Neutral Citation Number: [2013] EWHC 438 (Admin)

Case No: CO/4700/2012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/03/2013

Before :

THE HON. MRS JUSTICE NICOLA DAVIES DBE

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Between :

	THE QUEEN on the application of **1) M.A. (FORMERLY A CHILD BUT NOW OF FULL AGE)** **2) N.B. (FORMERLY A CHILD BUT NOW OF FULL AGE)** **3) M.B. (FORMERLY A CHILD BUT NOW OF FULL AGE)** **4) H.B. (FORMERLY A CHILD BUT NOW OF FULL AGE)** **5) B. (FORMERLY A CHILD BUT NOW OF FULL AGE)** **6) S.D. (FORMERLY A CHILD BUT NOW OF FULL AGE)** **7) G.O. (FORMERLY A CHILD BUT NOW OF FULL AGE)**	**Claimants**
	- and -	
	Independent Adjudicator & Director, HMYOI Ashfield	**Defendants**
	Secretary of State for Justice	**Interested Party**

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Ms Phillippa Kaufmann QC & Ms Caoilfhionn Gallagher (instructed by The Howard League for Penal Reform) for the **Claimants**
Mr Jeremy Johnson QC (instructed by DWF LLP) for the **Second Defendant**

Hearing dates: 4 to 6 & 12 December 2012

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Approved Judgment

See also Costs at foot of judgment

Mrs Justice Nicola Davies:

1.The claimants bring these proceedings for judicial review to challenge a number of related decisions of the first and second defendants, the Independent Adjudicator ("IA") and the Director of HMYOI Ashfield. At all material times each claimant was aged 17, serving a custodial sentence for a serious criminal offence at HMYOI Ashfield ("Ashfield"). Ashfield is a Young Offenders' Institution ("YOI") for sentenced and remand male young people (YP), aged 15 to 18. It is a private institution, operated by Serco Limited pursuant to a contract with the Ministry of Justice. On 2 February 2012 the claimants jointly, together with a number of other detainees, took part in a concerted act of indiscipline. As a result the claimants lost certain privileges, MB and B were placed in the segregation unit and all were the subject of adjudications which have since been quashed.

2.Proceedings for judicial review were issued on 3 May 2012. The original grounds of challenge focused upon the IA's failure/refusal to recuse himself from hearing the adjudications against the claimants on 1 March 2012 despite his prior knowledge of the disturbance which formed the basis of the charges against them. On 11 May 2012 the Treasury Solicitor, on behalf of the first defendant and the interested party, informed the claimant's solicitors that they would not be contesting the challenge to the findings of guilt made by the IA or the sanctions imposed. A consent order agreed between the claimants, first defendant and interested party, was approved by Singh J on 18 May 2012. As a result of the concession made by the first defendant and the interested party, claims against the first defendant have been settled in the claimants' favour. There remains one outstanding issue concerning the fifth claimant but this is to be listed separately. On 23 July 2012, Singh J adjourned the application for permission to be listed as a rolled up hearing on notice to the defendant and interested party. Having heard the submissions I am satisfied that this is a case where permission should be granted. For the purpose of this judgment the second defendant will be referred to as the 'defendant'.

Incident 2 February 2012

3. The claimants were staying in Phoenix Wing which held 24 young persons, they being the most serious offenders serving long sentences. At around 10.30am a "mass move" took place involving the movement of young persons and staff around Ashfield. During the move the claimants together with other young persons entered the Astroturf sports pitch within the complex which was out of bounds. This was said to be a protest against a decision to remove the toilet seats from a residential block. Approximately 14 young persons were on the pitch, some of them began to damage one of the goal posts. A decision was made by the staff to withdraw from the pitch as the risk posed was assessed as considerable and had to be managed, a number of the young persons involved had histories of violence. Ashfield was shut down causing significant disruption. A command centre was opened, the position on the pitch was monitored. A number of the young persons armed themselves with pieces of the broken football goal and approached the laundry room, where they began to threaten a member of staff. Some were threatening

each other on the pitch. At about 1.20pm a team of custody officers in protective gear went down to the pitch, at this point the majority of the young persons surrendered. Four or five were unwilling to do so, this included MB and B, they were restrained by staff and subsequently taken to the segregation unit (the Brunel Unit).

4. It is no part of the defence case that any claimant was directly responsible for an identified act of damage to property or a threat to a member of staff. The defendant contends that each claimant took part in a collective and concerted act of indiscipline which involved damage to property and threats. Claire Douglas, Assistant Director at Ashfield opened the young persons' adjudications on 3 February 2012. It was her opinion that the element of violence, the level of damage to the property, the protracted nature of the incident and the disruption caused to the operation of Ashfield meant that the incident was sufficiently serious to escalate to a hearing in front of the IA. The hearing took place on 1 March 2012 and resulted in the imposition of additional days imprisonment.

5. Section 47(1) of the Prison Act 1952 provides a power to make rules for the regulation of Young Offender Institutions. The relevant rules are the Young Offender Institution Rules 2000 (SI/2000 No.3371) ("YOI Rules"). All claimants were initially segregated pursuant to YOI Rule 58(4) pending adjudication. MB and B were in the Brunel Unit, the remaining claimants were restricted on Phoenix Wing. Following the adjudication on 3 February MB and B remained on the Brunel Unit subject to the Good Order or Discipline Regime (GOoD).

6. The remaining five claimants remained on Phoenix Wing until Monday 6 February 2012. Following the adjudication on 3 February these five claimants ceased to be subject to Rule 58(4) segregation but they remained on the wing "to enable investigation to take place into the indiscipline, to establish whether they continue to pose a risk, to prevent a recurrence and to enable the regime to resume for the remaining population who had not been involved in the indiscipline." Thereafter it is the defendant's contention that the claimants were reintegrated back into the normal regime "in a way that managed the risk they posed." The claimants were reduced in level on the Incentive and Earned Privileges Scheme (IEP). As a result there was a reduction in the amount of money they were permitted to spend, those reduced to Bronze were not permitted a television or telephone in their rooms albeit they had access to a telephone and television on the wing. As to education: on 2 February classes were missed because of the incident; on 3 February classes were missed because of the adjudication hearings; on 4/5 February no classes took place as it was the weekend. In the period 6 February onwards some classes were missed. A two week gym ban/suspension was also imposed.

The claimants' case

7.The claimants' challenges have altered during the course of these proceedings. On their behalf

it is said that following disclosure the case has been refined to address the matters disclosed. Mr Johnson QC on behalf of the defendant has responded well to the evolving challenges.

8. The claimants challenge two specific areas of the system operated at Ashfield:

i) unlawful disciplinary measures;

ii) unfair adjudication process.

