



Neutral Citation Number: [2014] EWHC 3997 (Admin)

Case No: CO/2081/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2014

Before :

THE HONOURABLE MR JUSTICE COLLINS

Between :

**THE QUEEN (on the application of BARBARA
GORDON-JONES)**

Claimant

- and -

**(1) THE SECRETARY OF STATE FOR
JUSTICE**

Defendants

(2) THE GOVERNOR OF HM PRISON SEND

**Ms Jenni Richards QC, Ms Victoria Butler-Cole and Ms Annabel Lee (instructed by Mr
Samuel Genen of Messrs Lound, Mulrenan and Jefferies) for the Claimant**
**Mr Brian Kennelly and Mr Jason Pobjoy (instructed by Treasury Solicitor) for the
Defendants**

Hearing date: 29 October 2014

Approved Judgment

Mr Justice Collins:

1. The Claimant is and was at all material times a prisoner serving an indefinite sentence for the protection of the public following her conviction for a number of offences including arson with intent to endanger life. She was sentenced in January 2013. She has completed her tariff of 5 years by reason of time served on remand. She is now 56 years old. This claim challenges the lawfulness of Prison Service Instruction (PSI) 30/2013 which amended the Incentives and Earned Privileges Scheme (IEP) which has been in effect since 1995. The challenge relates to what are said to be unlawful restrictions on the ability of prisoners generally and the Claimant in particular to receive or have for their use books.
2. The Claimant has a diagnosis of borderline personality disorder and depression. She suffers from epilepsy and, as a result of lapses of memory, she saw a neurologist in March 2014. He noted her love of reading and the importance to her of access to books. She has a doctorate in English literature and the books she wishes to read are often such as are not normally required by fellow prisoners. Indeed, when she saw the neurologist she was reading three books, one by Alan Bennett, one by Monica Ali and the dialogues of Marcus Aurelius.
3. The importance to the Claimant of books is also referred to in a report of February 2013 from the officer concerned with her engagement with what is called PIPE. This exists to enable inmates to develop their relationship and behavioural management strategies. She regards herself as intellectually superior and preferred to read in her cell rather than socialise with others. She herself emphasises her love of books saying she cannot stress how important they are to her. Thus any restrictions on her ability to have available books which are not easily obtainable through the prison library operate particularly harshly.
4. This claim was lodged on 6 May 2014. The PSI was issued on 24 October 2013 and came into effect on 1 November 2013. Its full effect was postponed in relation to the Claimant until 18 February 2014 but one important aspect of it, namely a severe restriction on the ability of prisoners to receive items, including books, either sent by friends or relatives or brought in by visitors, had immediate effect. The first Defendant raised a delay point. The claim against the second Defendant is based on his refusal to allow the Claimant to have some particular books delivered by exercising his discretion to permit such delivery in exceptional circumstances. That decision was made on 9 April 2014 and so no delay point arises in relation to it.
5. No doubt because of the delay point raised by the first Defendant on 18 June 2014 Lang J ordered a ‘rolled-up hearing’. Mr Kennelly in his skeleton argument relied on what he submitted was a principle established in cases such as R v Secretary of State for Trade and Industry and Greenpeace Ltd (no 2) [2000] 2 CMLR 94 that where a challenge was made to a policy, time ran from the date on which the policy was implemented not when a decision which directly affected an individual claimant was made. That principle must obviously depend on the circumstances of a particular case since at the very least the affected claimant must have been aware of the existence and possible effect of the policy. Here there was publicity given to prisoners about the PSI. Thus it is said the Claimant and her solicitor, who was advising her in relation to an application to the Parole Board, must have appreciated that books were included in the severe restrictions on providing items for prisoners. The solicitor had been

accustomed to providing clients, including the Claimant, with books which were of a specialist nature or by authors not readily encountered. Since the PSI came into force, such provision has been impossible.

