The role of the prison lawyer in balancing the scales of justice

Kushal Sood, Bailey Nicholson Grayson Solicitors

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Abstract

Access to justice for prisoners has historically been limited, but in the recent past, as prison law has gained prominence as a stand-alone area of law, there has been much progress with regard to public law challenges made by lawyers on behalf of prisoners. However, prison law funding continues to experience restrictive change – particularly as a result of regulations that came into effect in December 2013 following the government's consultation paper *Transforming Legal Aid: delivering a more credible and efficient system*. This paper presents an overview of prison law's recent history and then considers the extent to which prisoners should be able to rely on taxpayer funded legal advice, and whether or not there are any viable alternatives to legal advice which could be provided at a lesser cost. The paper argues that prison law should continue to be funded both on the grounds of procedural fairness and cost.

Introduction

Access to justice for prisoners has historically been limited, and arguments in favour of limitation continue to the present day. In the recent past, however, as prison law has gained prominence as a stand-alone area of law, discrete from criminal practice, there has been much progress with regard to public law challenges made by lawyers on behalf of prisoners. This includes litigation on issues such as access to confidential mail, and the right to representation at prison adjudication hearings. Prison law funding, however, continues to experience restrictive change, despite its increasing recognition as a niche area of specialist practice.

In terms of prison law, two questions arise in the context of penal reform as a whole: Firstly, the extent to which prisoners should be able to rely on taxpayer funded legal advice, and secondly whether or not there are any viable alternatives to legal advice which could be provided at a lesser cost.

Legal advice is demonstrably useful at various junctures of a prisoner's sentence, and in general as a unique form of enfranchisement. There are inherent shortcomings in the kind of input that other organisations can offer, as an understanding of the law is a vital prerequisite to explaining the relationship between incarceration and entitlement. Organisations such as the Probation Service and charities are also limited in that they are bound by the objectives of the organisations they represent. Lawyers are also bound, but by funding restrictions and professional regulatory obligations meaning a fiduciary relationship between client and advisor[1] is uniquely present. The solicitor's duty not to act for his or her own benefit, or for the benefit of another party without the informed consent of his or her principal (the client) is not present in other types of assistance.

What is prison law?

Practitioner texts on the specific subject of prison law date back to 1993 (Livingstone and Owen, 1993), but the involvement of courts in prisoner rights cases began long before this. In his foreword to *Prisoners, Law and Practice*, Steven Shaw, who at the time had been Prison and Probation Ombudsman (PPO) for 10 years, stated:

> *Before the late 1960s, any guide to prison law would have been a thin volume indeed. But from that point on, prison litigation played a lead part in the development of public law as a whole*.
> (Creighton and Arnott, 2009: iv)

[1] Summarised in Millet LJ's judgment in *Mothew* v *Bristol and West Building Society* [1996] EWCA Civ 533.

Primary and secondary legislation frames the expectations of parties in the prison law context. The Prison Act 1952 is primarily an enabling statute, empowering the Secretary of State to make such provision as he or she sees necessary.[2] These provisions include the Prison Rules 1999[3], from which Prison Service Instructions and Prison Service Orders follow. They cover a vast array of topics, from appropriate staff footwear, to the conduct of prison disciplinary hearings.[4] The guidance is limited by expiry dates. The National Offender Management Service, an executive arm of the Ministry of Justice (MoJ), released further guidance material in February 2014.

The Probation Service is regulated by a much smaller number of Probation Instructions[5], which sometimes also exist as Prison Service Instructions where the content applies to both prison and probation officers. The Parole Board is regulated by the Parole Board Rules 2011, made by Statutory Instrument. The Secretary of State for Justice has withdrawn all but one set of directions once in force to assist the Parole Board in its decision making (Hansard, 2013). Collectively this guidance material, along with other primary legislation relating to sentencing and parole, and case law, forms the theoretical foundations of prison law.

