Neutral Citation Number: [2022] EWHC 1376 (Admin)

Case No: CO/4023/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/06/2022

Before :

Hugh Mercer QC sitting as a Deputy Judge of the High Court

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Between :

THE QUEEN (on the application of PETER KANE)	**Claimant**
- and –	
THE INDEPENDENT ADJUDICATOR	**Defendant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**Interested Party**

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- -

Michael Bimmler (instructed by **Coninghams Solicitors**) for the **Claimant**
Myles Grandison (instructed by **Government Legal Department**) for the **Interested Party**

Hearing date: 11 May 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to the National Archives. The date and time for hand-down is deemed to be 10:00am on Tuesday 7th June 2022.

Judgment Approved by the court for handing down.

HUGH MERCER QC:

1. This is an application for judicial review by the Claimant, a Category A prisoner at HMP Whitemoor, to challenge the decision of the Independent Adjudicator (DJ Wright). At a hearing on 31 July 2020, DJ Wright rejected an objection of lack of jurisdiction which the Claimant's solicitor had founded on alleged lack of evidence that the governor had applied his or her mind to the relevant legal test in the Prison Rules for referral. The Claimant is currently serving a sentence of 14 years for supply of heroin. His sentence was extended by a total of 18 additional days by DJ Wright.

Factual Background

2. A witness statement before me from DJ Wright gives the gist of the events of 7 June 2020 which gave rise to the referral to the adjudicator. The witness statement was made on the basis of evidence given by Governor Wood as supplemented by some CCTV footage viewed by DJ Wright. The Claimant asked me to take care in considering such evidence as the decision and reasoning of a judicial decision maker should stand or fall on the decision itself.

3. The Claimant had written a letter to a person outside prison and the Governor had asked to discuss the contents of the letter with the Claimant as the prison did not consider the content of the letter to be suitable to be sent. The Claimant was evidently very frustrated by the conversation. He left the Governor's office abruptly and then jumped over the balustrade but landed on netting strung between the floors of the prison. He picked up a wooden box and threw it at a window. He picked up a piece of wood from the debris of the box and threw it in the direction of the Governor as well as shouting offensive language. The Claimant accepted that wood was thrown in the direction of the governor but said that he did not mean to hit her. The wood missed the Governor because she ducked.

4. As a result, the Claimant attended the first adjudication hearing on 8 June 2020 at which the Governor decided to refer the matter to the police. The police decided to take no action. A different governor, who has been referred to as the second governor, on 10 June 2020 decided to refer four charges to an independent adjudicator giving the following reason:

> "due to the nature and the police returning the charge I will send to the independent adjudicator"

5. The charges consisted of four offences under the Prison Rules all arising in respect of the same incident and therefore referred together to an Independent Adjudicator: assault; criminal damage; using threatening, or insulting behaviour; endangering the health or personal safety of others.

6. When the matter came before IA Day, question F of the proforma is ticked 'yes'. This question reads as follows:

> "Is the IA satisfied that the Governor gave proper consideration to whether the charge is so serious that added days should be awarded if the prisoner is guilty (i.e. the offence poses a very serious risk to order and control of the establishment, or the safety of those within it)?"

7. Upon a final adjudication on 31st July 2020 by video link, the narrative record of the hearing records a submission by the claimant's solicitor of lack of jurisdiction due to a failure of the governor to address the issue whether the charge met the seriousness criteria.

The Legal Framework

8. Rule 53A of the Prison Rules provides as follows under the heading "Determination of the mode of inquiry":

> "(1) before inquiring into a charge the governor shall determine (i) whether the charge is so serious that additional days should be awarded for the offence if the prisoner is found guilty, or (ii) whether it is necessary or expedient for some other reason for the charge to be inquired into by the adjudicator
>
> (2) where the governor determines:
>
> (a) that it is so serious or that it is necessary or expedient for some other reason for the charge to be inquired into by the adjudicator, he shall:
>
> (i) refer the charge to the adjudicator forthwith for him to inquire into it;
>
> (ii) refer any other charge arising out of the same incident to the adjudicator forthwith for him to inquire into it; and
>
> (iii) inform the prisoner who has been charged that he has done so;
>
> (b) that it is not so serious or that it is not necessary or expedient for some other reason for the charge to be inquired into by the adjudicator, he shall proceed to inquire into the charge."

