Neutral Citation Number: [2020] EWHC 2846 (Admin)

Case No: CO/991/2020

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

Leeds Administrative Court
The Courthouse, 1 Oxford Row
Leeds, LS1 3BG

Date: 30/10/2020

Before :

MR JUSTICE JULIAN KNOWLES

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Between :

THE QUEEN ON THE APPLICATION OF SHAMMUS UDDIN	**Claimant**
- and -	
(1) GOVERNOR OF HMP LINCOLN	
(2) SECRETARY OF STATE FOR JUSTICE	**Defendants**

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- -

Becket Bedford (instructed by **Instalaw Solicitors**) for the **Claimant**
David Manknell (instructed by **Government Legal Department**) for the **Defendants**

Hearing dates: 9 October 2020

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Approved Judgment

Mr Justice Julian Knowles:

Introduction

1. This is a renewed application for permission to seek judicial review following refusal on the papers on 22 May 2020. There is also an application dated 17 September 2020 to rely on an expert psychiatric report from Dr Oyedbode (prepared for other proceedings) to the effect that the Claimant suffers from undiagnosed PTSD.

2. I held a remote hearing on 9 October 2020. The Claimant was represented by Mr Bedford. The Defendant was represented by Mr Manknell. I am grateful to both of them for their helpful oral and written submissions. At the conclusion of the hearing I reserved my decision and said that I would put my reasons in writing. This I now do.

Background

3. The Claimant was, until his release on 11 March 2020, a serving prisoner at HMP Lincoln and prior to that at HMP Birmingham. Whilst at HMP Birmingham, on 15 September 2018 an incident occurred in which he was assaulted by his cell mate. He alleges he had boiling water poured on him and that his cheek bone was fractured. The Claimant says that during the attack his assailant telephoned the Claimant's family to demand money to cease the attack. As a consequence, he alleges he suffered from PTSD which remained undiagnosed.

4. The Claimant has an outstanding private law claim in the County Court in respect of that assault in which he seeks damages against the Secretary of State for Justice.

5. In April 2019 the Claimant was transferred to HMP Lincoln and placed in a single cell. In June 2019 he was offered psychological therapy by Nottinghamshire Healthcare NHS Foundation Trust. As I shall explain, medical treatment in prisons is the responsibility of the Department of Health and not the Secretary of State for Justice. The therapy was eye movement desensitisation and reprocessing (EMDR). According to the Detailed Statement of Facts and Grounds (dated 9 March 2020), after a number of EMDR sessions the Claimant lost confidence in the therapist when she informed him that she would not support his single cell status.

6. The Claimant's pleaded case is that in October 2019 a cell sharing risk review (CSRR) was carried out by the First Defendant through the prison's Cell Sharing Risk Review Board, which in effect required him to share a cell. There was evidence his therapist considered this would aid his recovery. However, rather than do that, instead, he chose to self-isolate and he claims he suffered distress and other harm as a consequence for which he is entitled damages.

7. As originally pleaded, the Claimant's complaint related primarily to this CSRR. The decision challenged, as set out in Section 3 of the Claim Form, was 'the defendant's (sic) ongoing failures to safeguard against the claimant's re-traumatisation from cell sharing'.

8. The nub of the original claim (taken from the Detailed Statement of Facts and Grounds) is as follows:

> "5. By reason of the severe trauma experienced by the claimant at Birmingham prison on 15 September 2018 the claimant was terrified at the prospect of sharing a prison cell with another inmate.
>
> …
>
> 7. The claimant received no adequate treatment for his PTSD or any formal diagnosis.
>
> …
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> 12. On 11 October 2019 the first defendant conducted a cell share risk review (CSRR) and decided in effect that the claimant would require to share a cell with other prisoners (sic).
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> 13. The claimant was found not to be at elevated risk with respect to those who did not pose him an immediate risk of severe cell violence.
>
> 14. Following the CSRR the claimant was required to cell share and from 20 January 2020 the claimant chose to self-isolate as the lesser of two evils in a segregation unit where he remains, until his release which is scheduled for 11 March 2020.
>
> …
>
> 20. By requiring the claimant to share a cell, without diagnosing, or adequately treating his PTSD, the defendant has failed to address the substantial grounds for believing that it would expose the claimant to a real risk of inhuman treatment contrary to Article 3 ECHR by triggering his PTSD, re-traumatising him or by causing him to relive the trauma of 15 September 2018 and/or other trauma from his personal life.

