

Transfer to open conditions without a Parole Board recommendation

[R \(oao Guittard\) v The Secretary of State for Justice \[2009\] EWHC 2951*](#)

The Claimant, an IPP prisoner, requested that the SSJ transfer him to open conditions without a Parole Board review, and so without a Parole Board recommendation for such a move. He contended that the SSJ had acted unlawfully by failing even to consider a departure from his policy of seeking the Parole Board's advice on suitability for open conditions. At Court, the SSJ accepted that he did have a discretion to transfer an IPP prisoner to open conditions, without a Parole Board review / recommendation, in exceptional circumstances. Nonetheless, the Court held that the SSJ had in fact adopted an unduly rigid and unlawful approach to the transfer of IPP prisoners to open conditions; [24]:

"...I conclude that PSO 6010, being the only document/evidence relied on by D in this regard, does not evince a true discretion to depart, in exceptional circumstances, from the general policy of referring to the Parole Board the question of transfer of IPP prisoners from closed to open conditions. The reality is, as I find, that D has unlawfully fettered the discretion which he must have. In the alternative, there is no evidence that in practice any proper consideration is given to the exercise of the discretion...".

HHJ Stewart QC pointed out that even though the Defendant had accepted that he had a discretion to transfer IPP prisoners to open conditions, without a Parole Board review / recommendation, no-one knew about this discretion; [23(iv)]:

"That the relevant discretion actually exists is something which should be apparent not only to D's officers but also to anyone else e.g. IPP prisoners themselves and those acting for them."

Comment

Although this case concerned an IPP prisoner, it is submitted that the same principle applies to lifers as well. Practitioners representing indeterminate sentence prisoners should carefully consider whether their client's circumstances are sufficiently compelling or exceptional, such that they can request that the SSJ transfer their client to open conditions outside of a parole review. Discussion after judgment indicated that applications should be directed to the Public Protection Casework Section. The SSJ has also indicated that he will be publishing a policy to cover such applications.

**Mr. Guittard was represented by Vijay Jagadeshm of Garden Court North and Sara Jayne-Pritt of Swain and Co.*

PSI 03/2009 – category D status

The judgment in **Guittard** also refers to PSI 03/2009, which provides guidance in respect of the recategorisation of (determinate sentence) prisoners to and from category D status. Practitioners should consult this PSI when advising their clients on such applications.

Oral Hearings – The Battle Begins

The new Parole Board policy on oral hearings envisages that they will be granted in accordance with two limited criteria: the first is where there is a 'reasonable prospect' that the prisoner will secure his release or a progressive move as a result of the hearing. The concept of a reasonable prospect likely means greater than 50%, and will result in those with a mere possibility of success being denied on the papers. This will inevitably produce prejudice and an increased instance of public law challenges in place of the simpler option of lowering the test to a level which is fair. Anecdotally the test is already being applied in a manner which results in meritorious cases being dismissed on the papers.

The second criterion allows for oral hearings where the risk assessment requires live evidence. This is hopelessly vague; indeed it might well be argued that it is impossible to conduct an effective risk assessment without hearing live evidence. The example cited in the Policy is where there is an issue as to the existence of a particular risk factor, such as whether there was a sexual element to the offence. The proposition that the Defendant will consider whether a particular risk factor exists, but not whether it has been addressed, is hardly in keeping with its remit. That the Board is expending valuable resources on such enquiries, whilst denying those with a possibility of success a hearing, is surely wrong in principle.

Parole Intervals

[R \(oao Johnson\) v SSJ \[2009\] EHC 3336 \(Admin\)](#)

The Claimant was an automatic lifer who had served his tariff twice over. He had secured a transfer to open conditions having made good progress and completed all relevant offending behaviour work. The SSJ decided that there should be an interval of 15 months prior to his next hearing on the basis of such vague outstanding targets as testing his behaviour in open conditions, completing further (unspecified) work, and developing his release plan. Langstaff J held that such reasons were inadequate to justify an interval of greater than 12 months. He cited the shortness of the 6 year tariff, the

time served post-tariff, and the absence of further offending behaviour work as all indicating that a sooner review was appropriate. The interval was held to be unlawful under Article 5 (4) and was quashed.