9. Prison Service Instruction 05/2018 ("PSI"), is entitled Prisoner Discipline Procedures (Adjudications). Annex A to the PSI gives guidance on referral to an independent adjudicator of which the following is most relevant:

> "2.31 the adjudicator should state their reasons for referral to the IA on form IA1 under 'additional comments', as quoting 'seriousness of the offence' alone may not be sufficient in all cases. Care should be taken not to compromise their independence; *Staff must not discuss individual cases with the IA.*
>
> 2.32 The test for seriousness (see paragraph 2.28 in this Annex) is whether the offence poses a very serious risk to order and control of the establishment, or the safety of those within it. Governors/Directors should also bear in mind that IAs are

an expensive resource, as is the legal aid that prisoners may claim for representation at IA hearings. Each case will be assessed on its merits, but the following offers some guidance:

- Serious assaults should always be referred, e.g. those where the injuries include broken bones, broken skin, or serious bruising ..."

The Procedural Background

10. In terms of the procedural background, John Howell QC sitting as a Deputy Judge of the High Court refused permission on paper and David Lock QC, also a Deputy Judge, refused permission following an oral renewal hearing. In the Court of Appeal before Lord Justice Popplewell, the application for permission was renewed only in respect of the first ground. The Lord Justice commented as follows:

> "The ground advanced is arguable and raises an important point of practice. It is also arguable that the Judge's alternative basis for rejecting the application at paragraph 16 of his judgement fails to address the relevant question of whether the prison governor made the determination required by rule 53A."

11. David Lock QC had decided upon refusing permission that:

i) Although there was no material before the adjudicator to explain why the prison governor had made a decision that the 'so serious' test was satisfied, because the adjudicator had no obligation to investigate the factual basis upon which the prison governor found that the 'so serious' test was met on the facts, the adjudicator could not have acted unlawfully in failing so to inquire;

ii) The conduct in this case was plainly sufficient to satisfy the 'so serious' test and in any event the claimant had pleaded guilty to two of four charges which showed that it was entirely proper to have referred the case to an adjudicator.

The Role of Independent Adjudicators

12. The Claimant's first ground focuses on the reasons given by the adjudicator for considering there to have been a sufficient 'determination' by the prison governor for there to have been a lawful referral. This is the logical starting point, as it is the governor's determination which refers the charge to the adjudicator under rule 53A. The adjudicator is given a specific task of inquiry by Rule 53A but that task has to be lawfully conferred on the adjudicator without which he has no power to act. The adjudicator appears in my judgment to be in the same or at least in an analogous position to that of any statutory tribunal – that it only has those powers conferred by the relevant statutory framework. Both counsel before me agreed that an adjudicator has the power to inquire into the legality of the reference to the adjudicator as this goes to the adjudicator's jurisdiction. In support of that position, I was referred in particular to the words of paragraph 2.33 of Annex A of the PSI:

> "Once a charge has been referred to an IA it cannot be referred back to a governor - the IA will deal with it from then on. However, if the IA considers the referral to have been unlawful, they may decide not to proceed and therefore the adjudication will be dismissed. An unlawful referral would be one in which the PSI or Prison or YOI rules have not been correctly followed i.e. the case should not have been referred in the first place if the guidelines in the PSI were followed correctly, for example, if a Governor referred a case that was simply a charge of disobeying an Officer, with no other aggravating features."