Unlawful disciplinary measures

9. Issue is taken upon a number of matters, namely:

i) A shadow segregation regime referred to as "restriction on the wing". This is alleged to have taken place on Phoenix Wing between 3-6 February 2012. It was an informal scheme, lacking any of the safeguards applicable to the formal segregation regime and by reason of that, unlawful;

ii) Incentive and Earned Privileges Policy: the failure by the defendant to comply with its own IEP Policy and the Secretary of State for Justice's (SSJ) Guidance;

iii) Education: the unlawfulness of the restrictions placed on access to education;

iv) Gym ban: the operation of an unlawful blanket restriction on physical education including a failure to follow Ashfield's own policy or proposed policy concerning access to the gym.

Unfair adjudication process

10. The allegation is of procedural unfairness: (a) a failure to provide adjudication paperwork, including evidence and statements, to legal representatives when requested; (b) a failure to provide witness statements relied upon in relation to sentencing in advance of sentencing itself; (c) an absence of any system at Ashfield for ensuring that IAs are made aware of punishments already imposed, thus failing to ensure that overall punishments arising from proven behaviour were proportionate and appropriate.

The defendant's case

11. The defendant recognises that its treatment of young people is, and should be, subject to rigorous supervisory scrutiny. The incident represented a serious breach of the good order of the establishment and resulted in an obvious risk to staff and young persons. The director of Ashfield had a duty to his staff and the young persons to take reasonable care for their safety. In exercising that duty the director had to act in a way that was compatible with the law. On 2 February Ashfield had to be shut down in order to minimise risk. In the aftermath it took the establishment a few days to return to normality. In the ensuing period senior staff took the view that it was appropriate to reintegrate those involved in the incident in a controlled way. Had the normal day to day routine continued to operate without allowing time for matters to cool down there was an obvious risk of a repetition of the incident which would bring with it a risk of injury to staff and the young persons.

12. Aside from the adjudications, which have been quashed, and the segregation of MB and B which is not challenged in principle, the effect of the challenged decisions is modest: a restriction on a wing over a weekend; a few missed sessions of education and two weeks loss of gym. It is recognised that education is important for young people but this is of a different order of concern to a loss of liberty. As to the restriction on the wing, it was no part of a general policy but an ad hoc decision by senior managers to respond to difficult issues. Specifically the following matters are relied upon:

    i) The decisions made by the defendant were lawful. Further it was open to the claimants to appeal the IEP decisions;

    ii) The claims in respect of loss of privileges do not reach the exceptionally high threshold level required for the court's intervention;

    iii) The claims in respect of the fairness of adjudications are academic because the adjudications have been quashed.

Evidence

13. Evidence on behalf of the claimants was provided in the form of witness statements of Claire Salama, a solicitor at the Howard League for Penal Reform (the Howard League), Frances Crook, the Chief Executive of the Howard League, Clare Mann, a paralegal at the Howard League, Catherine Lee, trainee solicitor and secondee at the Howard League (the Howard League being instructed to represent the claimants). During the hearing the court received witness statements from MB and GO which confirm the content of their solicitors' witness statement. The solicitors' witness statements contain accounts provided by the claimants to their respective solicitors. Exhibited to the statements are handwritten notes from all the claimants except B attesting to the accuracy of the content of the statements.

14. The defendant relies upon a number of witness statements from those working at Ashfield at the relevant time, these include Claire Douglas, David Oakes, Deputy Assistant Director and Kath Brown, unit manager of the Phoenix Wing.

Evidence of segregation / restriction

15. The evidential position regarding periods of segregation and restriction of activities was less than satisfactory. The claimants relied upon their accounts contained in their solicitors' witness statements. The defendant relied on the witness statement of David Oakes and records and/or documentation relating to attendance at education and the gym. In an effort to clarify the position both parties helpfully produced a schedule identifying agreed evidence and areas of disagreement. In summary the position is as follows:

Duration of segregation in Brunel Unit

16. MB and B segregated between 2 – 13 February 2012. Agreed.

Duration of restriction on wing MA, NB, HB, SD, GO

17. Segregation (Rule 58 (4)) 2 – 3 February 2012. Agreed.

3 – 6 February 2012 restriction on wing. Agreed.

NB – 6 – 16 February 2012 restriction on wing. Not agreed.

SD 6 -8 February 2012 restriction on wing. Not agreed.

GO 6 – 8 February 2012 restriction on wing. Not agreed.

Association

18. There is fundamental disagreement between the claimants and the defendant as to the restriction imposed upon the five claimants who were not in the Brunel Unit. It is the claimants' case that save for leaving their cells for showers, the use of telephones and open air exercise they were confined to their cells for 23 – 23 ½ hours a day. It is the defendant's case that the claimants were restricted to the wing but not to their cells. As to MB and B it is their case that they remained locked in their cells other than time permitted to shower or telephone, the defendant has not addressed this point.

Education

19. It is agreed that education was disrupted on 2 February 2012. No education was provided on 3 February 2012 because of adjudications, none was provided over the weekend of 4 - 5 February. There is a dispute as to the education provided in the days following 6 February 2012 in respect of the claimants in the Phoenix Wing. It is agreed that it is unnecessary to resolve this issue because on the defendant's case lessons were missed as the claimants were being phased back into education which Ashfield maintains was lawful and the claimants maintain was unlawful. The exact number of days missed is not relevant to the core submissions.

Restriction of gym

20. MA, NB, HB, SD, GO

It is agreed that these claimants were banned or suspended from using the gym for two weeks. It is not agreed that an offer of alternative structured physical education e.g. gym based education classes and one hour of open air exercise per day was made.

21. MB and B

It is agreed that between 2 – 13 February 2012 MB and B had no access to the gym during the period of segregation. It is not agreed that they were able to use gym equipment in the Brunel unit. It is MB's case that his ban lasted until 15 March 2012, this is not agreed by the defendant.

IEP Status

22. MA

It is agreed that between 3 – 10 February 2012 MA was reduced from silver to bronze and refused to sign form D2 identifying the downgrade. The defendant disputes that the reduction commenced on 2 February 2012.

NB

It is agreed that NB was reduced from gold to silver from 3 – 26 February 2012 and that he signed form D2.

MB

It is the claimant's case that MB was reduced from gold to bronze from 2 – 13 February 2012, therefore he was on silver for 5 weeks. The defendant contends MB was reduced from silver to GOoD between 4 – 13 February 2012, the remaining allegations are not agreed.

HB
It is agreed that HB was reduced from silver to bronze between 3 – 10 February 2012 and he did not sign form D2. A reduction on 2 February 2012 alleged by the claimant is not agreed.

