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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WHITE & CASE

Contents

NEWS

Prison service quashes governor's rulings seen in Channel 4 show

Governor to undergo training after flaws found in rulings filmed for documentary series

Article by Eric Allison and Simon Hattenstone, published in The Guardian on 12 February 2019

A prison governor has been ordered to undergo training after delivering two unlawful verdicts in jail adjudications that were watched by more than a million TV viewers.

The verdicts have been quashed and all adjudications the governor has made are to be reviewed. The governor also told a prisoner on camera that staff who felt threatened by inmates were "allowed to strike them", but failed to make clear that this was only in a situation when there is no other option.

The adjudications were seen in the final episode of the Channel 4 documentary Prison, a three-part series about Durham prison, broadcast on 14 January. The episode focused on rising violence at the jail and was watched by 1.4 million people.

The head of the Prison and Probation Service admitted the governor's failings in a written response to a complaint from a prisoners' charity.

The final episode of Prison included details of an incident in which staff put an inmate on a basic regime and removed his television from his cell. The inmate, Tommy Calder, said staff attacked him as they took away his TV. A prison officer said Calder kicked him and he retaliated by punching him.

The incident was not filmed, but footage was shown of Calder being led away from his cell by nine prison officers. He was wearing only underpants and his face was badly marked, with one eye closed.

The incident resulted in an investigation into the prisoner's allegations that he had been assaulted by staff and adjudication proceedings against him for alleged possession of a weapon and assault on a member of staff. The governor found the prisoner guilty on both counts.

In relation to the first charge, she said: "You have given me no reason to doubt the word of the officer, so I find the charge proven." In relation to the alleged assault, the governor said: "On the balance of probabilities, I find the charge proven." Balance of probabilities is the burden of proof required in civil cases.

The prison service instruction 47/2011, dealing with adjudications, states: "The adjudicator will dismiss the charge if not satisfied that it has been proven beyond reasonable doubt." Beyond reasonable doubt is the burden of proof required in criminal cases.

Calder asked the governor if she had seen pictures of his injuries. She replied: "The thing about the use of force is that it is not always nice and clean and tidy and sometimes when an officer feels threatened he is allowed to strike you and that is what the officer did."

The prison service order states that force is lawful if it is necessary and proportionate to the seriousness of the situation. It warns that blows to the head can lead to skull fracture and/or brain haemorrhage.

Although this order, dating from 2005, does not state that staff are allowed to strike prisoners if they feel threatened, a 2015 amendment says pre-emptive force can be used in limited circumstances. It says staff should "not normally use force in self-defence when there are clearly other options available, such as retreating and summoning help, which do not compromise the safety of themselves or others". In this case, other options appear to have been available.

Calder was sentenced to 28 days' loss of privileges. The investigation into Calder's claim that he was assaulted by staff exonerated the officers concerned.

After the programme aired, the director of the Prisoners' Advice Service (PAS) wrote to Michael Spurr, the chief executive of the Prison and Probation Service, pointing out the unlawfulness of the governor's findings. The letter asked Spurr to urgently inquire into whether other Durham governors had similarly misapplied the standard of proof require in adjudication.

In his reply, seen by the Guardian, Spurr agreed that the ruling was unlawful. "I can confirm that as soon as we found out about this issue, we quashed the findings of the two adjudications completed for Mr Calder," he wrote, adding that the adjudicating governor would undergo additional training and that the service was reviewing all the adjudications she had presided over.

Lubia Begum-Rob, director of the Prisoners Advice Service, said she was pleased that the prison service had faced up to its responsibilities in the matter, but concerned that what the documentary showed could be the tip of the iceberg.

"Thousands of disciplinary hearings take place in prisons across the country every week and we have no idea how many are misconducted in the same way as those at Durham," she said. "There is no provision for legal representatives to attend disciplinary hearings in front of prison governors. Legal aid for advising on them was cut in 2013, and the proceedings are not tape-recorded.

"Consequently, unless there is some kind of accidental exposure of the process, as happened in this case, we have no way of telling how widespread the problem really is."

A Prison and Probation Service spokesperson said: "We are reviewing adjudications made by this member of staff, and adjudicating staff have been reminded how they should carry out this role."

