IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
2021 EWHC 3624 (Admin)

No. CO/416/2021

Royal Courts of Justice

Wednesday, 15 December 2021

Before:

THE HONOURABLE MR JUSTICE LANE

B E T W E E N :

THE QUEEN
on the application of
the POA

Claimant

- and -

SECRETARY OF STATE FOR JUSTICE

Defendant

MR H. SOUTHEY QC (instructed by Thompsons Solicitors LLP) appeared on behalf of the Claimant.
MR R. O'BRIEN (instructed by the Government Legal Department) appeared on behalf of the Defendant.

J U D G M E N T

(Via Microsoft TEAMs)

MR JUSTICE LANE:

1 This is a renewed application for permission to bring judicial review to challenge two decisions of the defendant made in December 2020. The first decision, made on 10 December 2020, was not to accept recommendation 3 of the Prison Service Pay Review Body (hereafter the "PSPRB" or "the PRB") that there should be a £3,000 increase for Band 3 prison staff. The second decision is one said to have been taken on 10 December but which, on any view, emerges in concrete form on 16 December 2020. This decision was not to seek a recommendation from the PSRB for any general Prison Service pay uplifts in the year 2021/22, but instead to confine the PSPRB's review exercise to providing recommendations on uplifts for those earning less than £24,000 per annum. That was said to stem from the Government's decision, temporarily, to pause pay awards for at least the majority of the public sector "as we assess the impact COVID-19 has had on the wider economy and the labour market". That detail comes from the Minister of State's announcement of 16 December 2020.

2 Permission to bring judicial review was refused on the papers by Sir Ross Cranston on 20 September 2021.

3 The Band 3 decision relates to the following. Band 3 prison staff are the largest staffing group in the Prison Service. The recommendation, if implemented, would have amounted to a rise of between 14 and 21 per cent in their remuneration. The Band 3 recommendation was the only recommendation of the seven of the PSPRB recommendations not accepted by the defendant in 2020. The recommendations of the PSPRB were made in response to the defendant's letter of invitation to them of 30 October 2019. That was before the outbreak of COVID-19. The letter said that the Government's pay policy has three central principles that must be considered. They are current and future affordability, targeting awards to ensure the best public servants can be recruited and retained, and accompanying workforce reform and improvements in productivity, which can then be reinvested in higher pay.

4 After elaborating on that, the letter continued, "I expect affordability to be a critical part of your consideration when determining final awards." The letter ended by requesting that the final requested report set out what steps had been taken to ensure that affordability had been given due consideration.

5 The PSPRB then undertook an evidence-gathering process. The Government provided evidence in March 2020, but the claimant did not do so. This was consistent with a decision taken by its membership in 2015 not to provide written submissions or oral evidence to the PSPRB.

6 The report was provided to the Secretary of State in early June 2020. It made, as I have said, seven recommendations. It referred in its report to the exceptional nature of the circumstances under which it had been produced. This was the highly uncertain impact of the COVID-19 pandemic on economic conditions. The report said:

> "The impact of Covid-19 has also made it more difficult for us to consider the key economic benchmarks which we would usually draw on when making our decisions. Although we have considered the data that was available to us at the time of reaching our decisions, we are aware that forecasts by the Bank of England and Office of Budget Responsibility suggest that Covid-19 will have a significant downward impact on the whole of the United Kingdom and global economy."

7 Later, the PSPRB opined that this placed it in "an unprecedented position". It referred to the data it had drawn from as being from mid-April 2020, but noted "this is not likely to be fully indicative of the coming period."

8 The report was published on 21 July and on that day the defendant announced that the Government would accept six out of the seven recommendations. Those recommendations, in themselves, delivered an above-inflation pay rise of at least 2½ per cent for all prison staff, with cumulative awards of up to 7½ per cent, when progression pay was taken into account. The defendant, however, deferred the question of whether to accept recommendation 3. He noted that that recommendation, if implemented, would represent a rise of between 14 and 21 per cent for persons in that band. The defendant also noted that Band 3 prison staff represent around a third of the Prison Service workforce.