6. Mr Kennelly submitted that there would be prejudice to the first Defendant if the claim were allowed to proceed since the PSI had been implemented across the whole prison estate. While there are concerns raised about some other restrictions resulting from the PSI, this claim is limited to the restrictions on books. If it succeeds, the need either to exempt books from the IEP scheme or to remove any unreasonable restrictions would not be difficult.
7. Accordingly, I decided, if necessary by extending time, that permission should be granted. Lang J had required that the Claimant lodge an undertaking to pay the fee (then £215, now what may seem a surprisingly large increase namely £700) or an application for remission. It is clear that there must be in this case remission of that fee since I was informed that those representing the Claimant are acting pro bono. Restrictions on Legal Aid availability for prisoners may have had an impact. This judgment accordingly deals with the claim.
8. Rule 8 of the Prison Rules 1999 provides:-
 - (1) There shall be established at every prison systems of privileges approved by the Secretary of State and appropriate to the classes of prisoner there, which shall include arrangements under which money earned in prison may be spent by them within the prison....
 - (3) Systems of privileges approved under paragraph (1) may include arrangements under which privileges may be granted to prisoners only in 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.

Paragraph (4) requires any system set up under paragraph (3) to include procedures to be followed in determining whether any particular privileges should be or continue to be granted and there must be reasons given to a prisoner for any adverse decision together with a means whereby an appeal can be brought. The purpose of the IEP scheme had always been to encourage responsible behaviour by prisoners, to encourage effort and achievement in work and other constructive activity and to encourage sentenced prisoners to engage in sentence planning and benefit from courses and activities designed to reduce reoffending. Privileges can be earned by good behaviour and performance and lost by a failure to maintain acceptable standards. There are four levels of privilege, Basic, Entry, Standard and Enhanced.

9. On 30 April 2013 the first Defendant announced a number of changes to “strengthen and support efforts to reduce reoffending and rehabilitate prisoners as well as giving the public greater confidence in the prison system”. The main change instigated by the new PSI was that absence of bad behaviour was no longer enough to earn privileges. Prisoners would be required to work actively towards their own rehabilitation. There would be a standardised list of what was available at each level and an automatic IEP review for bad behaviour with a presumption of downgrading. Bad behaviour would result in loss of TV and prisoners would not be permitted to watch TV when they should be engaged in work or other activities.

10. In a press release on 1 November 2013 when the new PSI was to come into force, the first Defendant said:-

“For too long the public has seen prisoners spending their time languishing in their cells watching TV, using illegal mobile phones to taunt their victims on Facebook or boasting about their supposedly easy life in prisons.

This is not right and it cannot continue.

The changes we have made to the incentive scheme are not just about taking TVs away from prisoners, they are about making them work towards their rehabilitation. Poor behaviour and refusal to engage in the prison regime will result in a loss of privileges. It is as simple as that.

The expectation now is that prisoners engage in work or education as well as addressing alcohol or drug issues. Only by doing this can we hope to bring down our stubbornly high reoffending rates.

Since April, major work has been going on across the prison estate to make staff and prisoners fully aware of the changes and ensure that the scheme is implemented safely across the prison estate.”

I make no comment on the first paragraph. The rest indicates the effect that the new PSI is intended to have.

11. It is unnecessary for the purposes of this judgment to cite extensively from the PSI since, as I have said, it is only its effect on the availability of books for prisoners that is material. There are for convicted prisoners four levels, namely Basic, Entry, Standard and Enhanced. Each level provides a mandatory level of weekly private cash allowance. These are:-

Basic	£4
Entry	£10
Standard	£15.50
Enhanced	£25.50

These sums can be reached by provisions from friends or relatives, but the relevant weekly maximum cannot be exceeded. Since a prisoner will have to provide all that he or she wants from his or her earnings and the weekly private cash allowance, it is obvious that the available amount, certainly on basic and probably on standard, will not permit the purchase of many items, let alone books.

12. Each prison can join in a local scheme. These must, if operationally possible, include the following six designated key earnable privileges, namely:-

- i) Extra and improved visits
- ii) Eligibility to earn higher rates of pay
- iii) Access to in-cell television
- iv) Opportunity to wear own clothes
- v) Access to private cash
- vi) Time out of cells for association

In addition, there is set out in the PSI what is described as a menu of other possible privileges. The important privilege in paragraph 10.4 which severely restricts, indeed imposes subject to a very limited exceptional case a virtual ban on the sending, whether by parcel or by visitors bringing, items for prisoners. 10.4 provides:-

“The following two paragraphs apply to all prisoners regardless of which national IEP operational framework applies to them (i.e. PSI 11/2011 or PSI 30/2013). To ensure that the IEP scheme is not undermined the general presumption will be that items for prisoners will not be handed in or sent in by their friends or families unless there are exceptional circumstances. Governors have discretion to determine what constitutes exceptional circumstances; this could include for example disability/health aids or an artefact for religious observance, stamped-addressed envelopes so as to facilitate a prisoner’s ability to communicate or where there is a need to replace clothing due to restricted access to laundry facilities. In determining whether other exceptions are justified Governors should consider the impact on their IEP scheme, the potential risk to security associated with smuggling contraband and whether they have sufficient resources to examine and search the incoming property.”