Parole board developments

Reconsideration mechanism for parole board decisions

In February 2019, the government published its response to a public consultation which it had launched in April 2018. The aim was to consider a new mechanism by which parole decisions could be reconsidered, following the much-publicised decision by the Parole Board in November 2017 to release John Worboys on licence, which was subsequently reconsidered and overturned after judicial review proceedings. At present, the only way to challenge these decisions is through the courts by way of judicial review.

The government has now set out a reconsideration mechanism which it is understood it intends to implement in the

very near future. The exact detail of the operational process of reconsideration is, at present, subject to change and implementation will involve a change to the Parole Board Rules. The government has also said that this new mechanism will be part of a wider package of measures it intends to introduce to the system of parole.

The proposed mechanism:

> Applications for a reconsideration of a parole decision will be made to the Board.
>
> Only parties to the parole process will be able to apply (that is, the prisoner and the Secretary of State). However, victims will also be able to apply via the Public Protection Casework Section (on behalf of the Secretary of State).
>
> Applications must be submitted within 21 calendar days from the date on which a decision was notified to the parties. This means a prisoner will not be released during that 'window'.
>
> The criteria for applications to be accepted is along the lines of the grounds for judicial review (illegality, irrationality and procedural unfairness) and so the threshold is intended to be high.

Digital recording of hearings

From 1 February 2019, all oral hearings at the Parole Board will be digitally recorded. The stated purpose is that, in accordance with the High Court's judgment in *McIntyre* (July 2013), the Board must ensure that a proper record is made of each hearing and the evidence before it. Transcripts will only be made available to the parties to the hearings.

The Board expects requests by prisoners will be made through their legal representatives. Requests must be made within three months of the decision. Not all requests will be granted; there must be a specific point/area of dispute and the reason for the request must be sufficiently clear and precise.

CASE REPORTS

RIGHT TO PRIVACY

Bild GmbH & Co KG and Axel Springer v Germany (applications nos. 62721/13 and 62741/13), European Court of Human Rights

The applicants, the German limited liability company *Bild GmbH & Co. KG* and the German public limited company *Axel Springer AG*, brought a complaint to the European Court of Human Rights (ECtHR) claiming: (1) violation of Article 10 (freedom of expression); and (2) that the German courts had failed to comply with the criteria established by the Court in cases involving balancing Article 8 (right to respect for private life) and Article 10. *Axel Springer AG* publishes the daily German newspaper Bild and *Bild GmbH & Co. KG* manages the newspaper's website.

Background

In March 2010, a Swedish weather presenter was arrested and remanded in custody on suspicion of the aggravated rape and assault of his former girlfriend. In July 2010, Bild published an article, in print and online, together with two photographs, one of which showed the journalist sitting shirtless and surrounded by other prisoners in a prison yard. The journalist was later released and acquitted of all charges in criminal pro-

ceedings which attracted considerable media coverage.

In December 2010 the journalist applied to Cologne Regional Court for a ban on any further publication of the photograph as well as requesting that his lawyer's fees be repaid. The Cologne Regional Court delivered its judgement in June 2011, which banned Bild and Axel Springer AG from publishing or distributing the photograph without the journalist's consent and ordered them to repay a portion of the lawyer's fees.

In February 2012, the companies appealed to the Cologne Court of Appeal which dismissed the appeals but reduced the amount of lawyer's fees they were to repay. The Cologne Court of Appeal held that publication and distribution of the photograph were unlawful because the companies had failed to obtain the journalist's consent and there was no link between the photograph and any current event. The Court found that the photograph had had no information value and even if it had any such value, regard should be had to the fact that the photograph was taken of the journalist without his knowledge from a place that was not normally accessible to the public. The fact that the journalist had long been the subject of media reports did not deprive him of protection for his privacy when in a place of confinement.

The Federal Constitutional Court subsequently declared the companies' appeals inadmissible.

HELD: the ECtHR held that the applications were inadmissible and that the German courts had balanced the companies' right to freedom of expression and the journalist's right to respect for his private life.

