

Sentence Calculation

R (Elam) v SSJ* [2011] EWHC 1558 (Admin) [judgment](#) concerned the recalculation of certain prisoners licence expiry dates following the decision in *R (Noone) v Governor HMP Drake Hall* [2011] UKSC 30. Prisoners with an interest in the outcome are those serving mixed act sentences committed before and after 4th April 2005 (i.e. offences under both the CJA 1991 and the CJA 2003.)

Prior to the decision of the Supreme Court in *Noone* it was accepted practice that those in the claimant's position were entitled to a licence expiry date ("LED") on the CJA 1991 sentence. The licence would expire after three-quarters of that term because the 2005 savings provisions preserved section 37 (1) of the CJA 1991 for offences committed prior to 4th April 2005. This was achieved by the sentences being directed to run in the order expressed in court: a practice that was heavily criticised in *Noone*. The result was PSI 55/2010, by which it is ordered that all mixed act sentences should be aggregated pursuant to section 264 (3) of the CJA 2003 resulting in a common sentence and licence expiry date ("SLED.")

The claimant argued that his pre-act entitlement to release at the three-quarter point could be preserved without recourse to the method previously adopted, namely by aggregating the terms under section 264 (3) but deducting one-quarter of the CJA 1991 term to protect his pre-act entitlements. He relied, in particular, upon the decision of the House of Lords in *Stellato* to argue that the removal of his entitlement to a LED was unlawful.

The defendant argued that on a proper construction the savings provisions did not preserve the pre-act position for mixed act offenders serving multiple sentences and that the claimant's construction had no basis in law: either section 264 (3) applied in full or not at all. He relied, in particular, on the *obiter* of Lord Mance at §76 of the judgment in *Noone*.

The court (HHJ Behrens) preferred the defendant's arguments and took the view that the claimant had not been deprived of an accrued right to a licence expiry date in respect of the CJA 1991 sentence. The Judge

considered that he should follow what he considered to be the consequence of Lord Mance's judgment at first instance; however he did grant the claimant permission to appeal.

*Mr Elam was represented by GCN's Matt Stanbury and Nicola Lines of Chivers solicitors

Category A - Oral Hearings

R (Longmire) v SSJ [2011] EWHC 1488 [judgment](#) concerned Category A reviews and the question of when an oral hearing is required. The claimant had undergone extensive DSPD treatment and had twice been given credit for making significant progress by the Parole Board (who made no comment on the question of his categorisation.) He was then charged with a further historic offence of rape but the Local Advisory Panel nonetheless recommended him for Category B. The claimant had persuaded the clinical director of the DSPD unit that he could not remember the rape due to extensive drug and alcohol abuse at the time of its commission.

The Director of High Security considered that the clinical director had shown bias and been influenced by the claimant's "psychopathic charms." He declined to direct an oral hearing (there have still only been two oral hearings ever convened by the Director, which he has both dismissed as having been a waste of time.)

Nicol J held that there were features of the case which drove him to the conclusion that fairness did require there to be an oral hearing. Behind the Director's decision was a belief that the claimant had concealed the rape and so had not fully participated in the programmes at the DSPD unit with honesty and frankness; however this ignored the clinical director's opinion. That dispute of fact was a paradigm example of the type of situation where fairness required an opportunity to make oral representations. The accusation that the psychologist was biased and that she and her colleagues had somehow been deceived by the claimant were serious matters that ought to have been ventilated at an oral hearing.

Mackay or DM v SSJ [2001] EWCA Civ 522 [judgment](#) was another Category A procedural fairness challenge,

this time at the Court of Appeal (Sir Anthony May, Sullivan LJ and Gross LJ.) Of particular interest is the tongue-lashing given to the SSJ, who had proceeded on the basis that the decision of Bean J (that there should be an oral hearing) had been stayed, which plainly it had not. As such, he had conducted a further review on the papers in the intervening period, which “*flew in the face of Bean J’s decision and raised very grave concerns – possibly extending to contempt of court*” (per Sir Anthony May at §16.) The court gave serious consideration to declining to hear the appeal, commenting further (§17): *It was or ought to have been plain beyond peradventure that if a fresh determination was to be conducted, then the order of Bean J required an oral hearing to be convened prior to the decision being made.... Suffice to say, I am, with respect, at a loss to understand how there was room for any such misunderstanding. For my part, I deprecate the course so unfortunately taken.*”

Having incurred the wrath of the court, however, the SSJ went on to win the appeal, which concerned the question of whether an oral hearing is required where the Parole Board has indicated that recategorisation might be appropriate. The court noted that the decision of Bean J rested on a single comment by the PB that a progressive move “*may be appropriate*”; however the overall tenor of what the panel had said was that there was no evidence of a significant reduction in risk. When the Parole Board’s decision was considered as a whole, the court found it was difficult to discern any significant inconsistency with the CART’s decision. Insofar as there was any inconsistency, it went no further than that which was inherent in their different roles: the PB focused on release and the measures necessary to achieve it; the CART concentrated upon the risk posed by the prisoner in the event of his escape from custody. There was nothing in the PB’s decision that should have prompted an oral hearing and the appeal was therefore allowed. (§33-38.)

Adjudications - Religious Discrimination

***R (Bashir*) v Independent Adjudicator* [2011] EWHC 1108 (Admin)** [judgment](#). In this case it was undisputed that the claimant, a Muslim, was unable to provide a sufficient urine sample for the purpose of a prison drug test because he was fasting at the time on the advice of a prison Imam. In finding him guilty of disobeying a lawful order the Independent Adjudicator did not reject the sincerity of the claimant’s faith, he having been supported by the prison Imam, who also gave evidence.