When the Criminal Defence Service was established under section 12 of the Access to Justice Act 1999, prison law work was permitted as part of a firm's general criminal contract. It was described as advice and assistance regarding a prisoner's

> *treatment or discipline in prison (other than in respect of actual or contemplated proceedings regarding personal injury, death or damage to property...(where he) is the subject of proceedings before the Parole Board (or where he) requires advice and assistance regarding representations to the Home Office in relation to a mandatory life sentence or other parole review*.[6]

The Legal Services Commission launched a consultation in 2009 to address what was described as a desire to '*ensure that legal aid funding is targeted at those who need it most'* (2009: 1). The responses revealed concerns from practitioners that '*too many suppliers (of advice were) dabbling in prison law'* (Ibid.: 8).

Prison law became further defined, in this period, by other categories of work for which contract holders could provide either written advice or advocacy assistance to prisoners.

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[2] 'An Act to consolidate certain enactments relating to prisons and other institutions for offenders and related matters with corrections and improvements made under the Consolidation of Enactments (Procedure) Act 1949' – preamble, Prison Act 1952.
[3] SI No 728, made in exercise of the powers conferred upon the Secretary of State for Justice by section 47 of the Prison Act 1952.
[4] http://www.justice.gov.uk/downloads/offenders/psipso/psi-pso-subject-index.pdf.
[5] http://www.justice.gov.uk/offenders/probationservice/probation-instructions.
[6] Regulation 4, Criminal Defence Service (General) (No 2) Regulations 2001, SI No 1437.

The categories included written advice on sentence planning, licence conditions and resettlement as well as work related to changes in a prisoner's release date and progress to less restrictive parts of the prison estate. Limited scope was offered to provide advice on treatment cases, namely Prison Conditions, Treatment by Staff, Discrimination, Communication and Visits, Mother and Baby issues, Compassionate Release, Behaviour Courses and Other Treatment.

The Legal Services Commission was dissolved and replaced by the Legal Aid Agency, an executive arm of the MoJ on 1 April 2013. In the same month, the MoJ, led by the Secretary of State and Lord Chancellor for Justice Chris Grayling, produced the consultation paper *Transforming Legal Aid: delivering a more credible and efficient system* (MoJ, 2013), and regulations followed. Since 2 December 2013, and at the time of writing, practitioners with prison law contracts are able to conduct legally aided work only in adjudication cases so serious that they have been referred to a District Judge, or where a Governor has granted representation by a lawyer of his or her own volition. Representation is also permitted in parole cases where release is an option, and in cases where a sentence calculation is disputed.[7]

Prisoners' access to lawyers

It was first established that prisoners have a right of access to the courts and through this a right of access to lawyers in *Golder* v *UK* Series A No 18 (1975) 1 EHRR 524. Restrictions on access to lawyers, it has been held, must be 'proportionate to the aim sought' (for example preventing vexatious litigation) and should not be such that the 'very essence of the right is impaired'.[8] This issue was addressed further by the Queen's Bench Division of the High Court, where Lord Steyn concluded[9] that unimpeded access to a solicitor where litigation was possible, was an inseparable feature of access to the Courts.

The House of Lords, reaffirming principles established in several previous cases, emphasised that not all rights are sacrificed by the imposition of a custodial order; indeed the surviving rights may assume an enhanced level of importance given the loss of other rights:

> *Among the rights which, in part at least, survive are three important rights, closely related but free standing, each of them calling for appropriate legal protection: the right of access to a court; the right of access to legal advice; and the right to communicate confidentially with a legal advisor under the seal of legal professional privilege. Such rights may be curtailed only by clear and express*

[7] Criminal Legal Aid (General) (Amendment) Regulations 2013 (SI 2013/2790).
[8] See *Ashingdane* v *UK* Series A No 93 (1985) 7 EHRR 528.
[9] *R* v *Home Secretary ex parte Leech* (No 2) [1994] QB 198.