9 The written Ministerial Statement to Parliament of 21 July 2020 features heavily in these proceedings. I therefore need to quote it at some length:

> "It is only right that such a substantial increase for our largest staffing group is considered more carefully over the coming months as we move towards the Spending Review; due to the exceptional costs associated with implementing this recommendation, the impact on the overall pay structure, and the changing labour market conditions due to the exceptional impacts of the pandemic. The Government will also need to consider the recommendation in the context of the pay rises being given to other hardworking public servants.
>
> Furthermore, we wish to open discussions with recognised trade unions on the implications of this recommendation and how any such uplift in pay might be best implemented in an affordable and mutually beneficial manner alongside workforce reforms that deliver the best value for money for taxpayers.
>
> The government will therefore announce its response to this recommendation later in the year."

10 The decision was, of course, subsequently taken not to accept recommendation 3. The announcement to that effect was contained in a written Ministerial Statement of 10 December 2020. It is necessary again that I set it out in some detail:

> "Since the initial announcement, the Ministry of Justice, together with HM Treasury, has considered further the exceptional costs associated with implementing this recommendation, the impact on the overall pay structure, and the changing labour market conditions due to the exceptional economic impacts of the COVID-19 pandemic.
>
> Changes in the labour market as a result of the COVID-19 pandemic, and the unpredictable changing state of the economy means that the assumptions made by the PSPRB upon which they based their recommendations have now changed.
>
> The Department has also considered if any associated workforce reforms could be delivered alongside the recommendation which would create efficiencies and savings, and therefore deliver value for money by offsetting some of the cost of the recommendation. This was undertaken with a view

> to possible discussions with recognised trade unions, should an option for affordable delivery of the recommendation, which could offer value for money for taxpayers, be identified. The conclusion is that sufficient savings required to offer value for money could not be achieved, meaning the recommendation remains unaffordable.
>
> It has therefore been decided not to accept 'recommendation 3'."

11 I now turn to the legal framework. Section 127 of the Criminal Justice and Public Order Act 1994 provides that it is unlawful for anyone to induce a prison officer to engage in industrial action. Section 128(1) and (2) provide as follows:

> "(1) The Secretary of State may by regulations provide for the establishment, maintenance and operation of procedures for the determination from time to time of—
>
> > (a) the rates of pay and allowances to be applied to the prison service; and
> >
> > (b) such other terms and conditions of employment in that service as may appear to him to fall to be determined in association with the determination of rates of pay and allowances.
>
> (2) Before making any regulations under this section the Secretary of State shall consult with such organisations appearing to him to be representative of persons working in the prison service and with such other persons as he thinks fit."

12 The relevant Regulations are the Prison Service (Pay Review Body) Regulations 2001, SI/2001/116. They are, in my view, of central importance and it is, therefore, necessary to set out passages from them in some detail. Regulation 2 provides:

> "The Prime Minister shall appoint a Pay Review Body to examine and report on such matters relating to the rates of pay and allowances to be applied to the prison service in England and Wales and Northern Ireland as may from time to time be referred to them by the Secretary of State."

Regulation 4 provides:

> "With respect to matters referred to the Pay Review Body by him, the Secretary of State may give directions to the Pay Review Body as to the considerations to which they are to have regard and as to the time within which they are to report; and any such directions may be varied or revoked by further directions under these Regulations."

Regulation 5 provides:

> "Where a matter has been referred to the Pay Review Body, they shall give notice of the matter and of any relevant direction to such organisations appearing to them to be representative of persons working in the prison service in England and Wales, and Northern Ireland, and shall afford every

> such organisation a reasonable opportunity of submitting evidence and representations on the issues arising."

Regulation 6 provides:

> "Where a matter has been referred to the Pay Review Body, their report shall contain their recommendations on that matter and such other advice relating to that matter as they think fit."

Regulation 7 provides for the sending of any report from the Pay Review Body to the Prime Minister and to the Secretary of State.

Regulation 8 reads as follows:

> "Where, following the reference of any matter to them the Pay Review Body have made a report, the Secretary of State may determine the rates of pay and allowances to be applied to the prison service in England and Wales, and Northern Ireland, in accordance with the recommendations of the Pay Review Body, or make such other determination with respect to the matters in that report as he thinks fit."