13. The essential framework and therefore the jurisdiction of the adjudicator is provided by rule 53A. While there is no duty to inquire into the factual basis of the governor's finding, it must in my judgment be apparent to the adjudicator that the governor has applied his or her mind to the 'so serious' threshold. In this context, an adjudicator reviewing whether Rule 53A had been complied with would be entitled to expect to see brief reasoning, capable of being interpreted as addressing the threshold, stated on the face of the decision. This is apparent from the mandatory nature of rule 53A, the use of the word 'determined' and the two separate evaluations which need to be carried out in the application of Rule 53A(1), (i) and (ii), namely on the grounds that the charge is 'so serious' or 'necessary or expedient for some other reason'.

14. Moreover, that is supported by paragraphs 2.28 to 2.33 of Annex A to the PSI where significant guidance is provided on what conduct may cross the 'so serious' threshold. Accordingly, what is expected from the governor is to evaluate the seriousness of the conduct. In particular, the PSI indicates that the conduct should be considered by the governor to pose "a very serious risk to the order and control of the establishment": para. 2.32.

Analysis of the Independent Adjudicator's Reasoning

15. Before considering in more detail the reasoning of DJ Wright, I note that DJ Wright stated: "I am satisfied that the matter is serious enough for referral". The problem is that the rule 53A confers the task of assessing the seriousness of the charge on the prison governor. A similar comment can also be made in respect of IA Day's consideration and also that of District Judge Goozée on behalf of the Chief Magistrate relied on by the Interested Party. In my judgment, the view which matters in relation to the seriousness of the charge is that of the governor making the referral.

16. It also follows that the Court has no power to substitute its own view of the seriousness of the charge. Mr Grandison urged upon me six reasons as to why this charge was serious. But those reasons do not assist me on the legality of DJ Wright's finding on jurisdiction. Nor does Mr Grandison's overarching submission assist me: "If this conduct does not cross the threshold of seriousness, what does?"

17. I turn then to consider the two reasons given by DJ Wright in this case. The first is as follows:

> "First there are certain types of matter which are considered serious enough for referral in the light of COVID-19 hearings and the new regulations."

18. I was informed in argument that the only new regulation due to Covid-19 is Rule 53B Prison Rules which grants a new power to the Senior District Judge, in connection with the pandemic, to refer charges which had been referred to the adjudicator back to the governor. There is no suggestion that this new regulation is applicable to this case and it is therefore an irrelevant consideration on the issue of whether the governor has given sufficient consideration to the threshold test in Rule 53A. There is, it seems, no new regulation which deals with whether certain types of matter are considered serious enough for referral.

19. The Detailed Grounds of Resistance had asserted that the reference to 'new regulations' was in fact a reference to guidance issued by the Ministry of Justice to prison governors on 29 May 2020. After giving reasons why the second governor was entitled to refer the charges to herself, DJ Wright commented that "I am not bound by the PSI". In other words, DJ Wright made a clear distinction in her own mind between the Prison Rules on the one hand which bound her and guidance on the other hand which did not bind her. Accordingly, it would seem to me unlikely that a reference to 'new regulations' is in fact a reference to new guidance. It would also seem to me unlikely that the second governor took the new guidance into account without referring to it.

20. There is a reference to this guidance in the witness statement of DJ Wright in the following terms:

> "Consideration was given to what types of case should be referred to an IA and guidance was issued to prison governors on the 29th May by the MoJ, together with a process map. I append a copy of the guidance ['Appendix A'].

21. I note that, in this evidence, DJ Wright does not say expressly that regard was had by her to this guidance at the hearing of this matter on 31 July 2020 which gave rise to the Decision. Nor is there any evidence that this guidance was taken into account by the governor when deciding to refer the charges to the adjudicator. The highest Mr Grandison for the Interested Party put the matter was that this guidance was "possibly taken into account" but that "it is not 100% clear that it was". The Claimant submitted, on the authority of the Court of Appeal in *R v. Westminster City Council ex p Ermakov* [1996] 2 All ER 302 at p. 315j, that this Court could admit evidence to elucidate or, exceptionally, correct or add to the reasons given by a decision maker but should, consistently with Steyn LJ's observations in an earlier case, be very cautious about doing so. In the absence of an express statement that DJ Wright did take account of the guidance, exercising the caution I am told by the authorities to exercise, I do not consider that I should take the new guidance into account on the basis of DJ Wright's evidence.