B
It is agreed that a reduction in IEP took place between 3 – 13 February 2012. The claimants' case is that the reduction was from gold to bronze, the defendant's case is that the reduction was from silver to GOoD. In respect of both MB and B there is a limited issue as to the time when they left the segregation and on the claimants' case were on bronze for a period of some 30 minutes.

SD
It is agreed that between 3 – 10 February 2012 SD was reduced from silver to bronze, he did not sign form D2. It is not agreed that this reduction occurred on 2 February 2012.

GO
It is agreed that GO was reduced from silver to bronze from 3 – 10 February 2012 and he signed form D2. It is not agreed the reduction commenced on 2 February 2012.

Restriction on the wing
Claimants' Case

23. Segregation is permitted in YOIs pursuant to YOI Rule 49 or 58(4) in certain circumstances. When imposed it is subject to stringent safeguards detailed in PSO 1700.

YOI Rule 49 provides:

> "Part II
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> INMATES
>
> Discipline and Control
>
> **Removal from association**
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> 49. – (1) Where it appears desirable, for the maintenance of good order or discipline or in his own interests, that an inmate should not associate with other inmates, either generally or for particular purposes, the governor may arrange for the inmate's removal from association accordingly.

> (2) An inmate shall not be removed under this rule for a period of more than three days without the authority of a member of the board of visitors or of the Secretary of State. An authority given under this paragraph shall in the case of a female inmate aged 21 years or over, be for a period not exceeding one month and, in the case of any other inmate, be for a period not exceeding 14 days, but may be renewed from time to time for a like period.
>
> (3) The governor may arrange at his discretion for such an inmate to resume association with other inmates, and shall do so if in any case the medical officer or a medical practitioner such as is mentioned in rule 27(3) so advises on medical grounds."
>
> Segregation pursuant to Rule 49 can be referred to as segregation for "Good Order or Discipline" (GOoD).
>
> YOI Rule 58(4) is more limited:
>
> "(4) An inmate who is to be charged with an offence against discipline may be kept apart from other inmates pending the governor's first inquiry."

24. The Rules are supplemented by the interested party's guidance. PSO 1700 mandates identified requirements at each stage of segregation. The introduction to PSO 1700 includes the following:

> "Segregation should be used only as a last resort whilst maintaining a balance to ensure it remains an option for disruptive prisoners, … It is expected that segregation staff focus on helping prisoners manage their behaviour and problems rather than simply on punishment … positive regimes and activities are encouraged as this will act as a diversion to the boredom and lowliness of segregation … each establishment needs to develop their own segregation policy to reflect their own needs. This should be structured on PSO 1700 and will adhere to Prison Standards 55 and be an integrated part of the local safer custody strategy."

25. The Rules and PSO 1700 provide for risk assessment, health assessment and monitoring during the period of segregation. As to activities, the following is included in PSO 1700:

> "… In July 2003 the High Court held that it is not lawful to deny access to regime activities while a young person is held in a segregation unit. 'The young person must be provided with a full regime as far as possible, subject only to the constraints imposed by the need to keep the young person separated from others' –

> Lord Justice Jack. In cases where the prisoner is a young person a separate risk assessment must be made to identify the regime activities in which they can safely participate with others. The basic levels of privileges include legal visits, education, canteen, PE, work, religious services, showers, library, exercise and telephones. These basic rights can only be removed as a disciplinary punishment and where the assessment has identified a risk to the young person or other young person."

26. Specifically as to IEP the guidance states:

> "A prisoner located in segregation will remain on the same IEP level unless such time an IEP Review Board takes place and states otherwise. Within two hours of being located in segregation they will be informed of the regime and reasons in writing."

27. No challenge is made to the claimants' initial segregation pursuant to Rule 58(4) pending adjudication nor as to the segregation of MB and B for the entirety of their stay in the Brunel Unit. The restriction on the wing regime imposed upon the five claimants MA, NB, HB, SD, GO, for the period 3 - 6 February 2012 is said to be unlawful being based upon no rule or policy. It amounted to a "shadow" segregation scheme without the critical procedural safeguards detailed in PSO 1700 e.g. assessment, review and monitoring. No records were kept by Serco Limited during the period of the wing restriction, a mandatory requirement pursuant to PSO 1700. As each of the claimants was contained within his cell save for access to a telephone, shower and limited time in the open air, this was removal from association. Such a regime is unknown within the prison estate and is an example of Ashfield introducing its own policies. In September 2012 Ashfield introduced a policy for the operation of such a scheme, the details of which were not before the court.

Defendant's Case

28. The defendant accepts that incarceration does not deprive a detainee of his human rights. Segregation can amount to an interference to the right to respect for private life and can only be imposed pursuant to and in accordance with statutory requirements. The segregation decisions did comply with statutory requirements.

29. Between 3-6 February the five claimants retained all their rights on the Phoenix Wing including access to showers, telephones, open air exercise and association with other detainees on the wing. It is accepted that these claimants were not permitted to associate with other detainees outside the wing but they were not subject to solitary confinement or segregation. This was not a punishment or sanction, it was a reasonable, lawful and

short term practical measure to maintain security given the indiscipline and consequent disruption which had occurred. It was also done in order to prevent a recurrence. From Monday 6 February, the five claimants were integrated into the general regime and were able to associate with young offender persons from other wings.

30. If there was any error on the part of the defendant, this was due to the exigencies of the particular circumstances following the wide spread disturbance, there is no evidence of a broader systemic problem giving rise to an issue of fundamental public importance. The claimants rely upon no published or unpublished policy alleged to have been applied. It is accepted that pursuant to Rule 49 the defendant cannot segregate for reasons other than those prescribed by the Rule. It is the defendant's case that what Rule 49 is regulating is the removal of an individual from association which is to be distinguished from a limit upon association. Limiting an inmate to a wing in which association, exercise and related activities take place does not breach Rule 49. As to any guidance contained in a PSO that has no statutory status, there are no mandatory requirements to comply in all the circumstances at its highest it conferred a legitimate expectation.

Conflict of evidence

31. Prior to the hearing no claimant had made a witness statement for the purpose of these proceedings. Their evidence took the form of hearsay statements made to their solicitor and replicated in the solicitor's witness statement. During the course of the hearing I expressed my concern as to the absence of primary evidence on the part of the claimants. Witness statements from GO and MB were subsequently provided which attested to the truth of the contents of their accounts contained in their solicitors' witness statements.

