

Neutral Citation Number: EWHC (Admin) 2979

Case No: Co/9532/3008

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

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: Monday 16 November 2009

Before :

HH Judge Thornton QC

Between :

The Queen on the Application of Barrie Hewlett
- and -

The Secretary of State for Justice

Claimant

Defendant

Ms Abigail Smith (instructed by Scott Moncrieff, Harbour and Sinclair) for the Claimant
Ms Kate Olley (instructed by the Treasury Solicitor) for the Defendant

JUDGMENT

Judge Anthony Thornton QC:

Introduction

1. The claimant, Barrie Hewlett, is a category C prisoner currently serving an automatic life sentence in HMP Wymott. He seeks a judicial review of two decisions of an Incentive and Earned Privileges ("IEP") Board of HMP Wymott dated 11 March and 10 July 2008. The first decision changed his status under the IEP scheme from Enhanced to Standard and the second decision confirmed that change of status. Mr Hewlett complains that those decisions were reached without taking account of the Prison Service's own published policies relating to the IEP scheme and were irrational so that they were unlawful and should be quashed and the defendant, who is the Governor of HMP Wymott and responsible for all operational matters within HMP Wymott, should be directed to reconsider Mr Hewlett's IEP status.

2. Mr Hewlett is serving an automatic life sentence which was imposed in 2001 for two sexual offences of the attempted rape and indecent assault of a child. Mr Hewlett has always denied responsibility, and strenuously continues to maintain his innocence, for these offences. His stated position is clear. He states: "I did not commit the offenses. I will never change my strongly heartfelt and honest account nor will I admit to heinous acts that I did not commit." He was convicted at his retrial after the first jury at his original trial failed to agree. His automatic life sentence was imposed because he had been convicted of robbery in 1985 involving an imitation firearm. He accepts responsibility for that crime. He has a long criminal record including ten convictions for thirty nine different offences including twelve sexual offences and three firearms offences.

3. As part of his sentence plan, Mr Hewlett has been directed to undertake various programmes whose objective is to assist him in reducing his risk of committing further harmful offences once he is released. The principal programme that he is expected to undertake is the Sex Offender Treatment Programme ("SOTP") which is a programme that all sex offenders are set as an initial sentence plan target. However, a prisoner can only undertake this programme once he has been assessed as suitable for it by prison staff trained to assess for and deliver this programme which is cognitive-based and which requires the prisoner to accept responsibility for and to be prepared to discuss actively his sex offending in a group setting with other offenders. In consequence, the SOTP assessment will identify someone such as Mr Hewlett as being unsuitable for that programme so long as he continues to deny responsibility for his sex offending.

4. Mr Hewlett served the first part of his sentence in HMP Frankland and was re-categorised as a category C prisoner and relocated in HMP Wymott on 7 February 2007. During his sentence, he has completed the Enhanced Thinking Skills and Cognitive Skills Booster courses and has undertaken various educational and vocational courses. The SOTP was added to his sentence plan as a target for him to complete and, during 2006, he was required to be assessed by the psychology department at HMP Frankland for that programme. As a result of his continuing denial of responsibility, he was assessed as being unsuitable by the psychology department by a notification dated 22 September 2006. No individual one-to-one psychological work was available for or provided to Mr Hewlett so he arranged through the National Health Service and received counselling which included in-depth work on his general sexual offending.

IEP Schemes

5. A National framework for IEP schemes was introduced by amendment to the Prison Rules by PSO 4000 in October 2006. This updated and replaced earlier IEP frameworks. IEP schemes are introduced into each prison by virtue of Rule 8 of the Prison Rules 1999¹. This provides that every prison shall establish systems of privileges which may include arrangements under which privileges may be granted to prisoners only so far as they have met, and for so long as they continue to meet, specified standards in their behaviour and their performance in work or other activities. Systems of privileges must include procedures to be followed in determining whether or not any of the privileges shall be granted, or shall continue to be granted, including a requirement that the prisoner be given

¹ SI 728/1999.

reasons for any decision adverse to him with a statement of the means by which he may appeal against it. Rule 8 finally states that:

“Nothing in this rule shall be taken to confer on a prisoner any entitlement to any privilege or to affect any provision in these Rules other than this rule as a result of which any privilege may be forfeited or otherwise lost or a prisoner deprived of association with other prisoners.”

6. The framework constitutes instructions to individual prisons to introduce and maintain an IEP scheme and a framework to be followed by each prison when devising and implementing an individual scheme to suit that prison. The five broad aims of an IEP scheme are to encourage responsible behaviour, hard work and other constructive activities and a prisoner's progression through the prison system, to create a more disciplined, better controlled and safer environment for prisoners and staff and to establish the principle that privileges should be earned through good behaviour and can be taken away only when a prisoner's behaviour falls below an acceptable standard. These aims are encouraged and facilitated by specific earned privileges, particularly access to private cash, extra and improved visits, eligibility to participate in higher rates of pay schemes, community visits for category D prisoners in open prisons, adult females and young offenders, access to an in-cell television for standard and enhanced prisoners, the ability to wear a prisoner's own clothes and time out of cells for association. IEP schemes do not affect a prisoner's rights to be provided with core statutory entitlements and they may not undermine those core rights. There are three graded levels of privileges, being in ascending order basic, standard and enhanced. The standard regime is to be regarded as the norm.