22. Even if I were wrong in that conclusion, in oral submissions, Mr Grandison fairly accepted that new guidance of this nature should be published but his submission is that, even if I consider the guidance, the result would be the same as the new guidance merely complements the published guidance to be found in the PSI and provides clarity

for prison governors. Before analysing the legal basis for referring to the new guidance, it seems to me that I should consider whether it makes a difference.

23. Under the heading "Seriousness test", the new guidance states as follows:

> "As always, the priority for the chief magistrate will be to keep an adequate supply of judges for the running of the court system. Owing to a depleted pool of IAs available to attend prison, under the restricted regime that is now in place, we urge adjudicating governors to carefully consider the cases which are referred to the IA and **reserve this for the most serious of cases** (please refer to the guidance in PSI 05/2018, Prisoner Discipline Procedures).
>
> The circumstances of each case, not just the charge in question, must determine the seriousness of a case. We consider the following charges are likely to fall into your most serious category:
>
> PR 51(1), YOI 55(1) Assault: Assaulting prison officer …
>
> You will know best how to categorise the serious incidents of prisoner rule/law breaking in your establishment, which is why the list is intended to be used as a guide to help in your decision-making. It is not intended to be exhaustive and the circumstances of each case must always drive your decisions ... **If your referral falls outside of the charges listed above, please ensure that you include an explanation to cover why you have deemed the charge necessary or sufficiently serious for IA referral**." (emphasis in original)

24. Mr Bimmler for the Claimant, whilst objecting to the reliance on the new guidance, submitted that it is clear from the above that: a referral is limited to the "most serious of cases"; that the issue is not just the charge in question but also the circumstances of the case; that this guidance is a guide only. Mr Grandison submitted that "the result would be the same" by which I understand that it would have been concluded under the guidance both of the PSI and the new guidance that the seriousness threshold had been reached. The difficulty for me is that the issue is whether the material before DJ Wright justified a conclusion that the second governor had given proper consideration to whether the seriousness threshold had been reached. On that, I accept Mr Bimmler's submissions that, even if the governor had had regard to the new guidance, he would still have needed to give reasons for the threshold of seriousness being reached which included not only the charge but some reference to the circumstances. Indeed, the new guidance seems designed, if anything, to emphasise the need for appropriate reasoning due to the limitations on judicial manpower.

25. In the light of my conclusions in relation to the new guidance, I do not need to go on to consider the decision of the Supreme Court in *R (Lumba) v. Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 which concerned reliance on unpublished policy inconsistent with the published policy without any opportunity for the Claimant to make informed and meaningful representations before a decision was made. Had I considered there to be such an inconsistency in this case, a particularly important consideration would have been that there is no suggestion that the new guidance was put to the Claimant's solicitor by DJ Wright on 31 July 2020 despite the

fact that, as the Interested Party acknowledges, Article 6 ECHR is engaged by hearings before Independent Adjudicators which are criminal in nature.

26. DJ Wright's second consideration is as follows:

> "Second although the governor does not explicitly say so, he felt that the matter was serious enough for referral to the police.

27. The difficulty which arises from this second consideration is that it refers not to the determination which referred the charges to the adjudicator but rather the initial determination which referred the charges to the police. The Claimant submitted that this reasoning is confused but the second governor who referred the charges to the independent adjudicator did expressly refer to the fact of the police returning the charge and therefore to the fact that the charges had been referred to the police by the first governor so that I do not find the reasoning to be confused.

28. Mr Bimmler took me to the Crime in Prison Referral Agreement made between Her Majesty's Prison and Probation Service (HMPPS), National Police Chiefs Council (NPCC) and the Crown Prosecution Service which states at Annex A under the heading 'Mandatory Crime Referral Criteria":

> "The crimes below must be reported to the police for investigation.
> …
> - Assaults against a member of staff, except where there is no little or no injury (see Annex B)"

Annex B of the same document under the heading "Staff Assaults" states:

> "1. Other than those less serious assaults where there is little or no injury, which are more appropriately dealt with by adjudication, all assaults on staff will be referred to the police for investigation and consideration for prosecution."