13 The submissions of the parties in outline are as follows. The claimant says that the *quid pro quo* for s.127 and its prohibition on industrial action, is that things done under the 2001 Regulations, (which were made under s.128), require a form of intense public law scrutiny, including as to the giving of reasons; and that the ECHR Article 11 issue raised in the claim means that this court should form its own view of whether there are "exceptional circumstances". I shall explain that phrase in a moment.

14 The claimant also submits that the defendant cannot disregard the PSPRB's recommendations in the way he has because that body is, essentially, a quasi-judicial body, whose decisions are to be approached in the same way as the bodies featured in the case law to which I shall make reference.

15 The claimant further says that the defendant adopted an unfair procedure and that the claimant had a legitimate expectation that it would be consulted before the defendant decided to reject the Band 3 recommendation of the PSPRB.

16 The claimant finally says that, even if the enhanced form of public law scrutiny for which it argues is inapt, the defendant's decisions are still at least arguably unlawful on classic *Wednesbury* grounds.

17 The defendant's case is essentially as follows. The 2001 Regulations unarguably give him a broad discretion to determine the rates of pay and allowances of prison officers in England and Wales and Northern Ireland. Any residual issue regarding the s.127 prohibition on the taking of industrial action is addressed by the defendant's own policy, confirmed in these proceedings, that the defendant will accept the recommendations of the PSPRB except "in exceptional circumstances", which include matters of affordability (see in this regard para.47 of the judgment of Wyn Williams J in *Ministry of Justice v. POA* [2008] EWHC 239 (QB)).

18 I turn to the case law. In *Bradley v. Secretary of State* [2009] QB1 114, the Court of Appeal considered the extent to which the Secretary of State could depart from conclusions of the Parliamentary Ombudsman. The Court of Appeal held at para.72:

> "The question is not whether the defendant himself considers that there was maladministration, but whether in the circumstances his rejection of the ombudsman's finding to this effect is based on cogent reasons."

19 In *Evans v. Attorney General* [2015] UKSC 21, the Supreme Court held that the Government had been wrong to invoke a provision in the Freedom of Information Act 2000 to disregard an appeal decision of the Upper Tribunal. Lord Neuberger said in this regard at para.66:

> "In order to decide the extent to which a decisionmaker is bound by a conclusion reached by an adjudicative tribunal in a related context, regard must be had to the circumstances in which, and the statutory scheme within which, (i) the adjudicative tribunal reached its conclusion, and (ii) the decision-maker is carrying out his function. In particular, the court will have regard to the nature of the conclusion, the status of the tribunal and the decision-maker, the procedure by which the tribunal and decision-maker each reach their respective conclusions (e g, at the extremes, (i) adversarial, in public, with oral argument and testimony and cross-examination, or (ii) investigatory, in private and purely on the documents, with no submissions), and the role of the tribunal and the decision-maker within the statutory scheme."

20 In Strasbourg, the ECtHR held in *Van de Hurk v. The Netherlands* [1994] 18 EHRR 481, in the context of the Article 6 right to a fair trial before an independent tribunal, at para.45,

> "The power to give a binding decision which may not be altered by a non-judicial authority to the detriment of an individual party is inherent in the very notion of a 'tribunal' …"

21 In *Re Finucane* [2019] UKSC 7, the Supreme Court held that:

> "Where a clear and unambiguous undertaking had been made, the authority giving the undertaking would not be allowed to depart from it unless it was shown that it was fair to do so. Where, however, political issues overtook a promise or undertaking given by government, and where contemporary considerations impelled a different course, provided a bona fide decision was taken on genuine policy grounds not to adhere to the original undertaking, it would [in the view of the Supreme Court] be difficult for a person who held a legitimate expectation to enforce compliance with it."

22 Much earlier, in the case of *Secretary of State for Education and Employment Ex parte Begbie* [1999] 1 WLR 1115, Laws LJ had explained the varying intensity of judicial review. He observed that the facts of the case may steer the court to a more or less intrusive quality of review:

> "In some cases a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large or a significant section of it … here judges [in those circumstances] may well be in no position to adjudicate save at most on a bare *Wednesbury* basis, without themselves donning the garb of policy-maker, which they cannot wear."