The IA held, however, that because this was not a “religious festival”, the Claimant’s fasting was not protected by prison policy in the same way that fasting for Ramadan was.

The court (HHJ Pelling) found that this restrictive approach to Article 9(2) (the freedom to manifest one’s religion) was wrong in law (§16.) The SSJ sought to rely on an expert in Muslim affairs, who indicated that a voluntary fast could be broken. The Judge rejected the SSJ’s argument and reliance on that evidence, pointing out that the evidence post-dated the adjudication and that there had been no previous dispute to the genuineness of the claimant’s faith and belief (§21.) Further, it is well established that in order to determine whether Article 9 is engaged the Court will generally consider whether the assertion of the belief is made in good faith, not whether the belief is valid by reference to some objective standard or religious text (§18.) The Judge went on to find that the claimant’s refusal to break his fast was “intimately linked” to his religious belief (§20 – 21.)

*Mr Bashir was represented by GCN’s Vijay Jagadeshram and Carl Miles of Burton Copeland LLP

Foreign National Prisoners – Open Conditions

R (Omoregbee*) v SSJ* [2011] EWCA Civ 559** [judgment](#). In this case the same court that decided ***Mackay (ante) rejected an argument that PSO 4630 was unlawful insofar as it purported to apply a more stringent test to foreign national prisoners before directing their transfer to open conditions (i.e. that the risk must be “very low.”) In fact the court considered there to be no variable test as the general test contained in PSI 03/2009 still applies: the PSO merely requires the prisoner’s immigration status to also be taken into account.

*Mr Omoregbee was represented by GCN’s Matthew Stanbury and Emma Burkinshaw of Grayson Willis Bennett

HDC – Discrimination

In ***R (Young) v Governor HMP Highdown* [2011] EWHC 867** [judgment](#) the claimant argued that those who are convicted of carrying a bladed article were unlawfully presumed unsuitable from the

Home Detention Curfew scheme. The court (Lord Carlile of Berriew QC) rejected that argument, observing (§38): *"I agree with the Defendant's submissions that the principal goal of the policy contained in PSI 31/2003 is to maintain public confidence in the HDC scheme...Public confidence is particularly important, in relation to HDC, because that scheme operates to release prisoners before the end of the custodial period of their sentences at a time when the public might expect them to be imprisoned. Public confidence in the HDC system could be undermined if those convicted of offences which the public considered particularly serious or anti-social were released early."*

Recall

In **R (Jorgenson*) v Secretary of State for Justice [2011] EWHC 977 (Admin)** [judgment](#) the court (Silber J) considered the circumstances in which a prisoner could be recalled to custody for breaching the terms of his licence. The claimant had used cannabis in breach of his licence and had a long history of offending in the context of drug misuse. It had been inferred in his licence that in those circumstances other alternatives to the revocation of his licence may be considered but they were not. The grounds relied upon included the failure of the SSJ to consider such alternatives.

Silber J rejected the claim but accepted the proposition that the question of proportionality is engaged so far as licence revocation is concerned, i.e. that the recall must be necessary in order to protect the public because of the dangers posed by the prisoner while out on licence (**de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing** considered) and that in the premises the court must anxiously scrutinise decisions on revocation (§44.)

In terms of alternatives to recall the court held that (§47 – 48): *"The Secretary of State is not obliged to consider alternatives provided that he or she focuses on the central issue and concludes that the safety of the public makes it necessary to order the recall of the prisoner who has been released on licence because the risk to the public cannot be contained in any other way, which restricts the freedom of the claimant less....[However] In some cases, the aim of protecting the public might be achieved by imposing a condition in the licence that the prisoner does not enter a particular area or associate with certain individuals. Indeed, the decision to recall can only be necessary to protect the public if there is no other less onerous way of protecting the public."*

*Mr Jorgenson was represented by GCN's Vijay Jagadeshm and Elaine Moloney of Robert Lizar solicitors

PSIs

PSI 32/2011 is the prison service response to the Equality Act 2010 and replaces all existing PSOs dealing with issues of discrimination. It covers the full spectrum of discrimination, but of note is the inclusion of a dedicated section on learning disabilities, which extends to an acknowledgment that such persons may not regard themselves as disabled, but not to a recognition that they may not know they are entitled to be so regarded. There is recognition that certain behaviours may also be a result of the disability, with advice to staff that (Annex H): *"It is important that a prisoner's learning disability, and any behaviour which is a consequence of that learning disability, should not affect a prisoner's incentive and earned privileges level. A prisoner's learning disability may impact on interpersonal relationships and the understanding of instructions, and this should be taken into account when making decisions relating to that prisoner's incentive and earned privileges level."*

Dealing more specifically with the IEP scheme is **PSI 11/2011**, which replaces the previous PSOs on this. The existing position in relation to deniers is confirmed and elaborated upon, the policy providing that: *"In determining IEP levels, the fact that someone is in denial of their offence should not be a bar to attaining enhanced status. It is a prisoner's approach to their sentence and willingness to use their time in custody constructively to reduce re-offending eg. through involvement with OASys and sentence planning which should determine whether they meet required standards. Therefore it is important to ensure that relevant sentence plan targets are set and reviewed where necessary."*

And elsewhere (Annex G): *"A distinction can be made between suitability for SOTP – which applies to those sex offenders who have the risk and need factors that SOTP addresses; and readiness for SOTP – recognising there are needs to work on and are willing to do so via the Prison Service's accredited programme. A convicted sexual offender who denies his offence is technically suitable for SOTP but is not ready for SOTP. This is because SOTP requires analysis of the lead up to offences."*

Matthew Stanbury
4th July 2011