7. PSO 4000 stresses that IEP schemes are not to be designed or operated as secondary disciplinary systems. They are schemes that enable privileges to be earned by good behaviour and behaviour which fulfils the objectives of IEP schemes generally. Misbehaviour, particularly when this amounts to breaches of prison rules, should be dealt with by formal disciplinary proceedings.

8. A core objective of IEP schemes is the promotion and encouragement of the fulfilment of sentence planning objectives. This is to further the constructive use of a prisoner's time whilst in prison and to facilitate the reduction of a prisoner's risk of re-offending and committing serious harm to others following release into the community at the end of a sentence or release on licence. Sex offenders, particularly those who have been convicted of a serious sex offence as Mr Hewlett has, are given as a crucial element of their sentence plan the successful undertaking and completion of the SOTP. The use of an individual prison's IEP scheme to promote and encourage such an objective is an accepted and recognised purpose of such schemes and it falls within the stated and intended purposes identified by PSO 4000.

9. The provisions of PSO provide criteria which should govern the earning and retaining of privileges. In particular:

“Criteria for earning and retaining privileges

2.10 The earning and retaining of privileges must relate to the standards of behaviour and performance expected of prisoners. These standards may vary in fine detail between establishments, but overall should be consistent across the whole estate:

2.11 Factors which must be taken into account when making decisions about privilege levels and particular privileges include:

- The prisoner's approach to the sentence and willingness to use their time in custody constructively to reduce re-offending and to lead law-abiding, productive and healthy lives, e.g. through involvement in OASys and sentence planning and the relationship with the personal officer, probation officer, etc
- the prisoner's institutional behaviour, i.e. compliance with rules and routines, and relationships with other prisoner's and staff. Disciplinary offences (where proven) must be taken into account when considering overall patterns of behaviour, and a series of offences or a single major offence may lead to a review of a prisoner's privilege level

- o the prisoner's attitude to people outside prison, including family, victims and others they may come into contact with.

Review of privilege level

- 2.17 Prisoners on standard level may apply to be elevated to enhanced after three months, and at three monthly intervals thereafter. Standard level prisoners who do not apply for elevation, and all those on enhanced level, should be reviewed annually to ensure their behaviour reflects their incentive level. An earlier review can take place if there is a change in overall behaviour.
- 2.18 IEP assessments should take account of prisoners' progress in achieving OASys sentence planning objectives. Objectives linked to offending behaviour programmes should initially be based on the offender supervisor's assessment of the prisoner, rather than the prisoner's attendance on a programme. Targets connected with attendance on a programme should only be set with the offender supervisor's advice and should be reviewed annually. These reviews should again take account of the views of the offender supervisor and treatment manager. A prisoner's suitability for offending behaviour programmes does not depend on his or her IEP level, and no decisions about the suitability of a prisoner on basic level should be made until the prisoner has been assessed by the programme's treatment manager.

Loss of privileges

- 2.19 The pattern of declining behaviour or performance must be judged against the standards specified in the establishment's published criteria. Just as the granting of a particular privilege or movement to a higher privilege level provides an incentive and reward for good behaviour and performance, so the loss of an earned privilege or demotion to a lower level should be seen as the normal consequence of a general deterioration in behaviour and/or performance. 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 suitability to be granted or retain privileges.

Transfer

- 2.23 Whenever possible the local scheme must allow prisoners on progressive transfer to retain their privilege level. As a minimum, they must be able to retain the national key privileges wherever these are available. Prisoners who are returned from the resettlement estate without a current IEP level must be treated as new receptions and placed on standard level. Prisoners should be advised what is available at their new location on arrival, or before transfer if requested."

Use of the IEP Scheme in Connection with Mr Hewlett

10. Mr Hewlett has a significant offending behaviour history involving sexual offences and the two index offences which led to his being given an automatic life sentence both involved two very serious sexual offences that were committed against a child. He had been convicted of these offences by a jury at his retrial. He was provided with Enhanced status under the IEP scheme operated at HMP Frankland soon after he started his sentence in 2001. His sentence plan included the need to undertake and complete the SOTP from the outset of his sentence. However, Mr Hewlett had consistently refused to participate on an SOTP programme, even if he had been assessed as suitable for one. His explanation for adopting this stance, as explained in his supporting witness statement for these proceedings, was that although he has done his utmost to comply with every aspect of his sentence plan and to improve himself, he has always wished to serve his sentence with honour and integrity and so as not to compromise his position that he did not commit either of the two index offences. He did, however, make progress through his sentence and participated in other offending behaviour programmes and had one to one counselling with a counsellor related to his sex offending. On 12 April 2006, having past his tariff expiry date, his case was considered by the Parole Board who decided that his risk was sufficiently lowered to enable him to be recommended to the defendant for a move to open conditions.

However, this recommendation was rejected by the defendant and he remained in category B conditions.