The ECtHR found that the photograph had not provided any further information in addition to that contained in the written article and did not contribute to a debate of general interest. Furthermore, whilst the journalist had been reported in the media, this was not sufficient to deprive him of protection for his privacy and, in particular, to justify publishing a photograph showing him in a prison yard.

EXTENDED DETERMINATE SENTENCES

R (Stott) v Secretary of State for Justice [2018] UKSC 59, Supreme Court

Frank Stott was convicted at trial of 20 sexual offences. He was sentenced to an extended determinate sentence (EDS) in respect of 10 counts of rape of a child under 13 years, with a custodial term of 21 years and an extension period of 4 years.

Section 246A of the Criminal Justice Act 2003 requires, in most cases, that EDS prisoners are considered for parole only after serving two-thirds of the custodial sentence, which in Mr Stott's case was 14 years. In contrast, other categories of prisoners are eligible for parole at the half-way point of their sentences and if these rules applied to Mr Stott, he would have been eligible for parole once he had served 10½ years. Mr Stott contended that the provisions of the section were incompatible with the European Convention on Human Rights (ECHR).

Specifically, Mr Stott argued that the section violated his rights under Article 14 of the ECHR taken together with Article 5. Article 14 provides that rights contained within the ECHR are secured without discrimination on the basis of 'other status'. Therefore, Stott argued

that his right to liberty and security under Article 5 in the form of parole was being violated in a discriminatory manner on the basis of his status as an EDS prisoner.

For an Article 14 claim to succeed, it must be shown that the circumstances fall within the ambit of a convention right and that the difference in treatment was on the basis of 'other status'. It must also be shown that the claimant and the person who has been treated differently are in an analogous position and that there is no objective justification for the different treatment. The Court accepted that the right to apply for early release fell within the ambit of Article 5. Therefore, the first issue was whether the different treatment of Mr Stott and other categories of prisoners was on the basis of a ground within the meaning of 'other status' in Article 14. In addition, the Court had to consider whether EDS prisoners are in an analogous position with other categories of prisoner and, if so, whether there is an objective justification for the difference in treatment between such categories of prisoner.

The Court held that the difference in the treatment of EDS prisoners in relation to early release, in comparison to other prisoners, is a difference within the scope of Article 14 on the ground of 'other status'. In doing so, it departed from the House of Lords decision in *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484. However, the majority of the Court held that EDS prisoners are not in an analogous situation to other prisoners serving sentences under different regimes, given that the parole considerations and the minimum sentence to be served was part of the consideration on passing an EDS rather than an indeterminate sentence, and that, even if they were, the difference of treatment would be objectively justified on the basis that it seeks to legitimately protect the public and was part of the overall sentencing package for a prisoner sentenced with an EDS. Consequently, the appeal was dismissed by the Supreme Court with two judges dissenting.

GENDER DISCRIMINATION IN SENTENCING

Ēcis v Latvia (application no. 12879/09), European Court of Human Rights (10/01/2019)

Background

Mr Ēcis complained that male prisoners in Latvia were treated more harshly than female prisoners serving the same sentence for the same crime.

Under the rules of the Latvian penitentiary system at the time, all male prisoners convicted of serious crimes had to be placed in closed prisons at a maximum security level. Such prisoners were not entitled to certain benefits, such as home leave, until they were moved to a medium security level in a partly-closed prison – a transfer they were only eligible for after serving half of their imposed sentence. In contrast, female prisoners who had been convicted of the same crimes were placed in partly-closed prisons from the very beginning of their sentence, meaning that they were able to obtain certain privileges, such as leave, more rapidly than men.

Mr Ēcis claimed that in 2008 he realised that there was a difference in the respective treatment of male and female inmates with regard to the execution of custodial sentences. As he considered that this had a notable impact on restrictions of various prisoners' rights, he lodged multiple complaints

about this issue with several Latvian institutions including the Ministry of Justice, Ombudsperson and finally the Constitutional Court.

In his final compliant to the Constitutional Court, Mr Ēcis claimed that his rights in relation to Article 14 of the European Convention on Human Rights (freedom from discrimination), read in conjunction with Article 8 (right to private and family life) had been breached when a request for permission to leave prison in order to attend his father's funeral was denied on the grounds that he was serving his sentence at a medium-security level of a closed prison. He contended that a female inmate convicted of the same crime would have eligible for this leave.

