

New PSIs

33/2009 Pre-tariff sift process for indeterminate sentenced prisoners

Sentence planning and review meetings will make recommendations to the PPCS as to whether to refer pre-tariff indeterminate sentence prisoners to the Parole Board. The aim is that only cases where prisoners have a reasonable prospect of transfer to open conditions will be referred.

13/2010 Prosecuting absconders

Amends guidance in the Adjudications Manual which deals with the circumstances in which absconders should be referred to the police.

14/2010 Ending of ECL scheme

The ECL is abolished with effect from 12th March. No prisoners with eligibility dates on or after 13th March will be released on ECL except those with eligibility dates between 15th March – 9th April who have already been issued with an ECL3 form giving them a specific release date. No prisoners whatsoever are to be released on ECL after 9th April.

See also:

34/2009	Victim representation at parole hearings
03/2010	Category A and restricted status prisoners - security reviews
12/2010	Prolific and other priority offenders

Cases

Indeterminate sentences; Disability Discrimination Act; access to coursework

[R \(Gill\) v Secretary of State for Justice \[2010\] EWHC 364](#)

The claimant was a lifer with a learning disability which meant that he was disabled for the purposes of the Disability Discrimination Act 1995. By the time of the full hearing he had served more than twice his tariff period in custody and had only recently been moved to category C. Although various offending behaviour programmes had been identified as targets for him he had been unable to access such programmes as his IQ was too low.

The court upheld his claim that the defendant had unlawfully discriminated against him on the ground of his disability by failing to make reasonable adjustments to allow him to access some type of offending behaviour work. His claim also succeeded on the ground that the SSJ had failed in his public law duty to comply with his own policies, including those under PSO 2285 and PSI 31/2008 relating to the progression of disabled prisoners through their sentences.

We learn from the judgment that proposals for developing an adapted version of the Thinking Skills Programme, and a new programme for violent offenders, to accommodate those with lower functioning, have now been agreed. The bad news is that it is estimated that the new programmes will take a further 18 to 24 months to develop.

Foreign national prisoners; discrimination; compliance with statutory duty

[R \(on the application of the Equality and Human Rights Commission\) v Secretary of State for Justice \[2010\] EWHC 147 \(Admin\)](#)

This case arose from a number of challenges to the SSJ's new policy for the management of foreign national prisoners i.e. to transfer all FNPs to one of a number of designated FNP prisons throughout the country. As initially drafted the policy admitted of no exceptions and challenges were made to the legality of the policy and also to its operation in individual cases.

The policy was still in place when the case was heard but the SSJ had by then asserted that it was not a blanket policy and that consideration would be given to individual circumstances (for example ongoing coursework or family ties) before prisoners were transferred.

The case therefore concentrated on the question whether, before implementing the policy, NOMS had complied with its obligations under s71 Race Relations Act 1976 and s49A Disability Discrimination Act 1995 to have due regard to the elimination of unlawful discrimination and the promotion of equality of opportunity. The court considered that the defendant had indeed failed to comply with its statutory duties but that the position had been rectified by, at the latest, 16th November 2009. Therefore declaratory relief was given only in respect of the position prior to the implementation of the policy.

Repatriated prisoners; article 5

[Orobator v HMP Holloway & Anor \[2010\] EWHC 58 \(Admin\)](#)

The claimant, a British citizen, was convicted in Laos of drugs offences and sentenced to life imprisonment. Having been repatriated to the UK to serve her sentence pursuant to the Repatriation of Prisoners Act 1984 she issued proceedings for judicial review and habeas corpus on the basis that her conviction and sentence had not been imposed by a competent court within the meaning of article 5(1)(a).

The court dismissed her claims, holding that notwithstanding the fact that she had been treated unjustly by UK standards the evidence did not support the conclusion that her conviction and sentence were the result of 'a flagrant denial of justice'. The court considered that this very high test was justified because it was important not to jeopardise or undermine the operation of treaties for the repatriation of prisoners.

Licence conditions; Probation Service

[O'Dowd \(Boy George\) v National Probation Service London \[2009\] EWHC 3415](#)

Boy George sought judicial review of the defendant's refusal to allow him to participate in Celebrity Big Brother whilst on licence following his conviction for false imprisonment. His probation officer initially approved his request subject to certain conditions but was subsequently overruled.

The claim was dismissed. Two points about the judgment are worthy of note: firstly, the claimant had argued that the purpose of supervision on licence was not punitive but merely directed to the protection of the public, the prevention of re-offending and securing the successful re-integration of the prisoner into the community. Therefore the refusal of permission was not rationally connected with the objectives of the

claimant's licence. This submission was rejected by Bean J, who held that the obligation of the Probation Service under s2(2) of the Criminal Justice and Court Services Act 2000 to have regard to the 'proper punishment of offenders' extends to the management of offenders on licence. Secondly, the court rejected an argument that the decision was based on an irrelevant consideration, namely the fear of unjustified media criticism. Bean J held that when considering what restrictions to place on offenders subject to licence it was legitimate to have regard to public perception, or 'the expectations of right-thinking members of the democracy under whose laws a judge has imposed [the] sentence'.