11. Mr Hewlett had remained on Enhanced status throughout his time at HMP Frankland. In the summer of 2006, he was warned that his IEP Enhanced status would be reviewed if he continued to decline to undertake the SOTP or to continue to prevent his participation in the SOTP by virtue of his continued denial of responsibility. Mr Hewlett, as instructed, then presented himself for an SOTP assessment by the prison psychology department at HMP Frankland for his suitability to undertake this programme. On 22 September 2006, he was assessed as being unsuitable for this programme because of his continued denial of responsibility for the two index offences. That was the only reason why he was assessed as unsuitable for this programme. The assessment report read as follows:

“Further to your meeting with [the named member of the psychology department] on 8th September 2006, I can confirm that, as you reported, you do not accept responsibility for the sexual offences for which you are convicted, SOTP would not currently be suitable in meeting your needs as this time. Should your stance relating to your offending change in the future we will be happy to assess you for the programme. Please note that the SOTP will remain a sentence planning target due to the nature of your convictions.

We will visit you in 12 months to review your situation.

In the meantime, if you have any further queries or concerns, please contact me in the Psychology Department.”

12. Following his being assessed as being currently unsuitable for the SOTP, the IEP warning was not acted upon. Mr Hewlett was, soon afterwards, re-categorised as a category C prisoner and transferred to HMP Wymott on 7 February 2007 as an Enhanced prisoner. On 5 March 2007, an internal review of Mr Hewlett’s Enhanced status was conducted without his being informed of the fact of the review or of its conclusion. This was:

“There is very little information to hand at this current time. Received Enhanced status at previous establishment but I am unable to ascertain whether Mr Hewlett continues to meet the criteria regarding achieving his sentence plan targets. I will be leaving his IEP regime level alone until it can be reviewed fully with appropriate evidence of conduct and sentence plan.”

13. IEP status is intended, under an IEP scheme, to be reviewed annually. Mr Hewlett’s next review was held in March 2008. This took place without his being notified and, without prior warning, Mr Hewlett received from under his cell door on 11 March 2008 an undated letter from [the Prison Officer concerned] informing him of the result of that review which was to downgrade his IEP status. The letter read as follows:

“IEP Enhanced Status

I have recently conducted an annual review of your IEP status. I note that you are refusing to undertake offence related work. The expectation is that you fully agree with your sentence plan and take responsibility for the offences that you have been convicted of thereby participating constructively in addressing your offending behaviour.

The IEP Board cannot continue to support Enhanced status. Therefore, your IEP level will be reset at Standard level unless and until you are able to demonstrate that you are committed to addressing your offending behaviour.”

14. Mr Hewlett submitted an internal complaint on 12 March 2008 to the effect that he had not been given notice of or the opportunity to make representations before the review took place and that the decision as to his IEP status had been taken without taking into account the PSO provisions regarding innocent prisoners and the decision itself contained an inaccurate explanation for the decision. Mr Hewlett requested and was granted an appeal to review this decision. Mr Hewlett’s solicitors instructed counsel to draft detailed written representations dated 21 May 2008 which were submitted to, and considered by, the IEP Board in considering its review of the original decision. The gist of these submissions was that:

- (1) Mr Hewlett's circumstances had not changed since being granted Enhanced status in 2000.
- (2) He had received no warning of concerns about his IEP status, the views of relevant prison officers who were familiar with his progress were not sought or taken into account and he had had no warning of, or opportunity to address, the IEP review.
- (3) His behaviour had been consistently good, he had been granted IEP status notwithstanding his denial of responsibility and he had undertaken intensive one to one counselling work which had addressed many of the issues covered by the SOTP.
- (4) The principles identified in the **Oyston**² and **Hepworth**³ cases should apply to any consideration of the downgrading of a prisoner's IEP status. This principle was stated to be that IEP status should not be removed solely on the basis that a prisoner has not completed offence specific work because of his assessed unsuitability as a result of his denial of responsibility for and his maintaining his innocence of the index offences.
- (5) In consequence, the decision was unreasonable, procedurally flawed and irrational and should be reversed.

15. The IEP Board, having reviewed the decision, confirmed it in a decision letter dated 10 July 2008 sent by the Residential Governor to Mr Hewlett's solicitor. The salient part of this letter reads:

"... I have held discussions with [the Principal Officer concerned] seeking his reasons for concluding why Mr Hewlett's IEP position should be altered.

Having examined Mr Hewlett's wing file and taken advice from our Offender Manager Unit and Psychology department, I am satisfied with Mr Sailor's decision.

The PSO and IEP has numerous references to prisoners complying with their sentence planning targets and attending Offending Behaviour Programmes to reduce the risk of re-offending. As Mr Hewlett is in denial of his index offence and is not an appellant, the relevant course work cannot be completed.

The Prison Service is obliged to treat all in our care with equality and we feel that our IEP Scheme reflects this. One of the national aims of our scheme clearly states: 'to encourage sentenced prisoners to engage in OASys and sentence planning and benefit from activities designed to reduce re-offending.'

The decision to place Mr Hewlett on Standard was based on the above. ..."