32. The evidence of each claimant regarding the restriction on the wing found its initial form in a type written document exhibited to the first witness statement of Claire Salama dated 2 May 2012. The document identifies each claimant and in bullet point form identifies the punishments imposed which include restriction on the wing. In her second witness statement dated 17 May 2012 this brief information is elaborated upon by MB, HB and GO by way of details given to Miss Salama as to their time in Ashfield. Exhibited to this statement are short handwritten notes from each of the three claimants attesting to the accuracy of their solicitor's witness statement. Clare Mann carried out the same exercise with MA, NB and SD, each claimant provided a similar handwritten note in the same terms as those exhibited to the statement of Claire Salama. Clare Mann's witness statement is dated 17 May 2012. In a further witness statement dated 3 September 2012 Claire Salama provides limited details from B to whom she spoke on the telephone. B did not meet with his solicitor nor did he provide a note attesting to the accuracy of his account as contained in his solicitor's statement.

33. Each of the relevant claimants addressed the issue of restriction on the wing. Their account was that during the period of restriction or "segregation" as a number of them

described it they were alone and confined to their cell save for showers, phone calls and exercise. When released from his cell each claimant would be alone in performing any of the identified activities. There was no association or mingling, meals were eaten alone in the cell. As to the time each spent in his cell it is fair to record that there was a vagueness of recollection: MA "approximately 5 days"; NB "approximately 2 weeks"; HB "approximately 4 days"; SD "approximately 7-10 days"; GO "1 week".

34. The defendant's evidence as to the nature and extent of the restriction on the wing was contained in the witness statement of David Oakes which contained the following:

> "…8. The other Claimants were subject to restriction on the wing from Friday 3 February until Monday 6 February. The boys were restricted to the wing to enable an investigation to take place and to allow the management at Ashfield to understand what happened and why. The restriction was also deemed necessary to prevent a potential recurrence of the incident and to allow a normal regime to take place for the remaining population. The decision to restrict the Claimant's regime was taken by the Senior Management Team (which comprises management ranks from Director to Deputy Assistant Director) at the morning meeting on 3 February.
>
> 9. Whilst the claimants were restricted on the wing they would have received all their basic rights such as showers and access to a telephone and also offered an hour of open air exercise. Serco do not keep records of YPs use of showers and telephones but YPs will usually use the showers and telephones in the early morning. Records are not kept of participation in the open air exercise and not all boys will choose to participate but it is a basic right and something that is offered to all boys regardless of whether they are restricted or not….
>
> Association
>
> 13. All YPS are entitled to some association unless they are subject to segregation. The amount of association is determined by their level on the incentives and own privileges ("IEP") regime so boys on the higher levels will have more association time than those on the lower level. It is possible that the claimants who are restricted on the wing would not have had their normal time applicable to their IEP regime during the period of their restriction but they would still have had association time such as when they were out in the yard for exercise and would have enjoyed all their entitlements on the wing during the period of their restriction which related solely to activities off the wing…"

35. I regard the evidence of the claimants and the defendant on this disputed issue as unsatisfactory. The claimants have not provided primary evidence in the form of their own witness statements detailing what occurred at Ashfield, the defendant has not addressed the specific points raised by the claimants. In his submissions to the court Mr Johnson QC firmly refuted any suggestion that the claimants were subject to solitary confinement or in segregation but the evidence produced by the defendant is in generalised terms. As Ms Kaufmann QC pointed out: the evidence that the claimants were permitted to shower, exercise and make phone calls is consistent with the claimants' own accounts. It is of note that no member of staff on duty on Phoenix Wing during the period of alleged restriction has provided a witness statement to comment directly upon the allegation that the claimants were confined to their cell.

36. Notwithstanding my reservations as to the manner in which the evidence was presented the claimants' accounts contain a level of detail that is persuasive. The detail descends into the difficulty of being allowed to make phone calls, the limited time permitted, conditions which obtained when exercise was permitted. Not all accounts are the same, each claimant tells of his own experience. The consistency lies in the critical area namely confinement to cell save for certain activities and the limits imposed upon them. Given the detail provided on behalf of each of the five claimants I am satisfied that during the period of 3-6 February 2012 each was confined to his cell in the manner he has described and permitted out alone, for a limited period, in order to either shower, make a phone call or, if he so chose, take exercise. I find that this did represent removal from association, it was segregation by another name, outwith the provisions of Rule 49 and its critical safeguards.

37. I am satisfied that the restriction lasted until 6 February 2012, I am not satisfied that it prevailed beyond that date. On this point the claimants' evidence is particularly unsatisfactory. The claimants were unable to specifically recall the dates upon which they were so confined or for how long. Further, there is a consistency in the defendant's evidence that it was from 6 February 2012 that the claimants' restriction was lifted and they were permitted to mix beyond their wing which is consistent with the claimants' gradual re-entry into education.

Failure by the defendant to comply with its own IEP Policy and the Secretary of State for Justice Guidance

Local Policy

38. The local IEP Policy "Director's Rule HMP & YOI Ashfield" RES003 is dated 20 April 2011. The policy would have been submitted to the Secretary of State in accordance with YOI Rule 6. It was sent to a NOMS area manager.

Paragraph 7.2 of the Policy states:

"The rewards and sanctions scheme works in parallel to the formal disciplinary process that is regulated by the Home Office (Adjudication's) but is not a part of it. An R&S review can take place at any time. A young person cannot be lowered in regime and subject to adjudication for the same offence, with the exception of:

a proven Adjudication for Assault

as a result of producing a positive MDT or failing to provide an MDT sample,

Or a proven Adjudication for possession of a mobile phone or Drugs"

Paragraph 10 states:

"10.0 Enrichment

Enrichment activities of some form will be made available to all young people across all of the regimes. Activities for young people who are not entitled to Association will normally be held in the housing unit. Enrichment operates separately to this scheme."

Annex I contains the following:

"9 Applicability of scheme

The rewards and sanctions scheme does not apply to those Young people held on GOOD or those held in the healthcare unit due to the normal association times and the normal privileges not being applicable to both these statuses. A separate regime is in place to meet the young people individual needs.

Young People will be returned to normal location from GOOD on Bronze regime and will be reviewed after one week."

39. In an information booklet "A Guide to HMP & YOI Ashfield" provided to detainees as part of their induction, the following reference is made to the possibility of lowering in regime:

"Violent incidents

Any young person who is found guilty on Adjudication of an act of violence (assaults on staff members or against other YPs) will

be lowered in regime regardless of the Adjudication award ..."

Further, as to "rewards and sanctions" warnings are stated to last for 14 days. If after two warning letters the young person's behaviour does not improve then there may be a lowering in regime.

