Neutral Citation Number: [2024] EWHC 1465 (Admin)

Case No: AC-2023-LON-001603

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 June 2024

Before :

His Honour Judge Siddique sitting as a Deputy High Court Judge

Between :

The King (on the application of)
(1) GARRY COOPER
(2) MB

Claimants

- and –

SECRETARY OF STATE FOR JUSTICE

Defendant

- -
- -

Michael Bimmler (instructed by Bhatia Best Solicitors) for the **Claimants**
Myles Grandison (instructed by Government Legal Department) for the **Defendant**

Hearing date: 10 April 2024
- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 13 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives
(see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

.....

His Honour Judge Siddique sitting as a Deputy High Court Judge:

Introduction

1. This case concerns the challenge to the defendant's refusal to transfer the first claimant, Mr Cooper, to a prison establishment which is within such travel distance from the home of the second claimant, MB, his mother, that she is able to visit him notwithstanding her health impairments. MB's health impairments include severe chronic obstructive pulmonary disease, emphysema, osteoarthritis of both knees, asthma, severe reactive depression and anxiety, cognitive impairments linked to potential early onset dementia, suicidal ideation, personality disorder and general unsteadiness, and attention deficit hyperactivity disorder.

2. Mr Cooper is a life sentence prisoner. On 22 December 2020, at Nottingham Crown Court, he was sentenced to life imprisonment following his conviction for murder. The sentencing Judge, Mr Justice Goose, set the minimum tariff at 29 years, less time spent on remand. At the same hearing, Mr Cooper was sentenced to concurrent determinate terms of imprisonment, having previously pleaded guilty to offences of conspiracy to supply Class A drugs (13 years), possession of a firearm with intent to cause fear (5 years) and affray. Due to her medical conditions, MB is neither able to drive a car herself nor use long-distance public transport.

The grounds for judicial review

3. There are four grounds on which permission was granted:

   (1) Breach of the duty to make reasonable adjustments;

   (2) Breach of the Public Sector Equality Duty;

   (3) Breach of the claimants' article 8 ECHR rights to respect for family life; and

   (4) Irrationality.

4. The parties were in agreement that the fourth ground, irrationality, was intertwined with the first ground, so I shall deal with them together.

Grounds 1 and 4: Breach of the duty to make reasonable adjustments and Irrationality

5. In relation to the offences of murder and conspiracy to supply class A drugs, Mr Justice Goose, sentenced Mr Cooper on the basis that he was the leader of a county lines drugs operation which earned the equivalent of £1 million pounds a year. A rival gang had taken over by force one of the properties from which drugs were being dealt. Mr Cooper responded by directing his associates to re-take the property. They did so armed with a sword, machetes and a baseball bat. One occupant of the rival gang died of his injuries in the ensuing violence. Mr Justice Goose remarked that Mr Cooper had "directed that this offence take place…your drugs operation…had been attacked and it was you that wanted to inflict punishment and to send a clear message to others."

6. In those circumstances, it is unsurprising that on 16 February 2021 the defendant decided that Mr Cooper's risk profile warranted his being held in a maximum security Dispersal prison. That decision has never been challenged. HMP Whitemoor, where Mr Cooper is currently held, is an example of a Dispersal prison. There are only four others covering England and Wales. The claimants submit that given MB's disabilities the reasonable adjustment that is required in the circumstances is a transfer on a

permanent basis to another prison within the Long Term and High Security Estate; specifically HMP Lowdham Grange, a Category B Training – Standard prison.