9. The remedies sought in Section 7 of the Claim Form were:

   a. a mandatory order 'for the first defendant to carry out a lawful cell sharing risk assessment';

   b. a declaration 'that the second defendant's internal guidance on cell sharing and PTSD is unlawful'.

10. The Detailed Statement of Facts and Grounds accompanying the Claim Form sought different and/or additional remedies, namely (per [25]):

    a. damages under the Human Rights Act 1998 and aggravated damages for:

       > '… the severe trauma, anxiety and distress [the Claimant] has experienced and continues to experience by self isolating in response to the defendant's refusal to place him in a single cell'; and

b. a declaration:

> 'that second defendant's (sic) guidance is unlawful in so far as it suggests that a cell share risk assessment is confined to the risk a prisoner poses to another prisoner in a locked cell and in failing to require an assessment of the psychological harm that cell sharing may cause a prisoner who was the victim of severe cell violence in the past or who is otherwise at real risk of experiencing severe mental trauma in being required to share a cell without any or any adequate treatment for PTSD or other significant mental health condition.'

11. The 'guidance' in question is PSI 20/2015 (*The Cell Sharing Risk Assessment*) and PSI 64/2011 (*Management of prisoners at risk of harm to self, to others and from others (Safer Custody)*).

12. Paragraph 25 was, at that stage, the full extent of the Claimant's pleaded case about the alleged unlawfulness of these PSIs. As the case later developed, the Claimant focussed on PSI 20/2015. According to [1] of the claimant's skeleton argument for the oral renewal hearing, the claimant challenges the legality of the PSI on the ground that its application will lead to a breach of Convention rights in a significant or more than minimal number of cases by exposing prisoners to an unacceptable risk of inhuman or degrading treatment. In relation to the unlawfulness of policies generally, he relies on *R(W) v Secretary of State for the Home Department* [2020] EWHC 1299 (Admin) at [57]-[58], where it was held that in relation to guidance/policy, the question of its legality in Convention terms depends upon whether there is a significant number of cases in which the application of the guidance/policy will lead to a breach of Convention rights. The Claimant maintains that PSI 20/2015 has that effect.

13. The judicial review claim was lodged on 10 March 2020. The following day the Claimant was released from HMP Lincoln having served his sentence. (Whilst not relevant to this claim, according to the Secretary of State's Skeleton Argument, the Claimant was then imprisoned at HMP Nottingham on 8 May 2020 for driving offences and was released on 8 July 2020).

14. The Secretary of State lodged Summary Grounds of Defence on 6 April 2020. These argued as follows:

a. The claim should be dismissed against the First Defendant because the Secretary of State is responsible for the actions of the Governor and so it was unnecessary to add the Governor as a Defendant (at [26]);

b. The claim was academic because on the day it was lodged (10 March 2020) the Claimant and his representatives knew that the Claimant was due to be released the following day and hence the pleaded 'ongoing failure' in relation to cell-sharing was academic because the Claimant was no longer going to be in a cell at all (at [2], [27]-[31]);

c. The case was not one of those exceptional ones which should be allowed to proceed despite its academic character (at [29]-[31]);

d. The Claimant had failed to exhaust alternative remedies, namely the internal prison complaints procedure and/or the Prison and Probation Ombudsman (at [32]-[33]);