All of Mr Ēcis's complaints were rejected. On 12 December 2008, he lodged a claim in the European Court of Human Rights (ECtHR) under Article 34 of the Convention.

Jurisdiction to bring the claim

The Latvian government made two key arguments in opposition to Mr Ēcis's claim. Firstly, it argued that Mr Ēcis has no jurisdiction to bring a claim to the ECtHR because he had not exhausted all domestic remedies. In particular, the government argued that the previous complaints that Mr Ēcis had made to Constitutional Court had been deficient as the grounds for each complaint had not met the standard required to bring a constitutional complaint. The government reasoned that Mr Ēcis had been aware of the mandatory requirements of a constitutional complaint and could not bypass the obligation to exhaust the available domestic remedies by deliberately and consistently submitting incomplete and insufficiently reasoned constitutional complaints. Moreover, Mr Ēcis had not been precluded from remedying the deficiencies identified by the Constitutional Court and lodging another constitutional complaint.

Mr Ēcis submitted that he had tried, within the limits of his resources and abilities, to defend his rights before the Constitutional Court. He asserted that an ordinary citizen could not enjoy the protection of the Constitutional Court, its standards being enormously high for a person without a legal education. Drafting a constitutional complaint was a difficult task even for legal professionals; thus, it was not fair to blame Mr Ēcis for his inability to properly perform in this sophisticated legal field.

The ECtHR concluded that, although the rule of exhaustion of domestic remedies is a fundamental part of the functioning of the ECtHR, some degree of flexibility must be applied. The ECtHR noted that Mr Ēcis had submitted three complaints to the Constitutional Court in Latvia, with his final claim being on similar grounds to the claim made before the ECtHR on this occasion, as such, it was the ECtHR's view that the Latvian authorities had had an opportunity to put matters right through their own legal systems.

Differential treatment is not discriminatory

The Latvian government's second argument was that providing for the distinct needs of female prisoners, particularly in relation to maternity, in order to accomplish substantial gender equality, should not be regarded as discriminatory. Accordingly, certain differences in the prison regimes that were applicable to men and women were acceptable and might even be necessary in order for substantive gender equality to be ensured.

The government also submitted that women prisoners, in general, were less

violent and less prone to aggression, whereas male prisoners were more predisposed to inter-prisoner violence and attempted prison breaks, and they posed a higher threat to prison security and staff.

The ECtHR reasoned that, even within the context of the penitentiary system and prison regimes, a difference in treatment that was based on gender had to have a reasonable relationship of proportionality between the means employed and the aim sought, and that even if the claim that male prisoners were more violent were supported by data, it would not be sufficient to justify such difference in treatment in and of itself. Finding otherwise would be tantamount to concluding that all male prisoners, when compared to women who had committed exactly the same offences, were so much more dangerous that no individualised assessment was even purposeful. Such an approach would be incompatible with the case-law of the ECtHR, emphasising the need for an individualised risk assessment of all detainees with regard to prison leave.

HELD: The court found that men and women who had committed a serious crime and had received the same sentence were treated differently. Men were automatically placed in the highest security category and held in closed prisons, while women went to less restrictive partly closed prisons.

The law meant that Mr Ēcis had been automatically banned from attending the funeral of his father, while a woman would have had such a possibility. There had been no individual assessment of the proportionality of such a prohibition and he had suffered discrimination which was in violation of the Convention.

The ECtHR held by five votes to two that Latvia was to pay Mr Ēcis 3,000 euros (EUR) in respect of non-pecuniary damage.

PAROLE BOARD DELAY

R (Bate) v Parole Board of England and Wales [2018] EWHC 2820 (Admin)

The case concerned a claim for judicial review by Mr Bate, a former prisoner, in relation to a claimed unlawful delay by the Parole Board in reviewing his detention following expiry of his minimum tariff.

Background

Following his conviction for one offence of possession with intent to supply of a controlled class A drug and two offences of wounding with intent, Daniel Bate was in March 2008 sentenced to imprisonment for public protection with a minimum tariff of 3 years and 5 months. This expired in 2010 and at this point he could therefore be lawfully released on licence as soon as the Parole Board reviewed his case, if it was satisfied that it was no longer necessary for the protection of the public that he should remain confined.