Decision dated 4 August 2022

7. In a letter dated 4 August 2022, the Directorate of Security's Population Manager, Mr Mark Brook, wrote to Mr Cooper to explain his decision rejecting this proposal. His letter acknowledged MB's illnesses and the impact on her daily living. Mr Brook went on to explain that the defendant was "appropriately allocated into and located" within his current Dispersal prison, HMP Whitemoor, as it held "Cat B men serving long sentences with a significant time left to serve, that present an ongoing risk to the public and those in custody." Mr Brook explained there was a prisoner at HMP Lowdham Grange that Mr Cooper was not permitted to associate with; that prisoner had been his co-accused. There were similarly other such prisoners at other locations, but none were identified as being present at HMP Whitemoor. Finally, Mr Brook pointed out that before any permanent transfer from HMP Whitemoor he would expect Mr Cooper to first significantly reduce his risk to the public by completion of offence focused work. He concluded his letter by saying that he would be supportive of future periods of Accumulated Visits at HMP Lowdham Grange subject to appropriate risks assessments taking place.

8. The tenor of Mr Brook's August 2022 letter was consistent with an earlier response from Probation Officer Fieldhouse dated 17 March 2022, when responding to a complaint from Mr Cooper. In March 2022, Probation Officer Fieldhouse reminded Mr Cooper of his option to utilise video visits in order to maintain contact with his mother (although the claimants submit these are too difficult for MB to manage without help from others). He also stated that he would consider locating Mr Cooper to another dispersal site such as HMP Long Lartin but would require Mr Cooper to complete work on offending behaviour to demonstrate a reduction in risk (this was effectively rejected by Mr Cooper on the basis that it would still entail a journey of between one and a half to two hours which would remain too long for his mother, MB, given her disabilities).

Whether Accumulated Visits can amount to a reasonable adjustment

9. The claimants contend that the Accumulated Visits are available for prisoners in a variety of circumstances, and are not limited to those with disabled family members. They therefore contend that conceptually or as matter of principle or law, they cannot amount to a reasonable adjustment. No authority is relied upon for this assertion. Conversely, the defendant points to *R (JH) v Secretary of State for Justice* [2015] EWHC 4093 (Admin); [2015] 12 WLUK 134, where a claimant similarly sought a transfer from a Category B training prison to a Category B local prison in order that his seriously disabled wife could visit him. Her previous attempt to visit her husband from her home in Cornwall to the Isle of Wight had necessitated a round trip totalling 15 hours and "reduced her to agony." Holman J found [at 42(d)] that the claimant's proposed adjustment of a transfer to a local prison was not a reasonable one and that "the adjustment which he makes (namely the provision of Accumulated Visits) is a sufficient adjustment and does incorporate all such steps as it is reasonable to have to take to avoid the disadvantage."

10. In my judgment the fact that Accumulated Visits are available to prisoners without disabled family members does not change the fact that they remain discretionary in nature and are not an entitlement. Indeed, it is conceded in the claimants' Skeleton Argument [at 18] that "Accumulated Visits are at the governor's discretion…". Moreover, it is apparent that the decision making process leading to both decisions from Probation Officer Fieldhouse and Mr Brook properly exercised that discretion by considering the particular circumstances of the claimants, including Mr Cooper's risk

profile and MB's disability before offering the Accumulated Visits at HMP Lowdham Grange (as well as video calls and an option to transfer to HMP Long Lartin).

Whether Accumulated Visits are an adjustment in "real terms"

11. The claimants further contend that Accumulated Visits are subject to capacity and operational constraints and are not reliably available. Consequently, they submit that in "real terms" they are not an adjustment at all. It is correct that in July and August 2023, two applications for Accumulated Visits by Mr Cooper were rejected. Additionality, in November 2023 and January 2024, Mr Cooper was informed that Accumulated Visits could not currently go ahead to HMP Lowdham Grange. However, those failures have to be balanced with the following successes. First, Mr Cooper was allowed to take (or at least could apply to take) such visits every 3 months (instead of every 6 months). Second, between 25 April to 14 June 2022 Mr Cooper was transferred to HMP Lowdham Grange for Accumulated Visits. Third, between 4 November to 16 December 2022 Mr Cooper was again transferred to HMP Lowdham Grange for Accumulated Visits. He then remained at HMP Lowdham Grange between 16 December 2022 to 28 March 2023 on "medical hold." Finally, between 1 February 2024 to 4 March 2024, Mr Cooper was transferred to HMP Dovegate for Accumulated Visits. Whilst HMP Dovegate is a prison farther away from MB's home, at the oral hearing it was accepted by Mr Bimmler on behalf of the claimants that MB did attend HMP Dovegate in February 2024 and then again on 2 March 2024 by way of Accumulated Visits. Consequently, notwithstanding the pressures on prison population which are well known, I am unable to accept the claimant's submissions that what took place could not be said to amount to adjustments in real terms.