16. The defendant and HMP Wymott have declined to reconsider this decision and these proceedings were commenced. Permission to apply for judicial review was refused on paper by Sir Michael Harrison on the grounds that the two relevant authorities that appear to be against the grant of judicial review in this case, being the **Hepworth**⁴, **Potter**⁵ and **Green**⁶ decisions, were concerned with the initial refusal, rather than the removal, of Enhanced status. Moreover the decision was not arguable wrong in law. At the renewed oral application, permission was granted by Judge Rayner QC.

Denial of Guilt and Responsibility by Sex Offenders

² R v Parole Board, ex parte Oyston [2000] Prison LR 45.

³ R v Secretary of State for the Home Department, ex parte Hepworth and Others 25 March 1997, unreported, Laws J.

⁴ See footnote 3.

⁵ R v Secretary of State for the Home Department, ex parte Potter and Others [2001] EWHC Admin 1041, Moses J.

⁶ R (on the Application of Green) v Governor of HMP Risley and SSHD [2004] EWHC 596 (Admin), Collins J.

17. Dr Ruth Mann, a Chartered Forensic Psychologist and senior manager of the Interventions and Substance and Misuse Group within the National Offender Management Service Agency, who has worked for the Prison Service for over twenty years and who is responsible for managing cognitive, motivational and sex offender treatment programmes in both prisons and under the auspices of the probation service in the community, gave evidence about sex offender treatment programmes and the present prison policy in relation to those sex offenders who deny responsibility and guilt for their sex offences for which they are serving their sentence. Dr Mann authored or supervised the design of the current suite of Sex Offender Treatment Programmes currently offered within prisons. There are currently six separate sex offender programmes which fit together in various ways depending on the risks and treatment needs of an individual offender. These programmes are designed to assist convicted sexual offenders in prison to understand the reasons for their offending and to address their risk factors or causes of offending. There are many different risk factors such as a sexual interest in children, beliefs that support sexual abuse and problems associated with maintaining intimate relationships with adults. The usual pathway to sex offending treatment, at any rate for an offender assessed as being a medium risk is by the SOTP core programme.

18. Sex offender treatment in these programmes is built around a development of the understanding by an offender of the causes of that individual's offence. The SOTP undertakes this development in a group-based therapeutic programme during which convicted sex offenders are encouraged to explore the many cognitive, behavioural and external factors that contributed to their offending. In the early stages of treatment, the offenders spend their time describing and analysing the build up of their offence or offences and looking for patterns between those aspects of their lives and their thoughts that were going wrong and more general features of their lives. Having built up a picture of the causes of their offence, the treatment turns to assisting offenders to manage and overcome these risk factors. Although the process of analysing the individual offence is undertaken in a group setting by all participants, the relevant causal factors for each offender are identified individually. In the group setting, trust is developed amongst all participants in the group so that each member of the group establishes the confidence to discuss his individual offence in a confidential but meaningful way. It is therefore essential that each participant is willing and able to discuss, and hence admit, his responsibility for and the details of his particular sexual offences and those who deny guilt and maintain innocence cannot participate in the treatment.

19. There are many reasons for denial of responsibility. These include outside pressures, particularly where family or friends believe and support the denial. Same, particularly where there is an inability to admit even to himself that a shameful act has been committed, is also often a factor. A further difficulty is that many who have taken a firm stance at the outset, whether as part of a defence at the trial or with family or friends, become locked into that position and find it hard to reverse it due to a reluctance to lose face. For this reason, the Prison Service seeks to encourage offenders to recognise the benefits of sex offender treatment and to face up to and acknowledge their responsibilities for their offending. It is the experience of the Prison Service that many prisoners whose denials are firmly entrenched change their stance and accept responsibility, particularly where their external circumstances change or after extensive reflection about their position.

20. Participation in sex offender treatment is entirely voluntary. Thus, a prisoner in denial will not be pushed into, let alone forced, to attend sex offender treatment and, in any event, a prisoner in denial will not benefit from, will be unable to participate meaningfully in and will usually be disruptive of, the group-work and the confidence building needed for effective delivery of the sex offending treatment being provided. The Prison Service must, however, approach any denial of guilt from the standpoint that that prisoner has been convicted by a court and that that conviction was correct. It is the understanding of the Prison Service that the courts have stated and confirmed that a prisoner is to be considered as being guilty as charged and convicted unless and until that conviction is varied or quashed on appeal.

21. In recent years, the suggestion started to circulate that SOTP work should not be included in the sentence plan of deniers because that objective was not achievable. In consequence, officials from policy groups covering IEP, Sentence Planning and SOTP programmes collaborated to produce a guidance letter which was circulated to all prison governors and was made generally available in February 2008. The letter sets out what is intended to be a flexible and fair sentence planning process that can be followed with convicted sex offenders who claim to be innocent of their relevant sexual offences for which they have been convicted. This letter includes the following relevant points:

(1) The Prison Service must accept the verdict of the courts and thus convicted prisoners have to be treated for all purposes as being guilty of the offence (subject to some allowance for those still actively pursuing a relevant appeal).

(2) A court ruling in 2001 (the **Potter**⁷ case), was robust. The ruling was to the effect that it was reasonable for the Prison Service to expect prisoners to address their offending and to offer incentives for them to do so. The prison service regards it as right to encourage sex offenders to undertake the SOTP and in doing so must recognise that it is often an arduous experience for them.