Mr Bate was not released at the end of his tariff period. On 26 April 2011 he was transferred to open prison conditions. For various reasons, however, including one attempt at absconding and several drug related incidents, he was assessed as unsuitable to remain in open conditions, and was returned to closed conditions at HMP Lewes.

A panel of the Parole Board reviewed Mr Bate's detention at an oral hearing on 10 December 2014, but did not direct his release or another transfer to

open prison conditions. The period until his next review was set at 14 months, meaning that it should take place by February 2016. For various reasons, however, the next hearing date was not set until 22 June 2016.

Shortly prior to the hearing, Mr Bate admitted to having used the drug spice during the past five years, despite having previously denied doing so. Mr Bate was also suffering from mental health problems. His Offender Supervisor and Offender Manager recommended to the Parole Board that he be released for residential drug rehabilitation. However, in the light of Mr Bate's drug use, the panel decided to defer the hearing for a period of 3 months, stating that it was to be relisted in October 2016.

In the event, the next hearing did not take place until 22 March 2017. This was notwithstanding several attempts by Mr Bate's solicitor to secure an earlier hearing date, which included sending a letter to the Parole Board requesting Mr Bate's hearing be expedited. On 2 December 2016, this request was rejected, as the Parole Board did not consider Mr Bate's case to have any exceptional circumstances to satisfy the criteria for expedition or prioritisation. During this period, Mr Bate's mental health worsened considerably.

At the hearing on 22 March 2017, the Parole Board directed Mr Bate's release to a drug rehabilitation centre.

The case

Mr Bate's allegations against the Parole Board relied on four grounds:

A violation of Article 5(4) of the European Convention on Human Rights for failure to provide a parole hearing within a reasonably speed interval

Mr Bate submitted that there were two periods of delay for which there was no lawful justification and, following the deferral in June 2016, there was a legitimate expectation that his hearing would take place within 3 months.

The Parole Board argued that the hearings were held within a reasonable period in light of the significant risk factors in Mr Bate's case and the various factors which led to the delay, including lack of availability of witnesses and a specialist psychiatric member.

A systemic failure to maintain and operate a system for speedy and prompt parole reviews

Mr Bate claimed that the shortage of specialist members of the Board and the delay caused by this shortage showed a systemic failure in the system for parole reviews.

The Parole Board pointed to evidence showing that it had taken steps to reduce, and had succeeded in reducing, the backlog of parole hearings, and that it would be inappropriate and pointless for the court to make a declaration about the position as it was 2 years prior.

An unlawful policy for prioritisation of listing which ignores cases where there is a realistic prospect of release

Mr Bate submitted that the policy was unlawful as it ignored two key factors which ought to be regarded as favouring prioritisation or expedition: (i) positive recommendations supporting release and a realistic prospect of release, and (ii) an express timetable agreed with a prisoner and his representative when a case is deferred.

The Parole Board argued that positive support for an application for release is far from uncommon, and it was therefore reasonable not to regard such support as a reason for prioritisation, as it would not be an effective requirement in practice.

An unlawful failure by the 2 December 2016 decision to direct expedition of Mr Bate's hearing

Mr Bate claimed that the decision failed to take account of the support in favour of his release, the timetable agreed on deferral and the fact that his mental health problems would make the consequences of delay more harmful to him than to other prisoners.

The Board replied that support for release is not a factor that ought to favour prioritisation, and that the decision-maker had not had evidence of any mental health issues.

HELD: The court upheld grounds 1 and 4 of Mr Bate's claim, noting that, although there is no hard and fast rule, a review interval of around one year is likely to be reasonable, and that the burden will be on the Parole Board to show good reason for a delay of much more than a year. In the present case, the delay was more than two years from the original date of tariff expiry and the Parole Board had not been able to demonstrate that there were good reasons for this excessive delay.

In its reasoning, the court dealt with each of the above grounds in turn:

Ground 1 (failure to provide speedy hearing in the particular circumstances of the case) was upheld. The court found that the delay was due to a backlog of work and a shortage of resources but, in accordance with the principle in R (Noorkoiv) v Secretary of State for the Home Department [2002] EWCA Civ 770, a lack of resources does not excuse a failure to fulfil the state's duty under Article 5. Mr Bate was entitled to compensation for frustration, anxiety and distress caused by the delay and damages for delayed liberty.