- 13. Annex F to the PSI concerns what is described as a Generic Facility List, that is to say, a list of items that each prisoner will be allowed. The list contains columns headed “Approved Source of Entry” and “Reason for Restriction” to “help staff and prisoners understand the allowed routes of entry of selected items”. The introduction repeats what is contained in paragraph 10.4. Books are mentioned in the list. The approved source of entry is not identified, but there is a maximum of 12 books that a prisoner is entitled to have in his or her possession and the reason for the restriction is said to be because of the IEP incentive level.
- 14. PSI 23/2013 deals with what is called ‘Prisoner Retail’. It is intended to enable prisoners to spend their earnings and private cash to purchase items for their own use. Paragraph 7.1 enables what are described as specialist products which includes books to be purchased subject to the IEP schemes through catalogue suppliers. For books, that would involve, I was told, purchases through Amazon. It seems that there is no real problem with deliveries from Amazon needing detailed examination for possible contraband.

15. There is a limit to the overall amount of property which a prisoner can have in his or her cell. This limit is required because of the limited space in a cell and the need to ensure that possessions can be checked to see that no unqualified items are in the prisoner's possession. The limit is set out in PSI 12/2011 which deals with prisoners' property. Paragraphs 2.35 to 2.41 concern what is called volumetric control. In short, this requires that property held by a prisoner must be limited to that which fits into two standard size volumetric control boxes. There is in addition permission for one outside item. Governors may exceptionally agree to a prisoner having extra items. The example is given in paragraph 2.37 of the relevant PSI of outside medical equipment. There are some exempt items which do not come within the volumetric control limit. These include legal papers and religious texts essential for the practice of the prisoner's religion. Excess property can be held in storage but this is discouraged and excess property should be given to visitors to remove. Educational material may be permitted to be held in storage if in excess of the volumetric limit. Provided that the relevant educational officer agrees that a prisoner properly needs it, educational material, which obviously includes books, may be admitted as an exception to the bar on delivery of any item to the prison.

16. Paragraph 33 of the Prison Rules 1999 provides:-

“A library shall be provided in every prison and, subject to any directions of the Secretary of State, every prisoner shall be allowed to have library books and to exchange them”.

This accords with paragraph 40 of the Standard Minimum Rules for the Treatment of Prisoners adopted by the UN, which provides:-

“Every institution shall have a library for the use of all categories of prisoners, adequately stocked with both recreational and instructional books, and prisoners shall be encouraged to make use of it”.

17. The importance of access to books by prisoners is not disputed by the Defendants. It is the first Defendant's case that the restrictions on possession of books do not restrict access since whatever the prisoner wants can be obtained through the prison library. If the library does not have a particular book in stock, it can be obtained from the library service operated by the Council within whose area the prison is situated. Further, if that cannot produce a book which is requested, it can be acquired by the prison without cost to the prisoner.

18. As it happens, HMP Send has two libraries and provides what is clearly one of the best library services. Mr Rickards the librarian, has in his statement detailed the requests made by the Claimant for particular books, all of which were obtained for her. Further, there is reasonable access to the library in that it is open at sufficient times. It is accepted that there was no intention to prevent prisoners having access to books – indeed, such access is to be encouraged particularly as illiteracy is a real problem among prisoners – and the lawfulness of the policy in relation to restrictions turns on whether access through the library and the ability to purchase subject to the weekly limits in the IEP is sufficient to avoid the conclusion that the restrictions which are so severe as to amount to an effective ban on reasonable possession of books.