Secretary of State for Justice Guidance: PSI 11/2011

40. This document provides guidance upon IEP Policies, its effective date being 1 April 2011. The following is included:

> "… 2.3.2 Governors must ensure that their IEP scheme is fair and consistent, and that published procedures are in place for earning and losing privileges …
>
> 2.3.4 A single incident of misbehaviour or short term failure of performance will not automatically result in a change of status, but may be taken into account when considering the prisoner's general suitability to be granted or retained privileges…
>
> 4. Management and operation of local IEP Schemes
>
> 4.1 When a prisoner has consistently achieved the type of behaviour and performance specified in the local scheme, he or she may advance to the level above. If the prisoner's behaviour or lack of progress demonstrates that he or she cannot sustain his/ her current privilege level, he or she may be downgraded to a level below (as an administrative measure, not as a punishment imposed at adjudication). The fast-tracking of prisoners from enhanced to basic must be avoided except in the most serious cases of misconduct, e.g. assault. In this instance, a review must take place and be endorsed by a member of the local Senior Management Team …
>
> Forfeiture of individual privileges under the prison disciplinary system
>
> 4.7 Loss of specified privileges for a defined period as a result of an adjudication is separate from IEPs which is an administrative system …
>
> Double jeopardy
>
> 4.9 The disciplinary system and IEP scheme are two separate systems. Privilege levels are determined by patterns of behaviour. The adjudication process helps maintain order and

> discipline within a prison by awarding punishments for specific incidents. There may be occasions where behaviour results in both disciplinary proceedings for a specific act and a review of privilege level because the prisoner's behaviour falls below expected standards.
>
> 4.10 The loss of a particular privilege following an adjudication, or at the Governor's discretion, should not automatically result in the loss of IEP status …"

Claimants' Case
Local Policy

41. It is the claimants' contention that the claimants suffered 'double jeopardy'. They were subject to a downgrade in the IEP scheme which resulted in loss or reduction of privileges and were the subject of the formal disciplinary/adjudication process resulting in the sanction of additional days. This is said to be "unreasonable and at odds with the defendant's own policy". No claimant came within the exceptional categories identified in paragraph 7.2 of the local policy nor did the behaviour provide the basis for the lowering of regime identified in Ashfield's information booklet. The claimants were not placed on report for a charge of assault or any other disciplinary offence of violence the report was for an alleged breach of YOI Rule 55(20): being present at any place where he is not authorised to be. Further, as a result of the IEP downgrade, the claimants were prevented from having "enrichment and training activities".

Secretary of State for Justice Guidance

42. MB and B were on Gold status prior to entry on the Brunel Unit. Within the unit they were placed on GOoD status. On 13 February 2012 upon release from segregation it is recorded that at 14.35 MB and B were placed on Bronze, at 14.38 this was upgraded to Silver. The claimants rely upon this as representing an automatic placing on Bronze following return from segregation contrary to the Guidance. Further, it is said that this policy conflicts with the guidance contained in PSO 1700, namely that a prisoner located in segregation will remain on the same IEP level until such time as an IEP Review Board takes place and states otherwise. In fact, Boards for MB and B were held on 6 and 13 February 2012. There is nothing in the documentation which indicates any disagreement with the measures in place in the Brunel Unit.

Defendant's case

43. The application of the IEP scheme is subject to the court's reviewing jurisdiction but the court will only intervene in an exceptionally strong case involving bad faith or "crude irrationality". *R v The Parole Board ex parte Winfield* (25 March 1997 unreported) per Laws J (as he then was):

> " … I have some misgivings in principle as regards the privilege cases. They are attempts to review executive decisions arising wholly within the context of internal prison management, having

> no direct or immediate consequences for such matters as the prisoners release. While this court's jurisdiction to review such a decision cannot be doubted, I consider that it would take an exceptionally strong case to justify it being done …
>
> There are plain dangers and disadvantages in the court's maintaining an intrusive supervision over the internal administrative arrangements by which the prisons are run, including any schemes to provide incentives for good behaviour, of which the system in question here is in my judgment plainly an example. I think that something in the nature of bad faith or what I may call crude irrationality would have to be shown which is not suggested here…"
>
> In R (Hewlett) v Secretary of State for Justice [2009] EWHC 2979 (Admin) HH Judge Thornton QC summarised the principles applicable to an application to judicially review decisions made under IEP scheme as follows [27]:
>
> "(1) It would take an exceptionally strong case to justify the court in judicially reviewing the grant or the refusal to grant a particular level of privilege in an IEP scheme. Such a grant is an executive decision arising wholly in the context of internal prison management (Hepworth, Potter and Green).
>
> (2) The court would consider intervening if a particular grant has been refused in circumstances amounting to an obvious departure from the principles of unfairness (Potter)."

Local Policy

44. The complaint that the claimants were subject to double jeopardy is refuted. The relevant policy – PSI 11/2011 – is a national and published policy which could give rise to an enforceable legitimate expectation. It explicitly contemplates that particular behaviour might result in disciplinary proceedings and an IEP review (para 4.9).

45. In a document accessible to young offenders and more likely to be read by them, 'Outside Time', the prison service has made clear that both IEP downgrades and an adjudication could be imposed in respect of the same conduct. An open letter in the May 2010 edition of 'Outside Time' included the following:

> "It is important to clarify that the adjudication process and IEP scheme are two separate systems. The adjudication process helps to maintain order and discipline within a prison and the IEP scheme awards positive behaviour and active engagement in the regime, and removes privileges where behaviour fails to meet

expected standards.

> Legal advice was sought to clarify the situation and the advice received stated that the situation as described cannot amount to double jeopardy in law. The withdrawal of a level of privilege following an IEP review is different in nature from the imposition of punishment for an offence. Policy on IEP is set out in PSO 4000, and the alteration of a prisoners status under that policy is not an outcome open to a governor/ adjudicator when determining a disciplinary offence, even though a punishment for a disciplinary offence may be deprivation of one or more component elements of privilege listed in an IEP level. Alteration of IEP status involves the more rounded consideration of the prisoners behaviour with the aim of encouraging positive behaviour and discouraging negative behaviour…we will be reminding Governors and Directors that they may, where it is appropriate and proportionate to do so, continue to consider utilising both IEP and discipline processes in relation to a single incident…"

46. The local policy was stated to be 'NOT for release to young people'. It was an internal rule not capable of giving rise to a legitimate expectation on the part of any young person. The defendant accepted that the local rule is inconsistent with national published policy. This is administratively undesirable, good management requires that the rule be addressed. As the local rule is unpublished, internal and inconsistent with national published policy it is the defendant's case that it has no legal effect.

47. At the time of the IEP downgrades, no adjudication had taken place, thus the IEP downgrades did not breach the "Director's Rule". It is accepted that the subsequent carrying out of the adjudications was not consistent with para 7.2 of the "Director's Rule" but as the adjudications have been quashed, any wrong has been remedied. In summary: following the national published policy rather than the unpublished local "Director's Rule" does not amount to a public law error and even if it did, appropriate relief has been granted, thus no purpose is served in granting further relief.