e. In relation to the Claimant's complaints about medical treatment, that was not something for which the Secretary of State or the prison governor have responsibility. Any complaints about mistreatment or a failure to diagnose the Claimant's alleged PTSD was not the Defendants' responsibility because they 'have neither the duty nor the right to provide medical care'. That is because under the Health and Social Care Act 2012, commissioning responsibility for prisoners' healthcare passed to the Secretary of State for Health via NHS England in April 2013 (at [34]-[36]);

f. So far as the CSRR is concerned, the decision that the Claimant should share a cell was taken after consideration of all relevant information at three meetings of the relevant prison Board on 12 September 2019, 19 September 2019 and 11 October 2019; it involved Nottinghamshire NHS Healthcare NHS Foundation Trust, whose staff did not recommend that the Claimant should be accommodated in a single cell for healthcare reasons; and thus the Board's conclusion that the Claimant should be assessed as standard risk for cell sharing was one which was reasonably open it (at [37]-[41]);

g. The complaint about the alleged unlawfulness of PSI 20/2015, namely that it only allowed for assessment of risk arising from prisoner on prisoner violence, was wrong as a matter of fact. At [3.28] the PSI states that healthcare staff may determine that a prisoner be accommodated in a single cell for healthcare reasons (whether physical or mental). In the present case the medical advice was that the Claimant would benefit from sharing a cell as part of his recovery (at [42]-[44]).

The judge's decision on the papers

15. On 22 May 2020 His Honour Judge Davis-White QC, sitting as a judge of the High Court, refused permission on the papers. I can summarise his decision as follows.

16. The judge said that he did not accept at that stage that the claim was academic. Although the Claimant being released meant that the claim for a mandatory order/injunction to carry out a risk assessment was academic, that did not hold true for the damages claim. So far as the challenge to the legality of the policy was concerned, the risk of recall meant there was sufficient interest in pursuing the claim in respect of the policy (at [4]).

17. There were alternative remedies in relation to the injunction/damages namely the internal complaints procedure and/or the Ombudsman, but not in relation to the policy challenge (at [5]).

18. However, in respect of the damages claim, the judge said he was unable to identify an arguable ground for judicial review which had a real prospect of success (at [6]).

19. On the basis of all the information before the Board which carried out the CSRR, its decision that the Claimant was willing to compromise his mental health to gain a

single cell was one which was open to it. The healthcare provider took part in the review (at [7]).

20. Part of the complaint related to the healthcare received by the Claimant, but there was no proper basis for saying that the Defendants should have gone behind it (at [8]).

21. There was no arguable ground that the policy on cell sharing was unlawful. It does not mandate a governor to require a prisoner to share a cell in circumstances where the prisoner is suffering from PTSD and where it would breach his human rights to do so. Also, it does not limit the considerations on cell sharing to risk of harm at the hands of a cell mate but also covers self-harm. Also, the policy requires re-assessments whenever there is a change in circumstances (at [10]-[11]).

Discussion

22. Before me on the oral hearing, Mr Bedford for the Claimant challenged the lawfulness of the Second Defendant's cell sharing policy and maintained the damages claim. He accepted that there is an ongoing private law claim against the Secretary of State for damages, but said that a damages claim as part of this judicial review application was nonetheless an appropriate remedy for what he said were failures in diagnosis and treatment by the Defendants.

23. For the reasons given by His Honour Judge Davis-White QC, the substance of which I agree with, and for the following reasons, I am satisfied that:

    a. the challenge to the lawfulness of PSI 20/2015 is not arguable;

    b. whatever its merits, the damages claim should form part of the ongoing private law damages claim against the Secretary of State, and that is the appropriate forum for its determination. Judicial review is not an appropriate procedure for what inevitably will be a detailed fact-finding exercise involving, no doubt, disputed evidence. In any event, there is no arguable case that the Defendants were responsible for any failures in the Claimant's healthcare and thus the claim as presently presented is bound to fail.