Ground 2 (systemic failure to provide prompt reviews) was rejected. The court agreed that, during the relevant period, the Parole Board clearly did have insufficient resources to enable it to deal with cases speedily, which led to the unlawful delay in Mr Bate's case. However, the court also accepted that the Parole Board had subsequently addressed the issue, holding that it would therefore be inappropriate to grant a declaration of in respect of failures which by then were historic.

Ground 3 (unlawful policy in relation to prioritisation) was rejected. Although the court said that it could see no reason why a post-tariff prisoner whose application is supported should not have that positive feature of his case given some weight in the listing exercise, it still declined to make a general declaration that the policy itself was unlawful on the basis that what is sufficient to provide a speedy hearing depends on the circumstances of the individual case.

Ground 4 (unlawful decision on 2 December 2016 refusing expedition) was upheld. The court found that, following the June 2016 deferral, there were 'compelling reasons' why Mr Bate's case should have been expedited. These included the express statement that the case had been deferred to a hearing in October or very soon thereafter and a combination of mental health factors pointing clearly to a need to avoid delay. The 2 December 2016 deci-

sion was therefore found to have been unlawful.

BREACH OF ARTICLE 3

Provenzano v Italy European Court of Human Rights 25 October 2018 [application no. 55080/13]

The European Court of Human Rights held that the Italian government had breached the applicant's rights under Article 3 (prohibiting torture and subjecting someone to inhuman or degrading treatment or punishment) of the European Convention on Human Rights by re-imposing a 'special prison regime' without evidencing a genuine reassessment of changes in the applicant's situation, in particular his critical cognitive decline.

Background

The applicant, who had been sentenced to several terms of life imprisonment for his involvement in the Sicilian mafia and multiple homicides (among other offences), suffered from a number of chronic medical conditions and alleged that his Article 3 rights were contravened as:

(a) His detention was incompatible with his age (83 years old at the time of the application) and health conditions, and the domestic authorities had not taken all necessary measures to safeguard his health and well-being in detention; and/or

(b) The continued imposition of the 'special prison regime' breached his rights under Article 3 of the Convention. This regime gives the Italian Minister of Justice the power to suspend the application of the ordinary prison regime in whole or in part by means of a reasoned decision, on the grounds of public order and security, in cases where the ordinary prison would conflict with these requirements. The Minister had decided that, among other restrictions, the applicant should be limited to a single one hour visit per month from family members and prohibited from using the telephone in order to prevent him from communicating with mafia members.

The applicant died before the case was heard but the court allowed his son to continue the proceedings, noting that human rights cases often have a moral dimension and persons close to the applicant may thus have a legitimate interest in ensuring that justice is done, even after the applicant's death (see *Malhous v. the Czech Republic (dec. [GC], no. 33071/96, ECHR 2000-XII*).

HELD: The ECtHR held that the state must ensure that a person is detained in conditions which are compatible with respect for human dignity, that the manner and method of deprivation of liberty do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and wellbeing are adequately secured.

After conducting a detailed review of the applicant's various health issues and the medical attention he received, the Court held that it had not been established that the treatment he had received was incompatible with his health conditions and advanced age or that his health and well-being were not adequately protected. There had therefore been no violation of Article 3 in this respect.

With respect to the imposition of the special prison regime, the court accepted the Italian government's arguments that the regime was imposed in the interests of security and to prevent further

offending, rather than in order to be punitive: its aim was to sever contact between detainees and their criminal networks.

The court stated that the essence of the Convention is respect for human dignity and it considered that imposing additional restrictions on a prisoner without providing sufficient and relevant reasons based on an individual assessment of necessity would undermine his human dignity and infringe his Article 3 rights.