48. The defendant accepts that the IEP scheme did not operate for those segregated for GOoD, which involves a departure from PSO 1700. It is the defendant's case that the non-applicability of the IEP scheme in the circumstances and therefore the departure from PSO 1700 had been approved by NOMS pursuant to Rule 6 of the YOI Rules. The complaint that MB and B, in breach of PSI 11/2011, were placed on Bronze level on return from segregation is denied. The defendant relies on the statement of Kath Brown, the unit manager on Phoenix Wing. Ms Brown states that Ashfield does not operate a policy which automatically places boys on the Bronze regime when they return from segregation. She identifies the records which indicate that MB and B were placed on the

Bronze system but in 23 minutes were raised to the Silver regime and states:

> "I would say that in reality they were on Silver regime when they returned from segregation and the time discrepancy simply reflects when the computer system was updated…".

Findings

49. The national policy as contained within PSI 11/2011 permits disciplinary proceedings and a review of privilege level (4.9). The claimants are unable to rely upon it in support of the double jeopardy argument. The local policy was not for release to the young persons. Insofar as information was circulated amongst those detained 'Outside Time' described as a 'newspaper' reinforced the provisions of paragraph 4.9 of PS1 11/2011. Given the limit upon circulation of the local policy I accept the defendant's contention that it could not give rise to a legitimate expectation on the part of the young persons. I would make only this point: good management does require consistency as between national and local policies.

50. It should be noted that all the adjudications and consequent sanctions have been quashed. Had I taken the view that their was force in the claimants' submissions as to double jeopardy this would have been a material consideration affecting any relief sought. Further there is the additional point that it was open to each of the claimants to appeal their IEP status, they did not.

MB and B

51. These two claimants were recorded as having been on Bronze following release from segregation for a total period of 23 minutes. Given the short period of time and the absence of any evidence from the claimants of any particular problem relating to such a downgrade I regard as more plausible, and so find, that this represented a computer glitch as opposed to a specific policy authorising a downgrade.

52. MB and B's status in the Brunel Unit would have been part of the review performed on 6 February 2012. No concerns were raised by the Board at this review. At its highest the claimants' case is that for a maximum of 3/4 days the claimants lost their Gold status which is contrary to national policy. The defendant maintains that it acted in accordance with local policy approved by NOMS. Given the need for a strong case involving bad faith or 'crude irrationality' *R v The Parole Board* (above) in order to warrant the intervention of the court I do not regard the claimants' case as beginning to satisfy this test.

Education

53. The essence of the challenge relates to the period from 6 February 2012 when it is undisputed that the five claimants in the Phoenix Wing missed some of their education classes. The claimants contend that the defendant's action in preventing such attendance was unlawful. The defendant maintains that phasing the claimants back into such activities was necessary for the maintenance of good order in the aftermath of the incident.

54. The YOI Rules identify the need for and provision of education as follows:

> "Regime Activities
>
> "37 (1) an inmate shall be occupied in a programme of activities provided in accordance with Rule 3 which shall include education, training courses, work and physical education…"
>
> Education
>
> 38(1) provision shall be made at a Young Offender Institution for the education of inmates by means of programmes of class teaching or private study within the normal working week and, so far as practicable, programmes of evening and weekend educational classes or private study. The educational activity, so far as practicable, be such as will foster personal responsibility and an inmate's interest and skills in helping to prepare for his return to the community."

The minimum general requirement contained within YOI Rule 38 is 15 hours per week education to inmates of compulsory school age, Ashfield provides more than the minimum.

Claimants' Case

55. On behalf of the claimants other than MB and B it is submitted that Rule 38 does not permit an establishment to selectively disapply its general regime in relation to individual inmates. PSI 11/2011 explicitly prevents Governors or Directors from using their discretion to withdraw privileges from individual prisoners on a punitive basis without going through the safeguards contained in the PSI. Reliance is placed upon YOI Rule 60(1)(c) which identifies one of the punishments to be imposed upon an inmate who is found guilty of an offence against discipline as:

> "Removal for a period not exceeding 21 days from any particular activity or activities of the young offender institution other than education, training courses, work and physical education in accordance with Rules 37, 38, 39, 40 and 41."

56. This Rule is dealt with in PSI 47/2011 para 2.124 which reiterates that the young person

may only be removed from an activity not excluded by the Rule. It is the claimants' case that it would be perverse were this restriction to apply to the formal imposition of a punishment following a disciplinary hearing at which the young person may be represented but not apply to an inmate placed on "restriction on the wing" or segregation when no such process had been followed.

Defendant's Case

57. It is accepted that for a short period and as a practical consequence of the indiscipline, the claimants missed individual classes. The defendant argues that some classes were missed for practical reasons but the claimants still received significantly more by way of education than the statutory requirement. The underlying principle upon which the claimants rely, namely that education should not be removed for punitive reasons is accepted, it is the defendant's case that there is no evidence that education was removed for such a reason.

58. Rule 38 (i) does not require the establishment to ensure that an inmate attends every class nor is there a general prohibition on restricting education for reasons other than punishment. It is implicit that access to education should be allowed but such access cannot be unfettered when there is good reason to impose a prohibition. Nothing precludes an establishment from taking sensible and reasonable steps to manage risk. If senior management consider that the regime should be shut down because of mass indiscipline there is nothing to render that unlawful even though such shutting down included education. In the immediate aftermath of such indiscipline there is nothing to prevent the managers progressively reintroducing identified inmates to education if the aim is to limit risk. For good reason, some inmates were stopped from attending a few classes for a limited period of time. Such measures are not inconsistent with rule 38 (i). It is accepted that pursuant to rule 60 (i) (c) such a measure could not be taken if the same constituted a punishment, in this case it was the general management of a specific risk.

59. The evidence is that over a period of some days from 6 February 2012 the claimants attended some classes and missed others. There is no evidence to support the claimants' contention that this was done for punitive reasons. Further it is consistent with the defendant's account of gradually phasing the claimants back into classes. I accept the defendant's contention that there is nothing in Rule 38 (1) which prohibits a restriction upon education for a reason other than punishment. Common sense would support such a position in order to reflect situations which can arise and which require management. Given the gradual nature of the reintroduction of the claimants to their classes I am satisfied that this was done for the purpose of managing risk following the incident and does not breach Rule 38 (1).

Gym ban/suspension
Claimants' case

60. The claimants contend that the two week gym ban/suspension imposed upon the five

claimants in the Phoenix Wing had no lawful basis and represented removal from non-regime activities outwith the IEP scheme and in breach of Guidance.