Whether reasonable steps have been taken

12. The claimants contend that even if the defendant's steps do amount to adjustments they do not mitigate or deal with MB's disability. Because MB's anxiety and depression can fluctuate the claimants submit that she may not be fit to attend an Accumulated Visit, and therefore it follows that the adjustments are not reasonable in the circumstances.

13. On the one hand the evidence from MB in her witness statement dated 23 May 2023 is that she is reliant on a wheelchair and her breathing issues mean that "most days" she is restricted to lying in a bed. On the other hand the agreed evidence is that there have been at least two periods of Accumulated Visits at HMP Lowdham Grange and one at HMP Dovegate. Despite MB's disabilities she was fortunately well enough to attend these visits, including at HMP Dovegate in February and March 2024.

14. In his witness statement dated 11 July 2023, Mr Cooper also refers to at least two visits from his mother between 17 February and 22 March 2023 stating: "I am certain she attended at least twice as we took photos in a photo booth. I exhibit these photos at 'GC4'. I am confident these are on different visits as we are both wearing different outfits in each of the photos." Mr Cooper further stated:

> "Whilst I was allocated to HMP Lowdham Grange, I was provided with a phone in my cell and allowed to make as many phone calls as I wanted. During my stay, I would call my mother every day. I also had access to a messaging system called Unify Messaging. I could access this through the television in my cell and would message my mother throughout the day."

15. At this juncture it is helpful to identify how a court should approach the duty to take reasonable steps. In *R (Katherine Rowley) v Minister for the Cabinet Office* [2021] EWHC 2108 (Admin); [2022] 1 WLR 1179, Fordham J stated [at 29]:

> "(2) The duty is to take "such steps as it is reasonable, in all the circumstances of the case, to have to take in order to make adjustments", so that "[w]hat is a reasonable step for a particular service provider to have to take depends on all the circumstances of the case" and "will vary according to: the type of service being provided; the nature of the service provider and its size and resources; and the effect of the disability on the individual disabled person" (Code §7.29). "Whether a step is or is not unreasonable involves an exercise of judgment taking into account all the circumstances of the case" (Allen §46). (3) "The question of the reasonableness of an adjustment is an objective one for the courts to determine" (Code §7.33): "what is reasonable for the purposes of the test… must be judged objectively" (Allen §40). (4) Because the test is a reasonableness test for the Court to apply objectively, the ultimate focus is on substance rather than on reasoning process or decision-making procedure. The fact that a defendant "did not consider" a particular step does not render unlawful, by reference to the reasonable adjustments duty, the failure to adopt it (Allen §43), though a "failure even to consider whether adjustments may be needed" is something which "certainly makes" a defendant's "task more difficult" (VC §161), and the Court will "inevitably" have to "consider the grounds relied on" by the defendant and "the reasons advanced by" it (Allen §§40 to 41). The Court will look to the evidence submitted by the defendant to explain the decision-making (VC§68) and in some cases may need to "adjourn to allow further evidence to be adduced on the reasonableness issue" (MM §83). As to the decision-making, it is appropriate to have in mind what have been identified (Code §7.80) as "measures" which may "constitute good practice", such as: "planning in advance for the requirements of disabled people and reviewing the reasonable adjustments in place"; "asking disabled customers for their views on reasonable adjustments"; "consulting local and national disability groups"; "drawing disabled people's attention to relevant reasonable adjustments so they know they can use the service"; "properly maintaining auxiliary aids and having contingency plans in place in case of the failure of the auxiliary aid". (5) Although an objective question of substance, the duty and its enforcement allow for an appropriate 'latitude' on the part of the service-provider. The objective standard is one of "reasonableness". That allows for the possibility of there being "reasonable alternative methods", so that one way of putting the question is "whether it was a sufficient discharge of [the] duty that the [defendant] made available the alternative facilities on which it relies", so that "the duty [was] discharged by the provision of reasonable alternative methods" (Allen §§46 and 48). The statutory test concerns such steps as it is reasonable "to have to" take (Allen §§33 to 35, 67). The standard is contextual, informed by practical reality, viewed at the relevant time. The Court may have to do "determine whether the adjustment identified by the claimant is reasonable" and – where the burden of proof shifts (EWA2010 s.136) – to determine whether the defendant has been able to "demonstrate that it is not" (MM §82)."