> *words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment.*[10]

The rest of the Committee in the above case said proportionality would be at the heart of whether or not a prisoner's rights can be said to have been interfered with. Lord Bingham was clear to emphasise that this right was a common law right, and not just a result of what was the then recent enactment of the Human Rights Act 1998.[11]

The importance of access to lawyers has also been recognised internationally. The United Nations Office on Drugs and Crime has recognised the importance of legal advice for prisoners, in the context of reducing prison overcrowding:

> *Ensuring that prisoners have access to legal counsel following conviction and sentencing is key to enabling prisoners to enjoy their right to legal assistance during complaints procedures, appeals, applications for pardon or clemency. (United Nations Office On Drugs And Crime, 2013: 82–83)*

The fact that prison law clients are held in custody, however, presents a complication with regard to legal correspondence and confidentiality. In no uncertain terms it has been held:

> *[n]othing is more likely to have a 'chilling effect' upon the frank and free exchange and disclosure of confidences, which should characterise the relationship between inmate and counsel, than the knowledge that what has been written will be read by some third person and perhaps used against the inmate at a later date.*
> *(The Canadian Supreme Court in* Solosky *v* The Queen *(1979) 105 DLR (3d) 745,760, as per Dickson LJ*[12]*)*

Examples continued to surface, nonetheless, of Prison Governors and officers, justifying encroachment upon this relationship. The Court of Appeal, for instance,[13] justified the absence of a prisoner during a cell search on the bases that officers may be intimidated and there was an express safeguard in written Guidance preventing them from reading legal correspondence searched. In *Daly* v *Home Secretary* [2001] 2 AC 532, the claimant challenged whether or not it was lawful for a policy to ensure a prisoner was absent when legal correspondence was being examined.[14] The arguments cited in *Main* were reiterated by the Home Secretary, with the Director-General of the Prison Service adding on the party's behalf, that staff would become conditioned to relax

[10] *R (Daly)* v *Home Secretary* [2001] 2 AC 532, as per Lord Bingham, at paragraph 5
[11] Ibid., Paragraph 23.
[12] Reasoning adopted by Steyn LJ R v Home Secretary ex parte Leech (No 2) [1994] QB 198
[13] *R* v *Home Secretary ex parte Main* [1999] 349.
[14] As per Lord Bingham at paragraph 2.

security if a prisoner was present, and there was a danger of search methods being disclosed. Lord Bingham rejected this argument, stating that disruptive prisoners could be excluded from the cell search but a blanket policy infringing rights to maintain confidentiality of privileged legal correspondence was interference which went beyond more than the minimum necessary to achieve the aim of an effective cell search.[15]

The prevailing approach from the European Court of Human Rights is that the right to respect for one's private life would be violated where legal correspondence is read, save in exceptional circumstances (affirmed in a series of decisions dating back to 1989, and most recently in *Piechowicz* v *Poland* – 20071/07 [2012] ECHR 689 at paragraphs 239-40). This test of exceptionality is not present in the current prison guidance which permits cell searches without the presence of the prisoner in broader circumstances:

> *The Daly Judgement, which was ruled in the House of Lords in 2001, found that prisoners must, in normal circumstances, be present when legal correspondence is searched during a cell search. However, staff are not prevented from conducting a search of legal papers, without the prisoner present, on the authority of a senior manager where there is an operational emergency or intelligence which requires immediate action, irrespective of the presence of the prisoner.*[16]

The circumstances in which intelligence requires immediate action remains unclear. PSI 68/2011 came into force, it should be noted, before Piechowicz was promulgated. Where prisoners are present for cell searches, legal papers can only be searched for unauthorised articles (PSI 68/2011, Annex A, A2).