Later he said:

> "There will of course be a multitude of cases falling within these extremes, or sharing the characteristics of one or other. The more the decision challenged lies in what may inelegantly be called the macropolitical field, the less intrusive will be the court's supervision."

23 Recently, in *Secretary of State for Justice v. POA* [2019] EWHC 3553, the Divisional Court held that s.127 was not a disproportionate interference with the POA's Article 11 rights. At para.93 of its judgment, the Divisional Court held:

> "Differing reasonable judgments might be made about the nature and extent of any compensating safeguards to be put in place; and it is clear to us that there is a range of different measures that might together work effectively to enable a trade union to protect its members' interests in a service that is not permitted to take strike action for good reason, even where such measures do not involve binding arbitration or a minimum service level agreement. Provided the framework of measures has force and efficacy (and is obviously not a sham) that is likely to be sufficient even if a union would have liked more. There is solid evidence of a range of different protective measures available in this case, as described above. The measures are undoubtedly not a sham, and have force and efficacy. We are satisfied they provide an adequate guarantee offsetting the strike ban with a range of different mechanisms through which the POA can legitimately support and protect members' interests, notwithstanding that it would have liked more."

24 Before I embark on an analysis of Mr Southey's detailed challenges on behalf of the claimant, it is necessary that I give my view of the different approaches urged on me by him and by Mr O'Brien.

25 In my view, the defendant, unarguably, has a very broad discretion with respect to the determination of pay, including the way in which it may approach the work of the PSPRB. That is evident from the plain and unambiguous words of the Regulations that were made under s.128, which sits, as Mr Southey urges me to observe, right next to s.127.

26 The nature of the PSPRB, as it emerges from the Regulations, is, in my view, nowhere near that of the kind of independent adjudicative tribunal (including such things as the Ombudsmen and the Upper Tribunal), which was under consideration in *Evans*. I have already quoted the words of Lord Neuberger in *Evans.* Applying his test, it seems to me to be unarguable that the PSPRB does not come within the category for which Mr Southey contends.

27 What the PSPRB does is to recommend certain things to the defendant, who can give directions to the PSPRB as to the considerations to which it is to have regard. That is very far indeed from the kinds of organisations with which the other cases are concerned. It is true that the PSPRB is (and certainly considers itself to be) independent. That, however, is a necessary but not a sufficient condition for a body to be treated in the way in which Mr Southey argues.

28 The question whether there are "exceptional circumstances" justifying the rejection of a recommendation, one of which is expressly said to be affordability, is, as Sir Ross Cranston said in refusing permission, (perhaps quoting from Laws LJ in *Begbie)* "macropolitical in nature". The circumstances with which the defendant had to grapple in late 2020 were

quintessentially within the governmental political realm. They involved national and economic policy, in the light of what was an unprecedented global health emergency.

29 Although Mr Southey urges me not to place particular weight on *Begbie*, given its age and given that it was decided before the introduction of the Human Rights Act 1998, it still seems to me to have resonance. It has relatively recently been approved in the judgment in *R (Patel) v General Medical Council [2013] EWCA Civ 327* by Lloyd Jones LJ, as he then was, at para.61.

30 These, then, are my opening findings.

31 I now turn to the detailed challenges. The claimant says, first, that the decision to reject recommendation 3 was unlawful because there was inadequate justification or reasons given by the defendant. With respect to Mr Southey, I do not accept that submission.

32 It is plain that the increase would, as I have already noted, involve rises of between 14 and 21 per cent. As Mr O'Brien says, those rises are, on any view, exceptional in their own right. Furthermore, the Secretary of State estimated that the total cost of acceding to the recommendation would be, approximately £46.8 million, once account was taken of the non-operational prison service colleagues paid within the same band. The recommendation was substantially higher than the other recommendations made by the PSPRB in its 2021 report and, indeed, than other recommendations made by it in previous years. In fact, recommendation 3 alone would represent a greater cost than the estimated cost for the totality of the HMPPS' proposals which were put to the PSPRB for the same year.