19. Since the PSI is the policy for which the first Defendant and the Ministers are responsible, it is important to see what was said when concerns were raised about the PSI. It has been described by some as a ban on books for prisoners. It does not go as far as that but, as is clear, it amounts to a severe restriction on possession or acquisition of books which a prisoner can treat as his or her own. A statement from Mr Graham Beech, the Acting Chief Executive Officer of NACRO, underlines the importance of access to books and the damaging effects of any restrictions. He said restrictions send out the wrong message. He makes the point that prison libraries do not always stock the range and quality of books which would help prisoners with their own personal development. Receipt of items including books from friends and family help to keep prisoners' links with the outside world alive. Disconnection can have an adverse effect on rehabilitation.
20. While the library at HMP Send is good and there is reasonable access, the same cannot be said of all prisons. Economies which have resulted in staffing levels being reduced have worsened the situation and financial restrictions are likely to mean that purchases of particular books which will be unlikely to appeal to prisoners other than the one requesting them will not be approved. A statement from the Prisoners Education Trust includes statements from prisoners who are studying for particular qualifications who needed to possess books. While I recognise there may be an exception for accepted educational books (subject to the 12 limit) the ability to access what is needed from family and friends is most important. The supply by the solicitors for the Claimant which can no longer take place is an example of what a prisoner may need.
21. A report from the Prison Reform Trust has highlighted the hostility to the new PSI and has set out concerns that it is undermining the rehabilitative purpose of prisoners. It is what is seen to be the ban on receipt of parcels or items from visitors which has provided the greatest concern. The inclusion of books in the scheme is seen as a ban. Overall, the IEP as now operated seems to fail to recognise that it is deprivation of liberty that is the penalty imposed and that any further restrictions must be fully justified.
22. Concerns raised about the restrictions in relation to books led to a statement by the first Defendant on 24 March 2014. In this he said that prisoners' access to reading material was not being curtailed. There was access to the library, the ability to possess up to 12 books and to purchase with earnings which would be higher if the prisoner took positive steps within the IEP. In a response to a petition, the following day he said this:-

“The restrictions on access to parcels by prisoners are necessary because of the need to limit the ability of offenders to get hold of drugs and contraband. The logistics of a prison estate with 85,000 people would make it impossible to check in detail every parcel sent in, and rights of access to parcels are, and have always been, limited”.
23. On 29 March 2014 the first Defendant wrote to the Poet Laureate who had raised concerns about the restrictions in relation to books. He made the point about difficulties searching for drugs and contraband. He referred to the access to prison libraries and added the “ability to order books from Amazon via the prison shop using

their prison earnings or money sent in by relatives”. This I am bound to say was somewhat misleading since it seemed to indicate that money sent in could be used with no constraints. In reality, that is not so since a prisoner cannot spend more than his or her weekly limit however much is sent in by relatives or friends.

24. The letter was an open letter intended by the first Defendant to be published and to constitute his defence of the new PSI. Thus it can properly be regarded as his justification for the new arrangements. He said that neither he nor any other Minister had made any policy changes specifically about the availability of books in prisons and he had not sought to include them “in a list of privilege items that have to be earned by offenders – to do so would be wholly wrong”. The purpose of the changes was to achieve consistent rules across the prison estate and to ensure that access to privileges, “such as wearing non-prison clothes, the level of prison earnings and extra access to the gym” was linked to how well a prisoner engaged in rehabilitative activity, such as active participation in education and training. Thus it was agreed that there should be consistent rules about receipt of parcels and the ‘logistical impossibility’ of checking all parcels in the level of detail required to ensure no drugs or contraband articles were being smuggled in meant that parcels could only be received at the governor’s discretion in “exceptional circumstances”. He recognised the importance of encouraging learning and reading for which the library service would provide.

25. The other ministerial comment to which my attention was drawn was by the Deputy Prime Minister on 31 March 2014. He said:-

“If there was a ban on sending books to prisoners, I would be the first to demonstrate outside the local prison. It would be ridiculous. It’s outrageous.....Education and training, reading and learning are a critical part of [rehabilitation]. But the measures being proposed are not about banning books, they are about making sure the security arrangements around packages delivered to prisoners are applied consistently across the prisons estates.

Anyone can send books to the library of your local prison. Prisoners can take any books. They can keep books in their cells. I would encourage them to do so”.