Restrictions on prison law funding

In a recent lecture on the limits of judicial authority, Lord Dyson, Master of the Rolls, stated: 'The right of access to the court is useless if it cannot be exercised whether on grounds of cost or for any other reason'.[17] The European Court of Human Rights has indicated that legal aid may be the only means of making such access effective.[18] According to Livingstone, 'this will generally be where the applicant is asserting a 'civil right' as defined by the Convention… where the matter is complex, where the applicant cannot effectively represent him or herself, and where there is a reasonable chance of success' (2008: 314).

The term 'civil rights' in the European Court of Human Rights is said to have an autonomous Convention meaning, so that the classification of a right in domestic law is

[15] As per Lord Bingham at paragraph 19.
[16] PSI 68/2011
[17] Available at: http://www.ucl.ac.uk/laws/alumni/presidents/docs/dyson_2014.pdf (at page 7).
[18] See *Airey v Ireland Series A No 32* (1979) 2 EHRR 305.

not decisive.[19] It has in fact been stated that no clear principles can be derived from case law itself (Dijk et al., 2006: 538).

Article 6 has been engaged where the effect of disciplinary procedures is to reduce a prisoner's visiting rights[20], and legal aid will usually be required in civil cases involving family separation or parental rights[21] and in actions alleging mistreatment by state officials.[22] In *Öztürk – Germany* (Series A-73) ECHR, 21 February 1984 it was held, at paragraph 54: *'[…] the lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal character'.* In that case, the question which arose was whether or not a regulatory offence, which did not appear on a criminal record, engaged a right to a fair trial under Article 6.

Legal aid has also been held to be required to ensure equality between parties to civil proceedings.[23] Indeed the absence of legal aid, when coupled with other factors, has been said to infringe rights under Article 10 as well as Article 6.[24]

The changes made by the *Transforming Legal Aid* regulations make it clear that the interpretation of civil rights to be adopted is narrower than recognised in Strasbourg jurisprudence. Prison law legal aid has only been retained for matters where there is an immediate impact on liberty, including where there is a prospect that additional days may be added to a sentence.

It follows that the controversy caused by the regulations, both in the proposal stage and since they have been implemented, was unsurprising. The proposals attracted 16,000 responses, and petitions opposing their implementation have attracted around 130,000 signatures to date.[25] In relation to the prison law proposals specifically, the Lord Chancellor was called to appear before the Joint Committee on Human Rights (JCHR) and the Justice Select Committee (JSC) to answer concerns, and Lord Pannick laid a motion of regret– the debate for which involved 15 MPs opposing the cuts, before the motion was withdrawn so as not to divide the House. The regulations were also opposed by Her Majesty's Inspector of Prisons, the Parole Board and the PPO. An application for judicial review of the regulations was brought by the Howard League and

[19] *König* v *Germany* (1978) 2 EHRR 170, para 89.
[20] Gulmez v Turkey, judgment of 20 May 2008.
[21] See *Munro* v *UK* (1987) 52 DR 158; and P, C and S v UK (2002) 35 EHRR 31.
[22] See *Faulkner* v *UK*, Decision of 30 November 1996 (complaint that a lack of a civil legal aid system in Guernsey for an action for false imprisonment and assault and battery was an arguable violation of the right of access to the courts; a friendly settlement was reached on the Government's undertakings to introduce such a system: *Faulkner* v *UK*, The Times, 11 January 2000).
[23] *Steel and Morris* v *the United Kingdom* - 68416/01 [2005] ECHR 103.
[24] Ibid., at paragraph 95.
[25] http://epetitions.direct.gov.uk/petitions/48628; http://epetitions.direct.gov.uk/petitions/2436; http://www.change.org/en-GB/petitions/david-cameron-uk-government-save-legal-aid-to-protect-access-to-justice-for-all.

Prisoner's Advice Service, for which permission was refused.[26] An application to appeal this decision was granted on 1 July 2014.[27] The debate on entitlement to legal aid continues to develop at the time of writing.