16. In my judgment, the defendant has proved that it would not be a reasonable adjustment to transfer Mr Cooper to HMP Lowdham Grange. Essentially, this is due to the security considerations identified by the defendant. I have already referred to some of these above. Additional reasons are demonstrated in Mr Brook's statement of 16 January 2024 as follows:

> "52. As a Dispersal prison, HMP Whitemoor has greater physical and procedural security counter measures than HMP Lowdham Grange. For example, HMP Whitemoor has a dog section that patrols the internal perimeter. As a Dispersal prison, HMP Whitemoor also has slightly higher staff to prisoner ratios than HMP Lowdham Grange and other Category B Training (standard) prisons. In practice, this means greater monitoring of prisoners is able to take place at HMP

Whitemoor. For example, at HMP Whitemoor 100% of calls (excluding Prison Rule 39/Confidential Access calls) are monitored, as is 100% of hardcopy mail (excluding Prison Rule 39/Confidential Access). There is also a greater emphasis on searching, with a more frequent searching cycle than a Category B Training prison (standard). As HMP Lowdham Grange is not a Category B Training - Dispersal prison, it does not have the measures I have set out directly above.

53. Whilst, for compassionate reasons relating to the Second Claimant's health and mobility, I am satisfied that the First Claimant can be held at HMP Lowdham Grange for shorter periods (i.e. 28 days), in order to take Accumulated Visits, I remain of the view that HMP Lowdham Grange is not an appropriate long-term setting for the First Claimant at this time and based on his risk profile.

54. My view on allocation (i.e. that the First Claimant is appropriately detained in a Dispersal prison, currently HMP Whitemoor), as set out above in my original referral decision (allocating the First Claimant to HMP Frankland), and my letter of 4 August 2022, has been focussed on:

a) Sentence length/time left to serve;

b) The Offence Profile;

c) Risk;

d) Location of co-Defendants/non-associates.

55. I consider it highly relevant that the First Claimant is the Leader of a County Lines gang responsible for orchestrating an attack on a property resulting in someone being murdered, and that the First Claimant has been convicted of conspiracy to supply Class A drugs and possession of a firearm, as I have detailed above, and also, that many of the First Claimant's criminal contacts are in Nottingham (near to HMP Lowdham Grange).

56. The First Claimant's offending, which occurred against the background of a drugs operation in which he was the Leader, was also of a particularly violent nature; on two occasions, involving the use of machetes on the victims, one of whom had their ankle partially severed.

57. I also consider it highly relevant that the First Claimant is near the beginning of his life sentence, with over two and a half decades left to serve before he reaches his current tariff expiry date of 11 February 2049.

58. As is also clear from my 4 August 2022 letter, I have taken into consideration where the First Claimant's co-Defendants and any known associates are located. This is important, given the First Claimant is, as above, the Leader of a County Lines drug gang. I note the risks highlighted in the First Claimant's OASys, including that he may exploit other prisoners to perform tasks and be involved in the illicit economy (having previously exploited younger inmates whilst held at a Reception prison on remand) [MB/223; 226].