24. I begin with the lawfulness of PSI 20/2015. The Claimant makes a systemic attack on it as being unlawful. Mr Bedford helpfully referred me in his Skeleton Argument to *W*, supra, and the test for unlawfulness of a policy on Convention grounds. I reviewed some of the other jurisprudence in *R(Miller) v College of Policing* [2020] EWHC 225 (Admin), [216]-[219]. In order to succeed, a systemic challenge to a policy must show more than that the policy is *capable* of producing an unlawful result. The test is that the policy must give rise to an *unacceptable risk* of unlawfulness. In *R (Suppiah) v Secretary of State for the Home Department* [2011] EWHC 2 (Admin), Wyn Williams J said at [137]:

> "I am content to accept that as a matter of law a policy which cannot be operated lawfully cannot itself be lawful; further, it seems to me that there is clear and binding authority for the proposition that a policy which is in principle capable of being implemented lawfully but which nonetheless gives rise to an

> unacceptable risk of unlawful decision-making is itself an unlawful policy."

25. This is not, without more, established by individual instances of an unlawful result. In *R (Woolcock) v Secretary of State for Communities and Local Government* [2018] EWHC 17 (Admin), [68(iii)], the Divisional Court said:

> "(iii) An administrative scheme will be open to a systemic challenge if there is something inherent in the scheme that gives rise to an unacceptable risk of procedural unfairness."

26. The issue was considered recently in *BF (Eritrea) v Secretary of State for the Home Department* [2019] EWCA Civ 872, [60]-[63]. Underhill LJ concluded:

> "… In my view the correct approach in the circumstances of the present case is, straightforwardly, that the policy/guidance … will be unlawful, if but only if, the way that they are framed creates a real risk of a more than minimal number of children being detained. I should emphasise, however, that the policy should not be held to be unlawful only because there are liable, as in any system which necessarily depends on the exercise of subjective judgment, to be particular "aberrant" decisions – that is, individual mistakes or misjudgments made in the pursuit of a proper policy The issue is whether the terms of the policy themselves create a risk which could be avoided if they were better formulated."

27. Applied in the present context, these principles mean that in order to succeed on his challenge to the PSI, the Claimant must show that it creates a real risk of more than a minimal number of cases where Article 3 will be infringed by requiring a prisoner to share a cell in circumstances where this amounts to a violation of Article 3.

28. The essence of the Claimant's attack on PSI 20/2015 is set out at [13]-[14] of his Skeleton Argument for this renewal hearing:

> "13. The PSI at [3.3] states in terms that a CSRA [cell sharing risk assessment] process is a requirement of the case law of the European Court, but the PSI does not address the risk that it may be contrary to Article 3 to require a victim of severe cell violence, who may have significant PTSD, to share a cell.
>
> 14. PTSD is the entirely predictable sequela of a prison attack and although the PSI at [1.3] is meant to support victims, no account is taken of the likelihood that a victim of severe cell violence may develop significant PTSD, rendering them unsuitable to share a cell, unless reasonable steps are taken to eliminate the risk that it will lead to the infliction of inhuman or degrading treatment."

29. In my judgment the Claimant comes nowhere close to establishing that the PSI creates an unacceptable risk of a violation of the Convention. That is for the reasons given in the Secretary of State's Summary Grounds of Defence at [17]-[22] and [42]-[43]. The judge was correct to say that the PSI does not require a prisoner to share a cell in

circumstances where the prisoner is suffering from PTSD and where it would breach his human rights to do so. Also, it does not limit the considerations on cell sharing to risk of harm at the hands of a cell mate, but also covers self-harm. Further, the policy requires re-assessments whenever there is a change in circumstances.