33 In my view, the defendant was also unarguably entitled to conclude that the circumstances were rendered even more obviously exceptional as a result of the changing labour market conditions and the changing position of public finances, both of which had been occasioned by the COVID-19 pandemic. The pandemic had unarguably given rise to exceptional circumstances. Indeed, it is extremely difficult to see how the position could be described as otherwise. The defendant was unarguably entitled to conclude that recommendation 3 was unaffordable. He considered in that regard whether efficiencies and savings could deliver value for money, but, as we have already seen, the defendant came to the conclusion that they could not.

34 Mr Southey says that the decision did not engage with the PSPRB's own analysis of affordability or, indeed, identify any fresh evidence justifying a departure from the conclusions of the PSPRB. But the statement of 10 December 2020 made clear that the decision was based on the Ministry of Justice's own analysis of affordability; and that this had been informed by discussions with HM Treasury. Those were plainly macropolitical matters and I do not consider that the defendant was required to set out the details of its analysis, whether in a written statement or elsewhere.

35 The claimant says that the defendant was obliged to, but did not, take into account factors such as the impact of pay rates on safety, the cost to the Prison Service of high staff turnover and the implications of a decision for equalities. It is said by the defendant that those matters were fully taken into account. I shall leave aside the issue of equality for the moment but, so far as costs and staff turnover were concerned, it seems to me clear that those matters were analysed. Indeed, one sees as much from the decision of 10 December.

36 It was open, in my view, to the defendant to have regard to those factors, but, nonetheless, to conclude that recommendation 3 should not be accepted for the reasons he gave in his decision of 10 December.

37 I agree with Mr O'Brien that it is not a point of arguable legal error for the PSPRB to have seen certain of its recommendations adopted and not others. Plainly, that is within the ambit of the defendant's discretion as set out in the Regulations.

38 The claimant contends that this court must make its own assessment of whether there really are exceptional circumstances. In this regard, Mr Southey cites the well-known case of *Belfast City Council v Miss Behavin' Ltd [2007] UKHL 19*, to which I would also add the equally well-known case of *R (Begum) v Denbigh High School [2006] UKHL 15*. But the stark fact is that this court is simply not equipped to carry out such a task for itself. Indeed, it would, in my view, be entering into forbidden areas if it were to do so. These are matters on which the defendant's views fall to be given very significant weight and it is not arguable that, adopting the *Miss Behavin'* approach, the defendant has erred in law. The defendant has not irrationally concluded that there were "exceptional circumstances".

39 I turn to Articles 11 and 3 of the ECHR. As to Article 11, it is said that the defendant's decision was inconsistent with the policy that PSPRB recommendations would be departed from only in exceptional circumstances. I have already dealt with this submission. It is also said that reliance on affordability is inconsistent with Article 11. However, the Government has made it clear, since as long ago as 2005, that its commitment not to reject PSPRB recommendations was subject to a reservation in the case of "exceptional circumstances", which expressly include grounds of affordability. That has formed the framework of the compensatory mechanism since that time.

40 It is also said that, unless the defendant is bound to accept its recommendations, then this undermines the independence of the PSPRB. I do not accept that. The PSBRB is plainly an independent body. The fact that its recommendations are not always accepted does not make it any the less independent. On the contrary, it would seem to me that the opposite, if anything, is true. Furthermore, the Divisional Court in the *POA* case held that the PSPRB is independent and I can see no reason to go behind that.

41 Article 3 of the ECHR is relied on in the following way. Mr Southey submits that a high turnover of prison staff means that there will be a greater proportion of inexperienced or relatively inexperienced prison officers operating in prisons; and that this may lead to danger to them and to prisoners.

42 I consider that, in the circumstances, this is so indirect a matter as not to bear scrutiny.

43 I turn now to unfair procedure. The claimant contends that it was not consulted on new information, including an economic impact assessment and an equalities impact assessment obtained by the defendant. It is also said that the procedure adopted was inconsistent with regulation 5, which gave the parties an opportunity to present their case to the PSPRB. Any claim of change of circumstances, such as was identified by the defendant in December 2020, could and should have been addressed by reference back to the PSBRB.