The JCHR (2013) published its conclusions on the implications after the 2013 regulations came into force. They welcomed the retention of civil legal aid:

> *…to bring judicial reviews in relation to prison law matters, because this will preserve the possibility of access to court in the sorts of cases where such access is required. However, we agree with our witnesses that the Government cannot rely upon prisoner's retaining access to funding for judicial review, if the number of matter starts per year per firm remains restricted at the current level. If a matter is outside the scope of criminal legally aided prison law funding, we can envisage cases where a prisoner is unable to receive legal advice and representation because firms do not have enough matter starts to take on the case. Since there is no obvious practical alternative means for prisoners to seek legal advice such as attending a Law Centre, there is a clear risk of breach of Article 6 and common law rights in such a case.*

Following the introduction of the regulations, Chris Grayling gave evidence to the Justice Select Committee. Lord Lester of Herne Hill asked how cases outside of the scope of legal aid would be addressed, and was unimpressed by the answer given:

> *When I put this to Mr Grayling in evidence his reply was, 'well I'm sure that in that sort of case you can find barristers who do no win no fee cases'. That is no answer; for a prisoner to have to find such a barrister and to negotiate with the clerk and all the rest of it is patently absurd.*
> *(Hansard, 2014a)*

In his eventual written response to the JCHR, the Lord Chancellor did not accept that Article 6 would be breached, nor that the proposal was inconsistent with the common law right of access to the Court. In making this argument, he relied on the availability of specific types of funding, on an unlimited level and undertook to permit firms to apply for a limited number of matter starts (authorisation to commence individual cases) where there was evidence of 'unmet need in a particular geographical area' (MoJ, 2014a).

Discretionary funding has been shown not to work as a safeguard. For example, in 2009 the Legal Services Commission, further to their concerns on the growth of treatment cases made funding possible only where prior application had been made to them for that type of case. For the duration of the 2010–2013 contract, only 11 applications were

[26] *The Howard League for Penal Reform & Anor, R (On the Application Of)* v *The Lord Chancellor* [2014] EWHC 709 (Admin).
[27] http://www.howardleague.org/legal-news/.

approved nationwide (Association of Prison Lawyers, 2013). Even more recently, the MoJ accepted that of 1,151 applications made for exceptional case funding between 1 April to 31 December 2013 (for groups excluded from automatic funding under the Legal Aid, Sentencing and Punishment of Offenders Act 2012), 35 were granted (MoJ, 2014b). When these statistics are considered alongside details of the changes being made to judicial review, such as drastically increased court fees, the Lord Chancellor's undertakings, recorded above, are of limited value.

The disparity between Strasbourg jurisprudence and Mr Grayling's own views on the right to legal aid was made clear in his evidence to the House of Commons Justice Select Committee in July 2013. As Mr Justice Cranston put it:

> *He was asked by Jeremy Corbyn MP whether he accepted putting someone in prison was an enormous responsibility, that there was a duty of care on the Prison Service and the Ministry, and that prisoners had a right to make complaints, and if necessary, take a case to court if they felt badly treated in prison. The Lord Chancellor replied:*
>
> *'I suspect, Mr Corbyn, that this is an area where there is an ideological difference between us. I am absolutely of the view that somebody in prison should have the right to legal aid when it is a matter relating to their sentence and the length of time that they will spend in prison. When it is a matter relating to the conditions in the prison, or the choice of prison in which they are detained, we have a prison complaints system and a prisons ombudsman. To my mind, that is the route that we should follow. I do not believe that prisoners in jail should have the right to access legal aid to debate which prison they are put in.'*
>
> *Later he added that the taxpayer should not be funding legal aid for prisoners to litigate which prison they have been detained in or what the conditions were in their cell.* [28]

The Claimants in *HL/PAS*, *inter alia*, challenged the removal of scope in the context of pre-tariff reviews before the Parole Board, eligibility of women prisoners for mother and baby units, segregation and placement in closed supervision centres, category A reviews, access to offender behaviour courses, resettlement on leaving prison and disciplinary proceedings where no additional days may be awarded.[29]