61. Reliance is placed upon YOI Rules 3, 37 and 41 and the restriction upon imposing punishment contained in Rule 60(1)(c).

Rule 3 provides:

> "3. – (1) The aim of a young offender institution shall be to help offenders to prepare for their return to the outside community.
>
> (2) The aim mentioned in paragraph (1) shall be achieved, in particular, by –
>
> (a) providing a programme of activities, including education, training and work designed to assist offenders to acquire or develop personal responsibility, self-discipline, physical fitness, interests and skills and to obtain suitable employment after release;"

Rule 37 includes the following:

> "37. – (1) An inmate shall be occupied in a programme of activities provided in accordance with rule 3 which shall include education, training courses, work and physical education …
>
> (4) An inmate may be required to participate in regime activities for no longer than the relevant period in a day, "the relevant period" for this purpose being –
>
> (a) on a day in which an hour or more of physical education is provided for the inmate, 11 hours;
>
> (5) Inmates may be paid for their work or participation in other activities at rates approved by the Secretary of State, either generally or in relation to particular cases."

Rule 41 includes the following:

> "… PSI 58/2011 (physical education for prisoners) provides that 'all prisoners may participate in PE activities: prisoners will not be restricted unless otherwise authorised by the Governor (including Directors of contracted prisons) and/or a healthcare professional."

Rule 60 includes the following:

> "Governor's punishments
>
> 60. – (1) If he finds an inmate guilty of an offence against discipline the governor may, subject to paragraph (3) and rule 64, impose one or more of the following punishments:
>
> (a) caution;
>
> (b) forfeiture for a period not exceeding 21 days of any privileges under rule 6;
>
> (c) removal for a period not exceeding 21 days from any particular activity or activities of the young offender institution, other than education, training courses, work and physical education in accordance with rules 37, 38, 39, 40 and 41 …"

62. It is the claimants' contention that it would be perverse for physical education to be exempt from the formal punishment regime pursuant to Rule 60(1)(c) but a legitimate target for suspension under the informal regime at Ashfield. Rule 41 sets as a minimum requirement 2 hours of physical education per week or one hour per day. Further, PSI 8/2012 and 28/2009 require inmates to have the opportunity to attend "structured" physical education classes and access to the gym at other times such as evening and weekends.

Local policy

63. A document dated 2012 entitled *HMP & YOI Ashfield Physical Education Suspension Policy* was disclosed by the defendant. The policy begins with these words:

> "Due to the amount of serious offences and incidents that had taken place within the Gymnasium over the past few months I feel that we need to introduce a new suspension process in order to address the behaviour of the young people whilst attending Physical Education classes. I propose that we introduce the Yellow and Red card system,
>
> Yellow Card is a warning if the young persons behaviour is deemed unacceptable but not to the degree where his or another's safety is endangered then he will be issued with a Yellow Card, which will stand for a period of two weeks …
>
> Red Card is issued when a young person has already received a Yellow Card and behaviour continues to be poor within a two week period, Red Cards will also be issued automatically when a young person commits any violent offence for example a fight or

> an assault or endangers the Health and Safety of others. On issuing the Red Card the recipient will receive a seven day gym suspension from all gym activities, they will receive an in room workout so they can still complete structured physical activity during their Physical Education lesson time."

The penultimate paragraph in this two page policy document which is signed by the Physical Education Manager states:

> "Gym suspensions can be issued for any event or incident that a young person or persons if it is deemed serious and their behaviour has exhausted and gone beyond all prison rules, this action is only authorised by Assistant Director Grade or above."

64. Accompanying the document is an Ashfield headed "Notice to Young People" dated 3 June 2011. The subject is "Gym suspension system" and it reads:

> "There have been a number of violent incidents in the Gymnasium over a prolonged period of time; the demonstration of this type of behaviour is unacceptable.
>
> We are now implementing a new suspension system where if you commit or are involved in any violent offence on more than one occasion within a four week period you will be issued with a one month gym suspension from All gym activities, at the end of the suspension you will be reviewed and if your behaviour warrants then you will be able to attend normal Physical Education lessons.
>
> During the time of your suspension you will be given an in cell workout sheet for you to use during your time in your room."

No satisfactory explanation has been provided as to why the accompanying notice is dated June 2011 and the policy is dated 2012.

Defendant's case

65. It is accepted that individual gym sessions were missed by the five claimants. It is the defendant's case that the gym suspension policy had been explained to all of the claimants and was applied. The defendant accepts that pursuant to the YOI Rules it has to provide a regime of physical education of at least 2 hours per week but contends that such a requirement does not preclude a short term restriction in order to manage risk. The ill discipline occurred in the context of physical education, it included damage to the turf and goal posts, the latter in broken form being used as weapons. In the

circumstances a relatively short period of suspension was a proportionate and reasonable response to the incident.

66. Save for production of the actual gym suspension policy the defendant has adduced no good evidence to show:

a) that each claimant was informed of this policy;
b) that any claimant was informed of its invocation as a reason for the gym ban;
c) the reasoning and decision making taken by any identified employee of the defendant prior to the imposition of the two week ban/suspension.

67. David Oakes in his statement records:

> "21. I am informed by my colleagues in the education department that MA, HB, NB, SD and GO were banned from using the gym for a period of 2 weeks because of the damage caused to the hockey goal and hoardings round the Astroturf pitch. The ban did not completely remove their access to the gym because they were still permitted to attend gym based education classes; however, they were not permitted to use the gym for their other allotted sessions for the period of their ban but each individual was using the gym again by 14 February."

It is of note that no reference is made to the gym suspension policy, no policy or rule is identified as the basis for the 'ban'. The issue of managing risk is not mentioned, the identified reason for the ban being damage to the goal post and hoardings.

68. The claimants were asked by their solicitors about the gym suspension policy, they had no knowledge of it nor of any red/yellow card warning system. They stated that no cell/ wing alternative was offered.

69. In my view there is no good evidence to demonstrate that the defendant's suspension policy was the basis for the gym ban/suspension. If the policy was relied upon it is difficult to see how an incident which does not constitute an assault comes within its provisions such that a two week suspension can result. If it is the case that the ban was imposed to manage risk, of which there is no good evidence, why a 'blanket' ban and for so long a period? The length and nature of the ban and the sole reason for its imposition being identified as damage to property, in my view supports the claimants' contention that the measure was punitive in nature. As such it was outwith the YOI Rules and is unlawful.

Unfair adjudication process

70. The adjudications having been quashed the substance of the claimant's case is directed at the failure of the defendant to provide adjudication paperwork, including evidence and

statements to legal representatives when requested. The essence of the claimants' case is that notwithstanding a request by solicitors the relevant paperwork was not provided within a reasonable time of the hearing.