26. The ministerial comments have been referred to in support of the submission made by Ms Richards that since the policy was not intended to ban books for prisoners, it would be unlawful if in reality it did have that effect. Further, she relies on the restrictions on receipt of items including books, the limit on the number that can be possessed by a prisoner and the inclusion of books in the list of items that can only be obtained if the prisoner’s earnings level was sufficient as a result of the IEP requirements. Thus, it is submitted, the clear effect of the inclusion of books in the items falling within the standard facilities list and subject to IEP earnings shows that the ability to possess them is constrained. This is said to be inconsistent with the recognition that prisoners must be encouraged to read for educational and rehabilitational purposes and the policy does make changes about the availability of books in prisons.

27. It is to be noted that the reason given for the restriction on sending books to prisoners was so that the IEP scheme should not be undermined. Security was mentioned in the last sentence of paragraph 10.4, coupled with concerns about resources. But the reason given for the restriction on books is the IEP, not security which could have been included.
28. There has always been a limit on the number of parcels a prisoner may receive. Such limitation is reasonable and no objection to it is raised by the Claimant. What is objected to is the virtual ban on receipt of books since they are not given any special consideration. The exercise of discretion in exceptional circumstances does not include books as an example in paragraph 10.4, albeit it is possible that books for educational purposes if approved by the relevant officer dealing with a prisoner's education might qualify. Reference has also been made by Mr Kennelly to Section 40C of the Prison Act 1952 which by s.40C(2) render a person guilty of an offence if he brings, allows or otherwise conveys a List C article into a prison or causes another person to do so. A List C article is by s.40A(6) defined as "any article or substance prescribed for the purpose of this subsection by prison rules". Rule 70A of the Prison Rules 1999 identifies List C articles to include books. Those provisions do not seem to me to have any relevance since I do not think it would ever be suggested that a friend or relative who sent or brought to the prison a book for a prisoner in good faith was guilty of an offence.
29. Rule 44 of the Prison Rules 1999 deals with money or articles sent by post. It gives the Governor a discretion to deliver any article to the prisoner, place it in his property or return it to the sender. That discretion had not been constrained by the previous PSIs. At HMP Send the policy had been to allow prisoners to have an item sent in once every two months, albeit there was always a discretion which could be exercised to refuse to accept any items sent or handed in. The new PSI is said to fetter the governor's discretion since one parcel is permitted save in exceptional circumstances. It is permissible by a policy to guide the exercise of discretion provided that the decision maker, in this case the Governor, is not prevented from accepting the possibility of an exception to the policy in a deserving case.
30. The refusal of the request made for some particular books on 9 April 2014, which forms the basis of the claim against the second Defendant, is relied on to show that books are not regarded as falling within what can be permitted in exceptional circumstances. The Claimant's requests for particular books to the librarian had always been met, either by use of Surrey County Council's facilities or by buying in the book. The request to the governor made on 8 April 2014 was for five books, namely Brewer's Dictionary of Phrase and Fable, The Penguin Book of Saints (2013 edition), Elephant Bangs Train by William Kotzwinkle, Billy Bathgate by E L Doctorow and Portnoy's Complaint by Philip Roth. The refusal states:-

"No property is to be allowed sent in or posted in as per the new facilities list. Any item sent in will have to be posted out at your expense or handed out."

The potential loss of available money will be a considerable detriment to the prisoner since it will reduce what can be used to purchase items which the prisoner desires. I should add that the Claimant had in her request suggested that her solicitor could

arrange for the purchase and despatch through Amazon but that, I was told, was not possible.

31. The Claimant has room for more than 12 books without exceeding her volumetric control limit. Thus it was submitted that if she (or indeed any prisoner) chose to use up the allocated space for extra books rather than other items that should be permitted. That was not possible because of the new policy coupled with paragraph 2.37 in PSI 12/2011, which dealt with prisoners' property and which sets out the volumetric control limits, stating:-

“Property held in possession by any prisoner must be limited to that which fits into two standard size volumetric control boxes and an ‘outsize item’ unless the Governor agrees, exceptionally, to a prisoner holding property in excess of that limit or it is an item which is exempt from volumetric restrictions. Governors have the discretion to decide whether or not the circumstances of a particular prisoner’s case justify an exception being made for a specific item, for example items of outsized medical equipment may have to be permitted as additional outsize items”.

The generic facility list in PSI 30/2013 Annex F provides for a maximum of 12 books to be in possession.