The first argument raised by the Claimants was that the Lord Chancellor's consultation was flawed, in that he essentially did not warn consultees that pre-tariff parole board reviews were being considered for removal from scope. The Court refused permission

[28] *The Howard League for Penal Reform & Anor, R (On the Application Of)* v *The Lord Chancellor*, at paragraph 14.
[29] Ibid., para 40

on this ground on the basis the scope change was not fundamentally different from the original proposal, and consultees had opportunities, for example before the JCHR, to make their points heard.

The second ground looked at the risk of unfairness in cases where a great deal, albeit not liberty directly, was at stake (examples of mother and baby units and segregation were cited in the judgment) arguing that legal aid was the only means of ensuring informed representations could be made. The Court held that the Claimants had not established that there would be an unacceptable risk of procedural unfairness[30] 'which inheres in the system itself.[31] The Court pointed to alternative means of resolving complaints, whilst conceding that in 'particular cases none may match the assistance which has been provided by lawyers…under the existing system of criminal legal aid for prisoners'.[32]

In response to the Claimant argument that the regulations had implications for access to justice, the Court held:

> *There is no corollary to the common law right of access to a court of a right to legal aid:* R *v* Lord Chancellor ex parte Witham *[1998] QB 575, 581. The Strasbourg article 6 ECHR jurisprudence is clear that the provision of legal aid of this character is not mandatory, except in exceptional cases:* Airey *v* Ireland *(1979-80) 2 EHRR 305;* Hooper *v* United Kingdom *[2005] 41 EHRR 1. In any event the context of the present claim is not in relation to access to the courts but to proceedings before bodies such as the Parole Board, prison disciplinary hearings and the independent reviewer for access to mother and baby units. Legal aid for judicial review remains. For the reasons given already we do not see that it can be argued that the removal from scope of these aspects of prison law will lead to an unlawful interference with prisoners' rights of access to the courts.*[33]

This interpretation of Strasbourg jurisprudence imports a clarity into Article 6 and, by implication, the concept of civil rights, which cannot be reconciled with the judgments and other material cited above. The Court also took it for granted that the availability of funding for judicial review would constitute effective access to justice. The Claimants' argument that the regulations were discriminatory was not sustainable once the Court had held that Article 6 was not engaged. Both of the final arguments of the Claimant that the regulations were irrational and *ultra vires* were refused permission.

[30] The threshold established in *R (Refugee Legal Centre)* v *Secretary of State for the Home Department* [2004] EWCA Civ 1481; [2005] 1 WLR 2219.
[31] The Howard League case, para 44.
[32] Ibid., par 45.
[33] Ibid., para 47.

The Claimants' grounds covered some 100 pages and Ms Kaufmann QC on their behalf developed points in relation to each of the categories removed from scope by the regulations.[34] Such an exhaustive analysis of individual categories is beyond the scope of this paper. Examples can, however, notwithstanding the Court's conclusions, be extrapolated from a variety of sources in which pre-parole review matters have had an impact on liberty[35] and the provision of legal aid would assist and benefit decision makers.

Extensive case law exists on a multitude of subjects relating to sentence progress. For present purposes, the Lord Chancellor's repeatedly expressed aversion to legal aid being available for litigation on choice of prison or cell conditions, on the basis he would 'prefer to spend money on something more positive' (Grayling, 2014) suggests that sentence progress from a prisoner's perspective constitutes placement in their preferred prison. The reality is so different that one would be forgiven for suggesting the Lord Chancellor's aversion is disingenuous and artificial.