The court held that the original imposition of the special prison regime and the first renewal did not contravene Article 3. However, by the time that the Minister decided to renew the special regime again in 2016, the applicant's mental capacity had deteriorated to such an extent that he had a complete lack of autonomy in performing basic everyday functions and was described in medical reports as unable to maintain interactions with people or take care of himself. The court held that the renewal decision in 2016 should have stated the reasons militating in favour of renewal and, given the cognitive deterioration of the applicant, needed to be increasingly detailed and compelling. However, the decision contained no discernible trace of an explicit, independent assessment by the Minister of the applicant's cognitive situation when making the decision. The court therefore concluded that there was insufficient evidence in the reasoning of the order of a genuine reassessment having been made with regard to relevant changes in the applicant's situation, in particular his critical cognitive decline. There had therefore been a violation of Article 3, for the period following the 2016 renewal.

The court did not order the payment of any damages as it considered that the finding of a violation was sufficient to compensate for the non-pecuniary damage sustained. No costs were awarded as the applicant did not provide any documentary evidence demonstrating what costs had been incurred.

UPDATES ON PRISON SERVICE INSTRUCTIONS

PSI 05/2018 Prisoner Discipline Procedures (Adjudications)

This instruction replaces and consolidates PSI 47/2011 Prisoner Discipline Procedures and PSI 31/2013 Recovery of Monies for Damage to Prisons and Prison Property. While the substance of both PSIs has largely been preserved, there are several significant changes:

> In relation to the disclosure of adjudication papers, legal advisers are now also to be provided directly with copies of all relevant documents, as opposed to only legal representatives under PSI 47/2011 [2.9 Annex A].
>
> Where a prisoner receives a punishment of additional days, there is now a fixed period of 5 days within which the prisoner's release date must be adjusted [2.39].
>
> In cases in which a hearing is adjourned and it is decided that the accused prisoner should remain in the segregation unit until it is resumed, where this adjournment exceeds 72 hours the Segregation Review Board must review this decision to segregate [1.27 Annex A].

> The instruction makes clear that prisoners serving cellular confinement are to be visited daily by a member of the Chaplaincy Team [2.22 Annex B].

In addition to these changes, PSI 05/2018 also provides further guidance as to the application of the Prison Rule 51 offences. The offence of using threatening, abusive or insulting words or behaviour (Prison Rule 51(20)), for example, is suggested to be appropriate where sexual acts between prisoners occur in a public or semi-public place, provided that someone watching finds (or could potentially find) this behaviour offensive [1.111 Annex B].

Guidance as to the application of the offences is also provided in relation to foreign national prisoners and immigration detainees refusing to comply with Home Office requirements [1.133 Annex B]. For example, the instruction provides that where a prison officer gives direct order to a foreign national prisoner to attend an interview with the Home Office, the disobeying of this order may result in a charge of PR 51(22) or 51 (23) being laid against them.

OMBUDSMAN AND ICO CASE SUMMARIES

Prison and Probation Ombudsman cases

Incentive and Earned Privileges (IEP) warning [Case ref 83414/2018]

Mr D complained to the PPO about having an Incentive and Earned Privileges (IEP) warning reinstated after it had been rescinded. He had made a complaint about an IEP warning issued by his Offender Supervisor (OS). The response to his initial IEP appeal form informed him that staff did not believe his behaviour – leaving the cell to speak with the OS – warranted the warning.

The warning was then reinstated by the Head of the Offender Management Unit (OMU). Mr D complained that the reissuing of the IEP had caused him severe anxiety and panic attacks and requested that he be treated with equality and respect. He also stated that the decision went against the previous decision by two front-line officers to rescind the warning.

The Head of OMU stated that Mr D's initial appeal had been upheld on the basis that Mr D had not disobeyed a lawful order because no direct order was given. However, further consultations with officers supported the OS's original statement that Mr D did not comply with a reasonable instruction to return to his cell. The Head of OMU therefore upheld the reinstatement of the warning and did not consider there was any lack of fairness in the decision in relation to age or disability, or that mental health concerns should inhibit him from being managed appropriately by the IEP system.

The PPO found that the reviewing of the IEP warning was legitimate insofar as

the Senior Officer who investigated Mr D's first appeal was not of the correct grade to do so. The PPO upheld Mr D's complaint as it found that the subsequent investigation, which led to the reinstated IEP, did not include relevant evidence of officers who were present and who believed the issuing of a negative entry would have been more appropriate than an IEP warning. PPO resolved the complaint at local level by having the prison agree to conduct a further full investigation by an alternative governor grade involving relevant officers.