71. A statement from Byron Harris, a Senior Custody Officer in the Brunel Unit was provided by the defendant, he was called for cross examination

Evidence of Byron Harris

72. Byron Harris was responsible for the staff at Ashfield who prepare for the independent adjudications at the Brunel Unit. Mr Harris and his staff provide administrative assistance to the Independent Adjudicator but have no input into the hearings. Following the initial hearing on 3 February 2012, it was decided that the adjudication should take place before the Independent Adjudicator on 1 March 2012. A letter was prepared for each of the young persons informing them of the hearing on 1 March and making clear that it was their responsibility to arrange legal representation. In his witness statement, Mr Harris recorded that "the YPs were provided with a second copy of paperwork and also a postage paid envelope to enable them to send correspondence to their legal representative." He recalled being contacted by the Howard League, acting on behalf of MB, who requested a copy of the adjudication paperwork. Mr Harris said that he would need to obtain the Governor's authority to provide the paperwork but was unable to say how long it would take to send the same out. In practice, it took between 24 and 48 hours. He recalled obtaining authorisation and faxing the paperwork to the Howard League.

73. Accompanying Mr Harris' witness statement were a series of Howard League file notes and faxes passing between Mr Harris and the Howard League in the days leading to the adjudication. Of particular importance was a fax dated 24 February 2012 sent by a solicitor from the Howard League to Mr Harris in respect of the claimant MB which states, in part:

> "Further to our telephone conversation earlier today, we are writing to provide you with our client's signed consent for you to disclose his adjudication documents to us.
>
> We would be grateful if you could provide us with the following information:
>
> (1) Details of the adjudication;
>
> (2) Details of the witnesses that were present;
>
> (3) Copies of all documents relevant to the adjudication, including:
>
> (a) Report to the Governor of alleged offence

(b) 1) Notice of report

(c) 1) Prisoner adjudication information sheet and prisoner statement

(d)) Record of hearing and adjudication

(e) Adjudication report

(f) Conduct report for adjudicator

(g) Adjudication result

(h) 1A1: New referral to the Independent Adjudicator

(i) Copies of all statements taken relating to the incident, whether or not they are intended to be used at the hearing;

(4) Copies of any other relevant evidence, including medical evidence.

On receipt of the requested papers we will need to consider them and have the opportunity to advise our client prior to 1 March 2012. In light of this and the fact that we first requested these papers last week, we would be grateful if you would provide us with the requested papers as a matter of urgency …"

This document was sent on 27 February 2012 and received by Mr Harris. Accompanying the faxed letter was a signed consent form by MB.

74. A file note made by Clare Mann records that at 10.34 on 27 February 2012 she received a phone call from Mr Harris who said it was the prisoner's responsibility to send the adjudication papers, he would give the prisoner a free envelope. In his evidence Mr Harris said it was his plan to take the fax from the Howard League to the Assistant Director in order to obtain authority to release paperwork. As he was due to be off work, he gave an envelope to the prisoner. In order to obtain consent to disclosure from the Assistant Director, Mr Harris placed the documents from the Howard League in an envelope in the pigeon hole of the Assistant Director. Critically, the only documentation which Mr Harris envisaged being given to the prisoner and sent to the Howard League was the charge sheet.

75. Mr Harris accepted he had been trained as to his role in preparing for independent adjudications and had read the relevant Guidance. He could not remember if he was aware of PSI 47/2011 dated 1 October 2011 which requires the disclosure of documents which include witness statements. It was Mr Harris' understanding that the only document which required to be sent out was the charge sheet. It was put to Mr Harris

that there was no system in place in Ashfield for ensuring that the papers included within PSI 47/2011 could be provided in advance of the hearing to the legal representative of a detainee. To that, Mr Harris replied that if such a system was in existence, he was unaware of it. As to the extent of the request made by the solicitors, Mr Harris said he had not fully appreciated the extent of what was being sought.

76. The evidence of Mr Harris highlighted the wholly inadequate system which existed at Ashfield for disclosure of material information to legal representatives in advance of an Independent Adjudicator hearing. It demonstrated a woeful absence of knowledge of the requirements of PSI 47/2011. Mr Johnson QC on behalf of the defendant did not seek to defend the position identified by Mr Harris.

77. Subsequent to Mr Harris' evidence the court was informed that guidance had been provided to staff to provide the relevant adjudication paperwork. Between the hearing and judgment I received a letter dated 22 January 2013 from the defendant's solicitor detailing the measures which have now been implemented. I do not intend to replicate the detail of the document, suffice it to say that measures have been taken in an attempt to comply with the requirements of PSI 47/2011. The claimant does not accept that such measures have achieved compliance with the requirements of the PSI but does not seek, at this point, to ask the Court to resolve the legality of the fresh measures.

78. There was undoubtedly a failure to comply with the requirements of PSI 47/2011 in that relevant paperwork was not provided by the defendant to the claimants' solicitor. The defendant has taken steps to attempt to rectify the position, the adjudications have been quashed. Both these facts are material to any relief sought by the claimants.

Article 8

79. In the claimants skeleton argument limited and generalised reference is made to Article 8 ECHR. I hope I do no injustice to Ms Kaufmann's oral submission when I observe that Article 8 was not a particular feature of her detailed and forceful submissions to the court.

80. By reason of my findings I grant the following declaratory relief namely:

i) The defendant unlawfully, and in breach of Rule 49 of the YOI Rules, removed MA, NB, HB, SD and GO from association for the period 3-6 February 2012;

ii) The defendant unlawfully restricted the claimants' use of the gymnasium;

iii) The defendant unlawfully and in breach of Article 6 ECHR failed to provide

relevant adjudication paperwork to the legal representative of MB in advance of the hearing held by the Independent Adjudicator on 1 March 2012.

Judgment On Costs

Mrs Justice Nicola Davies:

1. Written submissions upon costs have been received from the claimants and the defendant. In summary: the claimants seek their full costs, alternatively 75% of their costs; the defendant seeks no order as to costs or an order reflecting success upon specific issues.

2. My findings are set out in the substantive judgment. In that judgment I refer to the fact that the claimants' challenges have altered during the course of these proceedings. Some of the original grounds were withdrawn. During the trial, further amended forms of relief were submitted to the Court. The defendant had to, and did meet, the changes to the claimants' case. In considering the issue of costs I take account of the changes in the claimants' challenge, the claimants' lengthy final skeleton argument citing numerous authorities upon which there was no disputed issue of law and my findings of fact.

3. I do not regard the issue as being as simple as identifying one party as having achieved an overall 'win'. To reflect the matters identified I regard the fair order as being no order as to costs.