(3) The Standard level is the norm for IEP schemes. Some deniers can be granted the privilege of Enhanced status but it is possible subsequently to lose that status. This is not punishment for their denial.

(4) A prisoner whose risk factors can be addressed by SOTP is suitable for that programme but if the convicted sex offender denies responsibility, he is not ready for that programme. In such cases, interim targets can be set with the objective of helping the prisoner to get ready, particularly by removing the barriers to treatment, particularly that of denial.

22. It is also clear that assessment of a prisoner's performance on the SOTP will usually form an integral part of the risk assessment of a sex offender. Furthermore, many sex offenders will be unable to demonstrate that their risk has been reduced until they have undertaken an SOTP because, without successfully completing that programme, they will have been unable to identify the core risk factors leading to their offending, to address those risk factors so as to effect the necessary and safe modification of their dangerous behaviour once released, to develop appropriate and necessary risk avoidance strategies once they have been released and to demonstrate to those assessing their risk in prison that their risk of harm has indeed been appropriately reduced. If that risk reduction cannot be demonstrated, it will not be possible, or even lawful, in many cases for the prisoner to persuade the Parole Board or anyone else making critical risk assessments relating to release that he should be released or provided with the appropriate privilege that is dependent on a satisfactory risk assessment.

Parties' Submissions

23. On behalf of Mr Hewlett the potentially far-reaching consequences for Mr Hewlett of losing his Enhanced status were stressed. His daily prison life was profoundly affected by lower rates of pay for work carried out, no access to his own clothing, limited access to the library and to Release on Temporary Licence for the purpose of daytime escorted town visits to assist him in becoming re-acclimatised to life in the community. He also risks being less favourably assessed by the Parole Board in forthcoming reviews.

24. It was contended that it was relevant and significant that Mr Hewlett had been on Enhanced status for over seven years. There had been no adverse change of circumstances since he had always maintained his innocence. On the contrary, over that period, his circumstances had continuously changed for the better in that he had behaved in an exemplary manner throughout, he had completed all other offending behaviour work required of him and an extensive voluntary and a lengthy course of therapy that was highly relevant to his sex offending and had demonstrated his reduced risk sufficiently for the Parole Board to recommend to the defendant that he could safely be re-categorised as a category D prisoner and transferred to open conditions. In consequence, the decision to downgrade his IEP status was only explained by a wish to punish him for his continued denial and demonstrated an inexcusable inconsistency in decision-making by the prison service. Mr Hewlett's denial and maintenance of his innocence is now so entrenched, and is not attributable to outside influences, that it is no longer appropriate to expect him to attend the SOTP and is certainly such as to make it inappropriate to downgrade him from the Enhanced to the Standard level.

25. It was also contended that the irrationality of the decision was demonstrated not only by the content of the decision but by the sudden and unheralded manner in which it was initially made and communicated to Mr Hewlett and by the failure to give any adequate reasons. Unlike the **Potter**⁸ and

⁷ See footnote 1.

⁸ See footnote 1.

Green⁹ decisions, which suggested that a refusal to grant a prisoner Enhanced status was not judicially reviewable, this decision to down grade an Enhanced status prisoner was reviewable since it was irrational and demonstrated an unwarranted and inexcusable inconsistency of decision-making which infringed Mr Hewlett's legitimate expectations. Support for this second ground for seeking judicial review was provided by the recent **Lowe**¹⁰ case.

26. On behalf of the defendant it was contended that the authorities showed that only an exceptionally strong case could justify a judicial review of the application of the criteria for the grant or removal of privileges. There is no distinction between cases where Enhanced status is not granted initially and those where it has been granted but is then removed. In any case, the present challenge is against the refusal to reinstate and not, on analysis the initial decision to remove. It was neither unfair nor irrational, and it is in any case provided for in the PSO guidelines for IEP schemes, for Enhanced privilege to be removed for a refusal to attend an SOTP by reason of a denial of guilt. It is not for the prisoner to determine, by virtue of his continue denial of guilt, whether the SOTP remains an appropriate sentencing target and it is wholly rational and within the competence of the relevant prison staff to re-assess the continued status of Mr Hewlett as an Enhanced prisoner where his continued long-term denial precludes him from completing his sentencing targets.

Law

27. It is helpful to summarise the relevant legal principles that are applicable to an application to judicially review the use, or alleged misuse, of the granting or removal of IEP privileges under an IEP scheme operated in accordance with PSO 4000. These are as follows:

(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**¹¹, **Potter**¹² and **Green**¹³).

(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**¹⁴).

(3) It is not unfair to base the decision to refuse to grant a particular level of privilege on the denial by a sex offender of responsibility or guilt and the corollary that he remains unsuitable to undertake the SOTP (**Potter**¹⁵ and **Green**¹⁶).

(4) There is no applicable principal that a prisoner should not be denied an IEP advantage because he is a denier. Thus, the **Oyston** principal, to the effect that denial of guilt does not of itself preclude release is not applicable to enable a sex offender denier to override a denial of an IEP privilege because of that denial (**Green**¹⁷).