Comment: the SSJ continues to determine such intervals in a seemingly arbitrary way. This case emphasises that vague, generic reasons are insufficient to justify a delay of more than 12 months, and that shortness of tariff may be relevant to the requisite time to be spent in open conditions.

[R \(oao Gray\) v SSJ \[2010\] EWHC 2 \(Admin\)](#)

In this case the court was invited to go one step further, and to rule that the Parole Board should apply a different (lesser) test when considering the transfer of IPP prisoners to open conditions, due to the very short tariffs involved. Burnett J roundly rejected this contention, concluding: 'it may be possible to argue on the facts of a particular case that the balance of risk against benefit to the prisoner involved in a decision relating to open conditions should be struck differently because of the youth of the offender and the short duration of the minimum term. But that possibility, pregnant with difficulty as it would be, does not begin to provide support for an argument, essentially in abstract, that through the mechanism of a positive obligation under Article 8 ECHR the Board has a duty to issue guidance to its members on such issues.'

Consenting to Punishment?

[R \(oao KB\) v SSJ \[2010\] EWHC 15 \(Admin\)](#)

Holman J held that the disciplinary system operated at YO1 Wetherby is unlawful and made a declaration to that effect, although he declined to quash the system for fear of causing disruption. The DIR system was ultra vires the Prison Act 1952 and was arbitrary in its characterisation of offences, in particular a 'miscellaneous' category which was patently unlawful. The system was not saved by the curious caveat that trainees (offenders) has to consent to be dealt with under the scheme, which had the ultimate sanction of reducing the trainees' classification under the Incentives and Earned Privileges ("IEP") Scheme in the event of conviction. There was nothing unlawful, however, about the operation of the IEP scheme itself.

Penalising Offenders in Denial

[R \(oao Hewlett\) v SSJ \[2009\] EWHC 2979 \(Admin\)](#)

Another example of a failed attempt to challenge the downgrading of offenders in denial under the IEP scheme. The Claimant lifer, who had been downgraded to standard despite being post-tariff, relied upon the *obiter* in the cases of **Green** and **Potter** to suggest that there must come a stage in the sentence whereby it becomes unreasonable to expect the prisoner to comply with the Sex Offenders Treatment Programme ("SOTP.") The Claimant also relied upon **Lowe** in

contending that his legitimate expectation of remaining enhanced level had been violated. HHJ Thornton Q.C. accepted wholeheartedly the evidence of Dr Ruth Mann for the prison that the SOTP will always remain a sentence goal notwithstanding a prisoner's denials such that he felt there could never be a stage when it would become unreasonable to expect a prisoner to comply with his sentence plan unless exceptional circumstances exist.

Comment: This is likely to be the final nail in the coffin of these challenges, although the exceptional circumstances caveat allows some hope to remain.

And finally....

Big Brother is Watching You, But Boy You Won't Be Watching Him

[R \(oao O'Dowd \(Boy George\)\) v Probation Service \[2009\] EWHC 3415 \(Admin\)](#)

The singer Boy George made an application for judicial review of the refusal of the probation service to allow him to appear on Celebrity Big Brother. The service was concerned that should anything go wrong (perhaps a diary room tantrum?) it could lead to a tabloid field day, and was concerned about public confidence in the system. It was certainly sufficiently concerned to have instructed a silk, as had the Claimant (although his was snowed in, apparently in Amsterdam.) Bean J rejected the claim that this public concern was an irrelevant consideration: 'I consider that right-thinking members of the public would take the view that an offender serving the non-custodial part of a sentence of imprisonment should not be allowed to take part in a high profile, controversial television production, promoting his status as a celebrity and with considerable financial gain.' The learned judge also felt it worthy of mention that O'Dowd has sold 33 million records, which in this writer's view was perhaps more surprising than the outcome of the claim itself.

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