44 The defendant says that the claimant cannot justifiably complain about any restriction on its ability to make representations to the PSPRB, as it has, since 2015, elected not to provide any written submissions or oral evidence to that body. There is something in that view. However, I think here that the claimant's point is rather that the defendant's Ministerial Statement of 21 July 2020 said, (as we have seen):

> "… we wish to open discussions with recognised trade unions on the implications [of recommendation 3] and how any such uplift in pay might

be best implemented in an affordable and mutually beneficial manner alongside workforce reforms … "

45 The real point is that, as the defendant's statement of 10 December makes plain, the defendant was not at this point committing himself to consult with the claimant, come what may, on whether there could, in theory, be workforce reforms that might make recommendation 3 affordable. Rather, the defendant was saying that, if he were to come to the conclusion that savings might theoretically be made by such reforms, then the defendant would wish to have discussions on delivering those reforms.

46 This demonstrates that there was no arguably unfair procedure.

47 It also must be borne in mind that referring matters back to the PSPRB, as the claimant suggests should be done, flies in the face of the clear language of the Regulations and would also, in my view, make the pay review system unworkable.

48 What I have said about the nature of the statement on 21 July brings me to legitimate expectation. The position here is that the claimant alleges that the statement amounted to a clear promise to consult with the POA before deciding whether to reject the recommendations. The test for legitimate expectation is whether there was a clear and unambiguous representation devoid of relevant qualification. We see that from the speech of Lord Dyson in *Francis Paponette and Others v The Attorney General of Trinidad and Tobago* [2012] 1AC 1. If such a promise has been made, the question is: would frustrating that expectation be so unfair that to take a new and different course would amount to abuse of power?

49 As I have already indicated, I am of the view that the statement of 21 July was, at the very least, not an unambiguous promise to consult. The fact that the defendant could take the view that he did in December shows there is at least one very valid contrary interpretation of what was said on 21 July. In any event, viewed in its own terms and purely linguistically, I do not consider that the words "we wish", etc., carry the force for which Mr Southey contends. A wish is not a promise. Looking at the second limb of Lord Dyson's test (i.e. fairness), matters had quite plainly moved on between the summer and the winter of 2020, so far as Government finances were concerned, in light of the pandemic.

50 Therefore, as the defendant says in his skeleton argument, to have entered into negotiations, knowing that they would be futile, would have amounted to the defendant not acting in good faith, which cannot be countenanced.

51 In respect of the challenge to the first decision, I come finally, to the public sector equality duty. I said that I would omit that element out from my earlier consideration; and I now turn to it specifically.

52 The submission of Mr Southey is, essentially, as follows. Section 149(1) of the Equalities Act 2010 creates the public sector equality duty. PSED is about process and not results. In other words, it identifies matters that must be considered during a decision-making process, but does not determine what outcome must be breached. Mr Southey describes PSED as requiring "a muscular review of possible impacts and mitigating steps". In that regard, he cites *Bracking v. Secretary of State for Work and Pensions* [2014] EQLR 60.

53 In refusing permission, Sir Ross Cranston considered that it would have been better if the defendant had given information about the equalities impact assessment, which the defendant says was produced and, indeed, considered in the context of this decision.

Nevertheless, given the duty of candour under which the defendant operates in defending judicial reviews, Sir Ross concluded it was not arguable to go behind the defendant's categorical statement that a detailed EIA had been produced and considered.

54 Mr O'Brien, in oral submissions, said that in the claimant's grounds, there had never been any particularisation of the equalities issue that was of concern to the claimant. It was only when Mr Southey was making his oral submissions to me that it emerged there were concerns about two classes of prison officer: those within the bands described as "fair and sustainable" and those within the bands described as "closed". Mr O'Brien therefore said that it was appropriate to meet a bald and unparticularised challenge regarding the absence of an EIA by the equally bald statement that one had been considered; but without disclosing what that document was.

55 Mr Southey, in reply, pointed to the fact that in the grounds of challenge at para.9(a) reference is made to those two grades and that:

> "One reason for that need for a consistent approach was said to be a concern that the current system had equalities implications."