28. Ms Abigail Smith, counsel for Mr Hewlett, relied on the **Lowe** case¹⁸ by analogy. She did so because, in that case, in relation to a decision to re-categorise a prisoner as a category B prisoner after he had been a category C prisoner for about eighteen months, Judge Kay held that the prisoner had a legitimate expectation that he would not be re-categorised as a category B prisoner unless there was a good reason and changed circumstances which justified or made rational such a decision. If the decision in this case can be shown to be irrational and one taken without there being any changed circumstances, I am disposed to accept that the decision is susceptible to judicial review. It is a matter

⁹ See footnote 2.

¹⁰ R (on the application of **Lowe v Governor of Liverpool Prison** [2008] EWHC 2167 (Admin), HH Judge Michael Kay QC.

¹¹ Last paragraph on the penultimate page of the transcript.

¹² Paragraphs 36 – 40.

¹³ Paragraph 26.

¹⁴ Paragraphs 40 – 41.

¹⁵ Paragraphs 57 – 58.

¹⁶ Paragraphs 22 – 26).

¹⁷ Paragraph 19.

¹⁸ See footnote 10 above.

of semantics whether judicial review is in principle available in such a case because the decision-making process has not been consistently and fairly applied or because it is irrational because there are no changed circumstances that have occurred.

Discussion

29. It is first necessary to consider whether the decision that is being challenged was the initial decision to downgrade Mr Hewlett or the subsequent review decision which was, or could be seen to be, a decision not to reinstate Mr Hewlett's previously acquired Enhanced status. Undoubtedly, the first decision was flawed. It had not been preceded by any consultation with Mr Hewlett and the reasons provided do not give any indication that they have taken account of Mr Hewlett's lengthy period as an Enhanced status prisoner whilst maintaining his innocence. Unsatisfactory as that is, Mr Hewlett was provided with a review at which detailed written submissions settled by counsel on his behalf were considered. The review was conducted by the Residential Manager and he concluded that he was satisfied with the original decision. It is clear, therefore, that the challenge mounted on behalf of Mr Hewlett was to the process of reviewing Mr Hewlett's Enhanced status that culminated in his reduction of status from Enhanced to standard.

30. There remain three potentially unsatisfactory features of this review process. These are that Mr Hewlett was not given any notice of the initial review decision and was not able to participate in the hearing or contribute his views to the decision-making group that took that decision; he was not able to participate himself in the appeal or review of that first decision despite being informed that he would be able to participate in it and the reasons supplied by both the initial decision makers and the subsequent reviewing prison officer were scant and arguably insufficient. These procedural complaints must be addressed despite the fact that HMP Wymott did not make available the details of the local IEP scheme in operation at HMP Wymott so that these were not provided to the court. The guidelines contained in PSO 4000 stress that each local scheme must be fair and consistent with published procedures in place for earning and losing privileges. The criteria for earning, retaining and losing privileges, which should relate to the standards and patterns of behaviour and performance in regime activities, should be provided by the prison in a written statement which should be made freely available to all prisoners and staff. Finally, procedures should be identified in the written and published scheme that inform prisoners of decisions, reasons for adverse decisions and appeals.

31. It is to be regretted that HMP Wymott did not provide for this review full details of their scheme or any explanation of how the two decisions that are now challenged were arrived at and an explanation for the particular and unsatisfactory features of the review that occurred. Dealing firstly with the way in which the initial decision was arrived at, it is incontrovertible that the failure to invite Mr Hewlett to a hearing or meeting to discuss his potential loss of Enhanced privileges and the cursory way in which the decision that had been taken was delivered to Mr Hewlett was wholly unsatisfactory. Moreover, it is not entirely clear who took that decision. The decision was stated, in the decision notification, to have been taken by the Prison Officer who signed the decision, Officer Kissane. This notification also stated that the decision had been taken at an annual review of Mr Hewlett's IEP status. However, the decision also stated that the IEP Board could not continue to support enhanced status. Finally, in the review decision, the reviewing officer, Residential Governor Catterall, stated that he had consulted with a different officer, Principal Officer Sailor, about his reasons for concluding that Mr Hewlett's IEP status should be altered. I conclude that the first decision was actually taken by whatever group of prison officers at HMP Wymott are responsible for IEP decisions and who constitute the IEP Board and that that group comprised or included both Principal Officer Sailor and Officer Kissane. Mr Hewlett was then notified of this decision, in a somewhat highhanded manner, by merely being passed a copy of the decision under his cell door without any other explanation. Standing on its own, these procedural mishaps might have given grounds for review but I am satisfied that the procedure that was subsequently followed to review that first decision cured any judicially reviewable grounds of complaint.

32. Mr Hewlett immediately complained in writing about both the first decision itself and the manner in which it had been taken and communicated to him. In his complaint, he asked to be allowed to be present at the hearing of his appeal in accordance with the procedure recommended by PSO 4000. There is no mandatory provision for the attendance of the prisoner contained in PSO 4000 but Mr Hewlett was presumably referring to the written procedure in operation at HMP Wymott. However, of

greater significance is that the prison officer who communicated the original decision to Mr Hewlett wrote on the bottom of the application form:

“The IEP co-ordinator will arrange for you to attend the board in mid April.”