29. It follows therefore that an assault on a member of staff would normally be referred to the police unless it were a case of little or no injury such as the present one. The fact that this assault was without injury but was nevertheless referred to the police tends to suggest that it was regarded as being at the higher end of assaults without injury. Also, Annex B suggests that adjudication is for less serious charges than those referred to the police. However, there is no suggestion that the threshold for referral to the police is the same as that for referral to an adjudicator. Mr Grandison submits that, by referring the matter to the police, it is implicit that the governor concluded that a maximum sentence of 42 additional days of additional possible imprisonment was an inadequate punishment. It does not seem to me that this necessarily follows because a referral to the police for assaults on staff is to be made, save for a few exceptional cases.

30. The reference by DJ Wright to the matter being "serious enough" may be capable of being interpreted as a reference to the 'nature' of the offence on which the second governor relied in making his referral to an adjudicator. But there is no suggestion by the Interested Party that all assaults on staff are without more to be referred to an

adjudicator. Assaults are many and various as are the circumstances in which they occur. For example in this case, matters such as the conditions of detention applicable in this prison in June 2020 taking account of Covid-19; the applicable visits regime in January 2020 and the nature of the Claimant's relationship with the addressee of the letter could potentially form part of the relevant circumstances.

31. In conclusion, the reasons given by DJ Wright for considering the governor to have properly considered the threshold for referral fail to reveal any consideration of the 'so serious' threshold by the second governor. Accordingly, in my judgment, DJ Wright lacked the power to proceed with the adjudication and should have dismissed it.

32. I deal briefly with the irrationality challenge. This was on the basis that there was no information before the adjudicator to satisfy her that the second governor had given proper consideration to the threshold in Rule 53A. However, I must approach this on the basis that I am wrong on my first finding. On that hypothesis, the reasons given by the second governor would have been capable of satisfying DJ Wright that the Rule 53A task had been lawfully discharged. Accordingly, it seems to me that the rationality challenge has no independent force from the primary ground.

33. For the above reasons, I quash the adjudication decision and punishments dated 31 July 2020. The Claimant's Skeleton invited the Court not to remit the matter for a "re-trial" and, at the end of the oral hearing, Mr Grandison for the Interested Party agreed that, due to the effluxion of time, there was no prospect of this matter returning to the adjudicator. I therefore make no order in this regard.

34. With regard to the application for a payment on account of costs by the claimant following success in this application for judicial review, had there been a statement of costs filed in this case, I would have summarily assessed the costs of this application for judicial review. As it is, no such statement of costs was filed but there is nevertheless an application for a payment on account of £10,000. CPR 44.2(8) makes clear that I should order a payment on account of costs unless there is a good reason not to do so. Mr Grandison does not object in principle on behalf of the Secretary of State to a provision for a payment on account but proposes that this should only be made following receipt of the claimant's bill of costs. The difficulty with such an approach is that it introduces another stage in a process which the rules appear to regard as being fairly streamlined. Mr Grandison relies on the need for his client to ascertain the full amount being sought and to propose a proportionate sum for payment on account whilst also providing sufficient time to pursue the correct procedures given that the client is dealing with public money. I am sympathetic to the timing issue as it can take longer than other litigants to obtain that the necessary authorisation to make payments and I have therefore amended the draft order to provide for payment within 28 days of the date of this order. However, the proposed payment on account of £10,000 pounds in respect of counsel's fees of £11,000, court fees in the region of £10,000, and solicitor costs in the region of £15,000 seems to me to be a modest proportion of the overall costs. Clearly those costs may be reduced on assessment, but an order for £10,000 leaves a significant margin for reduction and it seems to me that the Claimant's costs are very unlikely to be assessed at less than £10,000.