To highlight this, it is worthwhile looking at public statements made by professionals who have spent considerable time working in the Prison System. As detailed above, the PPO, the Parole Board and Her Majesty's Inspectorate of Prisons opposed the regulations. In *HL/PAS*, the Claimants relied on the witness statements of two former prisoner governors, both of whom asserted the importance of legal advice for prisoners, to give them a sense of fairness, and to enable the preparation of independent reports.[36] Mental health experts, who prepare such independent reports, have referred to the uncertainties of risk assessment; belittling tools still relied on within the Prison Service and by the Secretary of State for Justice at Parole hearings. Dr Bob Johnson, who was Consultant Psychiatrist in the Special Unit in Parkhurst Prison from 1991 to 1996, and a clinician with experience over five decades, stated that the P-CLR, a questionnaire test used to determine psychopathy

> *has negative clinical value — it signally fails to benefit the actual patient. It derives from a legal view that would grace the worst dictatorships, generating positively Kafkaesque conundrums. And it propagates a covert political agenda which is both degrading and unworthy of any civilised society*.
> (Johnson, 2006)

Yet the test continues to be used and endorsed within both the probation and prison service.

[34] Ibid., para 42.
[35] For example *Donnelly (AP), Re Judicial Review* [2013] ScotCS CSOH_106; Roberts v Parole Board [2005] UKHL 45.
[36] Howard League case, para 42.

Psychologist Robert Forde has described another continually used risk assessment tool, the HCR 20 as 'seriously flawed' and the main report of risk relating to sex offenders – SARN – as:

> …*useless. It is simply not an indicator of risk, and is therefore not a guide to how much risk exists, or whether it has been reduced through treatment (or indeed anything else). However, the implications of the research go far beyond this. The SARN is the assessment scheme which is used to determine treatment goals, and to assess supposed improvement in treatment, for the SOTP and all of the other sex offender treatment schemes run by NOMS. In effect, this invalidates the basis on which the treatment goals are selected, and on which improvement in treatment is assessed. This research therefore not only undermines the SARN, but also the entire family of sex offender treatment programmes based upon it*. (Forde, 2012)

In *Manning, R (on the application of)* v *Secretary of State for Justice* [2013] EWHC 1821, the Claimant prisoner was approved for transfer to Category D conditions, but the decision was revoked upon the Governor's realisation that he had overlooked an outstanding confiscation order. Mr Justice Kenneth Parker expressed sympathy for the Governor, who *'had to take up to 50 categorisation decisions each week, on top of his other duties and responsibilities'.*[37]

The prison complaints system comprises a two-stage process followed by an appeal if the complaint is not resolved. There is a requirement to respond, at least to the initial complaint, within five days[38], which means that at least three different personnel can be engaged. On the other hand, Prison Service policy is to respond to legal representations within 28 days, and so a legal response would engage only one person over a longer period.

Governors under pressure will inevitably make mistakes, whether in favour of the prisoner or not. It is of note that in *Manning* the prisoner was only legally aided for the judicial review and not for the initial negotiations with the Governor. Legal aid provision for the latter could have avoided the mistake being made altogether, and even where it had not, it would have conveyed the Claimant's point of view, with the benefit of a full and expert analysis of prison records. In other words, solicitors' categorisation representations assist both decision-makers and prisoners. This argument survives any conclusions that categorisation decisions do not comprise an assessment of civil rights, as discussed above.

[37] Paragraph 19.
[38] Prison Service Instruction 02/2012, Annex B.

The issue of categorisation relating to indeterminate sentence prisoners was raised in a recent House of Lords question for short debate (Hansard, 2014b). The Lord Bishop of Lichfield considered the problem of the continued difficulties prisoners face in accessing offender behaviour courses, a failure which had resulted in the finding of a breach of Article 5 by the European Court of Human Rights.[39]

He stated:

> *…on the process for determining how far risk has been reduced, the Parole Board is under enormous pressure, which has grown greatly following a recent judgment requiring oral hearings in many more cases than before. I welcome the sensible suggestion made by the Prison Reform Trust, that the decision on a move to open prison conditions should be made by the prison governor, as already happens with those on determinate sentences, rather than the Parole Board. If that is not done, then there is a strong case for reinstating the recently removed right to legal aid for IPP prisoners in relation to their recategorisation decisions.*

