

9 April 2010

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**Re: Young people and prison discipline following R (M) v The Chief Magistrate,  
16<sup>th</sup> February 2010 [ CO/1789/2010 ]**

I write following a recent High Court judgment which concerned a young person represented by our legal team. The judgment highlights the need for a proactive approach to legal representation for young people facing adjudications. The judgment also strongly reinforces the need for adjudicators to consider the welfare of the young person. Mr Justice Collins specifically suggested that the prison service and independent adjudicators might want to consider changing the approach to representation for adjudications in the light of his observations. I enclose a copy of the judgment for your information.

**The case of M**

The child, known as M, had been awarded extra days by an independent adjudicator. He had had no legal advice and was not legally represented. The Chief Magistrate refused to consider our application for a review since it was out of time.

On 16<sup>th</sup> February 2010 Mr Justice Collins quashed the punishment of ten extra days imposed for failing to obey a lawful order in June 2009.

**The need for a proactive approach to legal representation**

In his judgment Mr Justice Collins made the following comment about legal representation for adjudications:

*'It seems to me that there are formidable arguments in favour of a proactive approach and it may be that the prison service and Adjudicators may want, in the light of my observations, to consider*

*carefully whether there should be a change to the way representation is considered where young offenders are put before an independent adjudicator because there is a real possibility of an increase the period of custody.’ (paragraph 19)*

The type of approach to which Mr Justice Collins is referring is set out in paragraph 6:

*‘The main basis for the claim, which is brought on his behalf by the Howard League for Penal Reform, is that, where young offenders are considered to have committed offences which merit increases in custody and so are referred to the independent adjudicator, they should be granted legal representation and it is a positive requirement, so that it is not sufficient that the offer is made, as it is routinely, if turned down, no further consideration is given to it. Rather it is submitted that there is a positive duty to be proactive and what should happen is that a young offender is told that he ought to be represented and that only if he knows that it is there for the taking, that he ought to take it and that it is in his interest to take it, but he refuses, that such a refusal should be accepted. It is said that the general practice is merely to offer and the forms that have been produced in this case show that nothing more than that was done.’*

Mr Justice Collins found the arguments in support of this view ‘formidable’. He said this was an important issue that would not go away.

Following representations from my legal team, the need for positive steps to be taken to ensure legal representation where appropriate for young people at internal adjudications was also affirmed by the Prison and Probation Ombudsman in his decision, SC, 35286/2009.

### **Welfare matters**

Mr Justice Collins also highlighted the duty of adjudicators to consider the child’s welfare:

*‘The welfare of the child is an important and indeed fundamental consideration in determining how a child who has committed offences should be dealt with...a young person’s welfare is something that has to be properly taken into account and, indeed, that is clear from section 37 of the 1998 Act.’ ( Paragraph 7)*

The judgment demonstrates the important role that legal representation can often play to ensure full regard is had to the welfare duty, both in respect of any issues arising from the incident under investigation and broader issues such as the impact that the decision may have on the young person’s entitlements to social services support in the community.

In this particular case, from the adjudication records, it was clear that the young person had raised concerns about bullying in relation to his refusal to obey an order and that this had not been investigated during the adjudication. Mr Justice Collins

found that the adjudicator erred in not investigating the issue of bullying in greater depth.

Mr Justice Collins also found that the adjudicator had not considered the effect of his decision to award ten additional days on M's entitlement to leaving care services. M was to be accommodated by social services under s20 of the Children Act 1989 on his release. The extra days in custody would have prevented M from qualifying for continuing leaving care support since he could not then have been accommodated by social services for the requisite 13 weeks before his 18<sup>th</sup> birthday. Mr Justice Collins noted that M was clearly in need of significant assistance from social services. He suggested that legal representation might have ensured that these welfare matters were put to the adjudicator.

### **Steps that can be taken to ensure justice for all young people facing prison disciplinary proceedings**

I hope that urgent steps will be taken to ensure that other young people are provided with the assistance they need in prison disciplinary matters. To that end, my legal team has set out some key points that should be incorporated into guidance for the prison service and independent adjudicators. I hope that you will consider these points carefully and I would be happy to meet with you or your colleagues to discuss this issue further.

In brief, the following points should be incorporated into guidance:

#### **1. A proactive duty to ensure legal advice and representation for all disciplinary matters**

There should be a duty on the prison or the independent adjudicator to take proactive steps to ensure that the young person has been genuinely encouraged to take up the offer of legal representation in all external adjudications without exception. The young person should be made aware that it is in his or her interest to accept it. The prison should also ensure that young people are aware of their entitlement to legal advice, and, if appropriate, representation, for all internal adjudications. This should be recorded in detail on the adjudication record. As Mr Justice Collins noted, this is not a simple box ticking exercise: rather the young person needs to be told that he or she ought to be represented. Mr Justice Collins suggested that only if he or she knows that legal representation is available and that it is in his or her interests to take it, should a refusal be taken as the answer given.

#### **2. Specific guidance on the need to consider welfare when sentencing young people for disciplinary matters**

The welfare of the young person, including the impact of the sentence on the young person's rights and entitlements, including leaving care rights, ought to be considered fully by the decision maker. Guidance should be drafted to ensure that all decision makers are fully aware of the factors that they should take into account in sentencing. At present, the chief magistrates' guidelines make no reference to young people at all. In relation to internal prison matters, there is no standard guidance for young people. The sentencing guidelines' council has recently drafted guidance on the overarching principles

for sentencing young people and decision makers should be required to have reference to this document in reaching their decisions.

**3. Specific guidance on the discretion to allow out of time reviews**

Mr Justice Collins considered the case of M despite the fact that the adjudication had taken place many months before because of the need to consider the overall justice of the matter. The chief magistrate had previously refused to consider our legal team's application for a review because it was out of time. We consider that the strict application of the 14 day time limit for review is inadequate, particularly where unrepresented young or vulnerable people are concerned. We would welcome such guidance drawing attention to the discretion to consider out of time applications for review. The guidance should specifically point out that it would be appropriate to use this discretion where young and vulnerable people are concerned, especially where they were unrepresented or where there are concerns that relevant matters were not considered.

I hope that you will find the suggestions in this letter helpful and look forward to hearing from you.

Frances Crook