Article 8 of the European Convention of Human Rights, to the decision to refuse him permission to attend either funeral.

The court made two important findings in this case. First, it found that whilst not every restriction on prisoners attending funerals will breach Article 8 (the right to respect for private and family life), in this case it did. The Russian authorities failed to consider Mr Sokolov's request to attend the funerals on its individual merits. Instead they applied the relevant Russian law regarding prisoner leaves of absence without any "genuine desire to find another solution" for Mr Sokolov. This failure to a find solution to his particular predicament – especially given the fact he lost both parents in such quick succession – was held to be in breach of Article 8.

Second, the court held that the fact that Mr Sokolov was placed by the Russian authorities in a prison so far away from his close family affected his ability to maintain contacts with them, and for this reason amounted to a further breach of Article 8.

OMBUDSMAN CASES

Sending mail to the Legal Aid Agency [79922/2017]

Mr M complained that the Legal Aid Agency (LAA), an executive agency of the Ministry of Justice, was not recognised as a 'confidential access institution'. This meant letters from the LAA to Mr M could be intercepted and opened by prison staff.

Mr M's concerns were centred on legal aid certificates sent by the LAA which contained legally confidential information such as the amount of legal cover and suspected amount of damages which Mr M was due to receive. If this information was disclosed, Mr M argued that this could be highly advantageous to the Prison Service as the opposing party, thereby impinging on Mr M's right to a fair hearing. Mr M requested the LAA to be added to the list of institutions from which confidential mail could be received or to which it could be sent.

Mr M initially raised the complaint with the governor. The acting deputy governor responded, taking the view that the prison adding the LAA to the list of confidential access institutions would be *ultra vires*, and that it could not therefore be done at establishment level.

Mr M was aggrieved with this response and subsequently raised the complaint with the Prisons & Probation Ombudsman (PPO).

The PPO focused on the types of information that may be included within their correspondence and discussed this with the policy lead for PSI 04/2016 (The Interception of Communications in Prisons and Security Measures). The policy lead was happy to consider adding the LAA to the list of confidential institutions. The policy lead's decision was based on the role of the LAA and the information shared and required from prisoners. Given the length of time taken to amend a national policy, the policy lead had also undertaken to notify governors when it does add the LAA to the confidential access list, which is more expedient than prisons awaiting the publication of a revised PSI.

The policy lead will advise the PPO when the final decision has been made. Once approved, prisoners will have a right to communicate confidentially with the LAA and any telephone or written communication from them must not be intercepted by prison staff.

The PPO was satisfied that the process of change had been started which was considered as an appropriate resolution to Mr M's complaint.

Time in open air cancelled [Case 81197/2018]

Mr J complained to the PPO about time out in the open air being cancelled in breach of Prison Service policy.

Mr J had complained via a Comp 2 (Confidential Access) form that on 3 and 4 March 2018, senior staff refused to allow prisoners time in the open air. The acting deputy governor had responded that the decision to cancel exercise on 3 and 4 March was made by the duty governor ‘due to the adverse weather conditions and the concern for the health and safety of the prisoners and staff due to the amount of ice and snow’.

In his complaint to the PPO, Mr F said that he felt that the weather on 3 and 4 March had been mild compared to previous days. He also said that there were

no salt/grid boxes in the prison's exercise yards.

The PPO investigator noted that paragraph 2.21 of PSI 75/2011 says that prisoners must have a minimum of 30 minutes in the open air daily, subject to weather conditions. This is a mandatory requirement and cancellations must be recorded by a manager who has been authorised by the governor to do this.

The PPO investigator also read local weather reports for the respective days. These showed that on 3 March 2018 there had been a daytime temperature of 1-3℃, with no snow or rain. On 4 March 2018, the daytime temperature was 6-8℃ with no snow or rain. However, the PPO noted that it was not possible to establish what the condition of the exercise yards was on those days, since any snow or ice that might have built up in the yards previously might not have thawed yet.

The PPO investigator requested the following information from the prison's Business Hub: Dates when time in the open air was cancelled in February and March 2018; specific reasons for these cancellations; the name/grade of the officer(s) who authorised the cancellations; and whether the prison had any salt/grit boxes in outdoor areas.