Governors too are overwhelmed by categorisation requests as emphasised by Mr Justice Kenneth Parker in *Manning*. It is therefore clear that the provision of legal aid for all categorisation cases is worthwhile. There are many other categories of case in which it would make good sense to provide legally aided advice; some have indeed argued that this efficacy is fundamental to a decision maker's consideration of whether or not there has been 'an improvement in some economic, political or social feature of the community' (Dworkin, 1977: 22).

Alternatives to legally aided advice

Alternatives to legal aid must always be explored. Baroness Butler-Sloss, in her contribution to the Regret Motion, stated:

> *One group of young people—they are children—have advocates from Barnardo's, which is a step forward. As far as I know, however, they are not lawyers and do not provide that specialised help which, for instance, is needed in the resettlement of young people who come out of secure accommodation or youth prison. Those young lawyers are of course experts in dealing with these problems.*
> *(Hansard, 2014c)*

Similar problems would be encountered when specialist support is required. As Lord Pannick – who was responsible for the regret motion which prompted the Lords debate – stated:

[39] *James, Wells and Lee* v. *The United Kingdom* - 25119/09 57715/09 57877/09 - HEJUD [2012] ECHR 1706.

> *many prisoners lack basic skills of literacy or suffer from other problems which impede their ability to present an effective grievance.*
> *(Hansard, 2014d)*

An additional problem with exploring alternatives to legal aid relates to cost. Lord Pannick pointed out that the cost of lodging a complaint before the Ombudsman was £830 as opposed to £220 for the provision of prison law advice under the legal aid regime, before the regulations came into force (Hansard, 2014e).

Dr Nick Armstrong of Matrix Chambers, in his evidence to the Joint Committee on Human Rights, stated:

> *The (legal aid) changes will cost a lot more than they save. This is particularly true where prisoners are concerned, because they will now be held in prison longer, and also in higher security prisons for longer.*
> *(Armstrong, 2013)*

His analysis was preceded by these words of agreement from Lord Reed, albeit in the context of oral parole hearings:

> *procedures which involve an immediate cost but contribute to better decision-making are in reality less costly than they may appear.* [40]

The United Nations Office on Drugs and Crime encourage authorities to draw up rosters of lawyers to provide advice for free to inmates (United Nations Office On Drugs And Crime, 2013). Provision of solely free advice is no solution, however, as it would lead to a situation where the 'dabblers' complained of during the 2009 consultation would reappear.

Conclusion

Expert advice is the best way of enfranchising prisoners. It is likely to remain so until the law relating to prisoners becomes is simplified to an extent that support from non-lawyers will suffice, and prisoners themselves are in a position to make their views heard. While progress on these fronts will not obviate the need for legally aided advice, it will inevitably place some disputes and difficulties beyond the need for it.

The Lord Chancellor has claimed there is friction between the common law and Strasbourg jurisprudence, relating to the circumstances in which legal aid is imperative. Even the endorsement in *HL/PAS* of this legal interpretation, has been superseded – albeit in the context of immigration proceedings – by the more liberal interpretation in Gudanaviciene & Ors *v* Director of Legal Aid Casework & Anor [2014] EWHC 1840 (Admin) as per Mr Justice Collins at paragraph 50. Whatever the courts views are on this issue, there is clear good sense in prison lawyers being funded. Unless and until a

[40] *Osborn* v *The Parole Board* [2013] UKSC 61, paragraph 72.

credible alternative exists, several grounds – including lower cost and good administration – can be promoted independently of proof that an unacceptable risk to procedural fairness is inherent in the system.

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About the author

Kushal Sood is a Solicitor and Prison Law Supervisor at Bailey Nicholson Grayson Solicitors.