30. Although the policy is focussed on identifying, managing and supporting prisoners who are at risk of harm to others and from others ([1.2]), it is not limited to that. Paragraph 3.1 requires every prisoner held in closed conditions to have a CSRA even where there is no shared accommodation. Paragraph 3.4 requires the reporting of changes in a prisoner's behaviour which might affect CSRA risk issues. Paragraph 3.5 requires a prisoner's suitability to share a cell to be assessed whenever it is proposed to locate him with another prisoner. Whilst that process does focus on prisoner-upon-prisoner violence, Annex 1 makes clear that healthcare issues more generally have to be considered. Moreover, [3.28] provides:

> "If healthcare staff determine that a prisoner should be accommodated in a single cell for healthcare reasons which do not cover CSRA risk issues, the CSRA process is not to be used. For instance, a prisoner with an infectious disease will not necessarily be a serious risk to or from others in a shared cell. Healthcare staff should therefore note the requirement for a single cell in the medical records and advise residential staff appropriately."

31. This paragraph makes it absolutely clear that if, for example, a prisoner was suffering from PTSD so that he could not share a cell, the policy would operate so that he did not need to do so.

32. The policy challenge is, accordingly, not arguable and I refuse permission.

33. So far as the damages claim is concerned, the Claimant alleges that the Secretary of State for Justice is responsible in law for the injuries which were inflicted by his cell-mate. As I have said, there are ongoing County Court private law proceedings in relation to that. He also alleges that he suffered PTSD as a consequence, and that this was not properly treated by the Defendants and that he was then wrongly required to share a cell despite suffering from PTSD, as a result of which he was forced to self-isolate causing him 'severe trauma, anxiety and distress' for which he is entitled to damages (Detailed Statement of Facts and Grounds at [18]-[20], [25].

34. In my judgment one complete answer to this claim, and one reason permission must be refused, is to be found in [14]-[15] of the Second Defendant's Skeleton Argument on the renewal hearing:

> "14. In refusing permission, HHJ Davis-White QC referred to the fact that whilst his cell sharing classification may no longer be relevant to the Claimant, he also has a damages claim. However, a damages claim is not itself good reason for bringing a judicial review claim.

> 15. In this case, the position is even more clear, given that the Claimant already has a damages claim in progress in respect of the attack upon him by his cellmate, for which he is claiming damages for the effects of that attack upon him. To the extent that he claims that his suffering was exacerbated by subsequently sharing a cell at HMP Lincoln, that would need to be a matter in that damages claim. Damages for the same injury cannot be simultaneously assessed in two different Courts."

35. Hence, what is alleged are different tortious acts by either or both of the Defendants in the course of one continuous factual narrative which began with the assault on the Claimant on 15 September 2018 and carried through to the CSRR process in 2019. It is plain and obvious, having regard in particular to the overriding objective in CPR r 1.1, that all of the Defendants' allegedly tortious acts should be tried together in a single trial. Added to that, as I have already said, judicial review is simply not equipped carry out the sort of fact-finding exercise which will be required in the damages claim relating to PTSD. Even were I minded to let the damages claim go forward as part of this judicial review claim (which I am not), it would have to be transferred to the Queen's Bench Division for management and directions by a Master. That being the case, the just and appropriate course is to refuse permission and to leave it to the Claimant and his legal advisers to amend their pleadings in the County Court to include the Defendants' subsequent allegedly tortious behaviour in respect of the CSRR process and PTSD.

36. The Claimant also faces the difficulty, as the judge identified, that the Defendants were not responsible for his healthcare: that was the responsibility of the Secretary of State for Health. Any failure to diagnose PTSD was therefore his responsibility, not the Defendants'. As the judge observed in [8] of his reasons, there are no arguable grounds on which the Defendants could have gone behind the medical assessments carried out by the NHS Trust. That provides a second clear reason justifying refusal of permission.

37. If, however, the Claimant and his legal advisers believe there is a proper case against the Defendants on this aspect of the case then it needs to be properly pleaded as a part of a private law damages claim, with the Defendants being given the opportunity to plead in response. In short, there is an obviously much more suitable alternative remedy available to the Claimant on this aspect of his case.

38. For all of these reasons, and those given by the judge, I refuse permission. That conclusion makes it unnecessary for me to decide the application to rely upon the expert psychiatric report from Dr Oyebode.