56 At para.49 of the statement of grounds, reference was again made to the equalities issue. Mr Southey submits that, in the light of all of this, it must at least be arguable that the defendant has not had lawful regard to the duties imposed by the Equalities Act 2010.

57 I have to say that I have sympathy with Mr Southey's case in this regard. It seems to me that this is the single element of the challenge to the first decision that has any arguable merit. It may be that, following further consideration, the defendant's stance will be found by this court to be legitimate. However, as matters stand, I am troubled by the matter and I therefore grant permission in respect of this particular ground.

58 I turn to the challenge to the defendant's setting of the PSPRB's remit for 2021/22. The claimant says that the decision to constrain the next PSPRB review is contrary to the statutory scheme and/or that it is a breach of the claimant's legitimate expectation. The statutory scheme is such that the PSPRB is an independent decision maker; and the chair of the PSPRB has expressed concerns about its independence in the light of the second decision. The claimant also points out that the PSPRB has to be consulted about pay. It also says that the decision to constrain the next review violates Article 11 of ECHR, because it undermines the Board's role as an effective compensatory mechanism for the claimant's inability to engage in industrial action. Binding the PSPRB is also a violation of Article 14 and, in this regard, the claimant points to constraints on pay not applying to the NHS and also possibly to local authority workers. Finally the claimant relies on the finding of the Divisional Court in the 2019 *POA* case that prison officers provide "an essential service".

59 I have to say, with respect to Mr Southey's able arguments, that I do not accept any of them as being arguable. The point of importance is, of course, again, the nature of the statutory scheme and the nature and language of the Regulations. I agree with Mr O'Brien that the purpose of the statutory scheme, reading the primary and secondary legislation together (as Mr Southey urges me to do) is plainly not violated by the defendant doing what he did in December 2020. To the contrary, the clear wording of the Regulations expressly enabled him to do so.

60 The PSPRB is being required to do no more than is set out on the face of the legislation. I do not accept it is arguable that the PSPRB is being constrained in such a way as to violate Article 11. Having regard to the nature of the circumstances in which this country finds

itself, it is impossible to say that Article 11 is violated, particularly when one has regard to the margin of appreciation in these matters.

61 The claimant suggests that the PSPRB has some kind of inherent remit, which has in some way been constrained for the 2021/22 review. I agree with Mr O'Brien that there is no basis for that suggestion in the 2021 Regulations. Nor is it supported by historical practice with regard to the PSPRB. The public sector pay freeze in 2010 was also made in a period of exceptional economic difficulty. Indeed, I suspect the present economic difficulties are all the greater.

62 Standing back, the second decision does not in any way arguably suggest that the PSPRB's role is now no more than a "sham", to use the language in the *POA* case. It most plainly is not.

63 The final matter, with regard to the second decision, is Article 14 of the ECHR. Here it is said that there is discrimination between the members of the POA and other workers. Mr Southey cites NHS workers and also local authority workers. I do not accept that there is any arguable merit in this ground of challenge. Prison officers are, of course, providing an essential service, but that does not carry Mr Southey the requisite distance. The difference in treatment between prison officers and NHS officers at the hands of Central Government is plainly justified, given the unique impact of COVID-19 on the health service, as set out in the Chancellor of the Exchequer's announcement on public sector pay. The claimant acknowledges the service provided by NHS workers, but appears to assert that there is no material distinction between NHS workers and prison officers for these purposes. In the defendant's skeleton argument, it is said that:

> "Whilst the Secretary of State is conscious of the enormous contribution made by prison officers during the pandemic, a distinction can plainly be drawn between health workers and non-health workers in a public health emergency."

That seems to me to answer the challenge in this respect.

64 So far as local government workers are concerned, as it emerged in oral submissions, the defendant has no responsibility for their pay. Nor, as far as I am aware, does any other Minister of Central Government have direct responsibility for the pay and conditions of local authority workers. They are, therefore, an inapt comparator.

65 For these reasons, all of the claimant's grounds are unarguable, with the exception of the ground relating to the PSED and the EIA.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

This transcript has been approved by the Judge.