59. At HMP Whitemoor, where the First Claimant is currently allocated, he has no known associates or co-Defendants. However, one of the First Claimant's co-offenders is located at HMP Lowdham Grange. Whilst I consider the risk associated with this can be managed in the short term for Accumulated Visits (by the First Claimant and his co-Defendant being located in separate wings), I am concerned that if staying at HMP Lowdham Grange longer term, the First

Claimant and co-Defendant would find means of communicating with one another.

60. I am aware the First Claimant's behaviour, whilst at HMP Lowdham Grange for Accumulated Visits, has been acceptable. But I do not consider this justifies a longer term re-allocation to Lowdham Grange. We expect good behaviour as standard for Accumulated Visits, and good behaviour on its own does not demonstrate risk reduction. There needs to be longer term risk reduction work and consolidation before a longer-term re-allocation would be appropriate.

61. At the time of the First Claimant's initial allocation into the Dispersal Estate (HMP Frankland), I did not have any information concerning the Second Claimant's illness/mobility issues and so it was not something I considered. Had I been aware I might have considered a different Dispersal prison (e.g. HMP Long Lartin), however the allocation to a Dispersal prison would not have been any different for the reasons set out by me at the time.

62. The Second Claimant's health and mobility was later raised with me, whilst the First Claimant has been held at HMP Whitemoor. As is clear from my letter of 4 August 2022, I am aware of the Second Claimant's illness and it is something I have since considered in the context of Accumulated Visits. I do not consider it an issue that is appropriately addressed through re-allocation outside of the Dispersal estate. As above, I would however be open to considering a re-allocation to HMP Long Lartin, which is slightly closer to the Second Claimant, should the First Claimant wish me to.

63. I have sought to take a sympathetic approach and have been supportive of temporary transfers for Accumulated Visits, where possible, as a means to facilitate contact. I consider this strikes an appropriate balance between enabling family ties to be maintained, whilst also ensuring the First Claimant remains in a Dispersal prison where he has no known associates or co-offenders, and which is a high secure setting commensurate with his offending, risk and sentence stage, and where relevant training to assist in risk reduction will be available for him to undertake in due course.

64. I note for completeness, the First Claimant has previously indicated that (other than HMP Lowdham Grange) he would like to be transferred to HMP Dovegate (a Category B Local prison) or HMP Gartree (a Category B Training prison). Again, I do not consider it would be appropriate for the First Claimant to be allocated to either of these prisons for largely the same reasons I do not consider HMP Lowdham Grange as an appropriate long term setting for him at this time, namely, they are not Dispersal prisons. In the case of HMP Gartree, I further note that whilst it is a Category B prison, it was built to Category C specification (with a steel external perimeter rather than wall with beacon), which further weighs against it being an appropriate option for the Second Claimant."

Conclusion on grounds 1 and 4: duty to make reasonable adjustments and irrationality

17. Whilst I sympathise with the difficulties that the claimants will inevitably face as a result of Mr Cooper's conviction and life sentence for murder, coupled with his mother's, MB's, disabilities limiting her ability to visit Mr Cooper as frequently as they would like, I am satisfied that the defendant has evidentially demonstrated that the adjustment identified by the claimants is not reasonable in the circumstances. Conversely, I find that the adjustments that the defendant has adopted, including the Accumulated Visits, phone calls and video calls are objectively reasonable in the circumstances and not irrational. This is notwithstanding the assistance MB requires

for video calls, the current near over-crowding of the prison population leading to operational difficulties including some cancellations of the Accumulated Visits scheme and/or the lack of any current training allowing Mr Cooper to immediately address his risk profile, bearing in mind his minimum tariff was set by the sentencing judge as one of 29 years' imprisonment meaning there will very likely be opportunities in due course.