The prison did not respond to the PPO's queries, despite having been sent a reminder.

The PPO decided to uphold Mr J's complaint. Since the prison had not provided a record of when time in the open air was cancelled, there was no evidence that the cancellations were in accordance with PSI 75/2011. The PPO noted that the prison's failure to provide information was in breach of its duty under paragraph 1.7 of PSI 58/2010 to cooperate with PPO investigations.

The PPO also said that the prison's failure to respond was particularly disappointing in light of the fact that this was Mr J's second complaint to the PPO regarding cancellations of time in open air. Mr J's first complaint (case 78237/2017) had also been upheld by the PPO, and the PPO had recommended that the governor should apologise to Mr J, nominate managers who were authorised to cancel time in open air, and ensure that all decisions to cancel time in open air were recorded in an accessible manner. If the recommendations made by the PPO in response to the first complaint had been implemented, then it should have been easy for the prison to provide the information needed to resolve the second complaint.

In response to this (Mr J's second) complaint, the PPO recommended that the prison governor should apologise to Mr J for time in the open air being cancelled without providing evidence that the decisions were made in accordance with PSI 75/2011; explain why the information requested from the Business Hub was not provided; and provide evidence that the PPO's previous recommendations had been implemented.

Placement on closed visits [Case Number 77999/2017]

Mr E complained that he was placed on closed visits for the wrong reasons, in breach of the relevant PSIs.

Mr E was placed on closed visits on 11 April 2018. On 9 May and 5 June, the decision to place him on closed visits was reviewed and in both instances, it was decided that he should remain on closed visits for a further period. Mr E

was removed from closed visits on 30 June.

Reason for the initial decision – possession of a camera phone

The reason given by the prison for the decision to place Mr E on closed visits was that he had been found in possession of a camera phone. The prison said that it had to be assumed that the camera phone was conveyed through visits unless it could be proven otherwise and that, to date, it had not been proven otherwise.

The PPO reviewed Mr E's NOMIS case notes and three Intelligence reports relating to the phone found in Mr Elliott's possession. While these confirmed that Mr E had had a camera phone in his possession, none of them indicated that Mr E had obtained the phone through a visit.

Reason for the decision taken at first review on 9 May – receipt of book containing psychoactive substance

Mr E claimed that the reason for the decision to keep him on closed visits was that a book had been sent to him which, when tested locally, allegedly showed a positive result for a psychoactive substance. The prison denied that this was the reason for continuing to place Mr E on closed visits, but confirmed that Mr E had received a parcel containing books which had responded positively to a local test and were then sent to an outside laboratory to confirm the result.

The PPO checked the paperwork of the 9 May review, and these records show that the decision to keep Mr E on closed visits had indeed been taken because of the suspicious books. However, the PPO noted that the camera phone was also referred to in the decision.

Reason for the decision taken at second review on 5 June – inappropriate conduct

The prison said that the reason was that Mr E had displayed inappropriate behaviour during one of the closed visits. Mr E confirmed that inappropriate behaviour had taken place.

PSIs

The PPO considered PSI 15/2011, which says that placing a prisoner on closed visits is an 'administrative measure, not a punishment'.

Section 3.1 of the PSI provides a list of general reasons for which closed visits may be applied:
in the interests of national security;
for the prevention, detection, investigation or prosecution of crime;
in the interests of public safety;

1. for securing or maintaining good security or good order in the young offenders' institution;
2. for the protection of health or morals;
3. for the protection of the reputation of others;
4. for maintaining the authority and impartiality of the judiciary; or
5. for the protection of the rights and freedoms of any person.

Section 3.8 of that PSI states that closed visits should be applied where a prisoner is considered to pose a risk, or is proved or reasonably suspected, of being involved in smuggling prohibited items through visits.

Section 3.10 of the PSI says that when deciding to apply closed visits, a prison must be able to demonstrate that it

1. has taken into account all the individual circumstances of the case;
2. has acted proportionally; and,
3. has kept the requirement for the

closed visit under review.

Further, a mandatory instruction contained in section 3.10 is that 'in applying closed visits establishments must consider (...) analysis/use of intelligence or incidents indicating patterns of misuse of drugs or use/trafficking of mobile phones, or other contraband, derived either from visits or from behaviour in the prison.'