32. Those provisions in combination only apparently permitted an exception when the property sought would mean the volumetric limit was exceeded so that there was no discretion to exceed 12 books unless the volumetric limit was thereby exceeded. That seemed to me to be absurd and I so indicated in argument. I am pleased to say that the first Defendant has recognised that and has amended Appendix D of PSI 30/2013 so that the material provision now reads:-

“Governors must consider applications by individual prisoners for additional items to be held in possession exceptionally, outside volumetric control limits e.g. outsize medical equipment. In the case of books, Governors may also exercise a discretion to allow a prisoner to exceed the maximum of 12 books where the prisoner will not exceed his or her volumetric control limit”.

33. In a supplemental note, Ms Richards has maintained that the amendment in no way overcomes what she describes as the overall incoherence of the IEP scheme in respect of books. There is no good reason to apply 12 or any limit to the number of books a prisoner can have in his or her possession subject, it is accepted, to the overall volumetric control limit. It is not indicated whether the exceptionality test applies to the new discretion. It clearly does in relation to sending or bringing books to the prison because of the general restriction on receipt of items for prisoners. I note that the letter from NOMS drawing Governors' attention to the new discretion states:-

“The general 12 book limit on the standardised facility list remains, as do the existing restrictions on sending in packages: This small change simply allows Governors' discretion to

enable prisoners who are below the overall volumetric control limit to hold additional books if a request is made. For prisoners who are at their volumetric control limit, the position remains as outlined above and exceptional circumstances will be required for any additional items to be allowed”.

34. The last sentence suggests that exceptional circumstances may not be required to permit more than 12 books when the volumetric control limit is not exceeded. But exceptional circumstances will apply to the manner in which they can come into the prisoner’s possession so that it will not normally be possible to receive them through the post or delivery by visitors. Further, they can only be acquired if the prisoner has sufficient funds within the weekly levels dictated by the IEP. Thus the submissions on behalf of the Claimant assert that a limit of 12 is arbitrary, entirely unnecessary and so irrational. In addition, it is said that the IEP scheme should exclude books and they should be allowed to be provided, subject to a reasonable restriction on the number of parcels a prisoner can receive and security concerns. It is difficult, it is submitted, to see that it is reasonable not to allow someone such as the Claimant’s solicitor to bring in books requested by her since the security needs, which presumably in any event cover some sort of search, will not be extended.
35. The note from the Defendants which covered the amendment to allow more than 12 books stated that this had been done “in recognition of the particularly important role books play in rehabilitation”. All that has been said by the first Defendant or other Ministers has accepted the importance of books for prisoners and their rehabilitation. But the restrictions on acquisition and possession are justified on the basis that there are no restrictions on access because of the library services available. Prisoners can keep books from the library for three weeks at a time. There is a possibility of renewal for up to a total of twelve weeks. It must be obvious that if this can be relied on by the first Defendant the library service must be adequate. At HMP Send it is but this does not apply across the prison estate and at some prisons access and content leave much to be desired. The Claimant’s advisors have been accused of cherry picking in setting out in an appendix to the claim adverse comments on library facilities by HM Chief Inspector of Prisons in his annual reports. No doubt there are good and bad. There is real concern that staff shortages will create access problems, but the point is that if the only practicable means of accessing required books is through library services they must not only be readily accessible but able to produce the book or books requested. The Claimant may be particularly unusual in the books she requires but that is not material since the effect of the PSI must be considered for any prisoner however literate.
36. What in my view has not been taken into account is that for many there is a need to possess particular books to be treated as their own property. Some books are used as references, such as dictionaries; Brewer’s Dictionary may well fall in to that category. Others are regarded as those which need to be available to be reread or, such as for example a compendium of a particular author’s works, to be dipped into frequently. It is possession which can matter as much as access. It is difficult to follow why books are included in IEP facilities when their availability to prisoners is regarded to be so important. There is no ban on books in the IEP but the severity of the restrictions clearly may prevent acquisition and possession.