Ground 2: Breach of the Public Sector Equality Duty

18. Section 149 of the Equality Act 2010 establishes the Public Sector Equality Duty ("PSED"). It stipulates, insofar as is relevant:

> (1) A public authority must, in the exercise of its functions, have due regard to the need to— […]
>
> > (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; […]
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> > (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
> >
> > (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it; […]
>
> (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities. […]
>
> (6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.
>
> (7) The relevant protected characteristics are: […] disability…"

19. The defendant concedes that due regard was not given to the PSED. Whilst the issue was not therefore contested by the parties, I am not persuaded that this was something that the defendant should so readily have conceded. Mr Brook's 4 August 2022 statement refers to MB's medical evidence being taken into account as part of the decision making process. Further, the National Allocation Protocol v3.1 dated July 2021 (which provides the Prison Service with instructions and guidance on allocations into the Long Term and High Security Estate), at page 51 provides:

> "When assessing prisoners consideration must be given to the protected characteristics as set out in the Equality Act 2010. These are: age; disability; gender reassignment; marriage and civil partnership; race; religion or belief; sex; and sexual orientation. Consideration should also be given to maintaining family ties, Welsh language, health and vulnerability."

20. Notwithstanding the PSED breach, the defendant submits that the court should still refuse to grant relief under section 31(2A) of the Senior Courts Act 1981, on the basis that it is highly likely that the outcome for the claimants would not have been substantially different even if the PSED had been fully and duly discharged. I am

aware that "any consideration of whether the outcome was highly likely to have been substantially…should normally be based on material in existence at the time of the decision and not simply post-decision speculation by an individual decision-maker" (per see Blake J in *R (Logan) v Havering LBC* [2015] EWHC 3193 (Admin); [2016] PTSR 603 [at 55]). I am also mindful of what was said by Lindblom, Singh, Haddon-Cave LJJ in *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214; [2020] PTSR 1446 [at 273]:

> "If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore, although there is undoubtedly a difference between the old Simplex test and the new statutory test, "the threshold remains a high one" (see the judgment of Sales LJ, as he then was, in *R (Public and Commercial Services Union) v Minister for the Cabinet Office* [2018] ICR 269, para 89)."

Conclusion on ground 2: Breach of the Public Sector Equality Duty

21. The burden of proof to establish the criteria under section 31(2A) of the Senior Courts Act 1981 is on the defendant. Given the evidence from Mr Brooks and Mr Cooper's risk profile as a result of his very serious criminal offending, I am satisfied that the defendant has demonstrated that the requirement to hold Mr Cooper in a Dispersal prison is such that it is inevitable that a different decision maker would reach the same conclusion.

22. The claimants respond with section 31(2B) of the Senior Courts Act 1981, submitting that the court should disregard section 31(2A) "for reasons of exceptional public interest." They refer to Holman J in *R (JH)* (at [332]: "If even after a 'declaratory judgment' a public authority persisted in failing to discharge its public sector equality duty under section 149, then there may come a time when, on proof of that failure, a claimant may be able successfully to persuade the court that enough is enough and that the exceptional public interest under subsection (2B) has become engaged." However, it is noteworthy that Holman J's "declaratory judgment" was not a formal declaration of relief as provided for by section 31 of the Senior Courts Act 1981. That is clear from what he says at paragraph 346: "I intend those words to represent 'a declaratory judgment' of the kind contemplated by Blake J in paragraphs 58 and 61 of his judgment in *Logan*." Nor am I persuaded that solely because the defendant has conceded a breach of the PSED it follows that it is appropriate to disregard section 31(2A) "for reasons of exceptional public interest." I do not seek to prescribe an exhaustive list of exceptional public interest factors, however, I would expect a claimant to point to the individual facts and circumstances of their pleaded case in support of such a submission. That has not happened here. Indeed, on the facts of this case, I am aware that the defendant did at least have some regard to MB's disabilities, even if that fell short of what was required by the PSED. In those circumstances, I am not satisfied that section 31(2A) should be disregarded "for reasons of exceptional public interest."

23. Consequently, despite the failure by the defendant to discharge his duties under section 149 of the Equality Act 2010, I am bound by the mandatory terms of section 31(2A) to refuse to grant relief given my earlier finding that it is highly likely that the outcome for the claimants would not have been substantially different.