In fact, the review was conducted in a different manner and to a different timetable. This change was undoubtedly precipitated by Mr Hewlett's solicitor informing HMP Wymott that they wished to submit representations. These detailed and thorough representations were sent to HMP Wymott and were considered by the Residential Manager who, according to his decision letter, also held discussions with a different Prison Officer “seeking his reasons for concluding why Mr Hewlett's IEP position should be altered”. He also reviewed Mr Hewlett's file and consulted with the Offender Management Unit and the Psychology department. He did not speak to Mr Hewlett. The result of this consultation was that the originally proposed appeal hearing by the IEP Board attended by Mr Hewlett was transformed into a fresh review by the Residential Manager who took account of all relevant available material and evidence save for hearing directly from Mr Hewlett. He did have, instead, the detailed submissions submitted on Mr Hewlett's behalf which he also took account of. However, this was not the procedure that Mr Hewlett had been informed would be adopted for the appeal review of the procedurally flawed initial decision.

33. The departure from the procedure that had been offered to Mr Hewlett, particularly an opportunity to meet and discuss the proposed alteration in his IEP position and the review being conducted by way of a file review and consultation with relevant officers instead of a rehearing by the original decision-makers was unsatisfactory but the review in its reconstituted form had the benefit of detailed representations submitted on behalf of Mr Hewlett and appeared to take account of all relevant information and to have been conducted impartially by an officer who was independent of the first review decision-making process. In those circumstances, that decision-making process is also not susceptible to judicial review.

34. The third potential complaint relates to the sparse nature of the reasons provided by both Officer Kissane and Governor Catterall. The obligation to give reasons is imposed by the requirements of PO 4000 and, no doubt, by the HMP Wymott local scheme. In particular, Mr Hewlett should have been provided with details of the procedures for informing him of decisions taken about him, of the reasons for adverse decisions and of appeals. However, it is possible, if the internal note of the initial IEP panel hearing on 5 March 2007 is read with the decision notification delivered to Mr Hewlett on 11 March 2008 and the final decision dated 10 July 2008 to discern the decision-makers' reasons for downgrading Mr Hewlett's IEP status. These may be summarised as follows:

- (1) The IEP review was an annual review undertaken in a new establishment and in accordance with the criteria and guidelines provided by PO 4000 and the Departmental guidance concerning deniers who have been provided with a sentence plan objective of undertaking a sex offender programmes contained in the circular letter dated February 2008 sent to prison governors.
- (2) The IEP review was concerned to ensure that Mr Hewlett, as a denier and as one who refused to undertake and was thereby unsuitable for a required SOTP, was treated fairly so far as IEP privileges were concerned and that that treatment was fair and consistent with the relevant IEP treatment of similar prisoners in HMP Wymott.
- (3) No decision was taken at the February 2007 review because the decision-makers were concerned to obtain full details so as to see whether Mr Hewlett continued to meet the criteria with regard to meeting his outstanding SOTP sentence planning target.
- (4) Mr Hewlett continued to deny responsibility for the index offences with a consequent refusal and inability to complete his sentence plan objective of completing the SOTP. This objective was considered necessary to enable him to reduce his risk of re-offending.

These reasons, albeit not conveyed with the clarity and cogency that would have been desirable, are nonetheless sufficient to comply with the statutory duty to provide reasons for the downgrading or adverse decision taken in Mr Hewlett's case.

35. I now turn to the complaints that these reasons are irrational and inconsistent in a judicially reviewable manner. Before doing so, I should summarise the context in which the two decisions, taken together, were made. Mr Hewlett was and remains a convicted sex offender whose two index offences relate to serious sexual offending against two children. He is serving an indeterminate sentence and he cannot be released until he has demonstrated that the risk associated with such offending has actually been reduced and that reduction and the consequent demonstration of that reduction cannot be achieved until he has completed a cognitive skills-based group therapeutic programme, the SOTP. He has always denied responsibility for the offences but has not provided any explanation as to why he disputes the evidence that led to his conviction. All he has demonstrated, by way of risk reduction, is the completion of non-specific risk reduction programmes, education and training and good behaviour. None of that adequately addresses the risks posed by a convicted child sex offender. He has self-selected himself for extensive counselling which he has, he reports, satisfactorily completed and which addresses many of the issues covered by the SOTP. However, there is no readily available report of the progress that he has made to reduce his risk during that counselling. Having completed this other work, he was warned that his continuing refusal to undertake the SOTP would endanger his Enhanced IEP status, he was then assessed as unsuitable for the SOTP and, no doubt because of his imminent re-categorisation and move to a new establishment, nothing further was done to implement the IEP warning. He then moved establishment and that establishment decided to allow him to retain his IEP Enhanced status whilst a full review of his risk, his on-going sentence planning objectives and his continued denial of responsibility was conducted. During the course of that review, and in time for the subsequent review, the defendant published further guidance as to how deniers should be treated by the IEP process and all these factors were, or were apparently taken into account by the second review. It should also be borne in mind that the defendant had rejected a recent recommendation of the Parole Board that Mr Hewlett could be transferred to open conditions because, no doubt, he had not completed the SOTP and had not, in consequence, demonstrated sufficient reduction in risk.