37. Furthermore, a book requested by a prisoner may not be available because another has borrowed it. A book may not only be one which a prisoner may want to read but may be very useful or indeed necessary as part of a rehabilitation process. If educational and approved by the relevant officer no doubt it may be possible for it to be acquired, but that cannot be assured. All this shows that there are likely to be difficulties in being able to have access to particular books and those difficulties can be overcome if books were not included in the IEP. Provision of money or the assistance of a trusted source such as a prisoner's solicitor would be an obvious means of avoiding the severity of the restriction.
38. It seems to me that in the circumstances the PSI's effect is contrary to what the first Defendant has stated to be his intention. As I have said, I see no good reason in the light of the importance of books for prisoners to restrict beyond what is required by volumetric control and reasonable measures relating to frequency of parcels and security considerations. Just as an action taken by a public body must not be such as fails to promote the policy and objects of the enabling power as established in Padfield v Minister of Agriculture, Fisheries and Food 1968 AC997, so the policy will be unlawful if its effect is contrary to the expressed intention and objectives that it was supposed to promote. Since in my judgment it does have the negative effect contended for by the Claimant and since I do not regard access through the library services as sufficient, it is unlawful in so far as it includes books within the IEP.
39. I make it clear that the decision concerns only books. Criticisms have been raised at the restrictions on sending in any items. I have not considered those wider criticisms and nothing I have said in this judgment relates to them.
40. The discretion given to a Governor under the IEP is that which the IEP dictates. Whether or not a discretion is unlawfully fettered will depend upon the power under which it is to be exercised. The PSI guides the exercise of his discretion. It is entitled to do so and in the circumstances I do not think there is any unlawful fettering.
41. The Claimant has raised Article 8 of the ECHR. That a prisoner may be able to rely on Article 8 is established by the ECtHR in Dickson v UK [2007] ECHR 44362/04. Thus a blanket ban which interferes with an activity which can be enjoyed by a prisoner may not be proportionate. But the Article 8 claim adds nothing to this case. If the policy is lawful, it will be proportionate. If not, Article 8 is not needed and there are undoubtedly difficulties to applying it having regard to the constraints on private life activities inevitably resulting from imprisonment.
42. Ms Richards in addition relied on what she submitted was a breach of the public sector equality duty. The PSI states under the heading 'Equality and Fairness' in paragraphs 13.1 and 13.2:-

“13.1 The IEP scheme must include a range of earnable privileges to incentivise appropriate commitment to rehabilitation and good conduct by all prisoners including those who are elderly, disabled or who have other special needs. To the extent possible published schemes should be applicable to all prisoners but bespoke alternatives may be required to provide for special needs and this should be made clear in a published scheme.

13.2 IEP schemes must be inclusive and take account of equality considerations relating to any of the protected characteristics which are:-

- Age
- Disability
- Gender Identity
- Marriage/Civil Partnership
- Pregnancy/Maternity
- Race
- Religion/Belief
- Sex
- Sexual Orientation”.

43. Paragraph 13.9 requires Governors to ensure that behaviour which in the consequence of a protected characteristic is not penalised and flexibility must be applied to individual circumstances such as prisoners with learning difficulties. This means that the exercise of discretion must have regard to avoiding any unlawful discrimination.
44. An Equality Impact Assessment was produced. It is criticised by Ms Richards who submits it is inadequate. It is apparent that those such as the elderly or disabled who may be unable to work or have difficulties may find it difficult to have sufficient funds within the weekly allowances. However, the requirement of flexibility to overcome any inequality should, if applied properly, avoid any unlawful discrimination. It is clear that regard was had to the relevant issues and I do not think that in the circumstances a breach of the duty is established.
45. The claim against the second Defendant asserts that he failed to exercise his discretion properly. The second Defendant was bound to act in accordance with the policy. It was not for him to judge whether or not it was lawful. He acted in accordance with it and thus did not act unlawfully. In reality, it is only if the policy was unlawful so that the Claimant can succeed against the first Defendant that she can obtain any relief.
46. For the reasons I have given, I am satisfied that in so far as it includes books in IEP schemes PSI 30/2013 is unlawful. It is perhaps worth noting that the PSI refers to the obtaining by prisoners of privileges. In the light of the statement made about the importance of books and the absence of any intention to prevent or interfere unreasonably with prisoners being able to have access to books, to refer to them as a privilege is strange. As I have said, I am concerned only with books. The precise extent of any relief or court order I will leave to submissions of counsel. I would only say that the removal of books from the items included as earnable within the IEP, and excluding them from the items which cannot be sent or brought in should suffice. The volumetric limit will apply and is likely to put a limit on the numbers a prisoner can

have in his or her possession and 12 as a usual limit is not at all unreasonable. Equally, there will remain restrictions on the number of parcels a prisoner can receive. The amendments will not be extensive and will in no way undermine the new approach in the PSI.