Ground 3: Breach of the claimants' article 8 ECHR rights to respect for their family life

24. The claimants contend that because it is impossible for MB to visit Mr Cooper at HMP Whitemoor they have suffered interference with their rights to respect for their family life protected by article 8 of the European Convention of Human Rights. Additionally, they say first, that the concession relating to the breach of the PSED means that the interference is "not in accordance with law" and second, the interference was not a necessary and proportionate means to achieve a legitimate aim, such as public safety or the prevention of disorder or crime, as set out in article 8(2).

Whether any interference is in accordance with the law

25. There is no dispute that Mr Cooper received a lawful custodial sentence following his conviction. Permission to appeal against both conviction and sentence to the Court of Appeal (Criminal Division) was refused on the papers by the single Judge and then by the full court on 4 February 2022. On 16 February 2021, it was decided that he would be held in a maximum security Dispersal prison. That was consistent with the National Offender Flows for Adult Male dated March 2022, which provides:

> "When allocating into the LT&HSE, consideration should be given to the level of threat & risk each prisoner poses to the public. Those who are deemed the most risk to the public based on offence profile, age and significant time left to serve should be directed to the Cat B Trainer (Dispersal) prisons."

26. That decision was never challenged. However, the defendant concedes the subsequent decisions not to transfer Mr Cooper to HMP Lowdham Grange failed to give due regard to the PSED. The claimants submit that it therefore follows that any article 8 interference is not in accordance with the law. By way of authoritative support the claimants rely upon *Vintman v Ukraine* (ECtHR, judgment of 23 October 2014, app. no. 28403/05) where it was said [at 84]:

> "The Court notes that any restriction on a detained person's right to respect for his or her private and family life must be applied 'in accordance with the law' within the meaning of Article 8 § 2 of the Convention (see *Kučera v. Slovakia*, no. 48666/99, § 127, 17 July 2007). The expression 'in accordance with the law' not only necessitates compliance with domestic law, but also relates to the quality of that law (see *Niedbała v. Poland*, no. 27915/95, § 79, 4 July 2000, and *Gradek v. Poland*, no. 39631/06, § 42, 8 June 2010)."

27. In my judgment it does not necessarily follow that a failure to give due regard to the PSED, when exercising a discretion over whether to transfer a prisoner from within Long Term and High Security Estate, means that any article 8 interference is not in accordance with the law. In *Vintman* the court went on to consider the exercise of a lawfully provided discretion before concluding that the interference there was in accordance with the law, stating [at 85]:

> "The Court further observes that law which confers discretion on public authorities is not in itself contrary to that requirement (see *Lavents v. Latvia*, no. 58442/00, § 135, 28 November 2002, and *Wegera v. Poland*, no. 141/07, § 71, 19 January 2010). However, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference (see, for example, *Al-Nashif v. Bulgaria*, no. 50963/99, § 119, 20 June 2002, and *Aleksejeva v. Latvia*, no. 21780/07, § 55, 3 July 2012)."

28. In my judgment the Security Categorisation Policy Framework dated 17 August 2021, explains how allocation decisions should be exercised, whilst seeking to strike an

appropriate balance between a prisoner's needs, in order to protect them against arbitrary interference, and the legitimate aim of ensuring public safety and the prevention of disorder or crime. It states [at 1.5]:

> "Allocation decisions should consider the individual's offending behaviour and resettlement needs (such as access to suitable training and interventions and closeness to home at the end of their sentence), their individual circumstances (such as medical requirements), and control issues (such as danger to particular staff or other prisoners). This may result in an individual being held in a prison of a higher category than their own category."