The PPO also considered the prison's Visits Guidance (Version 2 June 2015).

Section 14 states:
'Closed visits for smuggling should normally be used in the following circumstances:
... (e) For prisoners found or believed to be involved in smuggling prohibited items '.

PPO decision

The PPO upheld Mr E's complaint, because all of the above reasons given by the prison were inappropriate. The PPO justified its opinion as follows:

Firstly, the policy was 'very clear' that in the majority of cases, applying closed visits was a measure to prevent smuggling through visits, but there was no evidence or justifiable suspicion of this in Mr E's case.

Secondly, there was also no other reason that would justify the decision to place Mr E on closed visits.

Thirdly, the prison's reasoning that it must be assumed that the phone was smuggled in through a visit suggested that instead of considering the individual circumstances of each case as required by section 3.10 of PSI 15/2011, the prison was applying a blanket rule in all cases of camera phone possession.

The PPO concluded that Mr E was unfairly placed on closed visits, and expressed its concern that the prison was using closed visits as a punishment, in breach of PSI 15/2011. Consequently, the PPO recommended that the prison governor should apologise to Mr E, review the local visits policy to ensure it is in line with PSI 15/2011, remind all relevant staff of the importance of following PSI 15/2011, and conduct a review of all prisoners currently on closed visits, to ensure that there is no breach of PSI 15/2011.

Failure to provide vegan toiletries [Case 80191/2018]

Mr L complained that HMP Swaleside refused to process his orders for vegan items from Amazon, including vegan shaving foam and vegan mouth wash.

The prison gave several different explanations for its refusal. First, it said that although Mr L did receive soya milk, he was not recorded on NOMIS as vegan. Second, once the NOMIS record had been updated, the prison said that Mr L was recorded as voluntarily vegan, and that the prison would not order the vegan items without a medical reason.

Third, when Mr L pointed out that a medical reason was not required under the relevant PSIs, the prison replied that items available in the canteen were not permitted to be purchased from catalogues.

Fourth, after Mr L said that at the time of his order, vegan shaving foam and vegan mouth wash had not been available in the canteen, the prison said that any items that were not on the facilities list needed to be authorised by means of a medical F35 form, which is a form for items such as medically required items such as food supplements, knee

supports or creams that prisoners cannot purchase through the canteen. The prison had asked Mr L to provide an F35 form, but none had been received.

Fifth, the prison said that in any event, the order of such items was at the discretion of the prison under PSI 30/2013 and 23/2013, and that as Mr L had only started to order vegan items six months after his arrival in prison, and as he did not arrive with any such items, it was decided that he could use what was available in the canteen.

In investigating Mr L's complaint, the PPO noticed that section 7.1 of PSI 23/2013 states that products suitable for vegans may be purchased by prisoners through catalogue suppliers at the discretion of the establishment, but that there is no requirement for form F35. The PPO also noticed that PSI 30/2013 contains the same wording but no additional information.

When asked about this, the prison said that it was not aware that national policy stated that an F35 was required, but that this was how it was done at HMP Swaleside to avoid prisoners ordering items they should not be ordering without sufficient paperwork. The prison confirmed to the PPO that it had processed a previous order by Mr L for vegan shaving foam without having received an F35 form, but said that this had been done in error.

The PPO also contacted the HMPPS policy team to ask whether it was considered reasonable to impose a requirement for prisoners to have a medical reason to order vegan items. The policy team responded that a prisoner does not need a medical reason to access vegan products. In giving reasons for its response, the policy team not only referred to PSIs 23/2013 and 30/2013, but also to PSI 75/2011, which states that while prisoners have access to toiletries necessary for health and cleanliness, the quantities or types of toiletries were a matter of local judgment having regard to the nature of a prisoner's activities and individual needs. The policy team also said that while a prison is able to exercise discretion when ordering items, it must consider access to the items as per the appropriate PSIs.

The PPO upheld Mr L's complaint, because there is nothing within national policy to say that prisoners must have a medical reason in order to access vegan items, and because the PPO did not consider it reasonable impose such a restriction.