Access to stationery and computers [Case ref 82365/2018]

Mr T complained about the prison he was in refusing to provide him with stationery and access to a computer. This meant he had difficulties preparing his representations for on-going legal cases.

Mr T had asked for a number of writing implements and stationery, which included lined A4 paper, 10 A4 document wallets, the use of a laptop to produce the required legal documents and access to a printer. He said that his request was covered by the Access to Justice policy and any denial thereof would be an obstruction of his right to justice.

In response, Mr T received a confusing range of responses from the prison, ranging from promises that his request would be actioned, to insistence that his weekly letter writing supply of 10 small pieces of paper and 10 small envelopes would suffice to draft his legal representations. His access to a laptop was met by numerous obstacles, the relevance of which to his case was unclear. Mr T attests that three long meetings were held on this matter; this is denied by the prison.

In response, the PPO found that under Rule 39 the prison is obliged to provide writing materials to correspond with his solicitors and any court. Mr T should therefore have been given sufficient paper and writing implements. The extra stationery requested by Mr T, such as 150 poly pockets, should be purchased at his own expense. In addition, the Prison Service National Security Framework was clear that the prison must provide access to IT for legal work.

Access to a copy of the Civil Procedure Rules [Case ref 84022/2018]

Mr E complained to the PPO that he had been unable to access a copy of the Civil Procedure Rules (CPR). He raised his concern initially with the staff in the library at the prison on various occasions. In response, the prison accepted that it was required to hold a copy of the CPR in accordance with Prison Service Instruction 2/2015; however the prison also informed Mr E that it did not intend to purchase the books, as any amendments would need to be printed and added on an annual basis. Mr E was therefore informed that the print shop would arrange for a full copy to be printed and placed in the library, but he was not told when this would be made available.

On 15 October 2018 the PPO contacted the prison and was informed that provision of the CPR was in process but that it would take some time given the volume of pages which needed to be printed, and that it was aiming to have a full copy available by 2 November 2018. In addition, the prison informed the PPO that it had offered to print particular sections where requested while the full copy was being printed, but Mr E was only interested in the full copy.

On 26 October 2018, the Business Hub advised the PPO that two copies were now available in the library at the prison.

The PPO upheld Mr E's complaint as prisons are required to make the CPR available in prison libraries in accordance with PSI 2/2015. However the PPO concluded that it was satisfied that the staff had taken adequate measures to address Mr E's complaint as quickly as possible and that the CPR was now available in the library. The PPO therefore deemed there was no further action required.

Information Commissioner's Office cases

DPA Subject Access Request time frame [Case ref: RFA 0796276]

Mr F complained to the ICO that the MOJ had failed to respond to his Subject Access Request (SAR) within the appropriate statutory time frame. He had submitted a SAR on 3 August 2018; the MOJ responded on 24 August, acknowledging the request and wrote to Mr F again on 17 October, stating it had not been able to respond to the request within one calendar month due to an increase in volume of SARs since May 2018.

The ICO decided that it was 'unlikely' the MOJ had complied with its obligations under the Data Protection Act 2018. In particular the ICO considered there had been an infringement of Article 15 of the EU General Data Protection Regulation. The ICO requested that the MOJ confirm to Mr F the date they expected to provide the information requested.

Information held and used by the Public Protection Casework Section [Case ref: RFA0736160]

Ms W complained to the Public Protection Casework Section (PPCS) regarding her concern that the name, prison number and pronouns listed for her were incorrect. PPCS responded that the correct prison number and NOMS number were recorded and that their systems had been updated to accurately reflect Ms W's name change.

Following PPCS staff enquiries to determine whether a review had taken place of the decision to refer to Ms W as a male prisoner, PPCS received confirmation by the prison that it had approved Ms W's request to live in the role of the gender she had expressed at an earlier date.

The ICO stated that the MOJ confirmed that the PPCS had amended the Public Protection Unit Database record to reflect Ms W's preferred name and gender, and that it was in the process of amending all reports within her parole dossier dated after the amended decision date to reflect the change.

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

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