29. Further, the National Allocation Protocol v3.1 dated July 2021 expressly refers to consideration to be given to "disability… maintaining family ties… health and vulnerability." This is reinforced by rule 4 of the Prison Rules 1999 which recognises the importance placed on maintaining positive relationships between a prisoner and their family. It provides:

> "(1) Special attention shall be paid to the maintenance of such relationships between a prisoner and his family as are desirable in the best interests of both.
>
> (2) A prisoner shall be encouraged and assisted to establish and maintain such relations with persons and agencies outside prison as may, in the opinion of the governor, best promote the interests of his family and his own social rehabilitation."

30. Consequently, I find that Mr Cooper's allocation into a Dispersal prison within the Long Term and High Security Estate and the subsequent decisions to keep him there were in accordance with a discretion provided for by the law, which provides sufficient clarity in relation to the exercise of that discretion. This is notwithstanding any subsequent concession relating to the PSED. I judge that the real issue in respect of this ground is whether there is any interference and if so, whether it is a necessary and proportionate means to achieve a legitimate aim.

Whether there is any interference and if so whether it is a necessary and proportionate means to achieve a legitimate aim

31. The defendant's principal point in respect of this ground is that there was no interference. Reliance is placed on *R (Stevenson) v Governor of HMP Wakefield and Secretary of State for Justice* [2015] EWHC 1014 (Admin); [2015] 3 WLUK 482, where Jay J stated [at 45]:

> "The first issue I need to address is whether the Article 8 threshold has been transcended, applying the test specified at paragraph 78 of the judgment of the European Court of Human Rights in *Vintman*. The facts of that case were truly exceptional, and no doubt of particular concern. Having said that, the legal test is whether visits are made 'very difficult or even impossible', such that in all the circumstances family life has been violated."

32. In *Vintman* the applicant was imprisoned many hundreds of kilometres away from his elderly mother. There had been no visits for ten years and the journey across Ukraine was lengthy and inhospitable. The court unsurprisingly found there was interference which was disproportionate to the legitimate aim pursued. Conversely, in *R* (*Stevenson)*, Jay J concluded there was no breach where visits had been taking place over a distance between Poole in Dorset and Wakefield in West Yorkshire. Whilst it is correct that MB has been unable to visit her son, Mr Cooper, at HMP Whitemoor, it is also correct that there have been visits at HMP Lowdham Grange and recently to HMP

Dovegate utilising the Accumulated Visits policy. I am therefore unable to find that the claimants have satisfied the legal test they need to, namely to demonstrate that visits are "very difficult or even impossible", such that in all the circumstances family life has been violated. In reaching this conclusion I am mindful of paragraph 78 of *Vintman* where the European Court of Human Rights said this:

> "The court has also held in its case law that the Convention does not grant prisoners the right to choose their place of detention, and the fact that prisoners are separated from their families, and at some distance from them, is an inevitable consequence of their imprisonment. Nevertheless, detaining an individual in a prison which is so far away from his or her family that visits are made very difficult or even impossible may in some circumstances amount to interference with family life, as the opportunity for family members to visit the prisoner is vital to maintaining family life...It is therefore an essential part of prisoners' right to respect for family life that the prison authorities assist them in maintaining contact with their close family."

Conclusion on ground 3: Breach of article 8 ECHR

33. For the reasons detailed above I do not find that visits between Mr Cooper and MB have been "very difficult or even impossible", such that in all the circumstances family life has been violated. If I am wrong about that and there has been interference, in my judgment such interference is in accordance with the law and is a necessary and proportionate means to achieve the legitimate aims of ensuring public safety and preventing disorder or crime, given Mr Cooper's risk profile.

Overall conclusion

34. In my judgment, when considering whether to transfer Mr Cooper to HMP Lowdham Grange, the defendant has demonstrated that proper attention was given to the relevant issues, including Mr Cooper's risk profile and MB's disabilities. Further, I am satisfied that the defendant has assisted Mr Cooper in maintaining contact with MB through the Accumulated Visits scheme and the option of video and telephone calls. I therefore dismiss this application for judicial review, although I recognise and sympathise with the difficulties the family will experience in order to maintain contact and undertake visits, even with assistance.