Sentencing; Home Detention Curfew

[Round & Anor v R \[2009\] EWCA Crim 2667 \(16 December 2009\)](#)

Having heard full argument, and following the decision of the Civil Division in the case of [HMP Drake Hall & Anor v Noone, R \(on the application of\)](#) [2008] EWCA Civ 1097, the Court of Appeal (Criminal Division) dismissed Mr Round's appeal against sentence. He had argued that the order in which he served his two consecutive sentences should be reversed to maximise his eligibility for Home Detention Curfew (HDC), but the court held that it was not incumbent on sentencers to alter the ordinary manner of expressing their sentences to maximise the uncertain possibilities of HDC.

Pete Weatherby of GCN appeared for Mr Dunn and will also appear (with Andy Fitzpatrick) in the Supreme Court when it hears the appeal in [Noone](#). It is to be hoped that the Supreme Court will resolve the current position, which continues to result in anomalies for many prisoners.

Indeterminate sentences; category D

[Guittard, R \(on the application of\) v Secretary of State for Justice \[2009\] EWHC 2951 \(Admin\) \(18 November 2009\)](#)

The defendant acted unlawfully in refusing to consider transferring the claimant, an IPP prisoner, to open conditions outside the parole process (i.e. without a review and recommendation by the Parole Board).

Mr Guittard was represented by Vijay Jagadeshm of GCN – for further details and comment see:

http://www.gcnchambers.co.uk/gcn/news/prison_jr_ssj_acted_unlawfully_in_respect_of_the_transfer_of_ipp_prisoners_to_open_conditions

IEP scheme

[Hewlett, R \(on the application of\) v Secretary of State for Justice \[2009\] EWHC 2979 \(Admin\) \(16 November 2009\)](#)

The claimant's challenge to a decision upholding the downgrading of his status on the Incentives and Earned Privileges Scheme from 'enhanced' to 'standard' was dismissed. The claimant, a lifer, had throughout his sentence maintained his innocence of the two sexual offences which had led to the imposition of his automatic life sentence. He was therefore deemed unsuitable for the SOTP, which nevertheless remained a sentence-planning target for him. The court held that the prison authorities were entitled to take his failure to complete the SOTP into account when reviewing his IEP status and to downgrade him, notwithstanding the fact that his stance in relation to the SOTP had not changed.

Parole Board delay and Article 5(4)

[Hoole, R \(on the application of\) v The Parole Board \[2010\] EWHC 186 \(Admin\) \(09 February 2010\)](#)

The defendant's refusal to prioritise the claimant's oral hearing had been lawful notwithstanding his personal circumstances (his wife having been diagnosed with cancer) and favourable reports.

[Degainis, R \(on the application of\) v Secretary of State for Justice \[2010\] EWHC 137 \(Admin\) \(03 February 2010\)](#)

The court dismissed the claimant's claim for damages for an admitted breach of article 5(4). Saunders J did not accept that the breach had extended the period the claimant would have to spend in custody and was not satisfied that the claimant had suffered the sort of frustration or anxiety which would merit an award of damages. Interestingly, the judge doubted whether the seriousness of the index offence was a relevant factor in determining whether damages should be awarded under article 5(5).

[Gray v Secretary of State for Justice & Anor \[2010\] EWHC 2 \(Admin\) \(11 January 2010\)](#)

The claimant was granted declaratory relief in respect of the Parole Board's breach of article 5(4). An application for damages was dismissed, as was the claimant's argument that an interval of 18 months between reviews constituted a further breach of article 5(4).

[Johnson, R \(on the application of\) v Secretary of State for Justice \[2009\] EWHC 3336 \(Admin\) \(18 December 2009\)](#)

The court (Langstaff J) upheld the complaint of the claimant, an automatic lifer, that the decision that there should be a 14-15 month interval between parole reviews in his case constituted a breach of article 5(4). The defendant had advanced no rationale for the decision and the court did not know why that particular period had been selected. On the facts of the case, the decision was unlawful.

The judgment is of particular interest because Langstaff J considered that the fact that the claimant had served nearly twice the tariff period was relevant to the question whether the delay in holding a review was proportionate. He also observed that 'as a general proposition the greater the period between reviews is beyond 12 months, and towards 24 months, the more cogent the reasons will have to be if the court is not to be persuaded that it is unreasonably long in this context'.

Kate Stone
March 2010

Forthcoming seminar

In conjunction with the Association of Prison Lawyers (APL) Garden Court North Chambers are pleased to announce a full day update seminar covering the latest developments in prison law.

This one day seminar will feature a number of Northern-based practitioners at the cutting edge of prisoners' rights law. Sessions during the day will include:

- A round-up of all the important cases and statutory, regulatory and policy changes over the last 12 months.
- Article 5 and post-tariff indeterminate sentence prisoners; where next after Walker and James, James and Wells, and a medley of Article 5(4) cases?
- What are the new arrangements? How will they impact on access to justice for prisoners, and will prison lawyers still be able to make a living?
- Prisoners voting; will the General Election be invalid if the UK does not comply with the ECtHR decision in Hirst?
- Question time; Trends in prison rights' law; you pick the topics.

Cost: £75 + VAT per delegate or £60 + VAT for APL members.

CPD Accreditation: 5 points

Venue: Manchester city centre.

Booking: Places are limited so book early to avoid disappointment. To reserve a place please [click here](#) to download a booking form or contact Chris Knowles on 0161 236 1840.