The PPO recommended that Mr L's future orders be processed without any undue delay, and that the prison should review its local prisoner retail policy to ensure that it was fully in line with PSI 23/2011, including permitting vegans to purchase vegan items without any need for an F35. The PPO would have recommended that all of Mr L's past orders also be processed without any undue delay, but Mr L asked for this recommendation to be withdrawn, as he would not have had enough money in his spends account to cover the orders if they were all made at the same time.

Addressing transgender prisoners and lack of privacy complaint [Case 77889/2017]

Ms S submitted complaints regarding two issues; the first of these was that she was not addressed by officers at HMP Littlehey in a manner consistent with her acquired gender. Ms S wished to be referred to by her gendered first name, as opposed to her ungendered surname. Ms S secondly complained that she suffered from a lack of privacy

as officers did not knock on her cell door before entering.

Issue 1
In response to this complaint, Ms S was told by an officer that the PSI 17/2016 requirement that '*transgender prisoners are addressed by officers in a manner consistent with their acquired gender*' was merely an expectation, and not a mandatory requirement. Whilst the prison assured her that regular staff would use her preferred name, they could not guarantee that staff unfamiliar with her would know to do so. Ms S subsequently requested that it was made clear to all staff that they should address transgender prisoners in accordance with their stated gender identity. The prison responded that there is an expectation that staff will use 'Ms', 'Mr' or a preferred name and that appropriate action would be taken if staff were found to be behaving unprofessionally.

The Ombudsman's investigator reviewed the complaints and responses and relevant sections of PSI 17/2016. It was concluded that the prison had been wrong to assert that the requirement under PSI 17/2016 to address prisoners in a gender-appropriate manner was an expectation only. It was therefore recommended that staff were reminded that this is a mandatory action. Ms S requested an apology from the governor at Littlehey for failing to enforce the mandatory requirement; however the investigator thought that the notice to staff would be sufficient.

Issue 2
Ms S complained that an officer had not complied with the note on her door requesting that they knock before entering her cell. She consequently asked to be placed on basic regime so that this incident would not be repeated. The Custody Manager refused this request as he saw no evidence that the officer's conduct had been discriminatory towards Ms S.

In letters to the Ombudsman, Ms S raised a number of other concerns, stating that Littlehey had removed all the 'identifying stickers' from cells occupied by transgender prisoners. She further found it to be '*completely unacceptable* 'that one officer had '*explicitly stated* ' that they would not knock before entering Ms S's cell.

HMP Littlehey told the Ombudsman's investigator that there are no official 'identifying stickers'; it was simply that some transgender prisoners had made their own signs for this purpose. The prison further confirmed that they did not have a policy requiring officers to knock on cell doors to alert prisoners to their presence. The Ombudsman's report concluded that they did not think the Ombudsman should recommend such a policy and as such Ms S's complaint was not upheld.

Processing of inaccurate data about a prisoner [Case ref RFA0718173]

Mr F raised a concern with the Information Commissioner's Office (ICO) that the Ministry of Justice (MOJ) had processed inaccurate data about the payment and source of monies into Mr F's account. This information was held in Mr F's intelligence report.

The ICO assessed the matter and requested the MOJ provide a response. Having engaged with Principle 4 of the Data Protection Act 1998 which states that personal information must be accurate and up-to-date, the ICO concluded that the MOJ was in compliance with this Principle.

The ICO decision is based on two rea-

sons. The first is that the data was based on the information available to the MOJ at the time. The second is that the MOJ can legitimately wish to record events that happened in error as these reflected the view of the department at the time.

Importantly, the ICO recommended that the MOJ is expected to insert a note of correction to ensure any data held is viewed in light of further new information. The MOJ created a new data entry based on the new information clearly stating that the monies were from a legitimate and lawful source.

The ICO ensured that the MOJ had taken appropriate steps to remedy the situation. The ICO was also satisfied that the new data entry accurately reflected the true state of affairs.

Interestingly, the MOJ stated that it will also be reviewing the coding of the intelligence report to determine whether this is still judged to be accurate, and that Mr F would be contacted directly in relation to the outcome of this review.

The ICO stated that Mr F's complaint will be stored on their file so that it can continue to monitor the MOJs data protection practices.

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