36. The IEP process must also be taken account of. It is intended to be conducted annually and, on each annual review, a fresh look is taken at the criteria governing a prisoner's appropriate IEP level. A prisoner on Standard level is also entitled to re-apply on a three-monthly basis for elevation to Enhanced level. Clearly, the starting point for any review is the decision previously taken but that previous decision may be modified or altered on account of a relevant change in circumstances or, even if these do not exist, for other good reason.

37. The principal objection to the decisions taken in relation to Mr Hewlett was that he had always been a denier, he had always been unsuitable for the SOTP, he had nonetheless made demonstrable progress to reduce his risk and since it was clear that he would never change his stance or become eligible for the SOTP, it was irrational and inconsistent now to reduce his IEP status some seven years after he had acquired it. Some support for this contention was sought from two passages in the earlier authorities.

38. The first suggested support was from **Potter**¹⁹:

"44. It can hardly be supposed that one who at first denies his sexual offences should straightaway be excused attendance on an SOTP. But if he persists in his denial, at what stage is it to be said that the denial is so entrenched that it is inappropriate to expect him to attend such a course? The question whether his denial is a good reason for non-attendance will depend on the individual circumstances of the particular prisoner.

45. Those circumstances are considered in the process of sentence planning, as the facts of these particular claimants demonstrate. Sentence planning lies at the heart of the IEPS ... Prisoners are encouraged to achieve the targets set in the individual process of sentence planning by the IEPS. It is through that process that that which can be reasonably required of a prisoner is ascertained. In the instant cases, this process can be observed."

39. The second suggested support was from **Green**²⁰:

¹⁹ Paragraphs 44 – 45.

²⁰ Paragraph 26.

"It is equally clear from the evidence that was before the court in the cases before Moses J, that there are circumstances in which even denials may be overridden to enable an enhanced status to be granted. That will depend upon the individual circumstances of a particular case. But I have no doubt in the circumstances of this case that Mr Jarvis was entitled to regard the failure to attend the course as fatal to his application."

40. Ms Smith submitted that these passages showed that a long-term denier could and, in the particular circumstances appertaining to Mr Hewlett should, be excused the requirement to undertake the SOTP and that this on-going requirement was now inappropriate and should be overridden. In consequence, the adverse reliance on this continued failure to address the SOTP by the IEP process was irrational. Ms Kate Olley, counsel for the defendant, submitted that the evidence available to me demonstrated that it would never be appropriate as a general statement of practice for a denier's entrenched rejection of responsibility or guilt to be considered as being excused an obligation to undertake the SOTP. The detailed evidence of Dr Mann coupled with the recent advisory guidelines issued to prisons showed that the SOTP should remain a sentencing target for all those whose assessed risk related to serious sexual offending was at least medium notwithstanding their entrenched denials of responsibility. It was, of course necessary for those assessing risk, particularly in a parole context, to look for other indications of risk where denial had precluded the completion of an SOTP but that did not obviate the continued need for the objective of completing the SOTP as a sentencing target. Individual circumstances, if these were exceptional, might satisfy an IEP Board that the non-completion of the SOTP by an entrenched denier could be disregarded for IEP purposes but the general statements of Moses J and Collins J in **Potter and Green** set out above, if they were taken to mean that a point would be reached for every denier where the SOTP would no longer be appropriate, were not supported by Dr Mann's evidence and should not be taken to represent the current law and practice.

41. I accept the submissions of Ms Olley. There is no moment in a denier's sentence when it can be said, absent exceptional individual circumstances, that the SOTP is no longer appropriate. If the contrary is understood to have been stated by either Moses J or Collins J, I am clear that that is no longer appropriate in the light of the much fuller evidence that I have been provided with from Dr Mann and from the clarification provided by the guidelines that were issued in February 2008.

42. It follows that Mr Hewlett's challenge can only succeed if he can show that there were no appropriate changed circumstances or other good reasons to support the adverse decision that was taken in his case. It is clear that there were changed circumstances and other good reasons which the decision-makers were entitled to rely upon. In summary, Mr Hewlett had recently changed prison and had been re-categorised and was now located in a training prison many of whose inmates were sex offenders undertaking SOTP work. He had completed all other required offending behaviour work, he had been refused a move to open conditions due to this outstanding sentencing target, his IEP status had been subject to a full year-long review and the appropriate criteria had been applied and, most significantly, the new guidelines as to IEP status consideration and review for sex offenders in denial had just been formulated and published in February 2008 and were available to assist in the review process being undertaken and which was being completed in March 2008. The IEP process and the guidelines both envisage that a prisoner could lose his Enhanced status without there having been a disciplinary occurrence for good reason and, in his case, good reason was demonstrated.

Conclusion

43. It follows that the decisions that are challenged by Mr Hewlett were neither irrational nor inconsistent with previous IEP decisions. They have been shown by the defendant to have complied with the relevant IEP criteria and they were ones readily available to, and within the wide margin permitted to, the relevant decision-makers. This case falls way below the exceptional type of case in this field that the authorities show as being susceptible to judicial review. Mr Hewlett's challenges and his application for judicial review fail and his claim should be dismissed.